



# News & Case Notes

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## BOARD NEWS

### Jenny Ogawa – Acting Board Chair

On July 13, 2023, Jenny Ogawa was appointed the acting Board Chair for the Workers' Compensation Board, after serving as a member of the board since October 2022. Member Ogawa attended the University of Wyoming, earning a Bachelor of Science degree, with Honors. She received her Juris Doctorate from Lewis and Clark Law School, and became a member of the Oregon State Bar in 1987. Following law school, she clerked for SAIF Corporation, worked as a staff attorney for the WCB, was the legal issues coordinator for the WCD, and represented insurers and employers at both hearing and appellate levels. In 2005, she was hired as an ALJ in WCB's Hearings Division, also working as an ALJ mediator, and remained in that position for 17 years. Then, in 2022, she was appointed to serve as one of the five members of the Workers' Compensation Board. In addition to her work at WCB, from 2014 through 2022, she was a member of the Executive Committee of the Oregon State Bar Workers' Compensation Section, serving as the secretary in 2015 and as the chair in 2017. She was on the OSB Legal Publications Department's editorial review board for the Workers' Compensation Bar Books. She was the 2023 recipient of the Section's Professionalism and Service Award.

### WCB Technology Plan – 2023 - 2025

The mission of the Workers' Compensation Board (WCB) is to provide timely and impartial resolution of disputes arising under Oregon's Workers' Compensation law and the Oregon Safe Employment Act. This aligns with Governor Kotek's directive to prioritize customer service by being more efficient and effective, and by creating systems that will empower the Board as public servants to deliver for Oregonians.

Using the state courts as a model, WCB is committed to achieving its mission utilizing technological advances in the development of its procedures and processes. Such technology may include, but not be limited to, databases, computer programs, internet, email, e-docket, website, Wi-Fi, video technologies, and other advancements in telecommunications.

This plan will be reviewed and revised biennially and evolve as needed in response to new and unexpected circumstances and events. At WCB, we are committed to supporting initiatives that help our services be more accessible to everyone. The full WCB Technology Plan for 2023-2025 can be accessed here <https://www.oregon.gov/wcb/Documents/announcements/wcbtechplan-2023-2025.pdf>

## Mediation Evaluation Project

Beginning July 1, 2023, and ending September 31, 2023, the Workers' Compensation Board (WCB) began conducting a mediation evaluation project. WCB is 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 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

### Third Party: Carrier Was a “Paying Agency” Under ORS 656.576 Even After CDA and Current Condition Denial – Carrier Still “Responsible” for Paying Benefits

*Juliane M. Nichols*, 75 Van Natta 383 (July 12, 2023). Analyzing ORS 656.576, the Board held that the carrier was a “paying agency” at the time of the third-party settlement, which took place after the parties entered into a Claims Disposition Agreement (CDA) and the carrier issued a “current condition” denial that became final. Specifically, the Board found that the claim remained compensable despite not actually paying benefits at the time of the third-party settlement, entering into a CDA, which had preserved medical services-related benefits, and the carrier’s issuance of a “current condition” denial that had denied the “current” condition, need for treatment, and disability as of the date of the denial.

In reaching this conclusion, the Board cited *Sedgwick CMS, Inc. v. Dover*, 318 Or App 38 (2022), in which the court stated that a “paying agency” means the self-insured employer or insurer “paying benefits” to the worker or beneficiaries at the time of the third-party settlement. It further acknowledged that “paying benefits” did not require that the self-insured employer or insurer literally be making payments to the worker at the time of settlement; rather, it must be responsible for paying benefits to the worker on a compensable claim. *Dover*, 318 Or App at 48-49. Finally, it noted that the underlying public policy of the third-party distribution statutes and the purpose of the statutory liens is to allocate whatever a claimant recovers from a third party between the claimant and the paying agency and to provide reimbursement to those responsible for statutory compensation of injured workers when damages for settlements are obtained against the persons whose act caused the injuries. See *Allen v. American Hardwoods*, 102 Or App 562, 567, *rev den*, 310 Or 547 (1990); *Schlecht v. SAIF*, 60 Or App 449, 456 (1982).

Ultimately, the Board distinguished *Dover*’s facts from the present matter. In particular, the Board reasoned that the noncomplying employer’s processing agent in *Dover* was not a “paying agency” for purposes of ORS 656.576 at the time of the third-party settlement when it had denied the claim and affirmed the noncomplying employer’s challenge to the processing agent’s claim acceptance through an earlier Disputed Claim Settlement (DCS). Thus, the claim in *Dover* was determined not to be compensable *ab initio* and the processing agent was no longer responsible for paying benefits at the time of the third-party settlement. Compare *Dover*, 318 Or App at 48 (addressing the definition of “paying agency” under ORS 656.576, the court noted that the statutory definition implicitly

*“Paying benefits” did not require that the self-insured employer or insurer literally be making payments to the worker at the time of settlement; rather, it must be responsible for paying benefits to the worker on a compensable claim.*

*Current condition denial did not encompass the initial compensability of the claim for which benefits were paid.*

contemplated a compensable claim). Moreover, the Board noted that the parties in the present matter did not enter into a DCS (as in *Dover*), but rather a CDA, which ensured that the carrier remained responsible for medical services-related benefits. ORS 656.236(1)(a). Finally, concerning the “current condition” denial, the Board explained that, although broad, it did not encompass the initial compensability of the claim for which benefits were paid, unlike the DCS in *Dover*, and noted that claimant could initiate a new or omitted medical condition claim, or assert the compensability of the medical services-related benefits that were preserved by the CDA, at any time. See ORS 656.267(1); ORS 656.236(1); ORS 656.245(1).

Because the carrier remained responsible for paying benefits at the time of the third-party settlement, the Board determined that the carrier was a “paying agency.” Thus, it analyzed the “just and proper” distribution of the third-party settlement pursuant to ORS 656.593(3), finding that the application of the distribution scheme in ORS 656.593(1) was appropriate. In particular, the Board concluded that it was “just and proper” for the carrier to partially recover its “claim costs” lien from remaining settlement proceeds after the distribution of the attorney fee, litigations costs, and claimant’s statutory share.

### Attorney Fees: Applying “*Peabody*” Analysis, Board Awards \$7,000 for Services on Review Under ORS 656.382(3) - Fees Under that Statute Not Eligible for “Bifurcation”

*Mark Acuna*, 75 Van Natta 407 (July 27, 2023). Applying ORS 656.382(3) and OAR 438-015-0010(4), the Board held that \$7,000 represented a reasonable, assessed attorney fee award for the claimant’s counsel’s services on Board review regarding a discovery violation penalty issue. In addition, the Board clarified that bifurcation of an ORS 656.382(3) attorney fee award was not authorized under OAR 438-015-0125(1). Citing *Karista D. Peabody*, 73 Van Natta 244, *recons*, 73 Van Natta 362 (2021), *rev’d on other grounds*, 326 Or App 132 (2023), the Board used the claimant’s attorney’s reported hours and proposed contingent hourly rate as a starting point for its application of the OAR 438-015-0010(4) attorney fee factors. Based on its review of the particular record, the Board found that the claimant’s counsel’s reported hours and proposed contingent hourly rate were excessive. Instead, applying the attorney fee factors, the Board considered 15.5 hours at a \$450 contingent hourly rate to be reasonable. Accordingly, the Board awarded a \$7,000 assessed attorney fee for the claimant’s counsel’s services on review.

*Board considered 15.5 hours at a \$450 contingent hourly rate to be reasonable.*

## APPELLATE DECISIONS SUPREME COURT

### Exclusive Remedy: “019” Does Not Provide “Exception” to “Exclusive Remedy” Provision of “018”

*Bundy v. Nustar GP, LLC*, 371 Or 220 (July 7, 2023). Analyzing ORS 656.018 and ORS 656.019, the Supreme Court affirmed a Court of Appeals opinion, 317 Or App 193 (2021), that had affirmed a trial court’s order granting

*Although denials of new/ omitted claims had been upheld, claimant's workers' compensation claim as a whole had been accepted.*

an employer's motion to dismiss a worker's negligence action for somatization disorders under the "exclusive remedy" provisions of ORS 656.018. The Court reasoned that, although a prior Board order had upheld the employer's denials of the worker's new or omitted medical condition claims for the conditions under the workers' compensation system (finding that a previously accepted "gasoline vapor exposure" was not the major contributing cause of the alleged "consequential" conditions), his workers' compensation claim as a whole had been accepted and, as such, ORS 656.019 did not entitle him to pursue civil damages for medical conditions deemed non-compensable on "major contributing cause" grounds.

In reaching its conclusion, the Supreme Court noted that, in enacting ORS 656.019, the 2001 legislature did not intend that the statute constituted a substantive exception to the "exclusive remedy" provisions of ORS 656.018, but rather enacted ORS 656.019 as a procedural statute to regulate a process that the legislature believed it would be required to accommodate in response to *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), *overruled in part by Horton v. OHSU*, 359 Or 168 (2016), until such time as it could provide workers with an adequate, substantive remedy when their workers' compensation claims were found non-compensable in a final litigation order because their work was not the major contributing cause of their claimed condition.

Emphasizing that the worker had not contended that he was constitutionally entitled to an exception of the "exclusive remedy" provisions of ORS 656.018 (to pursue a remedy for his claimed conditions), the Supreme Court expressed no view on that question. Instead, the Court confined its decision to a conclusion that the worker had not established the existence of a statutory exception to the "exclusive remedy" provisions of ORS 656.018 through ORS 656.019.