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BOARD NEWS

Board Meeting on February 29 to Discuss “Five-Year” Review: OAR 438-007-0045 “Translation of Documents”

The Workers’ Compensation Board has scheduled a public meeting for February 29, 2024, at 10:00 a.m. in its Salem, Oregon, office. At the meeting the Board will begin its “five-year” review of OAR 438-007-0045, Translation of Documents, pursuant to ORS 183.405. The rule was designed to prescribe the procedures concerning the admission of documents at hearing that contain a language other than English. Specifically, the rule requires that any non-English language document must be translated. In addition, the rule prescribed the manner in which such translations may be accomplished, as well as procedures for assigning costs for translations and for resolving disputes regarding the translations.

A formal announcement regarding this Board meeting has been electronically distributed to those individuals, entities, and organizations who have registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>

CASE NOTES

Appellate Procedure: Prior Dismissal Order Approving Settlement Invalid – Board Had Misinterpreted Prior Settlement – Board Retained Authority to Consider Parties’ Proposed Agreement

David Lomeli, 76 Van Natta 47 (January 30, 2024). Analyzing ORS 656.295(8), the Board held that it retained authority to consider the parties’ proposed stipulation resolving a carrier’s request for Board review of an ALJ’s compensability decision, even though the 30-day appeal period from its initial dismissal order had expired. In doing so, the Board reasoned that its initial order had erroneously interpreted the parties’ Disputed Claim Settlement (DCS) as resolving the pending compensability dispute and thus, the order was invalid. In issuing its initial order, the Board had approved the parties’ DCS (which had expressly provided that the condition pending review was compensable as a matter of law and accepted). Nonetheless, the Board’s initial order stated that the compensability of the condition pending had been resolved and the carrier’s denial reinstated. Furthermore, the Board’s initial order neglected to consider the parties’ proposed stipulation, which provided for the withdrawal of the

carrier's request for review, in return for a reduction of the ALJ's attorney fee award and the carrier's payment of litigation costs.

More than 30 days after the Board's initial order, the parties sought approval of their stipulation. Referring to ORS 656.295(8), the Board acknowledged that generally, it is not authorized to reconsider an order once the 30-day appeal period has expired. See *Mark J. Lackey*, 62 Van Natta 2345 (2010), *recons den*, 63 Van Natta 796 (2011) Nonetheless, relying on *Korey S. Eubanks*, 68 Van Natta 2031 (2016), the Board reiterated that, when its approval of a proposed agreement is invalid, it retains authority to reconsider its decision, notwithstanding the expiration of a specified period.

Turning to the case at hand, the Board determined that the basis for its prior approval of the parties' settlement was directly contrary to their intention as expressly detailed in the agreement. Moreover, coinciding with the parties' express intention to retain the compensability of the condition in question, the Board noted that their proposed stipulation (which the Board had neglected to previously consider) provided for modification of the ALJ's attorney fee award, the withdrawal of the carrier's request for review, and dismissal of the appeal.

Under such circumstances, the Board concluded that its previous order approving the parties' settlement was invalid and, as such, the 30-day appeal period had never been initiated. Consequently, the Board determined that it retained authority to further consider the parties' proposed agreements. Accordingly, the Board approved the parties' stipulation and because their proposed DCS resolved the compensability of claimant's current conditions (which had not been at issue on review), it referred the agreement to the Hearings Division for consideration of that agreement. (The ALJ's order approving the DCS issued the same day as the Board's approval order.)

New or Omitted Medical Condition: Record Did Not Establish That a Work-Related COVID-19 Exposure Was a Material Contributing Cause of The Disability or Need For Treatment of a Claimed Asthmatic Condition

Scope of Acceptance: Record Did Not Establish that Previous Acceptance of COVID-19 Conditions Constituted Acceptance of The Claimed Asthmatic Condition or Its Symptoms

Stephanie Koutsopoulos, 76 Van Natta 3 (January 8, 2024). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board affirmed an ALJ's order that upheld the carrier's denial of claimant's new or omitted medical condition claim for an asthmatic bronchitis condition. The majority determined that the record did not establish that claimant's work-related COVID-19 exposure was a material contributing cause of the disability or need for treatment for the claimed asthmatic condition. In reaching this conclusion, the majority found the medical opinion of the internist who examined claimant at the carrier's request, as well as the opinion of a pulmonologist who performed a record review, well-reasoned and based on claimant's particular circumstances. In contrast, the majority discounted the treating physician's opinion for not sufficiently addressing the

timing of the onset of the asthmatic condition, which was significant to the contrary opinions. See *Nancy C. Prater*, 60 Van Natta 1552, 1556 (2008).

In addition, the Board found that the record did not establish that the carrier's acceptance of COVID-19 exposure, COVID-19, or long-COVID/PASC constituted an acceptance of the symptoms of the claimed asthmatic bronchitis condition or the claimed condition itself. Under such circumstances, the Board concluded that *Georgia-Pacific v. Piowar*, 305 Or 494 (1988), did not apply, and declined to set aside the carrier's denial on this basis. See *Boise Cascade Corp. v. Katzenbach*, 104 Or App 732, 735 (1990), *rev den*, 311 Or 261 (1991); *Raul Trinidad*, 60 Van Natta 2249, 2255-56 (2008).

Member Ousey dissented, finding that the treating physician's opinion, when read in context, was sufficiently persuasive to establish the compensability of the claimed condition. See *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999); *Freightliner Corp. v. Arnold*, 142 Or App 98, 105 (1996).

Scope of Acceptance: Carrier's Acceptance of a Combined Concussion Condition Was Valid Where Prior ALJ's Order Did Not Require Carrier to Accept a Standalone Concussion Condition, But, Rather, Determined That the Concussion Condition Was an "Otherwise Compensable Injury"

Maria F. Opferman, 76 Van Natta 10 (January 9, 2024). The Board declined to find that the carrier's post-litigation acceptance of a concussion condition combined with a preexisting condition was invalid. In doing so, the Board explained that although the compensability of a new or omitted medical condition claim for a concussion condition was previously litigated and final, the prior ALJ's order did not preclude the carrier's subsequent acceptance of the combined condition because the "concussion" was accepted as the "otherwise compensable injury" component of the combined condition. See, e.g., *Nancy E. Petock*, 59 Van Natta 2280 (2007). Moreover, the Board noted that the prior ALJ's order had not expressly found that a combined condition did not exist, but, instead, discussed the existence of a combined condition. Finally, the Board found that the ALJ's order did not otherwise direct the employer to accept a concussion as a standalone condition, but left that question open for claim processing.

The Board also addressed claimant's contentions regarding the validity of the carrier's "ceases" denial. In particular, the Board explained that the carrier's denial remained valid when it did not specify the effective date of the acceptance because the actual acceptance of the combined condition creates the baseline for determining whether there had been a "change" in claimant's condition. See *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006). Similarly, the Board declined to find the carrier's "ceases" denial invalid on the basis that it did not identify the effective date of the denial. In reaching this conclusion, the Board explained that when a denial issues without specifying a date, the denial date is considered the "effective date." See, e.g., *Deborah L. Sullivan*, 69 Van Natta 783, 787 (2017).

**APPELLATE DECISIONS
UPDATE**

None at this time.

**APPELLATE DECISIONS
COURT OF APPEALS**

Jurisdiction: Medical Treatment Dispute – Physical Therapy Bill For Non-Compensable Condition – WCD Authorized to Consider Worker’s Responsibility For Unpaid Medical Bill Based on Therapist’s Violation of WCD Rule

Mantle v. SAIF, 330 Or App 8 (January 4, 2024). Analyzing ORS 656.327(1)(a) and ORS 656.704(3)(b)(B), the court held that the Medical Review Team (MRT) for the Workers’ Compensation Division (WCD) on behalf of the Director was authorized to address a worker’s request for a finding that he was not responsible for physical therapy bills because the therapist had provided such medical services without a treatment plan in violation of WCD rules. In dismissing the worker’s request, the Director concluded that because the Board had previously determined that the therapy treatment was not related to the worker’s compensable claim, the treatment fell outside of the workers’ compensation system and, thus, ORS 656.327 and the corresponding WCD rules concerning medical treatment disputes were not applicable and the Director did not have the authority to decide that the worker was not responsible to pay the disputed medical bills.

The court reversed the Director’s decision. The court acknowledged that if a claim is not compensable, the workers’ compensation carrier has no liability for paying for the disputed medical service. Nevertheless, the court reasoned that such a determination did not mean that the Director loses authority to resolve a dispute about whether a medical provider violated WCD rules regarding the provision of medical services to the worker and whether the worker was required to pay for such services. Finding no statutory authority for the proposition that the Director lost authority over medical treatment disputes if the Board first determined that the claim was not compensable, the court concluded that the Director was statutorily authorized to determine whether the physical therapist had provided medical services to the worker in violation of WCD rules and whether the worker was required to pay the medical bills.

A dissenting opinion asserted that the statutory context makes clear that the right to request administrative review of medical treatment disputes is limited to disputes relating to compensable claims. Thus, once a determination had been made that the disputed medical services were not compensable, the dissent contended that the procedures prescribed in ORS 656.327 for the Director’s review of medical service disputes were not applicable. Consequently, the dissent found no error in the Director’s dismissal of the worker’s request for relief from payment of the physical therapy bills.