Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Board Meeting on May 16 to Discuss Advisory Committee Reports on OAR 438-015-0052(1) "Attorney Fee Caps for CDAs and DCSs" - and OAR 438-005-0055 "Mandatory Denial Language"

The Workers' Compensation Board has scheduled a public meeting for May 16, 2024, at 1:00 p.m. in its Salem, Oregon office. At the meeting, the Board will begin review and discussion of advisory committee reports involving OAR 438-015-0052(1), Attorney Fee Caps for Claim Disposition Agreements and Disputed Claim Settlements, and OAR 438-005-0055, Mandatory Denial Language. The Members will also consider whether rulemaking action should be initiated in response to the advisory committee reports. The reports can be accessed at: https://www.oregon.gov/wcb/Documents/brdmtgs/2024/031824-sett-attyfeecaps-rpt.pdf

And at: https://www.oregon.gov/wcb/Documents/brdmtgs/2024/031324-denial-appeal-lang-rpt.pdf

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

"Five-Year" Review: OAR 438-007-0045 "Translation of Documents" - Report Filed With Secretary of State

At its April 23, 2024, public meeting, the Board Members considered responses to their invitation for comments on the "five-year" review of OAR 438-007-0045 ("Translation of Documents"). *See* ORS 183.405. After reviewing comments received from the original advisory committee members, the Members determined that the rule is achieving its intended effect. The Members further concluded that there was a continuing need for the rule and that there was no adverse fiscal impact on stakeholders or small businesses.

Consistent with the Members' direction, the "5-Year Rule Review" report has been finalized, signed, and filed with the Secretary of State. Copies of the report have been mailed to all members of the rule's original advisory committee. In addition, a copy of the report has been posted on the Board's website at: https://www.oregon.gov/wcb/Documents/five-yr-review/2024/050824-oar438-007-0045finalrulereviewreport.pdf

CASE NOTES

DCS: Matter Remanded to the ALJ Because Record Was Insufficiently Developed Regarding the Claimant's Challenge to a DCS/CDA, the Carrier's Request to Convene a Hearing, and Other Circumstances Surrounding the Execution of the Settlement Agreements – ORS 656.295(5)

Helio Bedolla-Huerta, 76 Van Natta 249 (April 22, 2024). Applying ORS 656.295(5) in its second review of the matter, the Board held that the record was insufficiently developed regarding the circumstances surrounding the claimant's execution of a Disputed Claim Settlement (DCS), as well as claimant's specific contentions on remand. In its initial review, the Board concluded that there was no record on which to determine the circumstances surrounding the execution of the parties' settlement, which warranted remand to the ALJ. On remand, the ALJ proceeded with a written record, treating the claimant's request for Board review as an opening argument, providing the carrier with an opportunity to submit a response and claimant with a reply. The carrier requested a hearing to further develop the record or, alternatively, argued that the claimant's previous objections to the DCS did not amount to extraordinary circumstances supporting a rescission of the agreement. The ALJ issued an Opinion and Order without addressing the carrier's request for a hearing. Rather, the ALJ noted that the claimant had not responded to the carrier's argument and that the claimant's assertions did not constitute extraordinary circumstances to justify setting aside the DCS.

The claimant submitted a response to the ALJ's order that was written in Spanish and not interpreted. The ALJ issued an Order on Reconsideration referring to the submission, but without additional explanation regarding specific contentions raised by the claimant. The Claimant appealed the reconsideration order.

Citing ORS 656.295(5), the Board explained that, when a party has appealed an ALJ's approval of a DCS and the record has been insufficiently developed regarding the party's dissatisfaction with the ALJ's approval, it has remanded to the ALJ for development of the record and consideration of the parties' positions. The Board noted that the ALJ's letter on remand was written in English without translation, that the record established that the claimant spoke Spanish and could not read English, that the claimant's reconsideration request was not sent for translation, and that the reconsideration order did not describe or address the claimant's contentions within that request. Under such circumstances, the Board was unable to determine whether the claimant's submission addressed the ALJ's reasoning and conclusions, the ALJ's decision to proceed with a written record, the carrier's request to convene a hearing, the claimant's understanding of the agreement, or his reasons for cashing the settlement checks. Therefore, the Board remanded the matter to the ALJ to conduct a hearing.

Unreasonable Refusal to Close: The Carrier's Refusal to Close the Claim Was Unreasonable Because it Delayed Seeking Clarification From Attending Physician Regarding an IME, PCE, and Whether Claimant Was Released to His Job at Injury – ORS 656.268(5)(f)

William Garwood, 76 Van Natta 206 (April 9, 2024). Applying ORS 656.268(5)(f), the Board reversed that portion of the ALJ's order that did not award penalties for the carrier's allegedly unreasonable refusal to close the claimant's injury claim. Citing *Cayton v. Safelite Glass Corp*., 232 Or App 454, 460 (2009), the Board explained that there are three predicates to the assessment of a penalty under the statute: (1) there must be a closure of a claim or a refusal to close a claim; (2) the "correctness" of that action must be at issue in a hearing on the claim; and (3) there must be a finding that the notice of closure or the refusal to close was not reasonable. Concluding that the carrier refused to close the claim and that the "correctness" of that action was at issue at a hearing, the Board examined whether the employer's refusal to close was unreasonable.

Over several months, the attending physician had concurred with the impairment findings determined in an independent medical examination and a physical capacity evaluation. During that time, the attending physician had stated that the claimant was medically stationary on several occasions. Noting that it was not until after the claimant's request to close the claim that the carrier took any action to clarify the inconsistencies regarding permanent impairment, the Board ultimately found that the carrier's refusal to close the claim, which was purportedly on the basis that further clarification and findings were necessary, was unreasonable.

Worker Requested Medical Examination: Carrier's Denial Was Based on an IME report – Claimant's Attending Physician "Does Not Concur" with IME Report Where He Neither Agreed Nor Disagreed with the Report – ORS 656.325(1)(e); OAR 436-060-0147(1)

Bret V. Barton, 76 Van Natta 211 (April 11, 2024). Analyzing ORS 656.325(1)(e) and OAR 436-060-00147(1), the Board held that the claimant met the eligibility requirements for a worker requested medical examination (WRME). Specifically, the Board stated that even though the carrier's denial did not expressly reference an independent medical examination (IME), the record established that the denial was "in fact" based on the IME report. In addition, the Board found that the only physician who had treated the claimant's conditions at the time of the WRME request was the claimant's attending physician, even though that physician had indicated that he did not handle workers' compensation claims. Finally, the Board concluded that although the attending physician did not render an opinion regarding the IME report, the absence of an opinion from the attending physician regarding the IME report was sufficient to

establish that the attending physician "does not concur" with the IME report for purposes of ORS 656.325(1)(e) and OAR 436-060-00147(1). Accordingly, the Board reversed a Workers' Compensation Division (WCD) order that denied the WRME.

Members Curey and Ogawa dissented. They stated that they would have found that the carrier's denial was not based on an IME report because the denial did not state that it was based on an IME and the carrier issued a corrected denial, which referenced the IME, after the claimant submitted his WRME request. In addition, the dissenting members noted that they would have found the physician who treated the claimant's conditions at the time of the denial (who had concurred with the IME) to be the claimant's attending physician. Moreover, the dissent reasoned that even if the claimant's subsequent physician was found to be the attending physician, the physician's lack of a concurrence would not be sufficient to meet the "does not concur" requirement under ORS 656.325(1)(e) and OAR 436-060-00147(1).

APPELLATE DECISIONS UPDATE

Worker Requested Medical Examination: Carrier's Denial Was Based on an Post-Denial IME Report When That Report Was Submitted as Evidence in Support of the Denial at Hearing – ORS 656.325(1)(e)

Teitelman v. SAIF Corp., 332 Or App 72 (April 17, 2024). Analyzing ORS 656.325(1)(e) and OAR 436-060-0147 regarding a claimant's entitlement to a Worker Requested Medical Examination (WRME), the court held that a carrier's denial may be "based on" an Independent Medical Examination (IME) in cases where the IME occurs after the denial. The Workers' Compensation Division (WCD) and the Board on review, had determined that the carrier's denial could not be "based on" a post-denial IME under the statute because the IME had not taken place until after the carrier's issuance of the denial.

The court reversed the WCD's and the Board's decisions. The court reasoned that there was nothing in the statute or rule requiring an IME to be performed before a denial in order for the claimant to request a WRME. The court noted that the ORS 656.325(1)(e) language that referred to a denial being based "on one or more reports of examinations" suggested a legislative intent to not limit a claimant's WRME entitlement to pre-denial IMEs. The court further explained that, as a practical matter, there is little reason for multiple pre-denial IMEs to occur and that if the legislature had meant to limit WRME entitlement to pre-denial IMEs, it could have precisely phrased that requirement within the statute.

The court further reasoned that allowing WRMEs in response to post-denial IMEs was consistent with the statutory purpose of allowing workers to obtain WRMEs when there are competing medical reports. The court noted that this is particularly the case when those reports have been submitted as evidence in a hearing in which the carrier is defending its denial. The court concluded that in such cases, including the instant case, the carrier's denial was "based on" an IME. Consequently, the court found that the Board erred in finding that the

carrier's denial was not "based on" an IME and it reversed and remanded the case to the Board.

APPELLATE DECISIONS
COURT OF APPEALS

Exclusive Remedy: Civil Action By Estate of Deceased Worker on Behalf of Adult Children for Loss of Society and Companionship Barred by Exclusive Remedy Provision– Not Loss of Any Interest Guaranteed by Article I, Section 10 of the Oregon Constitution – ORS 656.018

Pierce v. Best Western International, Inc., 331 Or App 753 (April 10, 2024). The court affirmed the trial court's dismissal of a civil action for loss of society and companionship brought by the worker's estate on behalf of her adult children. In reaching its conclusion, the court determined that the civil claim was barred by the exclusive remedy provision in ORS 656.018. The court further disagreed with the worker's estate's contention that ORS 656.018 was unconstitutional as it applied to the adult children because it operated to deprive them of a remedy in contravention of the "remedies clause" of Article I, Section 10 of the Oregon Constitution, which guarantees that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Citing *Kilminster v. Day Management Corp*., 323 Or 618, 623-24 (1996), the court stated that the "exclusive remedy" statute means that "[a] worker who is injured in the course and scope of employment is entitled to receive from the worker's employer, only the remedies provided for in the Act." Referring to ORS 656.204, the court further noted that, in the event of a worker's death, an employer is responsible for disposition of the body and further expenses, and that monthly benefits are only available to specific beneficiaries, including a surviving spouse, minor children until they reach the age of 19, and some other limited dependents. Relying on *Kilminster* and *Juarez v. Windsor Rock Products, Inc.*, 341 Or 160 (2006), the court reiterated the Supreme Court's explanation that a civil claim for loss of society and companionship does not implicate the remedies clause of Article I, Section 10. Accordingly, the court concluded that the trial court had not erred in dismissing the adult children's civil cause of action against their mother's employer.