Workers' Compensation Board

Volume XLII, Issue 4

April 2023

News & Case Notes

BOARD NEWS

Attorney Fee Statistical Report Published

The Workers' Compensation Board (WCB) published its annual update of statistical information regarding attorney fees on January 19, 2023. The report includes attorney fee data through year-end 2021, and can be found on the WCB statistical reports webpage using this link: https://www.oregon.gov/wcb/Documents/statisticalrpts/011923-atty-fee-stats.pdf

Unrepresented Worker Litigation Report Available

In response to an inquiry from the Oregon State Bar's Workers' Compensation Section's Access to Justice Committee, the Board has prepared a report on litigation by unrepresented workers in our forum. The report can be found here: https://www.oregon.gov/wcb/Documents/statisticalrpts/040723-unrep-worker-rpt.pdf

CASE NOTES

Attorney Fees: On remand, Board Declines to Apply "*Peabody*" Analysis; Determines a Reasonable Fee Based on Factors, Considering that Claimant Prevailed on One of Many Issues

Margarett Y. Interiano, 75 Van Natta 198 (April 11, 2023). On remand from the court, *Interiano v. SAIF*, 315 Or App 588 (2021), the Board reversed its prior order, *Margarret Y. Interiano*, 71 Van Natta 111 (2019), that had affirmed an Administrative Law Judge's order that upheld SAIF's denial of claimant's injury claim for a low back condition. In reversing the Board's order, the court reasoned that a preexisting condition and its symptoms are not separate conditions, and that the Board had erred in determining that claimant had a "combined condition" within the meaning of ORS 656.005(7)(a)(B). On remand, SAIF conceded the compensability of the injury claim.

Because claimant had finally prevailed over SAIF's denial, the Board awarded an attorney fee for services at the hearing level, on review, before the court (in which a contingent attorney fee had previously been granted), and before the Board on remand. ORS 656.386(1); ORS 656.388(1). In awarding the attorney fee for claimant's counsels' services at the hearing level, on review, and before the Board on remand, the Board declined to apply an analysis pursuant to *Karista D. Peabody*, 73 Van Natta 244, *recons*, 73 Van Natta 362 (2021). Regarding the statement of services for the hearing and Board review

Board awarded a reasonable attorney fee that considered the proposed contingent hourly rate and statement of services, but did not apply Peabody.

levels, the Board explained that it did not delineate between the different issues litigated and on which claimant prevailed. Specifically, claimant prevailed only on one of many issues presented. *See, e.g., Chauntelle A. Olson*, 73 Van Natta 583, 598 n 10 (2021) (hours for record review, legal research, and briefing was considered excessive where many time entries concerning these tasks included multiple tasks and were difficult to evaluate for time spent on each task). Under such circumstances, the Board awarded a reasonable attorney fee that considered the proposed contingent hourly rate and statement of services, but did not apply *Peabody*.

Claim Processing/Closure: Board Finds Claim Not Prematurely Closed, Accepted Condition Medically Stationary; Motion to Remand Denied

Board declined to remand for additional evidence taking because ALJ would have been unable to consider evidence outside of the reconsideration record.

Jason Bybee, 75 Van Natta 207 (April 12, 2023). Applying ORS 656.268(1)(a), the Board held that the claimant's injury claim was not prematurely closed. The Board found that the record persuasively established that the accepted condition was medically stationary at the time of closure based on an examining physician's opinion and the attending physician's concurrence with that opinion. Further, the Board declined to remand the matter to the ALJ for additional evidence taking because the claimant had requested a hearing on an Order on Reconsideration and the ALJ would have been unable to consider evidence outside of the reconsideration record. Accordingly, the Board affirmed the reconsideration order that found that the Notice of Closure was not premature.

Medical Evidence: On Remand, Given Findings by the Court Regarding Attending Physician's Opinion, Board Finds Existence and Causation for L5-S1 Disc Condition Established

Noting the several conclusions reached by the Court of Appeals regarding the opinion of Dr. Herring, the Board found his opinion persuasive.

Douglas M. Sullivan (In re Culley), 75 Van Natta 213 (April 21, 2023). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board reconsidered its earlier decision on remand from *Sullivan v. SAIF*, 319 OR App 14 (2022), finding that claimant established the existence and the compensability of his new/omitted medical condition claim for an L5-S1 radiculopathy condition. Noting the several conclusions reached by the Court of Appeals regarding the opinion of Dr. Herring, the physician supporting compensability, the Board found his opinion persuasive. *See Somers v. SAIF*, 77 Or App 259, 263 (1986) (more weight is given to those medical opinions that are well reasoned and based on complete information); *Kevin G. Gagnon*, 64 Van Natta 1498, 1500 (2012) (physician's longitudinal history with the claimant rendered his opinion persuasive); *Craig C. Show*, 60 Van Natta 568, 576-77 (2008) (finding more detailed, accurate, and better-explained medical opinion to be persuasive). In contrast, the Board discounted the contrary opinions in the record for not addressing significant portions of Dr. Herring's persuasive opinion. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), ***aff'd without opinion***, 227 Or App 289

(2010) (medical opinion found unpersuasive when it did not address contrary opinion).

Medical Services: Treatments (Directed at Denied Conditions) Not (Materially) Causally Related on the Merits of the Medical Evidence; Concurrence Distinguishes *Garcia-Solis*

Isa Dean, 75 Van Natta 233 (April 26, 2023). Analyzing ORS 656.245(1)(a), the Board held that medical services (chiropractic treatment and massage therapy directed at conditions denied by the carrier) were not causally related to claimant's work activities.

Board found Dr. Perkins's opinion supporting the causal relationship between the denied medical services and claimant's work activities to be unpersuasive.

The Board found Dr. Perkins's opinion supporting the causal relationship between the denied medical services and claimant's work activities to be unpersuasive. The Board explained that Dr. Perkins relied on claimant's unreliable history, did not explain why claimant's symptoms did not dissipate after a significant reduction of work hours or work station modifications, and did not explain why the disputed medical services were causally related to her work activities as opposed to other potential causes (including a prior motor vehicle accident and previous neck pain). Therefore, the Board concluded that Dr. Perkins's opinion was unpersuasive and insufficient to establish the requisite causal relationship between the work activities and the disputed medical services. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Sara R. Lohala,* 71 Van Natta 1203, 1208 (2019) (physician's conclusory opinion, without additional explanation, was insufficient to find the disputed medical services compensable).

Member Curey concurred, writing separately to distinguish the case from *Garcia-Solis v. Farmers Ins. Co.,* 365 Or 26 (2019). She noted that the Supreme Court in *Garcia-Solis* determined that medical services under ORS 656.245 for an unclaimed, unaccepted condition can be the responsibility of a carrier if the medical services were due in material part to the work accident. Yet, because the disputed medical services in this case were derived from a condition that had already been denied, upheld by a previous ALJ's decision, and affirmed by a final Board order, she found the case distinguishable.

APPELLATE DECISIONS UPDATE

Claim Processing: Lump Sum Payment – Carrier Authorized to Deny "Request" When "NOC" Not Final – "230(1)"

Giltner v. SAIF, 325 Or App 566 (April 26, 2023). Analyzing ORS 656.230(1), the Court of Appeals affirmed the Board's order in *Vern E. Giltner*, 73 Van Natta 327 (2021), previously noted 40 NCN 4:7, which had held that a

carrier was not required to make a lump sum payment of claimant's permanent disability (PPD) benefits awarded by a Notice of Closure (NOC) because, although claimant had waived his right to appeal the adequacy of the PPD award, the time to appeal the NOC under ORS 656.268(5)(e) had not expired. On appeal, relying on *Cayton v. Safelite Glass Corp.*, 231 Or App 644 (2009), claimant argued that his waiver of his right to appeal the adequacy of his PPD award from the NOC was sufficient to trigger the carrier's obligation to make a lump sum payment under ORS 656.230(1).

The court disagreed. Although acknowledging that the *Cayton* decision concerning the former version of ORS 656.230(1) supported claimant's assertion, the court noted that the current version of the statute is significantly different. Specifically, the court observed that the statute prescribes four exceptions to the requirement that a carrier must make a lump sum payment of PPD benefits, one of which is when the PPD award "has not become final by operation of law." *See* ORS 656.230(1)(b).

Court concluded that the context of ORS 656.230(1) supported the Board's decision that the carrier was not required to make the lump sum payment based on claimant's waiver.

Turning to the case at hand, the court found that, when claimant applied for approval of the lump sum PPD payment, the 60-day period to appeal the NOC under ORS 656.268(5)(e) had not expired. Under such circumstances, the court concluded that the context of ORS 656.230(1) supported the Board's decision that the carrier was not required to make the lump sum payment based on claimant's waiver.

In reaching its conclusion, the court disagreed with claimant's contention that the 2007 legislative history regarding ORS 656.230(1) showed that the amendments were merely a "regulatory streamlining bill" whose "sole purpose" was to eliminate the Director from the lump sum payment process. To the contrary, the court stated that the legislative history indicated that, if any one of the four exceptions prescribed in the amended statute applied, a carrier was not required to immediately make a lump sum payment.

Finally, the court recognized that claimant's waiver of his right to appeal the adequacy of the PPD award from the NOC had coincided with the expiration of the carrier's 7-day "post-NOC" right to request reconsideration of the NOC. Nonetheless, reasoning that a worker can challenge a NOC in ways other than by appealing the adequacy or amount of the PPD award (*e.g.*, arguing that the NOC was prematurely closed and should be rescinded), the court considered it sensible to conclude that a PPD award from a NOC is not final by operation of law until the expiration of the 60-day appeal period.

Substantial Evidence/Reasoning: Board Order Misstated Physician's Opinion

Campbell Soup Company v. Langan, 325 Or App 429 (April 19, 2023). In a nonprecedential memorandum opinion under ORAP 10.30, applying ORS 656.298(7), and ORS 183.482(7) and (8), the court reversed the Board's order in *David Langan*, 73 Van Natta 896 (2021), which, in setting aside a carrier's denial of claimant's cervical injury claim, had found that a carrier had failed to establish (under ORS 656.005(7)(a)(B) and ORS 656.266(2)(a)) that his work injury was not the major contributing cause of his need for treatment/disability for a combined cervical condition. In reaching its decision, the Board had stated that

a physician had not rendered an opinion regarding the major contributing cause of claimant's disability/need for treatment.

On appeal, the carrier challenged the Board's findings that: (1) the ALJ had not abused his discretion in excluding three exhibits; (2) claimant was a credible witness; and (3) the physician had not rendered a "major contributing cause" opinion.

Concerning the ALJ's evidentiary ruling, the court noted that the Board had alternatively reasoned that, even if it had considered the excluded exhibits (which concerned claimant's general credibility), it would have continued to find him to be a credible witness. Observing that the Board's alternative ruling had not been challenged on review, the court found that it was unnecessary to further address the carrier's evidentiary contention.

Regarding the Board's credibility finding, the court stated that it does not reweigh evidence or substitute its judgment for that of the Board as to any issue of fact supported by substantial evidence. *See Guild v. SAIF*, 291 Or App 793, 796 (2018). Citing *Elsea v. Liberty Mutual Ins.*, 277 Or App 475, 484 (2016), the court reiterated that if the Board's finding is reasonable in the light of countervailing as well as supporting evidence, then the finding is supported by substantial evidence.

Turning to the case at hand, although acknowledging inconsistencies between claimant's statements over time, the court did not consider them to be so extreme that the Board could not have found claimant credible. Keeping in mind that it does not reweigh the evidence or substitute its judgment for that of the Board, the court concluded that substantial evidence supported the Board's finding that claimant was credible regarding his work injury.

Finally, concerning the Board's assessment of the competing physician opinions, the court found substantial evidence/reasoning to support the Board's determination that claimant's work event was a material contributing cause of his disability/need for treatment. However, regarding the Board's conclusion that the carrier had not persuasively established that the otherwise compensable injury was not the major contributing cause of claimant's disability/need for treatment for his combined cervical condition, the court determined that the Board had incorrectly stated that a physician had not rendered an opinion regarding the major contributing cause of claimant's disability/need for treatment. Specifically, the court noted that, in a concurrence letter, the physician had opined that, if claimant had a work injury, he had a combined condition, and his preexisting degenerative cervical disc disease was the major cause of his need for treatment/disability.

Court determined that the Board had incorrectly stated that a physician had not rendered an opinion regarding the major contributing cause of claimant's disability/need for treatment.

Under such circumstances, the court reasoned that it could not be certain whether the Board's more complete understanding of the physician's opinion would have affected its analysis of ORS 656.266(2)(a) and ORS 656.005(7)(a)(B). Consequently, the court reversed and remanded for reconsideration of that aspect of the Board's decision.

APPELLATE DECISIONS
SUPREME COURT

Penalty/Attorney Fee: "262(11)(a)" – Cessation of TTD Benefits Under "325(5)(b)" (Employment Termination for Work Rule Violation/Other Disciplinary Reason) – Board's Application of "Legitimate Doubt" Reasoning Unclear (Whether Based on What Carrier Knew or Via "Imputed Knowledge" Theory From Employer)

Coria v. SAIF, 371 Or 1 (April 20, 2023). The Supreme Court reversed the Court of Appeals opinion, 315 Or App 546 (2021), that had reversed that portion of the Board's order in *Hipolito Coria*, 71 Van Natta 742 (2019), previously noted 38 NCN 7:10, which had awarded penalties/attorney fees under ORS 656.262(11)(a) when the carrier ceased the payment of claimant's temporary disability (TTD) benefits pursuant to ORS 656.325(5)(b). In reversing the Board's assessment of penalties/attorney fees, the Court of Appeals had determined that the record did not establish that the carrier's claim processing decision to cease claimant's TTD benefits (based on the employer's termination of claimant's employment for violation of a work rule or other disciplinary action) had been unreasonable. In reaching its decision, the Court of Appeals noted the absence of a Board finding of employer misconduct in terminating claimant's employment and, as such, reasoned that there was no employer misconduct to "impute" to the carrier.

Before the Supreme Court, claimant contended that the Board's penalty/attorney fee assessment had been based on a finding that the carrier's claim processing, irrespective of any employer misconduct, had been unreasonable. In contrast, the carrier asserted that: (1) the Board's determination had been based on information that was not known by the carrier when it ceased paying claimant's TTD benefits; and (2) an employer's knowledge or conduct cannot be imputed to a carrier as the Board had determined.

If the Board had based its penalty imposition without relying on an "imputed knowledge" or "imputed conduct" theory, it had not explained why the carrier's conduct was unreasonable given what the carrier knew when it ceased paying claimant's TTD benefits.

After considering the parties' respective positions, the Supreme Court was unable to determine the basis for the Board's decision. In support of its determination, the Court noted that, if as claimant argued, the Board had based its penalty imposition without relying on an "imputed knowledge" or "imputed conduct" theory, it had not explained why the carrier's conduct was unreasonable given what the carrier knew when it ceased paying claimant's TTD benefits. Furthermore, the Court observed that the Board had not explained why the information that the carrier had received from the employer that claimant had been terminated for violation of a work rule or other disciplinary reasons had not given the carrier a legitimate doubt concerning its liability when it ceased paying the TTD benefits. Likewise, the court reasoned that, if as the carrier asserted, the Board had relied on the "imputed knowledge/conduct" theory, it had not explained what knowledge/conduct concerning claimant's termination had been

imputed to the carrier and how that knowledge led to a conclusion that the carrier had not been terminated for disciplinary reasons.

Under such circumstances, the Supreme Court concluded that the Board order lacked substantial reason because the order failed to articulate a rational connection between its findings of fact and legal conclusions. Consequently, the Court reversed and remanded for an explanation of the Board's reasoning. *See Jenkins v. Board of Parole*, 356 Or 186, 195 (2014).

Finally, the Supreme Court noted several disagreements between the parties concerning procedural/substantive requirements for the imposition of a penalty/attorney fee under ORS 656.262(11)(a): (1) which party bears the burden of proof; (2) what that party must show to establish that claim processing was unreasonable; and (3) in what circumstances, if any, an employer's knowledge or conduct can be imputed to a carrier. Expressing no opinion on those disagreements, the Court raised them so the Board could clearly set out its understanding of the legal requirements in its eventual order on remand.

Justice Bushong concurred. Bushong agreed with the carrier that its reliance on the employer's statement that claimant had been terminated for a work rule violation/disciplinary reason was enough to cause the carrier to "doubt" whether it should continue paying TTD benefits. *See Norgard v. Rawlinsons*, 30 Or App 999, 1003 (1977). However, Bushong also agreed with claimant's contention that the carrier's reliance on the employer's statement, standing alone, was insufficient to establish that the carrier's "doubt" was "legitmate." *Id.*

Because the question under ORS 656.262(11)(a) was whether the carrier had acted unreasonably, Justice Bushong did not consider the Board's decision that there was insufficient evidence that claimant was terminated for a work rule violation or other disciplinary reason was enough, standing alone, to establish that the carrier had acted reasonably or unreasonably. Given such circumstances, Bushong reasoned that the issue should be resolved by clearly identifying and applying the burden of proof.

Noting that ORS 656.262(11)(a) does not address which party has the burden of proof, Justice Bushong opined that where the carrier has failed to establish that it properly denied compensation (or correctly terminated TTD benefits), the burden should rest with the carrier to establish that its actions were nonetheless reasonable. Bushong further observed that placing the burden with the carrier provides an incentive for the carrier to conduct an investigation into whether it can cease paying TTD benefits, instead of just relying on the employer's statements.