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BOARD NEWS

Joy Dougherty – Board Chair

Joy Dougherty graduated from the University of Arizona and holds a law degree from Thomas Jefferson School of Law in San Diego, California. After law school, she relocated to Oregon and began her law practice doing workers' compensation. She joined the Workers' Compensation Board in 2003 as a Staff Attorney, and in 2010 she became an Administrative Law Judge. In October 2013, Joy was appointed as Presiding ALJ of the Workers' Compensation Board. As PALJ, she managed the Hearings Division. In October 2023, she was sworn in as the Chair of the Workers' Compensation Board. Outside of work, she enjoys spending time with her family and traveling.

Program Analyst Recruitment

The Workers' Compensation Board intends to fill a Program Analyst 2 position vacancy in the Hearings Division in Salem. This position works as the Hearings Division Program Support Coordinator, which includes mediation program coordination and executive administrative assistance to the Presiding Administrative Law Judge and the Assistant Presiding Administrative Law Judge. This position is eligible for remote work on a part-time basis once the incumbent has gained the proficiency to perform work independently. However, regular, scheduled office hours are also required. Applications will be accepted until October 24, 2023.

Position application information and qualification requirements can be found at:

External candidates:

https://oregon.wd5.myworkdayjobs.com/SOR_External_Career_Site/job/Salem--WCB/Hearings-Division-Program-Support-Coordinator--Program-Analyst-2-_REQ-138993

Current state employees:

[https://wd5.myworkday.com/oregon/d/inst/15\\$392530/9925\\$166010.htmlld](https://wd5.myworkday.com/oregon/d/inst/15$392530/9925$166010.htmlld)

Biennial Review/Attorney Fees/“388(4)”

The Board is currently engaged in its biennial review of attorney fees schedules under ORS 656.388(4). To assist in this review, the Board has published its September 6, 2023, attorney fee report which includes attorney fee data through the 2022 calendar year. The report can be found on the Board's website at <https://www.oregon.gov/wcb/Documents/statisticalrpts/090623-atty-fee-stats.pdf>

The Board is seeking written comments from parties, practitioners, and the general public. 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. All written

comments will be posted on the Board's website. The comments will be compiled and presented for discussion at Board meetings, where the Members will also consider public testimony. In establishing its attorney fee schedules, the Members shall also consult with the Board of Governors of the Oregon State Bar, as well as consider the contingent nature of the practice of workers' compensation law, the necessity of allowing the broadest access to attorneys by injured workers and shall give consideration to fees earned by attorneys for insurers and self-insured employers. See ORS 656.388(4), (5).

Announcements regarding Board meetings will be electronically distributed to anyone who has registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>

CASE NOTES

Appellate Procedure: Board Review Request Dismissed – Jurisdiction Continued to Rest With ALJ – Further ALJ Action Required to Finally Dispose of Claim and Fix Amount of Compensation – *Price, Lindamood, Norris* Cited

Salvador A. Mendoza, 75 Van Natta 515 (September 22, 2023). Applying *Price v. SAIF*, 296 Or 311 (1984), *Lindamood v. SAIF*, 78 Or App 15 (1986), and *Christopher R. Norris*, 54 Van Natta 2013 (2002), the Board dismissed the claimant's request for review of an Administrative Law Judge's (ALJ's) order that had deferred the matter pending a medical arbiter examination. The Board explained that the ALJ's order was not a final order because it neither finally disposed of, nor allowed, the claim. The Board stated that the ALJ's order, which had directed the parties to contact the Director to schedule a medical arbiter examination and to contact the Hearings Division after the completion of that examination, was, instead, interim in nature. Accordingly, the Board found that jurisdiction continued to rest with the Hearings Division and remanded to the ALJ.

Course and Scope: Injury Did Not Occur in the Course of Claimant's Employment – Parking Lot Exception to the Going and Coming Rule Did Not Apply – Injury Occurred on a Public Road, Not an Employer-Controlled Area – *Cope, Adamson, Thompson* Cited

Shawn Wiley, 75 Van Natta 521 (September 26, 2023). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's injury, did not occur "in the course of" his employment because the parking lot exception to the going and coming rule did not apply. Citing *Cope v. West Am. Ins. Co.*, 309 Or 232, 239-40 (1990); *Adamson v. The Dalles Cherry Growers*, 54 Or App 52, 58-59 (1981) and *John D. Thompson*, 58 Van Natta 476, 478-81 (2006), the Board reasoned that the parking lot exception did not apply because the injury occurred on a public roadway rather than in an employer-controlled area.

Further, because the Board determined that the “in the course of” prong was not satisfied, it was unnecessary for the Board to determine whether the injury “arose out of” the claimant’s employment. See *Krushwitz v. McDonald’s Rests.*, 323 Or 520, 531 (1996). Accordingly, the Board found that the claimant’s injury claim was not compensable.

Occupational Disease: Presumption of Compensability in ORS 656.802(7) Did Not Apply – Record Did Not Establish That Diagnostic Criteria for PTSD Was Satisfied by a Preponderance of the Evidence From a Psychiatrist or Psychologist – Record Also Did Not Establish That Claimed PTSD Arose Out of and in the Course of Employment by Clear and Convincing Evidence Under ORS 656.802(3) – ORS 656.802(3), (7) Cited

Camille Smicz, 75 Van Natta 497 (September 19, 2023). Applying ORS 656.802(7)(b), the Board held that the claimant, a covered employee, did not meet her burden to establish the rebuttable presumption that her occupational disease claim for post-traumatic stress disorder (PTSD) was compensable. The Board stated that the record did not establish through a preponderance of persuasive medical evidence from a psychiatrist or psychologist that the claimant more likely than not satisfied the DSM-5 diagnostic criteria for PTSD. In reaching that conclusion, the Board found a psychologist’s opinion unpersuasive because it was based on an inaccurate and incomplete history. In addition, the Board noted that the psychologist had not reviewed or addressed the persuasive, contrary opinions of an examining psychiatrist and examining psychologist. Moreover, the Board concluded that the record did not otherwise establish (without the presumption) that the claimed PTSD condition was compensable under ORS 656.802(3). Accordingly, the Board upheld the carrier’s denial of the claimant’s occupational disease claim for PTSD.

Own Motion: Premature Closure – Claimant’s “Worsened Condition” Was Medically Stationary at Claim Closure – No Specific “Closing Exam” Requirement, Provided That Claimant’s Medically Stationary Status Addressed – Carrier Must Attempt to Obtain “AP” Impairment Findings for New or Omitted Medical Condition – ORS 656.005(17), OAR 438-012-0055, *Wilson, Rickerd-Puckett, Leffler, Christeson* Cited

Adrian Jara, 75 Van Natta 490 (August 30, 2023). In an Own Motion order, the Board held that claimant’s Own Motion “worsened condition” claim for an eye condition was not prematurely closed because the record established

that his previously accepted eye conditions (the conditions for which his claim had been voluntarily reopened) were medically stationary when his claim was closed. On review, claimant contended that the claim had been prematurely closed because there had not been a proper closing examination. The Board disagreed with claimant's contention.

Citing OAR 438-012-0055(1), *Cheryl A. Wilson*, 73 Van Natta 963, 965, n 3 (2021), and *Jack M. Cooper*, 68 Van Natta 1446, 1451 (2016), the Board reiterated that an Own Motion "worsened condition" claim is closed when a claimant's worsened condition has become medically stationary.

Turning to the case at hand, the Board found that, based on claimant's attending physician's "pre-closure" opinion (that claimant's eye condition was medically stationary and claimant was released to regular work), the record unequivocally established that no further material improvement in claimant's worsened eye condition would be reasonably expected from medical treatment or the passage of time. Under such circumstances, the Board concluded that claimant's worsened condition was medically stationary when the claim was closed and, as such, had not been prematurely closed. See ORS 656.005(17); *Wilson*, 73 Van Natta at 965, n 3; *Pennie Rickerd-Puckett*, 61 Van Natta 336 (2009).

In reaching its conclusion, the Board noted that, in some circumstances, an Own Motion Notice of Closure may be invalid when, before closure of a "new or omitted medical condition" claim, a carrier does not attempt to obtain an attending physician's impairment findings. See *Charles D. Leffler*, 67 Van Natta 1997, 2004 (2015). Nonetheless, in contrast to a "new or omitted medical condition" claim (for which a claimant would be entitled to an evaluation for additional permanent disability benefits), the Board observed that the present claim involved a "worsened condition", for which claimant would not be entitled to such additional benefits. See *Paul E. Christeson*, 75 Van Natta 401, 403 (2023). In any event, the Board determined that the attending physician had conducted a closing examination, which included impairment findings, as well as a release to claimant's regular work.

Worker-Requested Medical Examination (WRME): Carrier's Denials Not "Based On" IME – Record Reviews Preceded Denials and Only IME Performed Post-Denial – No Statutory Exception for Covid -19 Pandemic - Requirements of ORS 656.325(1)(e) Not Met

Michelle L. Knowlden, 75 Van Natta 505 (September 20, 2023). Analyzing ORS 656.325(1)(e) and OAR 436-035-0147(1), the Board held that the claimant was not entitled to a worker-requested medical examination (WRME) because, at the time of her WRME request before the Workers' Compensation Division (WCD), the carrier's claim denials were not based on an independent medical examination (IME) report.

Citing *Julie A. Dellinger*, 72 Van Natta 35, 36 (2020), and *Lorinda A. Gauthier*, 70 Van Natta 96 (2018), the Board noted that a claimant's WRME entitlement depends on whether a denial is based on an IME report at the time of

the claimant's WRME request. Further, citing ORS 656.325(1)(e) and *Denise Amos*, 65 Van Natta 2100 (2013), the Board noted that a report does not constitute an "IME" in the absence of an in-person examination.

Turning to the case at hand, the Board concluded that the pre-denial physician record review was not an IME because it did not include an in-person examination of the claimant. Additionally, the Board found that the post-denial IME did not entitle claimant to a WRME, because the carrier's denial was not based on that examination at the time of claimant's WRME request. Finally, the Board noted claimant's argument that the pre-denial record review had been originally scheduled as an IME with an in-person examination, but the examination had been cancelled due to the COVID-19 pandemic. Nonetheless, the Board concluded that the circumstances of the pandemic did not constitute grounds for an exception to the ORS 656.325(1)(e) requirement that an IME include an in-person examination. As such, the Board concluded that claimant had not established her entitlement to a WRME.

Based on *stare decisis*, Member Ceja concurred with the lead opinion's application of *Dellinger*, *Gauthier*, and *Amos* to the particular facts of the case. Noting the potential of broader access to WRME's to address the financial disparity between carrier's and injured workers in the litigation of workers' compensation cases, Member Ceja proposed that the legislature consider revisions to ORS 656.325(1)(e) and OAR 436-060-0147(1) to expand access to WRME to include cases where an insurer utilizes a record review or post-denial IME.