Workers' Compensation Board

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BOARD NEWS

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

The Board has scheduled a public meeting for the Members to discuss responses received regarding the Board's invitation for written comments concerning its biennial review of attorney fee schedules under ORS 656.388(4), and its attorney fee report, which are published on the Board's website at https://www.oregon.gov/wcb/Documents/statisticalrpts/090623-atty-fee-stats.pdf. Additional written comments and public testimony will also be considered. Any responses received up to one day before the meeting will be posted to the Board's website prior to the meeting.

The Board meeting has been scheduled for September 18, 2023, at the Board's Salem office (2601 25th St. SE), at 1 p.m. In addition to reviewing the submitted comments, the Members will consider testimony and other written comments presented at, or in advance of, the meeting. 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. The public will also be able to participate in the meeting by means of a "phone conference" link.

A formal announcement regarding the Board meeting will be electronically distributed to anyone who has registered for these notifications at https://service.govdelivery.com/accounts/ORDCBS/subscriber/new.

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

APPELLATE DECISIONS
Court of Appeals
Subject Worker: "Substantial Evidence/Reason" Supported ALJ's "Non-Subjectivity Determination" - Alleged Employer (Contractor for Homeowner) Did Not Provide "Remuneration" to Claimant for Home Remodeling Project – Contractor Was "Agent" for Homeowner (Who Funded the Project), Not Claimant's "Employer" – "005(30)(2019)" 7

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

Course & Scope: Injury "Arose Out of" and Occurred "in the Course of" Employment – Resulted From an Unexplained Syncope – Record Did Not Establish Nonspeculative Explanation for the Syncope

Mengesha Kelkay, 75 Van Natta 460 (August 16, 2023). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's injury occurred "in the course of" and "arose out of" his employment, because it resulted from an unexplained syncope. *See Sheldon v. U.S. Bank*, 364 Or 831, 844 (2019); *Guill v. M. Squared Transp., Inc.*, 277 Or App 318, 323-24 (2016). In reaching this conclusion, the Board determined that the opinions of a primary care physician and an examining internal medicine physician, who identified possible causes of claimant's syncope/near syncope but were unable to identify the actual cause, did not establish facially nonspeculative idiopathic explanations for the claimant's syncope. *See Sheldon*, 364 Or at 847; *Guill*, 277 Or App at 323-24; *Maxim Glodyanu*, 71 Van Natta 1381, 1384-85 (2019).

Moreover, the Board concluded that even assuming the record established facially nonspeculative explanations for the syncope, the record persuasively established that those explanations were, in fact, speculative. *See Sheldon*, 364 Or at 847; *Francheter Harvey*, 75 Van Natta 65, 70 (2023). Accordingly, the Board found that the claimant's injury claim was compensable.

Extent of Permanent Disability: Claimant Not Entitled to Permanent Impairment Award – Medical Arbiter's Findings Were Invalid and Not Due to the Compensable Injury

Isaac R. Marholin, 75 Van Natta 478 (August 24, 2023). Applying ORS 656.214(1)(a) and ORS 656.283(6), the Board held that claimant was not eligible for an impairment award and had not established error in the reconsideration process. Citing *Robinette v. SAIF*, 369 Or 767, 782-83 (2022), the Board explained that impairment is not awardable if the loss of use or function of a body part or system is not caused in material part by the accepted condition

Turning to the case at hand, the Board noted that the medical arbiter, on whom it relied, gave a detailed explanation regarding "serious concerns" of claimant's potential voluntary limitations, somatoform overlay, and hypersensitivity that was out of proportion to the nature of his injury. Thus, the Board found that the medical arbiter considered claimant's examination findings to be invalid. *See Anthony J. Dasis*, 74 Van Natta 319, 420 (2022) (self-limited motions, with accompanying pain behaviors, invalidated the claimant's impairment findings); *Robin R. Jorgensen*, 72 Van Natta 179, 181 n 3 (2020) (the claimant's examination findings were invalid because of the claimant's poor, inconsistent effort). Accordingly, the medical arbiter's invalid findings did not support a conclusion that any impairment was caused in material part by the accepted condition. *See Gramada v. SAIF*, 326 Or App 276, 284 (2023) (the claimant was not entitled to a permanent impairment award where no impairment findings were caused in material part by the accepted condition).

In the alternative, the Board explained that even if it relied on the impairment findings of claimant's attending physician, his attending physician opined that there was no permanent impairment due to claimant's accepted condition. Thus, claimant would not be eligible for an impairment award. *See Robinette*, 369 Or at 782-84.

Consequently, the Board concluded that claimant had not established error in the reconsideration process. See ORS 656.283(6); *Wood Prods. V. Callow*, 171 Or App 175, 183 (2000); *Javon L. Washington*, 72 Van Natta 200, 200 (2020).

Hearing Procedure: Record Established "Good Cause" for Untimely Filed Hearing Request; Compensable Injury: Denial Set Aside

Michael T. Jones, 75 Van Natta 452 (August 15, 2023). Applying ORS 656.319(1)(b) and *Goodwin v. NBC Universal Media – NBC Universal*, 298 Or App 475 (2019), the Board held that the record established good cause for the claimant's untimely filed hearing request. Viewed in the light most favorable to the claimant, the Board stated that the late filing was a result of a mistake or inadvertence due to the claimant's lack of sophistication and confusion regarding the claim requirements and procedures. Turning to the compensability issue, the Board found that the record established that the work event was a material contributing cause of the claimant's disability or need for treatment. The Board stated that a treating chiropractor's well-explained opinion was more persuasive than a reviewing physician's opinion that was based on an inaccurate history. Accordingly, the Board reinstated the claimant's hearing request and set aside the carrier's denial.

Own Motion: PPD – "Varus Deformity" – No Impairment Value for "2 Degree" Deformity Under "035-0230(4)(a)" – But "5 Percent" Impairment Value

for "Grade IV Chondromalacia" & "Varus Deformity" (Even if Less Than 15 Degrees) Under "035-0230(11)(b)"

James D. Smith, 75 Van Natta 428 (August 4, 2023). In an Own Motion order, the Board held that claimant was entitled to an additional permanent value of 5 percent for "varus deformity" of his knee because, although the deformity was "slight" (only two degrees of the knee, which was not ratable under OAR 436-035-0230(4)(a)), he also had a "Grade IV Chondromalacia" (which, when coupled with the "varus deformity," entitled claimant to a 5 percent impairment value under OAR 436-035-0230(11)(b)). A medical arbiter found that claimant had a "slight varus deformity" of two degrees concerning his accepted knee condition. In addition, the arbiter diagnosed "Grade IV Chondromalacia" of claimant's lateral femoral condyle.

Citing OAR 436-035-0230(4)(a), the Board stated that a "varus deformity" impairment value is awardable if the deformity is greater than 15 degrees. Nonetheless, relying on OAR 436-035-0230(11)(b), *Wayne S. Devore*, 67 Van Natta 1112, 1116 (2015), and *Joann L. Goodsell*, 66 Van Natta 642, 646 (2014), the Board noted that a diagnosis of "Grade IV Chondromalacia" and the presence of varus deformity in the knee (even if less than 15 degrees) entitles a claimant to an impairment value of 5 percent.

Turning to the case at hand, the Board acknowledged that, because claimant's varus deformity was 2 percent, he was not entitled to an impairment value under OAR 436-035-0230(4)(a). However, because claimant had also received a diagnosis of Grade IV *chondromalacia*, the Board concluded that the presence of the varus deformity (even if it was less than 15 percent) a 5 percent impairment value pursuant to OAR 436-035-0230(11)(b) was warranted. *See Devore*, 67 Van Natta at 1116; *Goodsell*, 66 Van Natta at 646.

Temporary Disability Benefits: Record Established That Claimant was Terminated for Violation of Work Rules Under ORS 656.325(5)(b)

Tracy Gay, 75 Van Natta 447 (August 15, 2023). Applying ORS 656.325(5)(b), the Board held that claimant was terminated for a violation of work rules. Citing *Hipolito Coria*, 71 Van Natta 742 (2019) and *Robert P. Krise*, 74 Van Natta 911 (2002), the Board explained that when there is a dispute as to whether a claimant was terminated for violation of work rules or other disciplinary reasons, it is authorized to examine the factual issues to determine whether the claimant was, in fact, terminated for violation of a work rule.

In this particular case, the Board found that the record demonstrated concerns with claimant's driving safety. Claimant's employer's "Termination Form" also stated that claimant was terminated because he had not shown the ability to operate a truck safely or efficiently and he struggled with general awareness, trip planning, securement, execution, and following directions. Thus, based on its review of the record, the totality of the circumstances, and for the

reasons stated in the ALJ's order, the Board found that claimant was in violation of the employer's safety policies and was terminated for violation of work rules. *See* ORS 656.325(5)(b).

APPELLATE DECISIONS UPDATE

Course & Scope: "Arising Out of" Employment – Claimed "Appendicitis" – No Causal Connection to Remote Work Environment

Vilca-Inga v. SAIF, 327 Or App 430 (August 9, 2023). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court affirmed a Board order that held that claimant's abdominal injury claim was not compensable because it did not arise out of his remote work as a sheepherder. In reaching its conclusion, the Board had found that the record lacked any medical evidence that claimant's abdominal condition (acute appendicitis with a perforation) was caused by his work activities or work environment.

On appeal, claimant contended that his geographically remote work environment "exposed him to an increased risk or extent of harm due to delay caused in obtaining medical care resulting in his appendix rupturing and developing complications of that rupture." The court concluded that the Board had not erred in reaching its determination.

Citing *Phil A. Livesley Co. v. Russ*, 236 Or 25, 28 (1983), the court stated that a claimant has the burden of proving that the injury arose out of and in the course of employment. Relying on *Schleiss v. SAIF*, 354 Or 637, 643 (2013), the court reiterated that the phrase "arising out of employment" means that a workplace injury must be a material contributing cause of disability or need for medical treatment in order to be compensable.

Referring to *Bruntz-Ferguson v. Liberty Mutual Ins.*, 310 Or App 618, 626 (2021), the court repeated that to meet the threshold for the "arising out of" prong, there must be a causal connection between the injury and the employment. Citing *Clark v. U.S. Plywood*, 288 Or 255, 260 (1980), the court noted that the Supreme Court has explained that an appendicitis attack that occurs while an employee is working does not arise out of employment because "[t]here was no causal connection between the work and the attack."

Under such circumstances, the court clarified that claimant bore the burden of connecting his abdominal condition to his remote work environment. *See Redman Industries, Inc. v. Lang*, 326 Or 32, 36 (1997). After conducting its review, the court determined that the record did not support claimant's contention that his geographically remote work environment increased the likelihood of his abdominal condition by delaying his access to treatment. To the contrary, the court emphasized that a physician had testified that he could not determine when claimant's appendicitis began, when his appendicitis ruptured, or whether his appendix would have ruptured if he had sought medical treatment sooner.

Consequently, the court concluded that the Board's finding of a lack of a causal link between claimant's abdominal condition and his remote work environment was supported by substantial evidence and that the Board's determination that the claimed injury did not arise from claimant's employment was supported by substantial reason.

Firefighter's Presumption ("802(5)(b)"): "Material Part" – "Fact of Consequence" – Board's Conclusion That Carrier Did Not Overcome "Rebuttable" Presumption That Firefighting Was "Fact of Consequence" in Causing/Contributing to Claimed "Tonsillar Cancer" – Supported by Substantial Evidence/Reasoning

City of Salem v. Stadeli, 327 Or App 396 (August 7, 2023). Analyzing ORS 656.802(4) and (5)(b), the court affirmed the Board's order in *Maurice Stadeli, Dec'd*, 73 Van Natta 994 (2021), previously noted 40 NCN 12:4, which held that a deceased firefighter's tonsillar cancer was compensable because the carrier had not rebutted the presumption, by clear and convincing medical evidence, that his claimed condition was not caused or contributed to in material part (*i.e.*, "a fact of consequence") by his firefighting employment. On appeal, the carrier contested the Board's determination that the carrier had not rebutted the "firefighter's presumption" of ORS 656.802(5)(b).

The court held that the Board had not erred as a matter of law in construing the standard for the carrier to rebut the "firefighter's presumption" and that the Board could permissibly find that the record did not meet the carrier's burden of persuasion under that standard.

Addressing the standard for rebutting the "firefighter's presumption," the court determined that ORS 656.802(5)(a) requires clear and convincing evidence that the firefighter's employment was not a "fact of consequence" of any amount in causing or contributing to a claimant's condition or impairment. In reaching its conclusion, the court relied on its reasoning in *Mize v. Comcast Corp.- AT&T Broadband*, 208 Or App 563, 569-70 (2006), that "in material part" refers to a fact of consequence, without regard to the amount of causation or contribution beyond being a fact of consequence.

Applying the aforementioned standard to the case at hand, the court stated that, because it was undisputed that claimant had proved the predicate facts to support the "firefighter's presumption," the burden of production and persuasion shifted to the carrier to prove by clear and convincing medical evidence that the deceased firefighter's claimed tonsillar cancer was not a fact of consequence of any amount in causing or contributing to his condition or impairment.

Reviewing for substantial evidence/reasoning, and following the model used by the Supreme Court in *SAIF v. Thompson*, 360 Or 155, 157-58 (2016) (which analyzed the original "firefighter's presumption" in ORS 656.802(4)), the court concluded that the Board reasonably could have been persuaded: (1) by a physician's opinion that something other than the human papillomavirus-16

(HPV-16) was likely involved in the development of the decedent's tonsillar cancer; and (2) that contrary opinions (which were based only on the close connection between HPV and tonsillar cancer) had not detracted from the first physician's opinion.

Furthermore, noting that the contrary opinions were based on a lack of medical literature showing an association between firefighting and tonsillar cancer, the court found that the Board's conclusion (that such opinions did not persuasively explain how the lack of such empirical data ruled out firefighting as a fact of consequence in causing or contributing to the decedent's tonsillar cancer) was reasonable and supportable.

APPELLATE DECISIONS
COURT OF APPEALS

Subject Worker: "Substantial Evidence/Reason" Supported ALJ's "Non-Subjectivity Determination" - Alleged Employer (Contractor for Homeowner) Did Not Provide "Remuneration" to Claimant for Home Remodeling Project – Contractor Was "Agent" for Homeowner (Who Funded the Project), Not Claimant's "Employer" – "005(30)(2019)"

Mendoza v. Ron Dickson Corporation, 327 Or App 692 (August 30, 2023). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court held that an Administrative Law Judge's (ALJ's) order (issued on behalf of the Workers' Compensation Division/Director under ORS 656.740(5)(a)), which found that an alleged worker was not a "subject worker" pursuant to ORS 656.005(30) (2019) for a construction company and, therefore, the construction company was not a "subject employer," because substantial evidence/reason supported the ALJ's determination that the alleged employer (the construction company) had not provided remuneration for the worker's services. Reasoning that the officer of the construction company had been acting as the agent for the homeowner, the ALJ had determined that the construction company had not provided "remuneration" to claimant and, as such, the worker could not be considered a "subject worker" because the construction company was not his employer.

Judge Hellman dissented. Hellman contended that the ALJ's determination was not supported by substantial evidence/reason because the record supported a conclusion that the alleged employer (the construction company) was the contractor for the homeowner and had provided remuneration to the worker through the business account of the construction company, which had been funded by the homeowner for the remodeling project. In reaching this conclusion, Judge Hellman reasoned that the contractor's belief that he was not acting in his role as an officer of the construction company during the project was irrelevant in the legal analysis of whether the worker had received remuneration from the construction company.