Workers' Compensation Board

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News & Case Notes

BOARD NEWS

WCB Office Reopening Postponed

Plans to reopen State of Oregon offices to the public, previously scheduled for January 3, 2022, have been delayed indefinitely, Board Chair Connie Wold announced on December 17, 2021. The Workers' Compensation Board (WCB) will continue the current method of telephonic and video conference hearings and mediations through June 30, 2022. Here is Chair Wold's full announcement. https://www.oregon.gov/wcb/Documents/announcements/121721-conniereopeningltr.pdf

Parties can request that a proceeding be conducted in person. Please refer to Presiding Administrative Law Judge Joy Dougherty's September, 29, 2021 instructions on how to make a request. https://www.oregon.gov/wcb/Documents/announcements/093021-covidhearingupdate.pdf

Administrative Law Judge Appointed for Salem Office

Nicholas D. Cordes was appointed as a new administrative law judge (ALJ) for the Board's Salem office. He will start work in February 2022.

Cordes was most recently an associate with the Guinn Law Team, representing injured workers in workers' compensation cases, in addition to practicing social security disability law. He obtained his bachelor's degree from the University of Northern Iowa, and his law degree from Lewis & Clark Northwestern School of Law, where he graduated *cum laude*.

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.

CASE NOTES

Medical Service: "Consequential Condition" - Compensable Injury & Prior C5-6 Disc Fusion Surgery - Major Cause of Worsened C6-7 Disc Degeneration (Transitional Disc Syndrome) - "245(1)(a)," "005(7)(a)(A)"

Tommy S. Arms, 73 Van Natta 1055 (December 22, 2021). On remand from the Court of Appeals, *Arms v. SAIF*, 292 Or App 217 (2018), analyzing ORS 656.245(1)(a), the Board held that a carrier was responsible for claimant's proposed C6-7 surgery because the medical service was for his worsened C6-7 disc degeneration (transitional disc syndrome), which was due in major part to his compensable C5-6 disc fusion surgery. After summarizing the court's *Arms* decision, the Board clarified that its task on remand was to determine whether claimant's worsened C6-7 disc degeneration should be analyzed as a "consequential condition" (in which case the proposed surgery would be subject to the second sentence of ORS 656.245(1)(a), which requires the medical services to be directed to medical conditions caused in major part by the injury) or, if the worsened C6-7 disc degeneration was not a "consequential condition," whether the proposed surgery was a compensable medical service related to claimant's original work injury under ORS 656.245(1)(a) and the limitations of ORS 656.225.

Citing *Allen v. SAIF*, 279 Or App 135 (2016), the Board stated that the distinguishing feature of a "consequential condition" under ORS 656.005(7)(a)(A) is that it is not directly caused by the work-related injury event, but rather is a separate condition that arises as a consequence of an injury or condition caused directly by the work injury. Thus, the Board framed its task as determining whether the causal relationship between claimant's work injury and the condition to which the proposed C6-7 surgery was directed, was direct or indirect. Furthermore, referring to the court's instructions on remand, the Board reasoned that it must also address the threshold question of whether claimant's worsened C6-7 disc degeneration represented a separate condition to which the proposed surgery was directed. *See Barrett Bus. Servs. v. Hames*, 130 Or App 190, 196, *rev den*, 320 Or 492 (1994).

After conducting its review, the Board noted that the surgeon proposing the surgery had opined that the only relationship between claimant's work injury and the worsened C6-7 disc degeneration was that the prior C5-6 disc fusion had caused the interval worsening in his C6-7 disc and the resultant need for the proposed surgery. Observing that no physician had supported a direct relationship between the worsened C6-7 disc degeneration and the work injury, the Board found that the worsened C6-7 disc degeneration was subject to a "consequential condition" analysis.

Addressing the question of whether claimant's worsened C6-7 disc degeneration constituted a separate condition to which the proposed surgery was directed, the Board was persuaded by the surgeon's opinion (as supported by another physician) that the worsened disc degeneration represented transitional disc syndrome which had been accelerated by claimant's previous

C5-6 disc fusion. Under such circumstances, the Board determined that the C6-7 transitional disc syndrome constituted a separate condition to which the proposed C5-6 surgery was directed.

Major cause of C6-7 transitional disc syndrome was the compensable C5-6 fusion.

Turning to the question of whether claimant's work injury and resultant C5-6 fusion were the major contributing cause of his C6-7 transitional disc syndrome/worsened disc degeneration, the Board was likewise persuaded by the surgeon's opinion (as supported by another physician) that the C5-6 fusion was the major contributing cause of the interval worsening of C6-7 disc degeneration representing transitional disc syndrome. Accordingly, the Board concluded that claimant's medical service claim for the C6-7 surgery was compensable.

Occupational Disease: All Employment Exposures Considered (Even Employment With "DCS'd" Employer) - "802(2)(a)"

Lloyd R. Fleming, 73 Van Natta 1006 (December 16, 2021) On remand from the court (*Fleming v. SAIF*, 302 Or App 543 (2020)), the Board held that claimant's employment exposure with a previous employer, which was subject to a disputed claim settlement (DCS) for then-current right shoulder conditions, could be considered in determining the compensability of his occupational disease claim for a current right shoulder condition against a subsequent employer.

Attending physician addressed contribution of overall work activities at both employers.

The Board found persuasive the opinion of claimant's attending physician, who addressed the relative contribution of different potential causes of claimant's condition and opined that that claimant's overall work activities at both employers were the major contributing cause of the right shoulder condition.

In contrast, the physician relied on by the carrier did not address all of claimant's work exposure and did not explain how preexisting and age-related conditions contributed more than the work activities. Accordingly, the Board found the occupational disease claim compensable.

Occupational Disease: Chronic Mold Toxicity - Reasonable Inference of Casual Connection - "266" - Supported by Industrial Health Report and Co-Worker Testimony

Jean E. Runkle, 73 Van Natta 1018 (December 16, 2021). Analyzing ORS 656.266, and ORS 656.802(2)(a), the Board held that a worker's occupational disease claim for chronic mold toxicity was compensable because she produced persuasive affirmative evidence from her treating physician that permitted a reasonable inference that there was a causal connection between her work exposure to consistent water leaks that produced her claimed condition and that this exposure was the major contributing cause of her condition.

Claimant must provide some affirmative evidence of causation, not just disprove other potential causes.

The Board acknowledged that, pursuant to ORS 656.266, it is precluded, as a matter of law, from finding a claim compensable if the credible evidence only disproves the existence of other potential causes for the claimed condition. Nonetheless, the Board reiterated that a worker's burden of production of evidence under ORS 656.266 is satisfied provided that there is *some* affirmative evidence that permits a reasonable trier of fact to *infer* a causal link between the claimed disease and the worker's employment.

Occupational Disease: "Firefighter Presumption" - "Rebuttable Presumption" that Cancer Related to Firefighting - Not Rebutted by "Clear & Convincing" Evidence - "802(5)(b)"

Robert M. Shannon, 73 Van Natta 949, *Stephen Smith*, 73 Van Natta 955 (December 1, 2021). Applying ORS 656.802(5)(b), the Board held that the carriers did not rebut the statutory presumption that the claimants' prostate cancer resulted from their employments as firefighters. Noting that it was undisputed that the claimants proved the predicate facts to establish the rebuttable presumption, the Board went on to find that the carriers did not meet their burden to prove by clear and convincing medical evidence that the claimants' cancers were not caused or contributed to in material part by their employment.

Maurice Stadeli, DCD, 73 Van Natta 994 (December 14, 2021). Applying ORS 656.802(5)(b), the Board held that the carrier did not rebut the statutory presumption that the claimant's tonsillar cancer occupational disease resulted from his employment as a firefighter. The parties did not dispute that the decedent had proven the predicate facts to establish the rebuttable presumption.

Turning to the medical evidence, the Board found that the physicians' opinions on which the carrier relied did not establish the carrier's burden to prove by clear and convincing medical evidence that the claimant's cancer was not caused or contributed to in material part by his employment. Specifically, the Board observed that one opinion did not rule out firefighting as a contributor to the decedent's cancer. Other opinions did not persuasively explain their conclusion that ruled out firefighting as a fact of consequence, and were internally inconsistent by stating that there was no test to prove that employment did not contribute, yet also eliminating firefighting as even a minor cause. Accordingly, the Board set aside the carrier's denial.

Subject Worker: Delivery Driver Not Excluded From Coverage - "Right to Control" and "Nature of the Work" Tests Analyzed

Kevin A. McCallum, 73 Van Natta 979 (December 9, 2021). Applying ORS 656.005(30), the Board held that claimant, a delivery driver, was a "worker" that should not be excluded from coverage. Citing *S-W Floor Cover Shop v. Nat'l Council on Comp. Ins*., 318 Or 614, 630 (1994), the Board explained that, in determining whether an individual is a "worker" under ORS 656.005(30), the "right to control" test and the "nature of the work" test are applied.

Turning to the case at hand, the Board reasoned that because the employer exercised significant control over the manner of claimant's job performance, including requirements that claimant work every day and follow company policies, the "right to control" weighed in favor of an employment relationship. The Board also analyzed the employer's right to terminate employment, finding that the employer was free to fire claimant without liability, which also favored the existence of an employment relationship.

Moreover, the Board explained that claimant's work as a driver did not require advanced skills or highly specialized knowledge which would be indicative of an independent contractor relationship. The Board further determined that, even if claimant's skills as a truck driver and parts distributor were considered "specialized," the "nature of the work" test supported a finding that claimant was a "worker" because the delivery of automotive parts was part of the employer's regular business, claimant's work was continuous and ongoing, and claimant did not have time or days off to perform other jobs or deliver for other companies. Under such circumstances, the Board found that claimant was a "worker" under ORS 656.005(30), and affirmed the ALJ's decision.

Delivery of automotive parts was part of the employer's regular business, work was continuous, and claimant did not deliver for other companies.

Survivor's Benefits: Deceased Worker's Spouse Entitled to Benefits - Evidence Insufficient to Support that Decedent and Claimant Were Living in "Abandonment" - "005(2)(B)(A)" - Insurer Had Legitimate Doubt - No Penalty/Fee for Unreasonable Resistance to Payment

Maribeth T. Corrigan, DCD, 73 Van Natta 1047 (December 21, 2021). Applying ORS 656.005(2)(a) and (b)(A), the Board found that the deceased worker's spouse (claimant) was a "beneficiary" entitled to survivor's benefits. However, the Board found that the spouse was not entitled to a penalty for the carrier's allegedly unreasonable resistance to the payment of compensation pursuant to ORS 656.262(11)(a).

In reaching its conclusion that claimant was entitled to survivor's benefits, the Board observed that, although the decedent had filed for marital separation from claimant in February 2019, there was insufficient evidence to support a conclusion that claimant and decedent were living in a state of abandonment for more than one year. Rather, the record established that decedent had begun living separate and apart from claimant in June 2019 until the fatal injury date, May 14, 2020.

APPELLATE DECISIONS UPDATE

Claim Filing: Notice to Employer W/I 90 Days of Work Incident - "Claim" Filed Over 1 Year From Work Incident - Timely Filed - "265"

Double Tree Hotel v. Ansarinezhad, 316 Or App 51 (December 1, 2021). The court affirmed the Board's order in *Azam Ansarinezhad*, 71 Van Natta 1003 (2019), previously noted 38 NCN 9:5, which found that claimant's shoulder injury claim was timely because, although she did not file her claim until more than one year after her work incident, she had orally informed her employer within 90 days of the incident. On appeal, the carrier contended that claimant's injury claim was untimely because, although she had provided notice of her accident to her employer within 90 days, she had not submitted a formal notice of her claim within one year of the injury.

The "notice" a worker is required to give is notice of the accident, not a claim.

The court disagreed with the carrier's contention. The court framed the determinative question as the meaning of "notice as required by this section" as stated in ORS 656.265(4). In other words, the court summarized the question as whether the aforementioned "notice" refers to notice of a *claim*, not notice of an *accident*, and, as such, subsection (4) contemplates a one-year limit for giving notice of a claim independent of the 90-day period for providing notice of an accident resulting in an injury under ORS 656.265(1).

After reviewing the text of ORS 656.265 in its context, the court concluded that the "notice" to which ORS 656.265(4) refers is an accident and not a claim. Noting that subsection (4) provides that a claim is barred if "notice as required by this section" is not given (unless one of the statutory exceptions is applicable), the court reasoned that subsection (1) explicitly states the "notice" a worker is required to give is "notice of an *accident* resulting in any injury or death" and that subsections (2) and (3) prescribe the methods and delivery of such "notice." *See Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508 (2004).

The court acknowledged that, unlike subsection (2) (which uses the definite article "the" when referring to "the notice"), subsection (3) simply provides that "notice shall be given to the employer by mail, addressed to the employer * * *." Nevertheless, the court reasoned that it logically follows that "notice" in subsection (3) refers to the same "notice" that is mentioned in subsections (1) and (2) because subsection (3) further specifies to whom an injured worker must give notice of an accident for the purpose of satisfying the notice requirements under ORS 656.265.

After reviewing the 1995 legislative history concerning ORS 656.265, the court recognized the existence of portions of that history both supporting and undercutting the carrier's interpretation of the statute. Nonetheless, relying on *Suchi v. SAIF*, 238 Or App 48, 55 (2010), *rev den*, 350 Or 231 (2011), the court reiterated that even assuming that the legislative history supported the carrier's interpretation, it was required not to construe a statute in a way that was inconsistent with its plain text.

Applying its reasoning to the case at hand, the court concluded that in light of the plain and unambiguous text of the statute, the Board had not erred in holding that ORS 656.265(4) did not bar a claim filed more than one year after the date of injury provided that a claimant had given timely notice of the accident pursuant to the other provisions of ORS 656.265.

Course & Scope: "Course Of" Employment - "Parking Lot" Fall - Employer Had "Some Control" Over Leased Parking Lot - Had Right to Request Repairs & to Designate Areas for Employee Parking; "Arose Out Of" Employment - Claimant Parked In Employer-Designated Portion of Lot - Injured as Result of Cracked Pavement on Normal Ingress to Work

Miles v. Bi-Mart Corp., 316 Or App 481 (December 22, 2021). The court reversed the Board's order in *Sherrie A. Miles*, 71 Van Natta 40 (2019), previously noted 38 NCN 1:4, that had held that claimant's injury, which occurred while she was walking across a parking lot to the entrance of her employer's retail store to begin her workday, did not arise out of and in the course of her employment because the employer's lease with its landlord concerning the parking lot had not provided the employer with a right to require maintenance sufficient to establish "control" over the parking lot to satisfy the "parking lot" exception to the "going and coming" rule.

After conducting its review, the court concluded that the Board's decision was not supported by substantial reason. *See NAES Corp. v. SCI 3.2, Inc.*, 303 Or App 684, 692, *rev den*, 366 Or 826 (2020). Citing *Bruntz-Ferguson v. Liberty Mutual Ins.*, 310 Or App 618, 623-24 (2021) (a decision issued after the Board's order), the court reiterated that, rather than focusing exclusively on a maintenance provision in an employer's lease, "the important inquiry when evaluating the 'in the course of' prong is the degree of control" and an employer's "right to request a repair" evinced "some control" sufficient to satisfy the "parking lot" exception to the "going and coming" rule.

Turning to the case at hand, the court noted several relevant facts supporting a conclusion that the employer had "some control" over the parking lot that the Board's decision had not mentioned: (1) the employer used the parking lot for shopping cart racks, shelves, and displays; (2) the employer fenced off particular sections of the parking lot to dissuade skateboarders and loiterers; and (3) at the time of claimant's injury, a co-worker was engaged in a work activity (watering plants in the parking lot). Furthermore, the court observed that the employer's lease gave the employer the authority to restrict its employees' parking to designated areas and to request maintenance and repairs of the parking lot.

Reasoning that the aforementioned factors supported a conclusion that the employer had "some control" over the area where claimant's injury had occurred, the court concluded that the Board's decision was not supported by substantial reason.

Addressing the "arose out of" employment prong of the work connection test, the court reiterated that injuries resulting from a "neutral" risk (injuries that are not "distinctly associated" with a claimant's employment or personal to the claimant) are compensable if employment conditions exposed the worker to the risk or put the worker in a position to be injured by that risk. *See Phil A. Livesley Co. v. Russ*, 296 Or 25, 30 (1983); *Legacy Health System v. Noble*, 250 Or App 596, 603, *rev den*, 353 Or 127 (2012).

Applying that rationale to the present case, the court determined that the Board had not taken into account that claimant parked her vehicle in the portion of the parking lot designated by her employer for employee parking. Reasoning that such a directive benefited the employer and exposed claimant to the cracked and broken parking lot pavement as she made her way into her place of employment by her normal route of ingress to work, the court concluded that the Board's decision that her injury had not arisen out of her employment lacked substantial reason.

Course & Scope: "Course Of" Employment" - Trip/Fall in Elevator Lobby of Office Building - Employer Had "Some Control" Over Common Areas Via Lease - Right to Request Repairs; "Arose Out of" Employment - Common Location of Normal Ingress to Work

SAIF v. Houk, 316 Or App 568 (December 22, 2021). The court, *per curiam*, affirmed the Board's order in *Sally Houk*, 72 Van Natta 372 (2020), previously noted 39 NCN 4:5, that had held that claimant's injury, which occurred while she was walking to her work when she tripped in a construction area located in the elevator lobby in the building where her employer leased an office, arose out of and in the course of her employment because her employer had the right to require/obtain maintenance of the area through its lease with the landlord. On appeal, the carrier challenged the Board's determinations that, under the "parking lot" exception to the "going and coming" rule, claimant's injury occurred in the course of her employment because her employer's lease with the landlord provided the employer with sufficient control over the lobby area and that her injury arose out of her employment because it had occurred as a result of a "neutral" risk to which her employment had exposed her.

Court cited a case issued after the Board's order that the important inquiry was whether employer's right to request repairs of parking lot evinced some degree of control.

The court rejected the carrier's challenges. Citing *Bruntz-Ferguson v. Liberty Mutual Ins.*, 310 Or App 618, 623-24 (2021), the court stated that it had previously held the "in the course of" prong of the unitary work connection test had been satisfied because an employer's right to request repairs concerning common areas in a building where her employer leased office space constituted "some control" of the premises where the claimant had been injured on her way to work such that her injury was subject to the "parking lot" exception to the "going and coming" rule. Again referring to *Bruntz-Ferguson*, the court noted that it had also concluded that the claimant's injury "arose out of" her employment because, although her risk of injury from slipping and falling on an icy curb outside the office building was a "neutral" risk, her employment had exposed her to such a risk because she "could not arrive to her workstation

Risk of slipping on ice was neutral, but claimant could not arrive at employment without entering the building through normal ingress.

without first entering the building where her office was located" and her injury occurred in the normal ingress to her work. *Id.* at 628. As further support for the aforementioned rationale, the court relied on *SAIF v. Lynn*, 315 Or App 720 (2021) and *Miles v. Bi-Mart Corp.*, 316 Or App 481 (2021).

Consistent with the aforementioned cases, the court determined that substantial evidence supported the Board's determinations that: (1) the employer had exercised "some control" over the common area of the lobby sufficient to establish that claimant's injury had occurred in the course of her employment; and (2) in stepping onto the plywood ramp in the construction area as she exited the building's elevator, claimant had passed through a common location of ingress to her employment sufficient to establish that her injury "arose out of" her employment because the risk of injury was one to which her employment had exposed her.

Course & Scope: "Off-Duty" Pool Hall Manager's Injury on Public Sidewalk - After Removing Patron From Premises at "On-Duty" Manager's Request - "In the Course Of" & "Arose Out Of" Employment

Davis v. SAIF, 316 Or App 301 (December 15, 2021). The court reversed the Board's order in *Charles E. Davis*, 71 Van Natta 1391 (2019), previously noted 38 NCN 12:6, that held that an off-duty pool hall manager's injury, which occurred when he was punched by a patron on a public sidewalk after he had removed the patron from the pool hall at the request of the on-duty manager, did not arise out of and in the course of his employment. In reaching its conclusion, the Board had reasoned that claimant was not on-duty or being paid, the injury was off the employer's premises, and he had "exceeded the bounds" of his employment by using force.

On appeal, claimant contended that, because removing troublesome people from the pool hall was a regular part of his job and he had been asked by the on-duty manager to carry out that task, his activity came within the course of his employment even though he was not then on the job. In addition, claimant asserted that the facts that the activity took him outside of the pool hall's premises and may have violated the employer's "no force" policy did not remove the activity from the course of his employment.

The court agreed with claimant's contentions. Citing *SAIF v. Scardi*, 218 Or App 403, 411, *rev den*, 345 Or 175 (2008), and *Iliafar v. SAIF*, 160 Or App 116 (1999), the court reiterated that an activity need not be directed by an employer for it to be work-related nor is it required that the employer be compensated for engaging in the activity.

Removing people from the pool hall was a regular part of claimant's job and on-duty manager asked him to do so.

Turning to the case at hand, the court noted that it was undisputed that the task of removing troublesome people was part of claimant's managerial job and that he had been asked by the on-duty manager to remove the troublesome patron. Reasoning that claimant engaged in that task for the employer's benefit, the court concluded that those facts brought claimant's task within the course of his employment even though he was not on the job at the time. *See SAIF v. Sumner*, 313 Or App 434 (2021). In reaching its conclusion, the Board

determined that claimant's chosen method of carrying out his task (by pursuing the patron outside and using physical force) did not deprive the task of a work connection or remove the activity from the course of his employment.

Furthermore, the court found that, in light of his "course of employment" conclusion, the risk of claimant being injured while removing a patron was a risk of his employment. Consequently, the court held that claimant's injury arose out of his employment. *Freightliner, Inc. v. Hayes*, 325 Or 592, 601 (1997).

Court remanded to the Board to address carrier's contention that claim was barred under the "active participant" affirmative defense.

Finally, the court noted that because the Board had concluded that claimant's injury had not occurred in the course of his employment, it was unnecessary to address the carrier's contention that the claim was barred under the "active participant" affirmative defense pursuant to ORS 656.005(7)(b)(A). Consequently, the court remanded to the Board to address that issue.

Extent: Impairment Findings - Board Authorized to Consider Arbiter Findings (Even If ARU Did Not) - Arbiter Reported Valid, Ratable Findings Due to Accepted Condition & Medical Sequelae Notwithstanding "Not Med Stat" Statement - ("268(6)(g)," "283(6)," "295(5)")

Precision Castparts Corp. - PCC Structural v. Cramer, 316 Or App 18 (December 1, 2021). The court affirmed the Board's order in *Melonie Cramer*, 72 Van Natta 786 (2020), previously noted 39 NCN 8:4, which awarded claimant's permanent impairment for claimant's shoulder condition based on a medical arbiter's findings even though the arbiter had reported that she was not medically stationary at the time of the examination.

During the reconsideration proceeding, based on the arbiter's determination that the worker was not medically stationary, the Appellate Review Unit (ARU) proposed that the parties agree to a postponement of the proceeding. When the worker declined the postponement request, ARU issued an Order on Reconsideration that did not consider the arbiter's report/ impairment findings and affirmed the Notice of Closure (which had not awarded permanent impairment based on the attending physician's ratified "invalid" findings determination).

Reiterating that an ALJ's and the Board's review of a worker's permanent impairment is based on the record developed during the reconsideration proceeding before ARU, as well as any arbiter report, the court disagreed with the carrier's contention that the Board was required to assess whether it was an abuse of discretion for ARU to have not considered the arbiter's report. Instead, citing ORS 656.268(6)(g), ORS 656.283(6), and ORS 656.295(5), the court reasoned that, in accordance with its *de novo* review, the Board does not review ARU's application of rules regarding the evaluation of a worker's disability with any sort of deference, but rather was authorized to evaluate the evidence itself and to find the arbiter's findings more persuasive than an attending physician's "ratified" findings. *See also Marvin Wood Products v. Callow*, 171 Or App 175, 180 (2000) (review of a disability-extent determination at hearing and on Board

Board does not have to review ARU's evaluation with any deference.

review is *de novo*). Consequently, the court affirmed the Board's decision to grant the worker a permanent disability award based on the arbiter's impairment findings.

Subject Worker: Injury While Performing Volunteer, Unpaid Teaching Assistant Duties - No Reasonable Expectation of Remuneration ("005(30)") - Not "Subject Worker"

Wuhrman v. SAIF, 316 Or App 577 (December 22, 2021). The court affirmed without opinion the Board's order in *Joshua Wuhrman*, 72 Van Natta 967 (2020), previously noted 39 NCN 10:9, which had held that a volunteer, unpaid teaching assistant was not a subject worker when he was injured while performing his duties because he did not have a reasonable expectation of remuneration for his services.

APPELLATE DECISIONS
COURT OF APPEALS

Mental Disorder: Alleged Work-Related Stressors Separately Considered - "Generally Inherent" - Work Frustrations (Management's Changing & Inconsistent Directions) - "802(3)"

King v. Gallagher Bassett Insurance Services, 316 Or App 24 (December 1, 2021). Analyzing ORS 656.802(3), the court affirmed the Board's order in *Audrey J. King*, 72 Van Natta 287 (2020), which upheld a carrier's denial of claimant's mental disorder claim. In reaching its conclusion, the Board had viewed claimant's alleged work-related stressors as "several unrelated work incidents over a matter of months" and was not persuaded that she had established by clear and convincing evidence that her "non-excluded work-related stressors" were the major contributing cause of her claimed adjustment disorder and anxiety. On appeal, claimant contended that the Board should have evaluated whether her work environment *as a whole* was injurious and the major contributing cause of her mental disorder and had erred in separately considering each allegedly causative aspect of the work environment.

Court reiterated that each circumstance or condition must be evaluated to determine whether it falls within a statutorily excluded or non-excluded category.

The court disagreed with claimant's contention. Citing ORS 656.802(3), and *Liberty Northwest Ins. Corp. v. Shotthafer*, 169 Or App 556, 565 (2000), the court reiterated that, *preliminary* to weighing the overall causal contribution of employment, each alleged stress-inducing circumstance or condition must be evaluated separately to determine whether it falls within a statutorily excluded or non-excluded category. Further noting that only stressors determined to be non-excluded are weighed against excluded stressors to determine the compensability of a mental disorder claim, the court reasoned that claimant's contention that the work environment *as a whole* should be considered as a separate causal factor in and of itself would undermine that analysis because the overall work environment could include stress-inducing factors that should be excluded under ORS 656.802(3). *See Shotthafer*, 169 Or App at 565; *Havlik v.*

Multnomah County, 164 Or App 522 (1999) (the question under the statute is "whether the working *conditions that are directly responsible for claimant's mental disorder* are generally inherent in every working situation").

Alternatively, claimant asserted that the Board had erroneously excluded as "generally inherent" two of the alleged stress-inducing factors: (1) management's changing and inconsistent direction; and (2) the inadequate workspace she had been provided. Relying on *Havlik* and *SAIF v. Campbell*, 113 Or App 93, 96 (1992), the court stated that the Board is delegated responsibility under ORS 656.802(3)(b) to determine what "conditions [are] generally inherent in every working situation" and it is within the Board's delegated responsibility to determine how broadly or narrowly one defines an alleged stress-producing factor, based on the Board's identification of "the conditions that are directly responsible for the worker's stress." Finally, referring to *Fuls v. SAIF*, 321 Or 151, 161 (1995), and *Whitlock v. Klamath County School Dist.*, 158 Or App 464, 475 (1998), *rev den*, 329 Or 61 (1999), the court repeated that the legislative policy of the "generally inherent" statutory provision was "to curtail compensable claims for mental disorder based on on-the-job stressors" and, thus, conditions that are common to "the full range of employments" are generally excluded from the causation calculus.

Applying those principles to the case at hand, the court was persuaded that the Board had correctly identified "frustrations at work" as "the condition that is directly responsible for claimant's stress." Likewise, the court concluded that the Board's determination that claimant's work frustration is a circumstance that is "generally inherent" in the full range of employment was within the legislative policy to "curtail compensable claims for mental disorders based on on-the-job stressors."

Conversely, reasoning that it was not apparent from the Board's order that it had properly considered claimant's alleged stress for aspects of her particular workplace (*i.e.*, the lack of adequate physical space for all employees and the shortage of electrical outlets and writing materials necessary to complete the assigned work), the court determined that the Board's conclusion that the workplace should be categorized as a statutorily excluded factor was not supported by substantial reason.

Substantial evidence supported Board's determination that the only opinion supporting compensability considered excluded work stressors.

Yet, notwithstanding the Board's error, the court concluded that the Board had correctly held that claimant's mental disorder claim lacked a persuasive medical opinion establishing by clear and convincing evidence that the claimed mental disorder arose out of and in the course of her employment. In reaching its conclusion, the court found that substantial evidence supported the Board's determination that the only physician's opinion supporting the compensability of the mental disorder should be discounted because the physician had included some statutorily excluded work stressors (*e.g.*, management's changing and inconsistent directions, as well as her supervisor's attempts to undermine her) in rendering such an opinion. Accordingly, the court held that the Board had not erred in upholding the carrier's denial of claimant's mental disorder claim.