Workers' Compensation Board

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News & Case Notes

BOARD NEWS

New Board Members – Melissa Douglas and Katherine Caldwell

The Workers' Compensation Board (WCB) is pleased to announce that Governor Kotek has appointed two new Board Members: Melissa Douglas and Kate Caldwell. Both Members were confirmed by the Senate October 1, 2025.

Melissa attended the University of California Santa Cruz, where she earned her bachelor of arts degree with honors. She later obtained her juris doctor from Willamette University College of Law, graduating cum laude. Melissa's legal career has focused exclusively on representing Oregon employers in their workers' compensation matters. She is a certified mediator and has been an active member in the Oregon State Bar's Workers' Compensation Section. She loves both Oregon and workers' compensation law and feels honored to serve on the Board.

Kate is a lifelong Oregonian who grew up in Gresham and attended law school at Lewis and Clark. She has been involved in the workers' compensation system since 2004, and was a practicing attorney representing Oregon employers from 2009 to 2025. Kate was previously a member of the Workers' Compensation Section's Access to Justice Committee and Executive Committee, and served as section chair in 2019. When she's not working, she enjoys reading, gardening, and spending time with her family.

Melissa started October 6, 2025, and Kate started October 13, 2025.

Board Meeting – October 23, 2025

The Members have scheduled a public meeting for October 23, 2025, at 10 a.m. which will be held in Hearing Room A at the Board's Salem office (2601 25th St. SE, Ste. 150).

The agenda for the Board meeting will be:

- Proposed rule amendments to OAR 438-022 "Rulemaking Procedures"
- Proposed rule amendments to OAR 438-015-0019 "Cost Bill Procedures; Assessed Attorney Fees When the Claimant Prevails in a Cost Bill Dispute"

A formal announcement regarding this 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 438-015-0125 "Bifurcation of Attorney Fee Award (Board Review)" - Public Comment

At its September 11, 2025, public meeting, the Board began its five-year review of OAR 438-015-0125 under ORS 183.405. OAR 438-015-0125 allows parties to bifurcate the determination of an attorney fee from a decision regarding the merits of underlying litigation. The rule prescribes the manner in which such bifurcations are requested.

The rulemaking materials (including the Order of Adoption and Statement of Need and Fiscal Impact) from the rule's 2020 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:

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

Notice of this request for public comment was 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 Autumn Blake, Board Review Coordinator, at 2601 25th St. SE, Ste. 150, Salem, OR 97302, by email at autumn.k.blake@wcb.oregon.gov, or by fax at 503-373-1684. The deadline to submit written comments is November 10, 2025.

Attorney Availability Form Can Help Avoid Schedule Conflicts

If you anticipate you will be unavailable for hearings during a specific time period, please file your request at the following link: https://www.oregon.gov/wcb/hearings/Pages/atty-availability-form.aspx

We do our best to honor these requests, but cannot always accommodate due to statutory requirements under ORS 656.283.

WCB Website Will Not be Updated November 14 Through December 9

Due to sitewide maintenance, there will be no updates to the WCB website from November 14 through December 9. All website content, including forms and requests, will be accessible as well as the WCB Portal and the mediation calendar. However, no new Board, CDA, Own Motion, Oregon OSHA, or third-party orders will be added during that time. In addition, rulemaking comments and materials will not be added.

If you need to check the status of a case on Board review or a CDA, you may call 503-934-0103 and leave a message. Your call will be returned within one to two business days.

If you would like a copy of rulemaking materials, contact Board Review Coordinator Autumn Blake at 503-934-0123 or autumn.k.blake@wcb.oregon.gov.

CASE NOTES

HEARING REQUEST: Hearing Request Was Valid Because, Although Former Attorney Did Not Sign Request as Claimant's Attorney, He Signed it on Behalf of Claimant For Purposes of "283(2)"

GOOD CAUSE: *Sekermestrovich* Distinguishable Because Former Attorney Not Acting Within Scope of Authority as Claimant's Attorney

Andrew Burke, 77 Van Natta 494 (September 23, 2025). The Board affirmed an administrative law judge's (ALJ) order, which found that the claimant established good cause for his untimely filed hearing request and set aside the employer's denial. On review, the employer contended that the Board lacked jurisdiction because the hearing request that was filed by the claimant's former attorney was invalid. Analyzing ORS 656.283(2) and *Havi Group LP v. Fyock*, 204 Or App 558 (2006), the Board found that, although the attorney-client relationship ended before the claimant's former attorney filed the hearing request, it was signed in the interest of, for the benefit of, and on behalf of the claimant.

Finding the request for hearing valid, the Board distinguished *Sekermestrovich v. SAIF*, 280 Or 723, 727 (1977), to conclude that the claimant had good cause for his untimely filed hearing request. Unlike in *Sekermestrovich*, the claimant's former attorney did not represent him at the time of filing and was not acting within the scope of authority as the claimant's attorney. Therefore, the Board concluded that the court's holding in that case did not preclude a finding of good cause.

JURISDICTION: Hearings Division Lacked Jurisdiction to Resolve MCO Dispute

Bill Cleary, 77 Van Natta 482 (September 17, 2025). Analyzing ORS 656.260(7) and OAR 436-010-0008(1)(e), the Board vacated an ALJ's order that determined that WCB had jurisdiction over a medical services dispute and set aside the carrier's alleged de facto denial of the claimant's surgery request for his accepted medical conditions. The Board found that the director had exclusive jurisdiction over managed care organization (MCO)-related disputes. In *Cleary*, the claims administrator did not send preauthorization for the claimant's surgery to the MCO, the claimant had not requested review through the MCO's internal process, and the director had not reviewed the dispute before the claimant filed a hearing request. Because the MCO and director had not yet reviewed the dispute, the Board dismissed the claimant's request for hearing for lack of jurisdiction.

Member Ousey dissented. He expressed concern that the Board's dismissal, in addition to the Medical Resolution Team's dismissal of the claimant's request for administrative review, would leave the claimant without a remedy for the claim administrator's and MCO's failure to process the claimant's surgery request.

ATTORNEY FEES: "383(1)" Attorney Fee Awardable Because Record Established That Claimant's Attorney Was Instrumental in Obtaining Additional Temporary Disability Benefits at a Reconsideration Proceeding – Board Declined to Award Fees Under "268(6)(c)" or "262(11)(a)"

Frank A. Fasciana, 77 Van Natta 579 (September 30, 2025). The Board found that the claimant's attorney was entitled to an attorney fee under ORS 656.383(1), but not under ORS 656.262(11)(a) or ORS 656.268(6)(c).

Citing *Loren L. Boll*, 58 Van Natta 3115, 3119 (2006), *recons*, 59 Van Natta 56 (2007), the Board found that, because the Order on Reconsideration did not award additional compensation, the claimant's attorney was not entitled to 10 percent out-of-compensation fees under ORS 656.286(6)(c). Finding that there was no additional compensation due, the Board found that the carrier did not unreasonably delay or refuse to pay compensation. Therefore, no fee under ORS 656.262(11)(a) was awardable.

The Board also found that, because the claimant's attorney was instrumental in overturning the Notice of Closure and additional temporary disability benefits were paid after the reconsideration order, but before the ALJ's order, an assessed fee under ORS 656.383(1) was awardable. In reaching that conclusion, the Board distinguished *Brandon E. Lamb*, 75 Van Natta 167 (2023),

John C. Cole, 74 Van Natta 692 (2022), and *Robert L. Stanley*, 74 Van Natta 359 (2022), where temporary disability benefits were not due as a result of reconsideration proceedings.

COMBINED CONDITION: Claim Properly Analyzed Under Combined Condition Standard Because Record Established That Claimed Condition Itself Was a Combined Condition – Otherwise Compensable Injury Was Not Major Contributing Cause of Disability or Need for Treatment of Combined Condition

EVIDENCE: ALJ Did Not Abuse Discretion in Admitting Rebuttal Opinion Because Opinion Was Within Purpose for Which Record Was Held Open

Christopher J. Smith, 77 Van Natta 437 (September 8, 2025). The Board concluded that an ALJ did not abuse their discretion in admitting a physician's rebuttal report. In reaching this conclusion, the Board found that the rebuttal report addressed the carrier's combined condition "major contributing cause" defense. Because the record was left open for the carrier to obtain such a report addressing its burden to prove that the otherwise compensable injury was not the major contributing cause of the claimant's disability or need for treatment, the ALJ did not abuse their discretion.

The Board also upheld the carrier's denial of a new or omitted medical condition claim for a combined cervical myelopathy condition. First, the Board found that the claim was properly analyzed as a new or omitted medical condition claim for a combined condition based on persuasive medical opinion evidence. Moreover, the Board found that the preexisting degenerative conditions were the major contributing cause of the claimant's disability or need for treatment of the combined cervical myelopathy condition. Therefore, the Board affirmed the ALJ's order that upheld the carrier's denial.

Member Ceja dissented in part regarding the compensability determination, and would have found that the claim should have been analyzed as a standard new or omitted medical condition claim. He would have concluded that claimant had met his burden to prove that the cervical myelopathy condition existed and that the work event was a material contributing cause of the disability or need for treatment of the condition. Moreover, Member Ceja would have found that the record had not persuasively establish the carrier's combined condition defense under ORS 656.266(2)(a) and, therefore, that the claim was compensable.

CLAIM PRECLUSION: Claim Preclusion Applied Where Record Did Not Establish New Operative Facts in Current "Ceases" Denial Matter

CEASES DENIAL: Record Did Not Establish Change in Condition or Circumstances

PENALTY: Penalty Not Warranted for Unreasonable Denial Where Medical Opinions Established Legitimate Doubt

Luis Orozco, 77 Van Natta 520 (September 25, 2025). The Board reversed that portion of an ALJ's order that upheld the carrier's ceases denial of a combined condition on the basis of claim preclusion. Applying *Yi v. City of Portland*, 258 Or App 526, 530-31 (2013), the Board reasoned that a previously set aside ceases denial was based on the same set of facts as the current ceases denial. The Board, therefore, set aside the employer's denial.

The Board also declined to award a penalty and penalty-related attorney fee. Although the Board did not find that the medical opinions relied on by the carrier established new operative facts on which to base its denial, the opinions provided legitimate doubt as to whether the accepted condition remained the major contributing cause of the claimant's disability and need for treatment.

Member Curey dissented, in part, regarding the claim preclusion issue. She agreed with the ALJ's determination that the issue in the previous litigation was not identical to the current issue and that issue preclusion did not apply. Moreover, she would have found that the carrier was not barred by claim preclusion because claimant was not yet diagnosed with or treated for the additional accepted condition at the time of the previous denial. Additionally, Member Curey would have found that the claimant's "otherwise compensable injury" was no longer the major contributing cause of the disability or need for treatment of the combined condition and would have upheld the denial.

APPELLATE DECISIONS UPDATE

RESPONSIBILITY: Responsible Employer Had Implied-In-Fact Contract with Worksite Client

ATTORNEY FEES: Claimant's Attorney's Efforts Were "Active and Meaningful" Under "307(5)"

Employer Solutions Staffing Group, LLC v. SAIF, 343 Or App 206 (September 4, 2025). Reviewing *Jared R. Zeigler, DCD*, 75 Van Natta 275 (2023), previously noted 42 NCN 5:2, for legal error and substantial evidence, the Court of Appeals affirmed the Board's order that assigned responsibility

to Employer Solutions Staffing Group (ESSG), a national staffing agency, and not a staffing recruiting agent (Atlas) or the worksite client (BRF), in a deceased worker's claim and awarded an attorney fee under ORS 656.307(5).

First, ESSG argued that, because BRF asserted in an Employment Liability Law (ELL) action that it was the decedent's sole employer, it should be judicially estopped from denying responsibility in the present case and that the Board erred in declining to apply judicial estoppel. The court disagreed. Because there was no evidence in the record that a judicial tribunal made a final determination regarding the identity of the decedent's employer, the court agreed with the Board that BRF was not judicially estopped from asserting the position that it did in the workers' compensation proceeding. To the extent that ESSG contended that a settlement necessarily constituted a final determination because it is a benefit obtained through assertion of BRF's position, the court found that ESSG did not make that argument before the Board, and, accordingly, the court declined to address it.

The court also affirmed the Board's finding that ESSG had an implied-in-fact contract with BRF. In doing so, the court looked to the conduct of the parties, including that ESSG had accepted service fees and paid decedent's wages with knowledge that the decedent was working on a project of BRF. Moreover, through ESSG's agreement with Atlas, Atlas's knowledge that the claimant was working for BRF was imputed to ESSG. The court also found that there was no employer-employee relationship between the decedent and BRF because ESSG paid the decedent's wages and decedent submitted his IRS W-4 form to ESSG. Ultimately, the court determined that the Board's conclusion that ESSG was the responsible employer was supported by substantial evidence and reason.

Finally, the court found that the claimant's attorney was entitled to an attorney fee under ORS 656.307(5) for "actively and meaningfully" participating in the responsibility litigation. The director had issued a "307" order under ORS 656.307 designating ESSG's workers' compensation carrier as the paying agent. The claimant's attorney had taken a clear position that ESSG or Atlas was the responsible employer, took the case to hearing, responded to procedural matters and motions, and participated in the hearing. Therefore, the court affirmed the Board's attorney fee determination.

APPELLATE DECISIONS
SUPREME COURT

WORKER REQUESTED MEDICAL EXAMINATION: Carrier's Denial Was Based on a Post-Denial IME Report When That Report Was Submitted as Evidence in Support of the Denial at Hearing

Teitelman v. SAIF, 374 Or 271 (September 25, 2025). Analyzing ORS 656.325(1)(e) and OAR 436-060-0147 regarding a claimant's entitlement to a worker requested medical examination (WRME), the Supreme 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 of Appeals in *Teitelman v. SAIF*, 332 Or App 72, previously noted 43 NCN 4:4, had reversed WCD's and the Board's decisions.

The Supreme Court affirmed the Court of Appeals' decision, reversing WCD's and the Board's decisions, and remanded the case to the Board. Applying statutory interpretation principles to ORS 656.325(1)(e), the court determined that one must look at the grounds for the denial at the time the WRME request was decided, not when the hearing request was filed or when the compensability denial issued. The court explained that the statutory language "is based on" utilizes the present tense and, contrary to the carrier's position, could plausibly be understood to mean that the denial "is based on" an IME report whenever the carrier uses an IME report to defend its continued denial of compensability until the claim is resolved, not just when the carrier mails notice of its decision. Reasoning that the carrier intended to rely on the IME report to defend its continued denial at the upcoming hearing, the court concluded that the claimant was entitled to a WRME, even though the IME was conducted after the initial denial notice.

In reaching this conclusion, the court explained that a carrier's "denial of compensability" is not just the initial written notice, but continued throughout the claim process. Moreover, it noted that the legislative history showed that ORS 656.325(1)(e) was intended to address perceived bias in the IME process by allowing workers to get a "second opinion" when a claim is "in litigation." Under such circumstances, the court found that limiting a worker's right to a WRME based solely on the timing of the insurer's IME request would be inconsistent with the policies of providing "a fair and just administrative system" and interpreting the Workers' Compensation Law "in an impartial and balanced manner."

Two justices dissented. Justice Garrett, joined by Justice DeHoog, reasoned that, in his view, the legislature intended the word "denial" in ORS 656.325(1)(e) to mean the decision to deny the claim, with the corresponding notice to the claimant stating the basis for that decision, rather than the status of that denial over time.