Workers' Compensation Board

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BOARD NEWS

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The Workers' Compensation Board (WCB) has scheduled a public meeting for July 30, 2024, at 9:30 a.m. in its Salem, Oregon office. At the meeting, the Board will discuss a rule concept to expand the bifurcation of attorney fee awards to the Hearings Division and a staff report containing data concerning the bifurcation of attorney fee awards on Board review. The staff report can be found here.

Further, the Board meeting will include discussion of written and oral comments presented at the June 28, 2024, rulemaking hearing regarding proposed amendments to OAR 438-005-0055, OAR 438-015-0050, and OAR 438-015-0052, and possible rulemaking action concerning those amendments. The proposed amendments include:

- Proposed amendments to OAR 438-005-0055(1) and (2) designed to simplify and improve the readability of the appeal language required in denials.
- Proposed amendments to OAR 438-015-0050(1) and OAR 438-015-0052(1) that remove the 10 percent limits on attorney fee awards out of Disputed Claim Settlement (DCS) and Claim Disposition Agreement (CDA) proceeds exceeding $50,000 and provide that a claimant's attorney may receive a fee of up to 25 percent of the total DCS or CDA proceeds in the absence of extraordinary circumstances.

Due to the logistical challenge of distributing written comments on the day of the meeting, the Members encourage stakeholders to submit any written comments in advance of the meeting. Any such written comments should be directed to Katelyn Crowe, WCB's Rules and Transcription Coordinator at 2601 25th St SE, Suite 150, Salem, OR 97302, Katelyn.Crowe@wcb.oregon.gov, or via fax at (503)373-1684.

A formal announcement regarding this Board meeting has been electronically distributed to those individuals, entities, and organizations who have registered for these notifications.

APPELLATE DECISIONS Update

PENALTIES: Carrier Has Obligation to Modify Acceptance "From Time to Time" in the Absence of a New or Omitted Medical Condition – Carrier's Failure to Revise Notice of Acceptance Was Not Unreasonable Because Correct Interpretation of ORS 656.262(6)(b)(F) Was Not Well Settled 4

Bulletin No. 1 (Revised) - Annual Adjustment to Attorney Fee Awards Effective July 1, 2024

The maximum attorney fee awarded under ORS 656.262(11)(a), ORS 656.262(14)(a), and ORS 656.382(2)(d), which is tied to the increase in the state's average weekly wage (SAWW), will increase by 2.749 percent on July 1, 2024. On June 6, 2024, the Board published Bulletin No. 1 (Revised), which set forth the new maximum attorney fees. The Bulletin can be found on the Board's website.

An attorney fee awarded under ORS 656.262(11)(a) shall not exceed **$5,973**, absent a showing of extraordinary circumstances. OAR 438-015-0110(3).

An attorney fee awarded under ORS 656.262(14)(a) shall be **$456** per hour. OAR 438-015-0033. This rule concerns the reasonable hourly rate for an attorney's time spent during a personal or telephonic interview conducted under ORS 656.262(14).

An attorney fee awarded under ORS 656.308(2)(d) shall not exceed **$4,308**, absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5).

These adjusted maximum fees apply to attorney fees awarded under ORS 656.262(11)(a) and ORS 656.308(2)(d) by orders issued on July 1, 2024, through June 30, 2025, and to a claimant's attorney's time spent during a personal or telephonic interview or deposition under ORS 656.262(14)(a) between July 1, 2024, and June 30, 2025.

New Administrative Services Manager, Amanda Pletcher

WCB Hearing Staff Manager Amanda Pletcher has accepted the position of Administrative Services Manager for the WCB. Amanda joined the Hearing Division in June 2023. Her previous experience was in the healthcare industry where she had over 16 years of experience. Before joining the WCB, she worked as the practice administrator for a local dermatology company, where she managed all of the day-to-day operations ensuring compliance with federal and state laws and regulations. Prior to this, she was the human resource and administrative director for a physical therapy company where she gained knowledge of the workers' compensation system, contract management, and policy implementation, in addition to managing the employees responsible for human resources, billing, insurance, and administrative duties.

Amanda completed her Bachelor's Degree in Accounting and Finance, and holds a Master's Degree in Business Administration from the University of Phoenix. When not working, Amanda enjoys Oregon scenery with her three daughters, fishing, or reading a good mystery.

CASE NOTES

COMPENSABLE INJURY: Record Established Both Legal and Medical Causation Based on Claimant's Credible/Corroborated Testimony and a Treating Nurse Practitioner's Unrebutted Opinion; PENALTIES: Carrier's Denial Was Not Unreasonable - Reliance at the Time of Denial on Out-of-State Opinion That Was Ultimately Excluded Was Reasonable

Joseph Navalta Jr., 76 Van Natta 361 (June 24, 2024). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that the claimant's injury claim for a COVID-19 condition was compensable. The Board found that the record established legal causation, medical causation, that the claimant's testimony was credible, and that the injury arose out of and occurred in the course and scope of the claimant's employment. But the Board declined to award a penalty under ORS 656.262(11)(a) for an allegedly unreasonable denial. In reaching that conclusion, the Board found that even though the carrier had obtained a physician's opinion that was later found to be inadmissible under ORS 656.310(2), the carrier had met its obligation under OAR 436-060-0141(2)(b) to obtain an expert opinion before denying a COVID-19 claim. The Board noted that the carrier also had a legitimate doubt as to its liability based on its investigation of the claim, including obtaining medical records and taking the claimant's deposition.

Member Ceja dissented regarding the penalty issue. He stated that the carrier's denial was unreasonable because the carrier based that denial on the opinion of an out-of-state physician who had not treated or examined the claimant when it was well established that such an opinion was inadmissible under ORS 656.310(2). Member Ceja stated that because the carrier lacked any legal authority supporting the admissibility of the out-of-state physician's opinion, such an opinion could not have provided the carrier with a legitimate doubt as to its liability from a legal standpoint at the time of the denial. Member Ceja also noted that the carrier did not strictly comply with OAR 436-060-0141(2)(b), which required the carrier to obtain an expert opinion in a COVID-19 case.

REMANDING: Board found Compelling Reasons to Remand For Further Development of the Record Based on a Post-Hearing Submission That Concerned Disability, Was Not Obtainable With Due Diligence Before the Hearing, and Was Likely to Affect the Outcome of the Case

Lana McMichael, 76 Van Natta 335 (June 12, 2024). Applying ORS 656.295(5), the Board held that claimant's submission of post-hearing surgical reports established a compelling reason to remand the case to the Hearings Division for the admission of additional evidence and further proceedings. The

Board found that the post-hearing surgical reports, which concerned whether a prior SI joint fusion surgery was successful, were not obtainable at the time of the hearing with due diligence, and were reasonably likely to affect the outcome of the case. The Board explained that the carrier's denial was supported by medical opinions that were premised on a conclusion that claimant's prior SI joint fusion had been successful. However, the subsequent surgical reports indicated that the prior fusion had failed. Given the new information concerning the prior surgery, the Board concluded that the post-hearing surgical reports were likely to change the ALJ's evaluation of the medical opinions and the outcome of the case. Thus, the Board found a compelling reason to remand the case and vacated the ALJ's order with instructions to conduct further proceedings giving consideration to the newly submitted surgical reports.

WORKER-REQUESTED MEDICAL EXAMINATION: Claimant Entitled to a WRME - Carrier's Denial Was Based on IME Report Even Though the IME Took Place After the Denial Issued

Daniel M. Brown, 76 Van Natta 324 (2024) (June 6, 2024). Applying ORS 656.325(1)(e) and *Teitelman v. SAIF*, 332 Or App 72 (2024), the Board held that the claimant met the eligibility requirements for a worker-requested medical examination (WRME) because the carrier's denial was "based on" a post-denial independent medical examination (IME) report.

In reaching its conclusion, the Board noted that a claimant is eligible for a WRME under ORS 656.325(1)(e) when, among other requirements, the carrier's compensability denial is "based on" one or more IME reports. The Board explained that in *Teitelman*, the court held that, for purposes of ORS 656.325(1)(e), a denial is "based on" a post-denial IME report when the report is submitted as evidence in support of the carrier's denial. Noting that the carrier had introduced a post-denial IME report as evidence in support of its denial at the hearing regarding the compensability of the claimant's injury claim, the Board concluded that the denial was "based on" the IME report for purposes of ORS 656.325(1)(e). Accordingly, the Board concluded that the claimant was entitled to a WRME.

APPELLATE DECISIONS UPDATE

PENALTIES: Carrier Has Obligation to Modify Acceptance "From Time to Time" in the Absence of a New or Omitted Medical Condition – Carrier's Failure to Revise Notice of Acceptance Was Not Unreasonable Because Correct Interpretation of ORS 656.262(6)(b)(F) Was Not Well Settled

Nava v. SAIF, 333 Or App 196 (June 12, 2024). Analyzing ORS 656.262(6)(b)(F), the court affirmed the Board's order in *Luis F. Nava*, 74 Van Natta 372 (2022), previously noted in 41 NCN 5:3, which concluded that a carrier

was required to modify its Notice of Acceptance (to include a knee meniscus tear, in addition to its previously accepted knee sprain) when it received unrebutted medical or other information that was incompatible with its existing acceptance notice, even if the worker had not filed an omitted condition claim under ORS 656.267(1). Referring to ORS 656.262(6)(d), (7)(a), and ORS 656.267(1), the court acknowledged that portions of the statutory scheme supported the carrier's argument that the legislature intended workers, not carriers, to be responsible for identifying new and omitted medical conditions and, as such, the carrier was not obligated to address such conditions until they were claimed by the worker. However, the court determined that its review of the 1995 and 1997 legislative history concerning the statutes in question confirmed its understanding of the text of ORS 656.262(6)(b)(F) (which provides that a carrier shall modify its acceptance notice "from time to time as medical or other information changes a previously issued notice of acceptance") and overcame the ambiguity created by the coexistence with the other statutes.

Accordingly, consistent with the construction of ORS 656.262(6)(b)(F), the court reasoned that, when the carrier received unrebutted medical evidence clearly establishing the compensability of the worker's meniscus tear, the carrier was required to modify its previous acceptance of the knee sprain to include the meniscus tear as a compensable condition.

Finally, the court found that substantial evidence and reasoning supported the Board's decision that penalties and attorney fees under ORS 656.262(11)(a) for unreasonable claim processing were not warranted. Noting the absence of a judicial opinion construing ORS 656.262(6)(b)(F), as well as the existence of a previous Board decision supporting the carrier's interpretation of its statutory obligations, the court agreed with the Board's determination that the carrier had a legitimate doubt concerning its responsibilities under ORS 656.262(6)(b)(F) and, as such, its conduct was not unreasonable.