Quarterly Board Meeting – December 15, 2021

The Board Members have scheduled a public meeting for December 15, 2021, at 10:00 a.m., which will be held at the Board’s Salem office (2601 25th St. SE, Ste. 150).

The agenda for the board meeting will be:

- The Members’ quarterly meeting. OAR 438-021-0010(1)(d).
- ALJ hiring consultation. ORS 656.724(1).

Because our offices remain closed to the public due to COVID-19, the board meeting will be held virtually. To accommodate virtual attendance, arrangements will be made to allow board members, interested parties, practitioners and the general public to participate in the meeting by a "phone conference" link. Information on how to participate by phone can be found at https://www.oregon.gov/wcb/Documents/brdmtgs/2021/121521-brdmtgconfinstructions.pdf

A formal announcement regarding this board meeting has been electronically distributed to those individuals, entities, and organizations who have registered for these notifications at https://www.oregon.gov/wcb/Documents/brdmtgs/2021/121521nt-amended.pdf

Board Member Roger Ousey Reappointed

Roger Ousey was reappointed to serve a 4-year term on the Workers’ Compensation Board. Member Ousey was appointed by Governor Kate Brown and confirmed by the Oregon Senate on November 22, 2021.

Following a 30-year career as an attorney representing injured workers in Portland, Eugene, and Medford, Ousey was appointed to his first term on the Board in 2017.

ALJ Anonymous Survey Coming Soon

Consistent with ORS 656.724(3)(b), attorneys regularly participating in workers’ compensation cases will be sent a link, via email, to participate in the annual anonymous survey. So, please watch for your invitation to participate in this important survey tool. Please take a few minutes to complete the survey, which can be completed from your computer, smart phone, or tablet.

Responses will be accepted until February 11, 2022, and results will be posted on WCB’s website by March 3, 2022. Your participation is greatly appreciated.
Premature Closure: Discrepancies in Work-Release Opinion from Attending Physician – Record Lacked Claimant’s Work History and Education

APPELLATE DECISIONS

Update

Course & Scope: “Parking Lot” Exception to “Going/Coming” Rule – Employer Had “Some Control” Over Parking Lot Annex – Claimant Slipped/Fell on Ice While Walking to Work

Penalty: “Imputed Knowledge” to Insurer From Employer – Requires Finding of Unreasonable Conduct by Employer

TTD: Termination of Employment (“325(5)(b)”) – “Work Rule” Violation Not Established

Court of Appeals

Combined Condition: Two Separate Conditions – “Preexisting Condition” & Its Symptoms Do Not Constitute “Combined Condition”

Exceptions to going and coming rule applied in recent decisions.

Holiday Schedule for WCB Offices

The Board’s staffed offices will be closed on December 24 and December 31, 2021, for the Christmas and New Year’s Day holidays. In addition, the Board’s offices will be closed on January 17, 2021, for Martin Luther King, Jr., Day. A list of holiday closures for 2022 is posted here: https://www.oregon.gov/das/pages/calendar.aspx. This list does not include the addition of the Juneteenth holiday approved in this year’s legislative session.

CASE NOTES

Course and Scope: “Greater Hazard” Exception to the Going and Coming Rule – Customary Ingress/Egress – Tripped Due to Insufficient Lighting – Walkway Not Used By the General Public

Stephanie Tingle, 73 Van Natta 812 (November 1, 2021): Applying ORS 656.005(7)(a), the Board held that claimant’s tripping injury occurred in the course and scope of her employment under the “greater hazard” exception to the “going and coming” rule.

The Board agreed with claimant’s contention that she was exposed to a “greater hazard” as a result of the insufficient lighting (and proximity of dumpsters), and disagreed with the employer’s contention that a walkway was a “public” sidewalk and, thus, the public was equally exposed to the hazard. The Board determined that there was no evidence in the record that the public used the walkway, because of the employee-only keycard exit/entrance and the permit-only parking lot. Accordingly, the Board held that claimant was “in the course of” her employment when she was injured after leaving her workplace.

Regarding the “arising out of” element, the Board held that claimant’s injury came from a neutral risk (not inherent in her job nor as the result of personal conditions or character) which was compensable because her work activities placed her in a position to be injured. The Board thus concluded that claimant’s injury occurred in the course and scope of employment and set aside the employer’s denial.

Course and Scope: “Special Errand Exception” to the Going and Coming Rule – Worker Called to Work on Off Day – MVA Accident While Returning to the Employer – Modified Banking Errand to Assist Transaction

Jeff E. White, 73 Van Natta 933 (November 23, 2021). Applying the “special errand” exception to the “going and coming” rule, the Board held that the claimant’s injury from a motor vehicle accident while performing a personal banking errand occurred in the course and scope of his employment.
The carrier asserted that the “in the course of” prong was not satisfied because claimant was performing personal activities at the time of injury, and further asserted that the injury did not “arise out of” employment. The Board disagreed with SAIF’s contentions. Citing JAK Pizza, Inc.-Domino’s v. Gibson, 211 Or App 203, 206 (2007), and Ryan K. Gibson, 60 Van Natta 6, 9 (2008) (on remand), the Board reiterated that the “special errand” exception to the “going and coming” rule applies when a worker modifies the performance of a personal errand in furtherance of the employer’s business.

In addition, referring to Gibson, as well as Iliaifar v. SAIF, 160 Or App 116, 123 (1999), the Board observed that injuries “arise out of” employment if they are connected to activities performed in furtherance of the employer’s business or where the employer’s instructions put the worker in a position to be injured.

Turning to the case at hand, the Board found that the claimant modified the performance of his personal banking errand after his employer instructed him to report to work on his day off and return to its premises as quickly as possible following the banking errand in order to assist with a vehicle transaction. Relying on Gibson, the Board found that the claimant modified his errand in furtherance of the employer’s business, and concluded that claimant’s injury occurred “in the course of” his employment. In addition, relying on Gibson and Iliaifar, the Board found that claimant’s injury “arose out of” his employment.


Carl C. Stiefbold, 73 Van Natta 923 (November 18, 2021). Applying OAR 436-035-0330(1) and Caren v. Providence Health Sys. Or., 365 Or 466, 486-87 (2019), and Robinette v. SAIF, 307 Or App 11, 16 (2020), the Board found that the claimant had established entitlement to an additional permanent impairment award for a partial acromion resection.

In doing so, the Board observed that the attending physician opined that the surgical procedure included an acromioplasty, and the medical arbiter panel also noted that a subacromial decompression procedure was performed. As such, citing Benz v. SAIF, 170 Or App 22, 25 (2000), the Board determined that a partial acromion resection was performed.

The Board disagreed with the carrier’s contention that the procedure was not compensably related to the accepted left shoulder SLAP tear. The parties did not contest claimant’s entitlement to previously awarded permanent impairment for reduced left shoulder range of motion, and there were no denied left shoulder conditions. Applying Caren and Robinette, the Board concluded that claimant was entitled to an award for a partial resection of the acromion because his left shoulder impairment “as a whole” was materially related to the compensable injury. 365 Or at 486-87; 307 Or App at 16.
Additionally, citing Viorica Gramada, 72 Van Natta 339, 342 (2020), Donald V. Burch, 67 Van Natta 1866, 1869-70 (2015), and Juan L. Godinez, 64 Van Natta 1990, 1991 (2012), aff’d, Godinez v. SAIF, 269 Or App 578, 585 (2015), the Board explained that the attending physician’s opinion did not include an explanation regarding why a qualified limitation on overhead lifting constituted an important, meaningful, or notable limitation in light of claimant’s return and release to regular work. As such, the Board concluded that claimant was not entitled to a “chronic condition” award.

Filing: “Good Cause” for Untimely Filing – Change in Office Procedures Due to COVID-19 – Exceptional Circumstances Lead to Mistake

Jason Eddie, 73 Van Natta 817 (November 1, 2021). Applying ORS 656.319(1)(b) and ORCP 71B(1), the Board held that the record established “good cause” due to mistake and inadvertence for claimant’s untimely filed hearing request. Due to the COVID-19 pandemic, claimant’s former counsel’s paralegal attempted to file a hearing request via the Board’s website “portal,” which was not the firm’s usual office procedure. The paralegal mistakenly believed that she had submitted the form, but it was not received by the Board.

Referring to Goodwin v. NBC Universal Media-NBC Universal, 298 Or App 475, 486 (2019), the Board noted that the record should be viewed in the light most favorable to the party seeking relief when there is evidence of mistakes and inadvertences. Finding that the hearing request was untimely filed due to mistakes and inadvertences, and that the pandemic-induced office closure and resulting loss of usual business practices created exceptional circumstances excluding those mistakes, the Board reinstated claimant’s hearing request.

Own Motion: Worsened Condition Closure was Premature – Attending Physician’s Post-Closure Clarification Indicated Reasonable Expectation of Improvement – Carrier Had Legitimate Doubt – Penalties and Fees Not Awarded

Collin D. Stringer, 73 Van Natta 840 (November 8, 2021). Applying ORS 656.278(1)(a) and OAR 438-012-0055(1), the Board held that the claimant’s Own Motion claim for a worsened condition was prematurely closed because the record persuasively established that he was not medically stationary at the time of closure. The Board observed that although the attending physician had initially concurred with a Managed Care Organization letter stating that the claimant was “medically stationary,” he subsequently clarified that there was a reasonable expectation that the claimant’s condition would improve with physical therapy at the time of closure. Therefore, the Board set aside the Own Motion Notice of Closure as premature.
However, the Board declined to award penalties or penalty-related attorney fees under ORS 656.262(11)(a) for an allegedly unreasonable claim closure. The Board stated that it was only after closure that the attending physician had clarified that there was a reasonable expectation that the claimant’s condition would improve with physical therapy at the time of closure. Under such circumstances, the Board found the carrier had a legitimate doubt regarding the claimant’s “medically stationary” status based on the attending physician’s pre-closure opinion that the claimant was medically stationary.

Own Motion: Temporary Disability Benefits Awarded –
Open-Ended Authorization – Surgery Recommended –
Delay in Scheduling Does Not Prevent TTD Award –
Penalties and Attorney Fees For Unreasonable Delay

James F. Beyl, 73 Van Natta 910 (November 18, 2021). Applying ORS 656.262(11)(a), ORS 656.278(1)(a), OAR 438-012-0110(1), and OAR 438-015-0080, the Board held that claimant was entitled to temporary disability benefits on his reopened “worsened condition” claim, awarded claimant’s attorney an “out-of-compensation” attorney fee for being instrumental, and assessed penalties and penalty-related attorney fees for the carrier’s unreasonable delay in reopening and failure to pay temporary disability benefits.

Based on the attending physician’s “open-ended” temporary disability authorization for curative treatment and the consulting neurosurgeon’s surgical recommendation, the Board found that claimant was entitled to temporary disability benefits. The Board acknowledged that the surgeon was waiting for claimant to reduce his A1c level before scheduling the recommended surgery due to the risk of postsurgical complications. However, the entitlement to temporary disability benefits under ORS 656.278(1)(a) includes the date the requisite medical treatment is recommended (not the date a claimant actually undergoes surgery), and a delay does not necessarily vitiate the surgery recommendation. Therefore, the Board awarded temporary disability benefits from the date that the surgery was recommended.

Noting that the carrier conceded that it neither voluntarily reopened claimant’s Own Motion claim, nor submitted a recommendation to the Board for or against the reopening, within 30 days after the “worsened condition” claim had been determined to be compensable pursuant to OAR 438-012-0030(1), the Board assessed a penalty equal to 25 percent of the temporary disability compensation “then due” as of the date the carrier untimely voluntarily reopened the Own Motion claim. The Board found the carrier’s failure to pay temporary disability benefits to be unreasonable. However, claimant had been awarded a penalty on the temporary disability benefits, and so claimant was not entitled to duplicative penalties based on the same amounts “then due.”
Premature Closure: Discrepancies in Work-Release Opinion from Attending Physician – Record Lacked Claimant’s Work History and Education

**Apolonio Arias-Jasso**, 73 Van Natta 833 (November 5, 2021). Applying ORS 656.268(1)(a) and OAR 436-030-0020(1)(a), (2)(a), (b), and (c), the Board held that the claim was prematurely closed because the record did not persuasively establish that claimant had been released to regular work.

Specifically, the Board stated that there were discrepancies in the attending physician’s concurrences with an examining physician’s work-release opinion and that the examining physician’s opinion was internally inconsistent. Moreover, the Board observed that the carrier did not have sufficient information to close the claim because it did not provide the claimant or his attorney with an accurate job description. In addition, the record did not include the requisite work history or education information.

Concluding that the record established error in the reconsideration process, the Board reversed an Order on Reconsideration that had found that the Notice of Closure was not premature.

**APPELLATE DECISIONS UPDATE**

Course & Scope: “Parking Lot” Exception to “Going/Coming” Rule – Employer Had “Some Control” Over Parking Lot Annex – Claimant Slipped/Fell on Ice While Walking to Work

**SAIF v. Lynn**, 315 Or App 720 (November 24, 2021). The court affirmed the Board’s order in **Lahna K. Lynn**, 72 Van Natta 362 (2020), previously noted 39 NCN 4:6, that held that claimant’s injury, which occurred when she slipped/fell on ice while walking to work after parking her car in a parking lot annex, arose out of and in the course of her employment because her employer exercised some control over the annexed lot arrangements with the landlord to lease the additional parking spaces and by encouraging its employees to park in those spaces. On appeal, the carrier asserted that the employer did not have sufficient control over the annex because it did not own or lease that area and because the annex lot was not designated solely for the use of the employer’s employees.

The court disagreed with the carrier’s assertions. Citing **Henderson v. S. D. Deacon Corp.**, 127 Or App 333, 336 (1994), the court stated that, in analyzing the “in the course of” employment prong of ORS 656.005(7)(a), “injuries sustained while going to or coming from the workplace are not compensable.” However, relying on **Cape v. West American Ins. Co.**, 309 Or 232, 239 (1990), the court identified the “parking lot” exception to the “going and coming” rule, which applies “when an employee travelling to or from work
Whether employer had legal control of the injury premises is not the only evidence that can establish the “in the course of” prong.

Sustains an injury ‘on or near’ the employer’s premises.” Referring to Henderson, the court reiterated that, in determining whether the “parking lot” exception applies, it looks to whether “the employer exercises some control over the place where the injury is sustained.”

Turning to the case at hand, the court identified the question as whether the control exercised over the parking lot by the employer was sufficient, as a matter of law, to meet the “in the course of” employment requirement of ORS 656.005(7)(a). The court acknowledged the carrier’s contentions that the issue of control turned on the employer’s legal control of the premises; e.g., a lease, its payment of rent, or a right/obligation to maintain/repair the premises. While recognizing that such matters were certainly evidentiary indicators, the court observed that they are not the only evidence sufficient to establish the “in the course of” employment component. See Montgomery v. State Ind. Acc. Com., 224 Or 380, 388 (1960); Henderson, 127 Or App at 337; see also Krushwitz v. McDonald’s Restaurants, 323 Or 520, 530 (1996), quoting Rogers v. SAIF, 289 Or 633, 642 (1980) (“* * *in each case, every pertinent factor must be considered as a part of the whole. It is the basic purpose of the Act which gives weight to particular facts and direction to the analysis of whether an injury arises out of and in the course of employment.”)

After conducting its review, the court noted that the Board’s finding that the employer exercised “some control” over the parking lot annex was based on the following reasons: (1) the annex was exclusive to the employer; (2) the landlord acquired the annex parking spaces because the employer did not have enough parking in the office parking lot; (3) of all of the building’s tenants, only the employer parked in the annex pursuant to an oral agreement with the landlord; (4) the employer strongly encouraged its employees to use the annex so its customers could use the office parking lot; and (5) the employer’s testimony that she would have informed the landlord if there had been snow or ice in the annex, which was consistent with the employer’s prior practice regarding complaints/requests concerning the office parking lot.

Reasoning that the Board had considered “every pertinent factor” and gave “weight to particular facts and direction to the analysis of whether an injury [arose] out of and in the course of employment,” the court determined that the Board’s conclusion that the employer had “some control” over the parking lot annex was supported by substantial evidence. Consequently, the court concluded that the Board had correctly held that the “in the course of” prong of the unitary work connection test was satisfied.

Finally, addressing the “arising out of” employment prong, the court noted that the Board had found that claimant was encouraged to park in the annex for the convenience of the employer’s patients, which served the employer’s interests. Reasoning that such evidence supported the Board’s conclusion that claimant’s injury arose out of a risk to which her work exposed her, the court agreed with the Board’s determination that her injury arose out of her employment.
TTD: Termination of Employment (“325(5)(b)”) – “Work Rule” Violation Not Established

Penalty: “Imputed Knowledge” to Insurer From Employer – Requires Finding of Unreasonable Conduct by Employer

**SAIF v. Coria**, 315 Or App 546 (November 3, 2021). The court affirmed that portion of the Board’s order in *Hipolito Coria*, 71 Van Natta 742 (2019), previously noted 38 NCN 7:10, that held that a carrier was not authorized to terminate claimant’s temporary disability (TTD) benefits because the record did not establish that he had been discharged from his employment for a violation of a work rule. In reaching its conclusion, the Board had found that:

1. The record lacked a letter from the employer’s general manager to claimant explaining the reason for his termination;
2. The record did not contain any documents reflecting the reasons for claimant’s termination;
3. There was no evidence establishing the employer’s use of its progressive disciplinary policy; and
4. There was no testimony from the person who had made the decision to terminate claimant’s employment (some two months after the employer’s management learned of his alleged work rule violations and just three days after his on-the-job injury).

On appeal, the carrier contended that the Board’s conclusion was not supported by substantial evidence and reason. See ORS 183.482(8)(a), (c), and (7). The court disagreed with the carrier’s contention. Citing *Elsea v. Liberty Mutual Ins.*, 277 Or App 475, 484 (2016), the court reiterated that a Board finding is supported by substantial evidence and reason when it “is reasonable in the light of countervailing as well as supporting evidence[.]”

Turning to the case at hand, the court noted the Board’s acknowledgment that the general manager had testified that she gave claimant a letter explaining the reasons for which he was being terminated. Nonetheless, the court further observed that claimant disputed that testimony and that the “termination” letter had not been submitted into the record (nor had any other evidence explaining why the employer’s progressive disciplinary policy had not been followed and why claimant had been terminated some two months after his alleged work rule violation and just three days after his work injury).

Given such circumstances, the court determined that the Board was entitled to reach the conclusion that the unexplained timing of claimant’s termination “undermined” the carrier’s position that he had been terminated for disciplinary reasons. Consequently, the court held that the Board’s decision was supported by substantial evidence and reason.

Addressing another issue, the court reversed that portion of the Board’s order which had held that the carrier’s termination of claimant’s TTD benefits had been unreasonable. See ORS 656.262(11)(a). In reaching its conclusion, the Board had imputed the employer’s conduct to the carrier. See *Antilofieff v. SAIF*, 52 Or App 127 (1981).
On appeal, the carrier asserted that the Board had not found the employer’s conduct to have been unreasonable and, therefore, the “imputed knowledge” theory advanced by *Anfilofieff* had no application. Alternatively, the carrier argued that, because ORS 656.262(11)(a) requires an unreasonable delay or refusal to pay compensation be attributable to an insurer/self-insured employer, the *Anfilofieff* rationale was “patently wrong and should be overruled.”

Agreeing with the carrier’s first assertion, the court found it unnecessary to address the carrier’s alternative argument. Citing *DCBS v. Muliro*, 359 Or 736, 752 (2016), the court quoted the Supreme Court’s explanation concerning *Anfilofieff* and *Nix v. SAIF*, 80 Or App 656, *rev den*, 302 Or 158 (1986), that those decisions provide a “basic formula: unreasonable conduct by an employer designated to impede the claims process plus an employer’s obligation to process claims equals attribution of the employer’s misconduct to its insurer in certain circumstances.”

After conducting its review, the court noted that the Board had not found that the employer had terminated claimant’s employment in retaliation for his filing of a workers’ compensation claim or that it had otherwise acted unreasonably or engaged in any sort of misconduct. Reasoning that the erroneous termination of TTD benefits is not, *ipso facto*, evidence of misconduct, the court concluded that the Board’s order lacked a finding of employer misconduct. Absent such a finding, the court distinguished the present case from the *Anfilofieff* and *Nix* decisions. Accordingly, the court determined that there was no employer misconduct to attribute to the carrier and, therefore, reversed the Board’s penalty and attorney fee awards under ORS 656.262(11)(a).

**APPELLATE DECISIONS**

**COURT OF APPEALS**

**Combined Condition: Two Separate Conditions – “Preexisting Condition” & Its Symptoms Do Not Constitute “Combined Condition”**

*Interiano v. SAIF*, 315 Or App 588 (November 10, 2021). Analyzing ORS 656.005(7)(a)(B), the court reversed the Board’s order in *Margarret Y. Interiano*, 71 Van Natta 111 (2019), which, in upholding a carrier’s new/omitted medical condition denial of claimant’s low back condition, found that her preexisting arthritic low back condition and her low back/radicular symptoms from her work activities constituted a “combined condition” and that the carrier had established that her work injury was not the major contributing cause of the disability/need for treatment for her “combined condition.” On appeal, claimant contended that the Board’s “combined condition” conclusion was erroneous in that a “combined condition” must be comprised of a specific medical condition and a separate and distinct legally cognizable preexisting condition.

The court agreed with claimant’s contention. Citing *Brown v. SAIF*, 361 Or 241 (2017), and *Carrillo v. SAIF*, 310 Or App 8, 12, *rev den*, 368 Or 560 (2021), the court reiterated that the term “combined condition” suggests two separate
conditions that combine. Furthermore, relying on Carrillo, the court stated that because a preexisting condition and its symptoms are separate conditions, they cannot constitute a “combined condition.”

Applying the Carrillo rationale to the case at hand, the court noted that the physicians’ opinions on which the Board had relied to find a “combined condition” had not described the existence of two separate conditions. Reiterating that a preexisting condition and its symptoms are not separate conditions, the court concluded that the Board had erred in determining that claimant had a “combined condition.”