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**APPELLATE DECISIONS Update**

None at this time.

**BOARD NEWS**

## Board Meeting on April 23 to Discuss "Five-Year" Review: OAR 438-007-0045 "Translation of Documents"

The Workers' Compensation Board has scheduled a public meeting for April 23, 2024, at 10:00 a.m. in its Salem, Oregon office. At the meeting, the Board will review and discuss comments received pursuant to its "five-year" review of OAR 438-007-0045, Translation of Documents, under ORS 183.405. Comments received are available on the Board's website at <https://www.oregon.gov/wcb/legal/Pages/5-yr-review.aspx>

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>

## Terry Bello - Retirement

After more than 35 years of service working for the State of Oregon, Terry Taylor Bello, Administrative Services Division Manager, has retired from the Board. Terry started at WCB in September of 1987 as a temporary employee when cases were lining the walls. With previous experience as a Coordinator for the Marion County Soil and Water Conservation Board, she started work as a litigation coder. She then moved to processing new requests, then to docketing and was involved heavily in the "new" settlement program that has become what our CDA program is today. Around the same time, Terry received a Certificate of Appreciation from Governor Goldschmidt for volunteering to do calligraphing for the certificates for individuals appointed to boards and commissions. In 1991, Terry left the Board to work at DCBS as an Assistant Manager at the Department of Finance and Corporate Securities. However, in 1998, she returned to WCB as manager of Central Support. While working full time in 2000, Terry also attended Willamette for two years to complete her Certification in Public Management. Thereafter, in 2002, the Central Support Services and Business Operations units of WCB merged and became the Administrative Services Division. Terry has served as ASD Division Manager since that time.

While officially retired as of April 1, 2024, Terry will remain at WCB while we recruit for a new ASD Manager. She is also a vital member of our modernization team and will stay on to assist WCB in moving that project forward.

**CASE NOTES**

## COURSE & SCOPE: the Claimant's Injury That Occurred While Crossing a Street to Retrieve a Required Work Item During Work Hours "Arose Out of" and Occurred "in the Course of" Her Employment – ORS 656.005(7)(a), ORS 656.266(1)

*Cambria R. Souza*, 76 Van Natta 130 (March 1, 2024). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's left knee and right hip injury, which occurred when she was hit by a truck while walking to her car to retrieve a work apron, occurred "in the course of" and "arose out of" her employment. Relying on *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 598 (1997) and *Michael D. Razavi*, 65 Van Natta 506, 507 (2013), the Board determined that the "going and coming" rule did not apply because, although the injury occurred after the claimant had left the employer's premises, she was "on the clock" and performing a task that was reasonably incidental to her employment.

Moreover, the Board determined that, even if the "going and coming" rule applied, the "special errand" exception to the "going and coming" rule applied because the claimant was acting in furtherance of the employer's business at the time of the injury. See *JAK Pizza, Inc.-Domino's v. Gibson*, 211 Or App 203, 206 (2007); *Jeff E. White*, 73 Van Natta 933, 935 (2021); *Bethany Davidson*, 52 Van Natta 1351, 1352 (2000).

Finally, the Board found that the injury "arose out of" the claimant's employment because the employer's work environment exposed her to the risk of injury. See *Lamb*, 193 Or App at 570-71; *Stephanie Tingle*, 73 Van Natta 812, 815 (2021); *Razavi*, 65 Van Natta at 511. Accordingly, the Board found that the claimant's injury claim was compensable.

Member Curey dissented. Noting that the employer did not direct the claimant to retrieve her apron or control the claimant's actions at the time of her injury, Member Curey would have concluded that the going and coming rule applied without exception. Further, because the claimant was injured on a public street, which the employer did not control and where she was not reasonably expected to be, Member Curey would have concluded that the injury did not arise out of the claimant's employment.

## On Remand, the Claimant Did Not Meet His Burden to Rebut the Presumption That His Hearing Request Was Untimely Filed After the Board Considered an Attorney's Cover Letter it Had Previously Declined to Consider on Review - "319(1)(a)," "005-0046(1)(a)," "005-0046(1)(c)"

*Eric C. Kopf*, 76 Van Natta 193 (March 21, 2024). On remand from the court, *Kopf v. SAIF*, 321 Or App 764 (2022), the Board concluded that the claimant's hearing request was untimely filed because the attorney's unsworn

representations in a letter (which stated that the request had been mailed to the Board before the expiration of the 60-day appeal period), along with the carrier's receipt of its copy of the request within the 60-day period, did not rebut the presumption that the hearing request (which was received by the Board after the expiration of the 60-day period) was untimely.

The Board noted that the hearing request had not been mailed by certified mail to the Board nor had it been accompanied by a certificate of service by mail. Moreover, the Board observed that the record lacked either an affidavit or testimony from an employee at the worker's attorney's office describing the office's standard procedures for mailing hearing requests. Consequently, the Board found that claimant's hearing request was untimely filed. See ORS 656.319(1)(a).

Member Ousey dissented. He noted that it was undisputed that claimant timely mailed a hearing request to the carrier and that the carrier received that request. Further, he stated that the record contained a copy of a cover letter, addressed to the Board that accompanied the carrier's copy of the hearing request. Finally, he explained that the claimant's counsel represented in a letter that the original hearing request was "simultaneously" mailed to the Board and to the carrier and that the record did not contradict the claimant's counsel's representation. Under such circumstances, he would have found that the claimant met his burden to rebut the presumption of untimely filing under OAR 438-005-0046(1)(c). Alternatively, relying on *Goodwin v. NBC Universal Media-NBC Universal*, 298 Or App 475, 488-89 (2019), Member Ousey would have found that the claimant's mistake in believing that the hearing request was timely mailed would constitute "good cause" for the untimely filing under ORS 656.319(1)(b).

**PREMATURE CLOSURE: Aggravation Claim Closure Not Premature - ORS 656.005(17), ORS 656.268(1)(a), 436-030-0020(1)(a)**

**EXTENT: Permanent Impairment - Not Due in Material Part to Compensable Injury - ORS 656.214(1)(a), OAR 436-035-0006(1), OAR 436-035-0007(1), (5), (11)**

**CONSTITUTIONAL LAW: Due Process Rights Were Not Violated - Administrative Remedies Not Exhausted**

*Jantel C. Giovannetti-Kristich*, 76 Van Natta 163 (March 15, 2024). Applying ORS 656.268(1)(a) and ORS 656.005(17), the Board held that the claimant's aggravation claim was not prematurely closed. Specifically, the Board stated that the carrier had sufficient information to close the claim based on the attending physician's opinion that the accepted conditions and any direct medical sequelae were medically stationary. In addition, applying ORS 656.214(1)(a), OAR 436-035-0007(1), (5), and OAR 436-035-0006(1), the Board held that the claimant was not entitled to an additional permanent disability award. The Board explained that the medical arbiters had concluded that there were no objective

findings of permanent loss of use or function due to the accepted aggravated conditions or any direct medical sequelae.

In reaching its permanent disability determination, the Board rejected the claimant's assertion that her due process rights were violated because she did not have the opportunity to introduce oral testimony or cross-examine physicians during the reconsideration process or at the hearing level. Citing *Trujillo v. Pacific Safety Supply*, 336 Or 349 (2004), the Board concluded that the claimant was barred from pursuing her due process challenges because the record did not establish that she had exhausted her administrative remedies. Accordingly, the Board found that the claimant did not meet her burden to establish error in the reconsideration process.

Member Ceja dissented because he disagreed with the majority's conclusion that the claimant's procedural due process rights were not violated. Citing *Koskela v. Willamette Indus., Inc.*, 331 Or 362, 378 (2000), Member Ceja stated that, considering the permanent nature of an adverse permanent partial disability determination and the weight that the medical experts and the Workers' Compensation Division placed on a surveillance video (which put the claimant's credibility and veracity at issue), he would have found that the lack of an oral evidentiary hearing and the inability to cross-examine the medical arbiters prevented claimant from meaningfully participating in the reconsideration process.

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## **APPELLATE DECISIONS UPDATE**

None at this time.