Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Bulletin 1 (Revised) - Annual Adjustment to Attorney Fee Awards Effective July 1, 2023

The maximum attorney fees awarded under ORS 656.262(11)(a), ORS 656.262(14)(a), and ORS 656.308(2)(d), which are tied to the increase (if any) in the state's average weekly wage (SAWW), will remain unchanged. On June 1, 2023, the Board published Bulletin No. 1 (Revised), which sets forth the new maximum attorney fees. The Bulletin can be found on the Board's website at: https://www.oregon.gov/wcb/Documents/wcbbulletin/bulletin1-2023.pdf

An attorney fee awarded under ORS 656.262(11)(a) shall not exceed **$5,813** absent a showing of extraordinary circumstances. OAR 438-015-0110(3).

An attorney fee awarded under ORS 656.308(2)(d) shall not exceed **$4,193** absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5).

An attorney fee awarded under ORS 656.262(14)(a) shall be **$444** per hour. OAR 438-015-0033.

These maximums apply to attorney fees awarded under ORS 656.262(11)(a) and ORS 656.308(2)(d) by orders issued on July 1, 2023 through June 30, 2024, and to a claimant's attorney's time spent during a personal or telephonic interview or deposition under ORS 656.262(14)(a) between July 1, 2023 and June 30, 2024.

WCB Managing Attorney – Senior Staff Attorney Lauren Eldridge/One-Year "Rotational" Opportunity

For personal reasons, Robert Pardington has resigned his position as WCB's Managing Attorney. The Board extends to Robert its grateful appreciation for his service to the agency and wishes him well as he returns to the Hearings Division as an Administrative Law Judge. To assist the Board Review Division, Senior Staff Attorney Lauren Eldridge has accepted a "rotational" opportunity as the Managing Attorney. Lauren is scheduled to serve in this capacity for one year, starting on August 1, 2023.

Lauren attended Portland State University, earning a Bachelor of Arts degree in Political Science. She then received her Juris Doctorate from the University of Oregon, where she graduated, Order of the Coif, in 2014. After law school, Lauren worked as a judicial clerk at the Oregon Supreme Court for the Hon. Justice Jack Landau. She joined WCB as a staff attorney in 2016, and has served as a Senior Staff Attorney since August 2018.

Mediation Evaluation Project

The Workers' Compensation Board will begin conducting a mediation evaluation project from July 1, 2023, through September 30, 2023. WCB will be sending evaluations to attendees of all held mediations. The purpose of the project is to increase feedback to WCB from mediation participants about their mediation experience. Evaluations will be mailed out and will include a postage-paid return envelope for your convenience. We would appreciate your participation in providing us with feedback during the 3-month project period.

CASE NOTES

"Ceases" Denial – Employer Did Not Persuasively Meet its Burden of Proving a "Change" in Combined Knee Condition Since Acceptance

Philip Sappington, 75 Van Natta 321 (June 9, 2023). Analyzing ORS 656.262(6)(c), the Board held that the record did not persuasively establish that claimant's "otherwise compensable injury" ceased to be the major contributing cause of his need for treatment or disability of his "combined" left knee condition and, as such, set aside a carrier's "ceases" denial. In reaching its conclusion, the Board found that the physicians' opinions relied on by the carrier (which had opined that the compensable injury had ceased to be the major cause of the disability/need for treatment of the "combined" condition by the time claimant's condition was medically stationary) did not persuasively establish that claimant's combined left knee condition had "changed" since the acceptance of the condition. In doing so, the Board reasoned that the physicians' opinions had not adequately differentiated between symptoms attributable to the worker's accepted left knee condition and his previously asymptomatic arthritis and had focused on a hypothetical situation, rather than sufficiently addressing the worker's specific circumstances. A dissenting opinion considered the aforementioned medical opinions to be well reasoned and thoroughly explained and, as such, sufficient to support the carrier's "ceases" denial.

Board reasoned that the physicians' opinions had not adequately differentiated between symptoms attributable to the worker's accepted left knee condition and his previously asymptomatic arthritis.

Compensability/Consequential Condition: Right Knee Chondral Defect Established, Arthritis Was Compensable Consequence of the Chondral Defect

Brian E. Moore, 75 Van Natta 332 (June 15, 2023). Applying ORS 656.005(7)(a)(A), the Board found claimant's new or omitted medical condition claims for a right knee chondral defect and right knee arthritis condition compensable.

In doing so, the majority relied on the opinion of claimant's treating surgeon, who opined that the need for treatment or disability for the chondral defect and right knee arthritis was caused in material part by the work injury. Citing *Argonaut Ins. Co. v. Mageske*, 93 Or App 698 (1988), the majority concluded that the treating surgeon's opinion was persuasive because it was based on his direct observations during surgery and his ability to observe the

Treating surgeon had been treating claimant for several years and was the most familiar with his knee conditions.

condition firsthand. Moreover, citing *Kevin G. Gagnon*, 64 Van Natta 1498 (2012), the majority emphasized that the treating surgeon had been treating claimant for several years and was the most familiar with his knee conditions. The majority also concluded that the employer had not met its burden to establish that claimant's otherwise compensable injury was not the major contributing cause of a combined condition involving the chondral defect.

The majority also found that claimant's right knee arthritic condition was compensable as a consequence of his right knee chondral defect based on the treating surgeon's explanation that the rapid progression in claimant's right knee arthritis was due to the chondral defect.

A dissenting opinion found that an examining orthopedist's opinion was more persuasive than the treating surgeon's opinion. The dissent reasoned that the treating surgeon's opinion was unpersuasive because it was premised on claimant's lack of preexisting right knee arthritis and an otherwise healthy knee before the work injury.

Extent: Claimant Entitled to Full Measure of Impairment without Apportionment - Impairment Due in Material Part to the Compensable Injury

Claimant's impairment was due in material part to the compensable injury where a medical arbiter had opined that 30 percent of his impairment was due to the accepted conditions.

Joseph A. Clark, 75 Van Natta 317 (June 7, 2023). Applying *Johnson v. SAIF*, 369 Or 579 (2022), the Board held, on remand, that claimant was entitled to the full measure of his total impairment, without apportionment, including that portion attributed to noncompensable, preexisting conditions. The Board stated that the record established that claimant's impairment was due in material part to the compensable injury where a medical arbiter had opined that 30 percent of his impairment was due to the accepted conditions and 70 percent was due to preexisting conditions. Because an Order on Reconsideration had apportioned claimant's impairment (instead of awarding the full measure of his impairment), the Board concluded that the record established error in the reconsideration process.

Medical Services: Record Established that Disputed Medical Services Were for a Chronic Pain Condition Caused in Material Part by the Work Injury. Attorney Fees: ".386(1)" Fee Contingent on Finally Prevailing at the Department

Julie A. Daniels, 75 Van Natta 364 (June 28, 2023). Applying ORS 656.245(1) and ORS 656.386(1), on reconsideration, the Board held that the disputed medical services were for claimant's chronic pain syndrome condition that was caused in material part by her work injury and that claimant's counsel was entitled to an attorney fee for services at the hearing level and on Board review related to the medical services dispute contingent on prevailing in the "reasonableness" portion of the medical services dispute before the Workers' Compensation Division (WCD).

Claimant requested reconsideration of the Board's initial order that awarded a "contingent attorney fee" regarding the medical services dispute, asserting that the attorney fee award should be non-contingent. The carrier cross-requested reconsideration, asserting that the Board's initial order had failed to identify a specific condition, caused by the work injury, to which the disputed medical services were directed.

Record established that the disputed medical services were "for" a chronic pain condition that was caused at least in material part by the work injury.

The Board first addressed the medical services dispute. Citing *Garcia-Solis v. Farmers Ins. Co.*, 363 Or 26 (2019) and *SAIF v. Sprague,* 346 Or 661 (2009), and viewing the record as a whole and in context, the Board determined that the record established that the disputed medical services were for a chronic pain condition that was caused at least in material part by the work injury. In doing so, the Board deferred to the opinion of claimant's treating physician, who had treated claimant since 2005.

Turning to the attorney fee issue, the Board reiterated that under *AIG Claim Servs. v. Cole*, 205 Or App 170, 173 (2006) and *Antonio Martinez*, 58 Van Natta 1814 (2006), *aff'd*, *SAIF v. Martinez*, 219 Or App 182 (2008), an ORS 656.386(1) attorney fee is not awardable until claimant finally prevails over a denied claim, which, in the medical services context, requires the claimant to prevail over the "causation" and "reasonableness" aspects of the medical services dispute. Thus, the Board concluded that an attorney fee for prevailing in the "causation" aspect of the medical services dispute before the Board was contingent on prevailing over the "reasonableness" aspect of the dispute before the Workers' Compensation Division.

A dissenting opinion reasoned that the record did not establish that the disputed medical services were for or directed to a specific condition caused in material or major part by the work injury. Thus, the dissent concluded that the requirements of ORS 656.245(1) were not satisfied. Further, because it did not conclude that claimant had prevailed over the causation aspect of the medical services claim, the dissent would not have awarded a contingent attorney fee.

Own Motion: Board Refers Case to Hearings Division to Determine When Form 827/Aggravation Claim was Filed

Phillip A. Case, II, 75 Van Natta 329 (June 14, 2023). The Board held that the record was insufficiently developed to determine when claimant's "aggravation" claim was filed, and thus, it could not determine whether the claim should be re-opened under the Own Motion or standard claim processing statutes. Claimant and his attending physician had completed an 827 form initiating an "aggravation" claim before the expiration of claimant's "aggravation" rights. Yet, it appeared that the carrier did not receive the "aggravation" claim form until several weeks after the claimant's aggravation rights expired.

Citing ORS 656.273 and *Von D. Bailey*, 55 Van Natta 417, 421, *recons*, 55 Van Natta 851 (2003) the Board noted that a claim filed before the expiration of the claimant's aggravation rights cannot be processed under the Board's Own Motion jurisdiction. The Board also cited *Jonathan M. Myers*, 63 Van Natta 2086, 2087 (2011) and *David J. Albano*, 55 Van Natta 1361 (2003) for the proposition that insufficiencies in the record and the procedural posture of a claim may make it appropriate to remand the case to the Hearings Division for

827 form was completed before the expiration of the claimant's "aggravation" rights. Yet, it appeared that the carrier did not receive the document until after the expiration of the claimant's aggravation rights.

further development of the record. The Board observed that an 827 form was completed by the claimant and his attending physician before the expiration of the claimant's "aggravation" rights. Yet, for unknown reasons, it appeared that the carrier did not receive the document until after the expiration of the claimant's aggravation rights. Thus, the Board concluded that it would best serve the interests of the parties, and administrative economy, to remand the case for a fact-finding hearing.

Own Motion: Notice of Closure Set Aside as Invalid Where Carrier's Warning Letter Did Not Copy Attending Physician

Christopher A. Rouse, 75 Van Natta 345 (June 16, 2023). In an Own Motion Order, the Board held that a Notice of Closure (NOC) (which had closed an Own Motion claim because claimant had not responded to the carrier's "no treatment" warning letter under OAR 436-030-0034(7)) was invalid because the record had not established that a copy of the carrier's letter had been provided to claimant's attending physician. Reiterating that a carrier must strictly comply with administrative rules, the Board found that, although the carrier's "warning" letter indicated that it was sent to claimant and his attorney, there was no indication that a copy had also been sent to the attending physician. Under such circumstances, the Board determined that the NOC was invalid because the carrier's "warning" letter had not strictly complied with OAR 436-030-0034(7). Consequently, the Board set aside the NOC.

NOC was invalid because the carrier's "warning" letter had not strictly complied with OAR 436-030-0034(7).

APPELLATE DECISIONS
COURT OF APPEALS

Extent: Permanent Impairment Not Due "In Material Part" to Accepted Low Back Strain - Not Due to Compensable Injury - No Entitlement to PPD Award – "214" / Robinette Applied

Gramada v. SAIF, 326 Or App 276 (June 7, 2023). Analyzing ORS 656.214(2), the court affirmed the Board's order in *Viorica Gramada*, 73 Van Natta 969 (2021), that affirmed an Order on Reconsideration that did not award permanent disability for claimant's compensable low back injury because a medical arbiter had not attributed any of her impairment to her accepted lumbar strain (but instead had related 100 percent of her impairment to preexisting degenerative conditions). On appeal, claimant argued that she was entitled to a permanent disability award under ORS 656.214 because she suffered a "compensable injury" in her work accident, notwithstanding the undisputed medical evidence that her accepted lumbar strain had fully resolved and in no part contributed to her loss of use or function of her low back. In doing so, she asserted that "compensable injury" pursuant to ORS 656.214 refers to more than just the accepted condition, but rather refers to the "full measure" of impairment in the injured body part regardless of whether the impairment is the result of the accepted condition.

Claimant's accepted condition constituted the compensable injury for purposes of ORS 656.214.

The court stated that resolution of the disputed issue required a determination of whether a claimant's "accepted condition" is the same as a "compensable injury." *See* ORS 656.262(6)(b); ORS 656.214(2). Although acknowledging that no Oregon appellate decision had expressly decided the question, the court noted that the Supreme Court had nevertheless decided several cases that, when knitted together, led it to the conclusion that a claimant's accepted condition constituted the compensable injury for purposes of ORS 656.214.

After summarizing the Supreme Court's decisions in *Robinette v. SAIF*, 369 Or 767 (2022), *Johnson v. SAIF*, 369 Or 579 (2022), and *Garcia-Solis v. Farmers Ins. Co.*, 365 Or 26 (2019), the court reached the following conclusions. First, a finding of impairment requires: (1) that there is a loss of use or function of the body part or system, and (2) that the loss is due to the compensable injury. *Robinette*, 369 Or at 781-82. Second, the court reasoned that each loss of use or function is to be considered separately, and a loss is "due to the compensable injury" when the accepted condition is found to be a material cause of the loss. *Johnson*, 369 Or at 603; *Robinette*, 369 Or at 784.

The medical arbiter had not attributed any findings to the accepted lumbar strain, so the court concluded that the strain was not a material contributing cause of claimant's permanent impairment.

Turning to the case at hand, the court reasoned that claimant's compensable injury for purposes of ORS 656.214 was her accepted lumbar strain. Noting that the medical arbiter had not attributed any findings to the accepted lumbar strain (but rather had related 100 percent of the findings to her degenerative preexisting conditions), the court concluded that the strain was not a material contributing cause of claimant's permanent impairment. Consequently, the court found no error in the Board's determination that claimant was not entitled to a permanent disability award.

In reaching its conclusion, the court rejected claimant's assertion that because the carrier had failed to process her accepted lumbar strain claim under ORS 656.268(1)(b) by denying a "combined condition," apportionment of her permanent impairment was not permissible. Because the medical arbiter had not attributed any loss of use or function in claimant's low back to her fully resolved accepted lumbar strain, the court reasoned that there was nothing to apportion.

Finally, the court acknowledged that claimant had established that "there is a loss of use or function of the body part or system." *See* ORS 656.214. Nonetheless, because the medical arbiter's findings established that the loss of use or function was in no part "due to the compensable injury," the court determined that there was no "impairment" under ORS 656.214.