



News & Case Notes

BOARD NEWS

"Five-Year" Review: OAR 438-007-0045 "Translation of Documents" - Public Comment 1
WCB New South Coast Office – Florence, Oregon 1

CASE NOTES

ATTORNEY FEES: ORS 656.383(1) Attorney Fee Awarded by ALJ Was Proper - Attorney Was Instrumental in Obtaining Temporary Disability Benefits 2

PENALTIES: Carrier Unreasonably Delayed Temporary Disability Payment - Claimant's Counsel Entitled to Penalty-Related Attorney Fee for Services at Hearing and Review - "262(11)(a)," "262(4)(g), (h)," "060-0150(4)(b)." 2

REMANDING: Board Vacated and Remanded ALJ's Order That Dismissed Claimant's Hearing Request Because Record Did Not Contain Sufficient Evidence Regarding Whether Claimant Withdrew the Hearing Request – "295(5)." 3

RESPONSIBILITY: The Employer Was Not Presumptively Responsible for Claimant's Occupational Disease - Initial Treatment for Condition Took Place After Employment Exposure With Employer - Ultimately Not Responsible Under Last Injurious Exposure Rule- "308(2)(b)." 3

APPELLATE DECISIONS Court of Appeals

Own Motion: Board Order Not Supported by Substantial Evidence/Reasoning 4

BOARD NEWS

"Five-Year" Review: OAR 438-007-0045 "Translation of Documents" - Public Comment

At its February 29, 2024, public meeting, the Board began its "five-year" review of OAR 438-007-0045 pursuant to ORS 183.405. OAR 438-007-0045 requires the translation of any non-English language document being admitted as evidence at the hearing level. The rule prescribes the manner in which such translations may be accomplished, as well as procedures for assigning costs for translations and for resolving disputes regarding translations. The rulemaking materials (including the Order of Adoption and Statement of Need and Fiscal Impact) from the rule's 2019 adoption are posted on the Board's website at: <https://www.oregon.gov/wcb/legal/Pages/5-yr-review.aspx>

To assist the Members in their review of this rule, they are seeking written comments from the public that address the following questions:

1. Did the rule achieve its intended effect?
2. Was the anticipated fiscal impact of the rule underestimated or overestimated?
3. Have any subsequent changes in the law required that the rule be repealed or amended?
4. Is there a continued need for the rule?
5. What impact has the rule had on small business?

Notice of this request for public comment will be distributed to the members of the advisory committee that assisted in developing the rule and to those individuals and entities who have registered for "rule-related" notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>. 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@oregon.gov, or via fax at (503) 373-1684. The deadline for these written comments is April 15, 2024.

WCB New South Coast Office – Florence, Oregon

WCB is pleased to announce the opening of its new location in Florence, Oregon. While still ironing out minor details such as signage, we set hearings in March 2024 as a "soft opening" at the new site. The Florence office address is 4480 HWY 101, Building G, Florence, Oregon. Hearing notices for cases set in Florence will include the new address so please review your notices carefully.

The new location is equipped with one hearing room, one mediation room and a spacious common area, providing room for witnesses to wait and attorneys to confer with their clients. Parking is located directly in front of the building with multiple handicapped spaces. Additionally, Florence has many hotels, restaurants, and services. WCB worked with the City of Florence to compile a list of resources available to parties which is available upon request. PALJ Jacqueline Jacobson will be working with Docketing to ensure a smooth transition of cases. "We are happy to be able to provide an improved facility for our stakeholders in the South Coast area of our state" said Board Chair Joy Dougherty. "WCB works closely with the Department of Administrative Services (DAS) researching facilities before moving locations and remains committed to providing easy access for our stakeholders in the area." If you have questions about the new location, please contact Kayleen Swift at 503-378-3308. Please note this location is unstaffed and in-person filing is not available. Any and all correspondence and exhibit submissions should be sent to the assigned ALJ's home office.

CASE NOTES

ATTORNEY FEES: ORS 656.383(1) Attorney Fee Awarded by ALJ Was Proper - Attorney Was Instrumental in Obtaining Temporary Disability Benefits

PENALTIES: Carrier Unreasonably Delayed Temporary Disability Payment - Claimant's Counsel Entitled to Penalty-Related Attorney Fee for Services at Hearing and Review - "262(11)(a)," "262(4)(g), (h)," "060-0150(4)(b)"

Abdou S. Halirou, 76 Van Natta 123 (February 28, 2024). Applying ORS 656.383(1), the Board held that the claimant's counsel was entitled to an ORS 656.383(1) attorney fee because the claimant's attorney was instrumental in obtaining temporary disability compensation prior to an ALJ's order. The Board explained that after the carrier ceased paying the claimant's temporary disability benefits based on a conversation with a physician's office receptionist, the claimant's attorney's office contacted the carrier about the status of the claimant's temporary disability benefits, emailed the attending physician's conditional work release to the carrier, clarified that the conditional work release restricted the claimant to modified duty, and filed a hearing request identifying temporary disability benefits, penalties, and attorney fees as issues. The Board noted that although the carrier asserted that it had ultimately resumed paying the claimant's temporary disability benefits based on a subsequent letter from the attending physician, the Board found that the claimant's counsel was nevertheless instrumental in obtaining those benefits. Accordingly, the Board awarded an assessed attorney fee under ORS 656.383(1). In addition, the

Board awarded penalties and penalty-related attorney fees for the carrier's untimely payments of temporary disability benefits.

REMANDING: Board Vacated and Remanded ALJ's Order That Dismissed Claimant's Hearing Request Because Record Did Not Contain Sufficient Evidence Regarding Whether Claimant Withdrew the Hearing Request – "295(5)"

Araceli Diaz-Dominguez, 76 Van Natta 113 (February 23, 2024). Applying ORS 656.295(5), the Board held that the record did not contain sufficient evidence regarding the dismissal of the unrepresented claimant's hearing request to reach a determination concerning the propriety of the ALJ's dismissal order. In reaching this conclusion, the Board acknowledged that the claimant had signed a letter indicating that she wished to withdraw her request for hearing. However, included with that letter was a medical report from claimant's treating physician stating that she continued to experience low back pain associated with her work-related injury. Accordingly, the Board vacated the ALJ's dismissal order and remanded the matter to the ALJ for further proceedings to develop the record and determine whether the claimant had withdrawn her request for hearing. See *Jamie O. Lopez*, 71 Van Natta 655 (2019).

RESPONSIBILITY: The Employer Was Not Presumptively Responsible for Claimant's Occupational Disease - Initial Treatment for Condition Took Place After Employment Exposure With Employer - Ultimately Not Responsible Under Last Injurious Exposure Rule- "308(2)(b)"

Robert Babcock, 76 Van Natta 90 (February 20, 2024). Applying the Last Injurious Exposure Rule (LIER), the Board found that the only employer joined to the proceeding was not responsible for his occupational disease claim for left shoulder osteoarthritis. The Board first determined presumptive responsibility, finding that the medical evidence established that employment subsequent to the employer-at-issue was presumptively responsible. See *Agricomp Ins. v. Tapp*, 169 Or App 208, 211, *rev den*, 331 Or 244 (2000); *Timm v. Maley*, 125 Or App 396, 401 (1993), *rev den*, 319 Or 81 (1994); see also *Foster Wheeler Corp. v. Marble*, 188 Or App 579, 583, *rev den*, 336 Or 60 (2003). Although the record was not clear as to the specific dates of claimant's employment, this fact did not compel a different result because the record established that claimant had last worked for the employer-at-issue in 2011 and that his "onset of disability" took place in 2016, when he worked for one of two other employers.

The Board then analyzed ultimate responsibility under the LIER. In particular, the Board considered whether the record established that: (1) it was impossible for work with the presumptively responsible employers to have

contributed to claimant's condition; (2) if claimant's employment with the employer-at-issue was the sole cause of the condition; or (3) if the record otherwise established that employment after the employer-at-issue actually contributed to the condition. See *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999). The Board found that the persuasive medical evidence established that employment subsequent to the presumptively responsible employers, as well as the employer-at-issue, independently contributed to the condition. Moreover, it found that the record did not persuasively establish that claimant's work with the employer-at-issue was the sole cause of the condition or that it was impossible for subsequent employment to have contributed to the condition. Under such circumstances, the Board upheld the employer-at-issue's responsibility denial. See ORS 656.308(2)(b); *Emory M. Schaffer*, 66 Van Natta 441, 442 n 4 (2014).

APPELLATE DECISIONS UPDATE

Own Motion: Board Order Not Supported by Substantial Evidence/Reasoning

Gage v. Fred Meyer Stores – Kroger Co., 330 Or App 669 (February 14, 2024). On reconsideration of its earlier decision, 329 Or App 360 (2023), the court adhered to its opinion that found that the Board's Own Motion order which had not awarded additional permanent disability for a worker's "post-aggravation rights" new/omitted medical condition lacked substantial evidence/reasoning, but modified its decision to clarify the factual and procedural history of the worker's claim. Specifically, the court clarified that: (1) the Board had determined that claimant's L4-5 facet cyst had not resulted in additional impairment and that claimant was not entitled to a redetermination of her permanent disability; (2) following claimant's claim, the carrier had accepted various disabling conditions; (3) an MRI had showed a cyst at the L4-5 disc, along with an L4-5 herniation and nerve impairment; and (4) an examining physician's view that the L4-5 facet cyst had resolved by 2015 was contradicted by claimant's medical history and the Board's findings that the cyst could be, and was, seen in the 2015 MRI images, that the cyst was again seen in the 2016 MRI images, and that the cyst was removed in 2016.

APPELLATE DECISIONS COURT OF APPEALS

None at this time.