Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Biennial Review/Attorney Fees/"388(4)"

As the Board begins its biennial review of its schedule of attorney fees under ORS 656.388(4), it is seeking written comments from parties, practitioners, and the general public. Those written comments should be directed to Katy Gunville, WCB's Executive Assistant at 2601 25th St. SE, Ste. 150, Salem, OR 97302, katy.e.gunville@wcb.oregon.gov, or via fax at (503)373-1684.

These written comments will then be posted on WCB's website. The comments will be compiled and presented for discussion at Board meetings, where the Members will also consider public testimony. In establishing its attorney fee schedules, the Members shall also consult with the Board of Governors of the Oregon State Bar, as well as consider the contingent nature of the practice of workers' compensation law, the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees earned by attorneys for insurers and self-insured employers. *See* ORS 656.388(4), (5).

Announcements regarding Board meetings will be electronically distributed to anyone who has registered for these notifications at https://service.govdelivery.com/accounts/ORDCBS/subscriber/new.

New Managing Attorney – Robert Pardington

Robert Pardington has been selected for the position of Managing Attorney, Board Review. Robert is a graduate of Stanford University. He obtained his JD from Lewis & Clark Law School. Robert's nearly 30 years of experience in Oregon workers' compensation law started when he was a student law clerk in 1993 at a Portland law firm, and continued through his associate attorney years there, until December, 1999, when Robert began his employment at the Board as a Staff Attorney. In 2003 he was appointed to be a WCB Administrative Law Judge, a position he performed for 18 years until August, 2021, when Robert accepted a rotation as acting Managing Attorney, Board Review.

Administrative Law Judges Appointed

WCB is pleased to announce the appointment of two new Administrative Law Judges, Van Quan and Katherine S. Krametbauer.

Van Quan immigrated to the United States in 1980 and was raised in Spokane, Washington. She obtained her bachelor's degree from the University of Oregon in 2001, and graduated from the University of Oregon School of Law in 2005. After graduation, she worked in the Springfield area for John C. DeWenter, PC. She practiced in Workers' Compensation Law, representing injured workers. In 2008, she came to work at the Workers' Compensation Board as a staff attorney. In 2022, she will be joining the WCB Hearings Division, Salem office, as an Administrative Law Judge.

Katherine S. Krametbauer, a native Oregonian, obtained a Bachelor's degree from the University of San Diego before moving to the Washington, D.C. area to work and attend law school. After graduating from the Catholic University of America School of Law in 2007, she clerked for a Washington D.C. Superior Court Judge, was a civil litigation associate at a general practice Maryland law firm, and then worked as an Associate Deputy General Counsel at the Department of Defense. Upon returning to Oregon in 2010, she joined the Oregon State Bar and worked as a criminal prosecutor for the Hood River District Attorney's office. In 2015, she joined the SAIF Corporation as a trial attorney. In 2022, she will be joining the WCB Hearings Division, Salem office, as an Administrative Law Judge.

CASE NOTES

"Ceases" Denial: Carrier Persuasively Established that a Previously Accepted Left Knee Condition had Ceased to Be Major Contributing Cause of Combined Left Knee Condition

Luis Vela, 74 Van Natta 564 (August 16, 2022). Applying ORS 656.262(6)(c) and ORS 656.266(2)(a), the Board held that an examining physician's uncontroverted medical opinion persuasively established that a previously accepted "left knee medial meniscus tear" had ceased to be the major contributing cause of the disability or need for treatment of a combined left knee condition. Therefore, the Board upheld the carrier's "ceases" denial.

In doing so, the Board distinguished *Jonathan C. Farrell*, 74 Van Natta 295 (2022). In *Farrell*, the carrier had accepted an "exacerbation of preexisting right knee arthritis combined with preexisting right knee arthritis." *Id*. at 299. On review, the carrier had argued that the resolution of claimant's "right knee strain" established that the "otherwise compensable injury" was no longer the major contributing cause of the accepted "combined condition." The Board disagreed, explaining that the carrier had accepted the "exacerbation of preexisting right knee arthritis" as part of the combined condition and, therefore, the resolution of

the "strain" did not established the requisite change in circumstances to support the carrier's "ceases" denial.

Medical evidence concerned the "otherwise compensable injury" component of the accepted combined condition (i.e., the left knee medial meniscus tear).

Here, the Board reasoned that, unlike the medical evidence in *Farrell*, which addressed a condition that was not part of the accepted combined condition, the medical evidence, here, concerned the "otherwise compensable injury" component of the accepted combined condition (*i.e*., the left knee medial meniscus tear). Accordingly, the Board upheld the carrier's "ceases" denial.

"Ceases" Denial: No Combined Condition (of the Kind Accepted and Denied by the Employer) Established

Amanda C. Roberts, 74 Van Natta 607 (August 29, 2022). Applying ORS 656.262(6)(c), the Board held that the record did not persuasively establish the existence of the "combined condition" accepted and denied by the employer. In reaching that conclusion, the Board determined that the "combined condition" identified by an examining physician was distinct from the "combined condition" processed by the employer. Moreover, claimant's treating physicians concurred with the examining physician's unpersuasive opinion, and their opinions were phrased in terms of medical possibility, not probability. Accordingly, the Board set aside the employer's "combined condition" acceptance *and* denial. *See Dezi Meza*, 63 Van Natta 67, 70 (2011). It therefore modified the ALJ's order.

"Combined condition" identified by an examining physician was distinct from the "combined condition" processed by the employer.

Additionally, applying ORS 656.386(1), the Board held that the claimant was not entitled to an attorney fee for "clarifying" the scope of acceptance. In reaching that conclusion, the Board determined that the claimant had not prevailed over a "denied claim" distinct from the employer's "ceases" denial. *See SAIF v. Varah*, 160 Or App 254, 258 (1999); *Meza*, 63 Van Natta at 71.

Compensability: No *per se* Rule that a Medical Opinion Must Respond to a Contrary Theory, Factual Persuasiveness of the Opinion Nevertheless Discounted

Wanda Asato, 74 Van Natta 549 (August 10, 2022). The Board upheld the carrier's denial of the claimant's new/omitted medical condition claims. Citing *Carter v. Waste Mgmt. Disposal Servs. of Oregon*, 298 Or App 430, 435 (2019), and *Jennifer L. Green*, 72 Van Natta 121, 123 (2020), the Board noted that although there is no *per se* rule that a persuasive medical opinion must respond to a contrary theory, the absence of such a response may be a factor in determining the factual persuasiveness of a physician's opinion. However, the Board discounted the factual persuasiveness of a physician's opinion that did not sufficiently respond to another physician's opinion regarding the claimed condition and the mechanism of injury.

Course and Scope: Claimant's Injury While Scraping Snow from Personal Vehicle on a Client's Private Property (After Clocking Out) Not Compensable

Claimant was no longer subject to the employer's direction or control at the time of the injury.

Jayne Rienks, 74 Van Natta 541 (August 9, 2022). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's injury of falling while scraping snow and ice from her personal vehicle on a client's private property did not occur "in the course of" or "arise out of" her employment. Citing *Krushwitz v. McDonald's Rests.*, 323 Or 520, 526 (1996), the Board determined that the "going and coming" rule applied, and therefore the "in the course of" prong was not satisfied, because the claimant had "clocked out" for the day and was no longer subject to the employer's direction or control at the time of the injury. *See also King v. SAIF*, 300 Or App 267, 270 (2019); *Maria L. Duran-Angel*, 63 Van Natta 2580 (2011); *Janet V. Dollens*, 42 Van Natta 2004 (1990), *aff'd without opinion*, 107 Or App 531 (1991).

Additionally, distinguishing *Bruntz-Ferguson v. Liberty Mut. Ins. Co.*, 310 Or App 618 (2021), the Board determined that the "arising out of" prong was not satisfied because, although the claimant was injured during her egress from work, the employer had no control over the area where the injury occurred. *See Robert M. Coleman*, 65 Van Natta 1748, 1753-54 & n 2 (2013). Accordingly, the Board found that the claimant's injury claim was not compensable.

Third Party: "Extraordinary Fee" of 40 Percent of Recovery from Third Party Approved

Claimant and his counsel agreed to an attorney fee of 40 percent of any settlement or recovery in the event that the case were settled less than 30 days before trial.

Henry M. Fuhrer, 74 Van Natta 585 (August 23, 2022). Analyzing ORS 656.593(3) and OAR 438-015-0095, the Board approved a third party settlement and allowed for an "extraordinary" attorney fee for services rendered in connection with that settlement.

The Board noted that, while third party matters are confined to 33-1/3 percent of the gross recovery of a settlement, it may award an "extraordinary" fee upon a finding of extraordinary circumstances. *See* ORS 656.593(3) and OAR 438-015-0095. The Board further noted that it had previously authorized "extraordinary" attorney fees of 40 percent in several third party cases. The Board found the circumstances of the case at hand analogous to those cases where it had previously authorized "extraordinary" attorney fees. Specifically, the Board explained that the issues in this case were complex and time consuming, numerous depositions and multiple motions requiring complex legal research was required, the investigation of claimant's claim and preparation for litigation involved more than 1,500 hours of attorney-related time, claimant and his counsel agreed to an attorney fee of 40 percent of any settlement or recovery in the event (as here) that the case were settled less than 30 days before trial, and there was no objection to claimant's counsel's request for an "extraordinary" fee.

Consequently, the Board was persuaded that extraordinary circumstances justified the allowance of an "extraordinary" attorney fee equal to 40 percent of the third party recovery proceeds.

"Three-day Waiting Period," ORS 656.210(3): Claimant was Not Continuously Off Work Directly Following the Injury, No TTD Awardable for that Period

Robert Tice, 74 Van Natta 556 (August 11, 2022). Applying ORS 656.210(3), the Board held that claimant was not entitled to temporary disability benefits for the statutory "three-day waiting period" because his disability had not continued for 14 days directly following the compensable injury. Further, applying ORS 656.262(11)(a), the Board modified the penalty and penalty-related attorney fee awarded by the Administrative Law Judge.

Citing ORS 656.210(3), the Board stated that the temporary disability benefits for the statutory "three-day waiting period" are recoverable only when the claimant's total disability "continues" for 14 days directly following the work injury. Relying on *Tennant v. Lyman Slack Chevrolet*, 102 Or App 470, 472, *rev den*, 310 Or 547 (1990), the Board explained that the court had interpreted the word "continues" to mean that the disability must continue for 14 days, without interruption, from the first day of being off work due to the compensable injury. Examining the legislative history of a post-*Tennant* amendment to ORS 656.210(3), the Board concluded that the amendment did not alter the court's interpretation of "continues" for purposes of analyzing entitlement to the "three-day waiting period."

The Board noted that claimant was taken off work from February 25, 2021 through March 1, 2021, and was restricted to modified work on March 10, 2021. Under such circumstances, the Board concluded that claimant's temporary total disability had not continued without interruption for 14 days directly following the compensable injury and that claimant was not entitled to temporary disability benefits for the ORS 656.210(3) "three-day waiting period."

Work Disability: Attending Physician's Statement Constituted a Release to Regular Work

Attending physician's statement, that claimant's condition was medically stationary without work restrictions as it pertained to the accepted conditions, constituted a release to "regular work."

Richard A. McConnell, 74 Van Natta 536 (August 3, 2022). Applying ORS 656.214(2)(a) and ORS 656.726(4)(f)(E), the Board held that claimant's attending physician released him to "regular work" and, consequently, he was not entitled to a work disability award. It was undisputed that claimant did not return to regular work. However, the Board found that claimant's attending physician's statement, that claimant's condition was medically stationary without work restrictions as it pertained to the accepted conditions, was based on an accurate understanding of claimant's job duties at injury and constituted a release to "regular work." Accordingly, the Board concluded that the record did not support claimant's entitlement to a work disability award. *See* ORS 656.214(2); ORS 656.726(4)(f)(E).

APPELLATE DECISIONS UPDATE

Preexisting Condition: Carrier Proved "Diabetes" "Actively Contributed" to Treatment for "Combined" Foot Ulcer Condition & Work-Related Foot "Ulcer" Injury Was Not Major Cause of Disability/Treatment for "Combined" Foot Condition – "266(2)(a)" / "005(7)(a)(B)"

Torres v. SAIF, 321 Or App 408 (August 24, 2022). Analyzing ORS 656.005(7)(a)(B), and ORS 656.266(2)(a), the court affirmed the Board's order in *Guillermo Torres*, 72 Van Natta 382, *on recon*, 72 Van Natta 452 (2020), previously noted 39 NCN 5:5, that had upheld a carrier's denial of claimant's injury claim for a foot blister condition. In reaching its conclusion, the Board found that the carrier had established that claimant's otherwise compensable injury to his foot had combined with a preexisting diabetic condition and that the injury was not the major contributing cause of his need for treatment/disability for his foot blister condition. On appeal, the carrier challenged the Board's "otherwise compensable injury" finding, while claimant contested the Board's determination that the carrier had met its burden of proving a combined condition for which the work injury was not the major contributing cause.

Citing ORS 656.005(7)(a), ORS 656.266(1), and *Coleman v. SAIF*, 203 Or App 442, 446 (2005), the court stated that claimant must establish that work was a material contributing cause of his need for treatment/disability for his foot blister condition. Relying on ORS 656.266(2)(a), and *SAIF v. Harrison*, 299 Or App 104, 106 (2019), the court reiterated that, if claimant met his burden of proof, the carrier must establish that the otherwise compensable foot blister injury combined with a preexisting condition and that the blister was not the major contributing cause of his disability/treatment. Referring to ORS 183.482(8)(c), and *Arms v. SAIF*, 268 Or App 761, 767 (2015), the court clarified that it reviews the Board's findings of fact for substantial evidence and reason to "determine whether the board provided a rational explanation of how its factual findings lead to the legal conclusions on which the order is based." Finally, the court emphasized that it does not substitute its judgment for that of the Board's, but rather determines only whether the Board's evaluation was reasonable. *See SAIF v. Pepperling*, 237 Or App 79, 85 (2010).

Board's order supported by substantial evidence and reason.

Turning to the case at hand, the court disagreed with the carrier's contention that the Board's "otherwise compensable injury" determination was not supported by substantial evidence. In doing so, the court noted that one physician had opined that claimant's work activities (as a firefighter) had caused his foot blister which had been complicated by his diabetes, while another physician had acknowledged that the blister itself was developed at work. Under such circumstances, the court concluded that the Board's "otherwise compensable injury" determination was based on substantial reason.

Next, the court addressed the Board's determination that the carrier had proven the existence of a combined condition for which claimant's work injury was not its major contributing cause. Referring to *Corkum v. Bi-Mart Corp.*, 271 Or App 411, 422 (2015), and *Murdoch v. SAIF*, 223 Or App 144, 149-50, *rev den*, 346 Or 361 (2009), the court acknowledged that if claimant's diabetes had not actively contributed to his foot condition, but rather made him more susceptible to injury, his diabetes would not constitute a legally cognizable preexisting condition to categorize the claim as a combined condition.

After reviewing the record, the court recognized that a physician had opined that claimant's diabetes had not actively contributed to his foot ulcer condition. Nonetheless, the court noted that the Board had discounted that opinion because the physician had initially described claimant's foot condition as a diabetic ulcer and not as a work-caused blister. The court further observed that the Board had relied on another physician's opinion that claimant's diabetes had caused peripheral neuropathy, diminished sensation, and diminished blood flow, which had actively contributed to his need for treatment. Determining that substantial evidence and reason supported the Board's view of the evidence and its ultimate conclusion that the carrier had met its burden of disproving the compensability of claimant's "combined condition" under ORS 656.266(2)(a), the court affirmed the Board's decision.