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BOARD NEWS

Biennial Review of Schedule of Attorney Fees Under ORS 656.388(4)

The Board is planning to begin its 2024 biennial review of its schedule of attorney fees under ORS 656.388(4). At this time, the Board is seeking written public comments from stakeholders. Those written comments should be directed to Katelyn Crowe, WCB Rules Coordinator by mail at 2601 25th St SE, Ste. 150, Salem, OR 97302, by email at katelyn.crowe@wcb.oregon.gov, or by fax at (503) 373-1684.

All written comments will be posted on the Board's website and compiled for discussion at public Board meetings, where the Members will also consider public testimony. To assist in planning, the Board will schedule three meetings over the next few months. Those meeting dates are: October 8, November 19, and December 17. The Board will accept written and verbal public comment from stakeholders through the November 19 meeting.

The first meeting, set for Tuesday, October 8, 2024, will be at 10 a.m. in Hearing Room A at the Board's Salem, Oregon office. A formal announcement regarding this meeting will be electronically distributed to those individuals, entities, and organizations who have registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>. Electronic notification of the November and December meetings will be electronically distributed in advance of those meetings Bulletin No. 1 (Revised) - Annual Adjustment to Attorney Fee Awards Effective July 1, 2024

2024 Attorney Fee Report Now Online

The Workers' Compensation Board has published its 2024 Attorney Fee Report. The report contains attorney fee data through the end of the 2023 calendar year and can be found on the WCB statistical reports webpage [here](#).

CASE NOTES

EXTENT: Record Did Not Establish That Attending Physician Findings Were More Accurate Than Those of Medical Arbitrator; STANDARDS: Work Disability Determined Using BFC of Medium Based on DOT Strength Category

Jodi L. Yeomans, 76 Van Natta 438 (August 1, 2024). Applying OAR 436-035-0007(5)(b), the Board held that the claimant was entitled to a 14 percent

whole person impairment award based on a medical arbiter's impairment findings. Moreover, applying ORS 656.214(2)(b), OAR 436-035-0012(9)(a), and OAR 436-035-0012(12), the Board determined that the claimant was entitled to a 22 percent work disability award. In reaching that conclusion, the Board explained that the claimant's base functional capacity (BFC) was "medium" based on the Dictionary of Occupational Titles (DOT) strength category for the claimant's at-injury job. In addition, the Board explained that the claimant's residual functional capacity (RFC) was "light" because the attending physician had opined that the claimant was permanently restricted from "occasional reaching to shoulder level on the right side."

APPELLATE PROCEDURE: Carrier's Motion for Stay of Enforcement of Board Order Pending Judicial Review Denied – Carrier Did Not Show Irreparable Injury

Bret V. Barton, 76 Van Natta 457 (August 8, 2024) (En Banc). Applying ORS 183.482(3)(a), the Board denied the carrier's motion to stay enforcement of a Board order that found that the claimant was entitled to a worker requested medical examination (WRME). The Board explained that, even assuming that the carrier's petition for judicial review of that decision presented a colorable claim of error, the carrier had not shown that irreparable injury probably would result if the stay was denied, as required under ORS 183.482(3)(a).

NEW OR OMITTED MEDICAL CONDITION: Amended Denial Upheld – Claimed Conditions Were Encompassed Within Previously Accepted Conditions – ALJ Did Not Abuse Discretion in Allowing Carrier to Amend Denial to Include Encompassed Condition Defense

Collin Stringer, 76 Van Natta 462 (August 12, 2024). Applying OAR 438-005-0035(5), OAR 438-006-0031(2), and OAR 438-006-0036(2), the Board found no abuse of discretion in the ALJ's decisions to allow the carrier to amend its denial to include an "encompassed condition" defense before written closing arguments and to admit the amended denial into the record. Moreover, the Board upheld the carrier's amended denial, concluding that the claimed conditions were not "new" or "omitted" for purposes of ORS 656.267(1). Specifically, the Board concluded that the persuasive medical evidence established that the claimed "status post right ankle total ankle arthroplasty" and "status post right calcaneal osteotomy" were encompassed within the previously accepted arthritis and fracture conditions. In addition, the Board declined to assess a penalty under ORS 656.262(11)(a) for unreasonable claim processing because the carrier was entitled to maintain its denial for the ALJ's determination regarding the persuasiveness of the medical evidence concerning whether the claims were for medical procedures or conditions.

Member Ceja concurred in part and dissented in part. He agreed with the majority's conclusion regarding the ALJ's procedural and evidentiary rulings. However, he disagreed that the record established that the claimed conditions were "encompassed" within the previously accepted arthritis and fracture conditions. Further, Member Ceja would have found that the carrier's denial was unreasonable because it did not seek further clarification from a physician regarding whether the claim was for conditions or medical procedures.

APPELLATE DECISIONS UPDATE

No Board related decisions issued from the appellate courts in August.