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BOARD NEWS

Jacqueline Jacobson - Presiding ALJ

On October 23, 2023, ALJ Jacqueline Jacobson was appointed as Presiding ALJ of the Workers' Compensation Board. As PALJ, Jacqueline will oversee the Hearings Division. ALJ Jacobson attended Reed College, earning a Bachelor of Arts degree, and received her Juris Doctorate from Lewis & Clark Law School. She became a member of the Oregon State Bar in 2001 and, thereafter, began practicing workers' compensation law. While in private practice, she represented both injured workers and insurers/employers. She has also worked as a staff attorney and ran her own law firm. ALJ Jacobson joined the WCB Hearings Division in 2010, and has held hearings and mediations since that time. Outside of work, ALJ Jacobson teaches the workers' compensation class at Lewis & Clark Law School as an Adjunct Professor. In addition, ALJ Jacobson was a member of the Executive Committee of the Oregon State Bar Workers' Compensation section from 2008-2015, serving as Chair in 2014, and continues to serve as a member of the Access to Justice and the Going Forward sub-committees.

Board Meeting – Nov. 6, 2023

The Members have scheduled a public meeting for Nov. 6, 2023 at 2:00 p.m., which will be held in Hearing Room "A" at the Board's Salem office (2601 25th St. SE, Ste. 150). The agenda for the Board meeting will be:

- Reconstitution of the Board. OAR 438-021-0010(1)(b).

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://service.govdelivery.com/accounts/ORDCBS/subscriber/new>

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

The Board is currently engaged in its biennial review of attorney fees schedules under ORS 656.388(4). To assist in this review, the Board has published its September 6, 2023, attorney fee report which includes attorney fee data through the 2022 calendar year. The report can be found on the Board's website at <https://www.oregon.gov/wcb/Documents/statisticalrpts/090623-atty-fee-stats.pdf>

The Board 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. All written comments will be posted on the Board'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>

Portal Housekeeping

One of the great things about the WCB Portal is that it allows users to manage their own Portal accounts. As staff changes occur in your firm, please take the time to have your account administrator(s) update your WCB Portal user and contact lists. If you have any questions or need any assistance, please email, portal.wcb@wcb.oregon.gov

Removing a User:

- Log into the Portal.
- Click the "Users" tab.
- Select the user you want to remove.
- Click "Remove User."
- Scroll down to the bottom of the page and click "Remove User".

Removing a Contact:

- Log into the Portal.
- Click the "Contacts" tab.
- Select the contact you want to remove.
- Click "Remove Contact."
- Click "Clear Contact" at the bottom of the page.

CASE NOTES

Appellate Procedure: Board Declined to Take Administrative Notice of Oregon Medical Board Opinion Not Included in Hearing Record – Board Granted Claimant's Motion to Strike Portions of the Employee's Brief That Referenced Medical Board Opinion

Kiera L. Ervin, 75 Van Natta 530 (October 10, 2023). Applying ORS 656.295(5), the Board held that an Oregon Medical Board (OMB) decision regarding claimant's treating physician, which was not a part of the hearing record, was not subject to administrative notice and the self-insured employer's references to that decision in its appellant's brief were stricken and not considered. Citing *Groshong v. Montgomery*, 73 Or App 403 (1985), the Board explained that it was limited to the record developed at the hearing with the exception that it "may take administrative notice of facts capable of accurate and

ready determination by resort to sources whose accuracy cannot reasonably be questioned.” See *SAIF v. Calder*, 157 Or App 224, 227 (1989).

Turning to the case at hand, the Board declined to take administrative notice of the OMB decision because it was not the type of document appropriate for administrative notice. The Board acknowledged that, in previous cases, it had taken administrative notice of Board and Workers’ Compensation Division (WCD) orders involving the same claimant. See, e.g., *Timothy C. Gould*, 68 Van Natta 741, 743 n 3 (2016). In declining to take administrative notice of the OMB decision, the Board explained that the decision did not involve an agency order concerning the same claimant. Rather, the Board concluded that it was a medical board decision regarding a physician. Moreover, the Board found that, even if it were to take administrative notice of the OMB decision, it would not have affected the outcome of the case.

Accordingly, the Board granted claimant’s motion to strike references to the OMB decision in the employer’s appellant’s brief. The Board adopted and affirmed the remainder of the ALJ’s order.

Combined Condition: "Ceases" Denial Upheld - Carrier Met Burden to Establish Change in Claimant's Condition or Circumstances

Mark S. Mooney, 75 Van Natta 563 (October 27, 2023). Applying ORS 656.262(6)(c) and ORS 656.266(2)(a), the Board affirmed the ALJ’s order that upheld the employer’s “ceases” denial of claimant’s combined cervical spine condition. On review, claimant contended that the employer could not prove that his accepted condition ceased to be the major contributing cause of the disability or need for treatment for his combined cervical spine condition because he received a permanent impairment award related to his condition.

Yet, the Board noted that compensability and impairment are separate inquiries. See ORS 656.262(6)(c); ORS 656.266(2)(a); ORS 656.214(1)(a). Specifically, the Board explained that permanent impairment relates to the loss of use or function of a body part, whereas the employer’s “ceases” denial pertains to the major contributing cause of the disability or need for treatment of the combined condition. See ORS 656.262(6)(c); ORS 656.266(2)(a); ORS 656.214(1)(a). Thus, the Board declined to conclude that the employer could not issue a “ceases” denial simply because claimant received a permanent impairment award for his previously accepted condition. *Id.*

Moreover, after evaluating the evidence, the Board found that the record persuasively established that claimant’s “otherwise compensable injury” (*i.e.*, the previously accepted condition), ceased to be the major contributing cause of claimant’s disability or need for treatment of his combined condition. See *Debra A. Mangine*, 68 Van Natta 1438, 1442-43 (2016) (physician’s opinion that described a surgery’s impact on the claimant’s combined condition persuasively established that the claimant’s otherwise compensable injury was no longer the major contributing cause of the condition); *Kurtis L. Kohl*, 66 Van Natta 1796, 1802 (2014) (physician’s opinion as a whole, read in context, persuasively established a change in the claimant’s condition sufficient to meet the carrier’s burden of proof under ORS 656.266(2)(a)).

Accordingly, the Board found that the employer met its burden of proof under ORS 656.266(2)(a) and upheld the employer's "ceases" denial of claimant's combined cervical spine condition.

Temporary Disability: Attending Physician Did Not Authorize Retroactive Temporary Disability Benefits - Authorization Not Contemporaneous with Disputed Period - Constitutional Law: ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g) Did Not Violate Remedies Clause, Privileges and Immunities Clause, Separation of Powers Doctrine, Due Process Clause, or Equal Protection Clause - Claimant Did Not Have Right to Jury Trial Concerning Entitlement to Additional Temporary Disability Benefits

James Hibbs, 75 Van Natta 538 (October 17, 2023). The Board held that statutory limitations regarding claimant's entitlement to temporary disability benefits did not violate his rights under the Oregon or United States constitutions.

Additionally, applying ORS 656.262(4)(h), the Board determined that claimant was not entitled to additional temporary disability benefits following the expiration of his nurse practitioner's statutory authority to authorize such benefits. See ORS 656.245(2)(b)(D)(ii); *Ana Galvan*, 67 Van Natta 1055, 1057 (2015).

Finally, applying 656.262(4)(g), the Board determined that claimant was not entitled to retroactive temporary disability benefits because the attending physician's authorization did not constitute contemporaneous evidence of entitlement. See *Reed v. Labor Force*, 155 Or App 595, 599 (1998); *David M. Williams*, 69 Van Natta 593, 604 (2017).

APPELLATE DECISIONS UPDATE

There were no decisions for the Board this month.

APPELLATE DECISIONS SUPREME COURT

There were no decisions for the Board this month.