
In the Matter of the Compensation of
ASHLEE AGTUCA, Claimant
WCB Case No. 16-05278
ORDER ON RECONSIDERATION
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

On March 2, 2018, we abated our February 1, 2018, order that affirmed an Administrative Law Judge's (ALJ's) order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for a mental disorder. We took this action to consider claimant's request for reconsideration in light of the decisions in *Minor v. SAIF*, 290 Or App 537 (2018), and *Kuralt v. SAIF*, 290 Or App 479 (2018). Having received the parties' supplemental briefs, we proceed with our reconsideration.

In upholding the denial, the ALJ concluded that the opinion of Dr. Marko, claimant's treating psychiatrist, was insufficient to establish the compensability of her claimed mental disorder. In doing so, the ALJ reasoned that Dr. Marko considered an excluded work-related factor (*i.e.*, claimant's being passed over on multiple occasions for job promotions) in determining that claimant's work was the major contributing cause of her claimed mental disorder.

On review, claimant contended that Dr. Marko's opinion persuasively established the compensability of her mental disorder. We disagreed and adopted the ALJ's opinion. In reaching our conclusion, we were not persuaded by Dr. Marko's opinion that claimant's being bypassed for several promotions was not "generally inherent" in the workplace. In so finding, we did not consider Dr. Marko to have any particular expertise that would enable him to make a more accurate judgment than this forum regarding whether the "not generally inherent" statutory requirement prescribed in ORS 656.802(3)(b) had been satisfied.¹

On reconsideration, claimant again asserts that Dr. Marko's opinion was sufficient to establish the compensability of her mental disorder. In doing so, she argues that *Minor* requires that we provide a rational explanation as to why

¹ ORS 656.802(3)(b) provides that a mental disorder is not a compensable condition unless "the employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation * * * ."

Dr. Marko's opinion is unpersuasive concerning the "legal" determination as to whether claimant's work activities are not "generally inherent" in every working situation.²

In *Minor*, the court reiterated the standard for conducting a "substantial reasoning" appellate review, stating that a Board order must "provide [] a rational examination of how its factual findings lead to the legal conclusions on which the order is based." 290 Or App at 545 (citing *Arms v. SAIF*, 268 Or App 761, 767 (2015)). Ultimately, the *Minor* court concluded that substantial reasoning did not support the Board's decision to discount the claimant's attending psychiatrist's opinion as unpersuasive when the physician had properly accounted for excludable work conditions in his causation analysis. *Id.*

Here, our order adopted and affirmed the ALJ's order with supplementation. A Board order need not set forth its own findings of fact and conclusions if it affirms and adopts an ALJ's order that is itself sufficient for appellate review. *See George v. Richard's Food Ctr.*, 90 Or App 639 (1998). Thus, by adopting and affirming the ALJ's order, we necessarily found the ALJ's findings and reasoning sufficient for appellate review, and the facts and conclusions in that order expressed our opinion.

We acknowledge claimant's argument that multiple pass-overs are not "generally inherent" in every working situation. Yet, as stated above, we have adopted the ALJ's rationale that claimant's employment condition of being passed over for a promotion, even on multiple occasions, was a condition generally inherent in every working situation. The ALJ found support for that conclusion in *Tracey A. Miller*, 57 Van Natta 1219 (2005), where we held that the claimant's disappointment from failing to receive an anticipated promotion was an employment condition common to all employments. In finding that being passed over for *multiple* promotions was also generally inherent, the ALJ reasoned that the frequency of not being chosen over a promotion was necessarily dependent on the amount of times that an employee applies for a promotion.

We supplemented the ALJ's rationale with a citation to *Kelly D. Shepard*, 61 Van Natta 592 (2009), where we had found that the claimant's being bypassed for several promotions constituted working conditions that were generally

² In seeking reconsideration, claimant also initially referred to the *Kuralt* decision in support of her position that her claimed condition is compensable. However, she has subsequently agreed with SAIF's position that the *Kuralt* rationale is not determinative in this case.

inherent in every working situation. Consistent with the rationale expressed and determination reached in those decisions, we continue to consider the effect on a worker who is not chosen for multiple promotional opportunities (even when qualified for the positions) to constitute a condition that is generally inherent in every working situation; *i.e.*, a worker's disappointment at not being selected for a promotional advancement.³

Therefore, based on the reasoning expressed in the ALJ's order, which we have adopted with supplementation, we continue to find that the claimed mental disorder is not compensable. Furthermore, for the reasons expressed above, we consider our decision to have provided a sufficient explanation for the court to adequately conduct its "substantial evidence/reasoning" review.

Accordingly, on reconsideration, as supplemented herein, we republish our February 1, 2018 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on July 17, 2018

³ With her appellant's brief, claimant has provided some statistical data from the Small Business Administration. This information was neither presented nor admitted into the hearing record. We are not authorized to consider additional evidence not admitted at the hearing and not a part of the record. ORS 656.295(5); *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985). However, we may take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be readily questioned." *SAIF v. Calder*, 157 Or App 224, 227 (1998). We have previously taken official notice of hearing requests, agency orders, and medical treatises. See *Alice R. Thompson*, 60 Van Natta 954, 954 n 1 (2008); *Jesse R. Walker*, 45 Van Natta 974, 975 (1993). However, here, none of the submitted statistical data satisfy the criteria for administrative notice. Consequently, under these particular circumstances, we decline to consider such information.