Workers' Compensation Board

Volume XLII, Issue 11

November 2023

News & Case Notes

BOARD NEWS

Quarterly Board Meeting – December 12, 2023

The Members have scheduled a public meeting for Dec. 12, 2023, at 10:00 a.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:

- Regular quarterly scheduled meeting. OAR 438-021-0010(1).
- Discussion of written comments and public testimony regarding the 2022 Biennial Review of Attorney Fee Schedules under ORS 656.388(4).

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

CASE NOTES

New or Omitted Medical Condition: Record Established Existence of Claimed Condition and That Work Incident Was a Material Contributing Cause of Disability or Need for Treatment - "005(7)(a)," "266(1)"

Greg S. Griffith, 75 Van Natta 569 (November 1, 2023). Applying ORS 656.005(7)(a) and ORS 656.266(2)(a), the Board affirmed the ALJ's order that found the claimant's new or omitted medical condition claim for left lumbar radiculopathy and left S1 radiculopathy to be compensable.

Relying on a physician's opinion that focused on the relationship between the claimant's work event, his symptoms, and his lack of symptoms in the preceding years, the Board was persuaded that the work event was at least a material contributing cause of the disability or need for treatment of the claimant's lumbar/S1 radiculopathy condition. *See Allied Waste Indus., Inc. v. Crawford*, 203 Or App 512, 518 (2005), *rev den*, 241 Or 80 (2006) (temporal relationship between a work injury and the onset of symptoms is one factor that should be considered, and may be the most important factor); *Damian Ruiz-Lopez*, 74 Van Natta 493, 496 (2022). The Board reasoned that, although the physician's opinion did not specifically address a previous MRI, the opinion was persuasive because it specifically addressed the claimant's preexisting arthritis and explained how the claimant's condition was caused by an acute event. *See Braden Maher*, 71 Van Natta 49, 54 (2019) (physician's opinion not discounted for not addressing specific imaging studies or finding when the physician adequately responded to the central issues of the contrary opinion).

Finally, the Board concluded that the carrier did not meet its burden of proving that the "otherwise compensable injury" combined with a statutory "preexisting condition" and that the "otherwise compensable injury" was not the major contributing cause of the claimant's disability or need for treatment of the combined condition. In doing so, the Board reasoned that the physician's opinion on which the carrier relied was hypothetical and not well explained.

Occupational Disease v. Injury: Claim was Properly Analyzed as an Injury - Record Supported Conclusion that Combined Neck Condition Arose Suddenly After Work Event

Combined Condition: Record Established that Previously Accepted Cervical Strain Combined with Cervical Osteoarthritis to Cause or Prolong Disability or Need for Treatment - Carrier Did Not Meet Burden Under ORS 656.266(2) - "266(2)"

Jose H. Pimentel-Hurtado, 75 Van Natta 603 (November 22, 2023). Applying ORS 656.005(7)(a)(B), the Board held that the claimant's new or omitted medical condition claim for a combined neck osteoarthritis condition was compensable. Citing *Keystone RV Co. – Thor Indus. v. Erickson*, 277 Or App 631 (2016), the Board found that because the claimant was claiming a "combined condition," he had the burden of proving the existence of the claimed condition.

After reviewing the medical record, the Board determined that the claimant met his burden to establish that an otherwise compensable injury (a previously accepted neck strain) combined with a preexisting condition (osteoarthritis) to cause or prolong his disability or need for treatment claimed for the combined condition. The Board further explained that although the medical experts did not use the specific term "combined condition," magic words are not required for the Board to conclude that a medical opinion is persuasive. *See McClendon v. Nabisco Brands, Inc.*, 77 Or App 412, 417 (1986). Finally, citing *Brown v. SAIF*, 361 Or 241, 255-56 (2017) and *Multifoods Specialty Distrib. v. McAtee*, 333 Or 629, 636 (2002), the Board reasoned that the record persuasively established that the claimant had a combined condition consisting of two medical conditions merging or existing harmoniously.

TTD: Claimant Was Entitled to Additional Temporary Disability Benefits Because he Was Enrolled and Actively Engaged in Authorized Training Program After Notice of Closure Issued - "268(10)," "340(12)," "030-0036(2)"

Paul D. Sadler, 75 Van Natta 596 (November 21, 2023). Applying ORS 656.268(10), the Board held that a worker was entitled to temporary disability

benefits for the period he was enrolled and actively engaged in an Authorized Training Program (ATP) until the claim was closed, even though his condition was medically stationary before claim closure. The ALJ found that ORS 656.268(10) did not apply and that the claimant was medically stationary before the disputed temporary disability dates. Accordingly, the ALJ concluded that such benefits temporary disability benefits were not due. *See* OAR 436-030-0036(2).

Although the Board affirmed the medically stationary determination, it nevertheless modified the temporary disability dates, finding that the claimant was entitled to the ATP-related temporary disability benefits under ORS 656.268(10). Citing *Intel Corp. v. Batchler*, 267 Or App 782, 786 (2014), the Board explained that ORS 656.268(10) contains two substantive rules for entitlement to ATP-related temporary disability compensation: (1) A Notice of Closure must have been issued and the worker must become enrolled and actively engaged in training in accordance with the rules; and (2) a worker must remain enrolled and actively engaged in training to receive such compensation. *Id*. at 788.

Applying *Batchler's* reasoning to the present matter, the Board explained that the claimant must show that a Notice of Closure had issued before the ATP and that he was actively enrolled and engaged in the ATP. Here, the carrier had issued a November 2020 Notice of Closure before the September 2021 ATP. Although the November 2020 Notice of Closure was ultimately rescinded as premature, the Board found that the express language of ORS 656.268(10) had been satisfied because the ATP took place after the issuance of a Notice of Closure. Moreover, there was no dispute that the claimant's ATP was approved and that he actively engaged in the ATP on September 27, 2021 through November 17, 2021. Therefore, the Board concluded that the ORS 656.268(10) requirements for ATP-related temporary disability compensation for that period were met.

APPELLATE DECISIONS UPDATE

Attorney Fees: Claimant's Counsel Was Entitled to Attorney Fee Under ORS 656.386(1) for Services Litigating the Amount of a Reasonable Attorney Fee Award for a Pre-Hearing Rescinded Denial

Taylor v. SAIF, 329 Or App 135 (November 15, 2023). The court reversed the Board's order in *Christopher Taylor*, 73 Van Natta 439 (2021), previously noted 40 CNN 5:4, that held that the claimant's counsel was not entitled to an attorney fee award under ORS 656.386(1) for services before the Board and the Court of Appeals in litigating the amount of a reasonable attorney fee award for a pre-hearing rescinded denial. Relying on *Peabody v. SAIF*, 326 Or App 132, *rev den*, 371 Or 511 (2023), the court explained that the Board's authority under ORS 656.386(1) extends to awarding reasonable attorney fees incurred in determining the amount of the fee award to which the claimant is entitled.

The court acknowledged that the present case concerned the third sentence of ORS 656.386(1) (involving fee awards for a denial rescinded prior to the hearing) whereas *Peabody* concerned the second sentence of the statute (involving fee awards for prevailing over a denial before the ALJ or Board). However, the court found no indication in the text or context of ORS 656.386(1) that the legislature intended the third sentence of the statute to depart from the general Oregon practice of allowing fees for litigating the amount of a fee award. Consequently, the court concluded that the Board was authorized to award a reasonable fee for the claimant's counsel's services litigating the amount of the rescinded denial attorney fee award before the Board and the court.

Senior Judge DeVore dissented. The dissenting opinion noted that the sole issue before the Board and the court was the amount of the attorney fee award for the rescinded denial under ORS 656.386(1)(a). Because there was no "denied claim" at issue before the Board or the court, the dissent reasoned that ORS 656.386(1) did not authorize the Board to award an attorney fee for services before the Board and court in litigating the amount of the attorney fee award. Further, the dissent noted that ORS 656.382(3) provides for an attorney fee award for the claimant's counsel's services in litigating the amount of a reasonable fee award when the carrier appeals a claimant's attorney fee award and the fee award is not disallowed or reduced. In the dissent's view, the legislature's adoption of ORS 656.382(3) demonstrates that the legislature intended attorney fees to be awardable for litigating the amount of a reasonable attorney fee in workers' compensation matters only under the circumstances set forth in that statute and not when the claimant initiates an appeal regarding the amount of a reasonable attorney fee award.