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BOARD NEWS

Biennial Review/Attorney Fees/"388(4)"

The Board has scheduled a public meeting for the Members to discuss responses received regarding the Board's invitation for written comments concerning its biennial review of attorney fee schedules under ORS 656.388(4). Additional written comments and public testimony will also be considered. Any responses received up to one day before the meeting will be posted to the Board's website prior to the meeting.

The Board meeting has been scheduled for June 22, 2023, at the Board's Salem office (2601 25th St. SE), at 10 a.m. In addition to reviewing the submitted comments, the Members will consider testimony and other written comments presented at, or in advance of, the meeting. Those written comments should be directed to Katy Gunville, WCB's Executive Assistant, at 2601 25th St. SE, Ste. 150, Salem, OR 97302, katy.e.gunville@wcb.oregon.gov, or via fax at (503) 373-1684. The public will also be able to participate in the meeting by means of a "phone conference" link.

A formal announcement regarding the Board meeting will be electronically distributed to anyone who has registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>.

Bulletin 1 (Revised) - Annual Adjustment to Attorney Fee Awards Effective July 1, 2023

The maximum attorney fees awarded under ORS 656.262(11)(a), ORS 656.262(14)(a), and ORS 656.308(2)(d), which are tied to the increase (if any) in the state's average weekly wage (SAWW), will remain unchanged. On June 1, 2023, the Board published Bulletin No. 1 (Revised), which sets forth the new maximum attorney fees. The Bulletin can be found on the Board's website at: <https://www.oregon.gov/wcb/Documents/wcbbulletin/bulletin1-2023.pdf>

An attorney fee awarded under ORS 656.262(11)(a) shall not exceed **\$5,813** absent a showing of extraordinary circumstances. OAR 438-015-0110(3).

An attorney fee awarded under ORS 656.308(2)(d) shall not exceed **\$4,193** absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5).

An attorney fee awarded under ORS 656.262(14)(a) shall be **\$444** per hour. OAR 438-015-0033.

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, 2023 through

June 30, 2024, 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, 2023 and June 30, 2024.

Unrepresented Worker Litigation Report Available

In response to an inquiry from the Oregon State Bar's Workers' Compensation Section's Access to Justice Committee, the Board has prepared a report on litigation by unrepresented workers in our forum. The report can be found here: <https://www.oregon.gov/wcb/Documents/statisticalrpts/040723-unrep-worker-rpt.pdf>

CASE NOTES

Attorney Fees: Responsibility Fee Properly Awarded under “.307(5)” Rather than “.308(2)(d)” Due to Issuance of “.307” Order by the Director

Jared R. Zeigler, 75 Van Natta 275 (May 15, 2023). On review, the Board affirmed the ALJ's order in part, and modified in part.

The Board adopted that portion of the ALJ's order addressing the “responsibility” issue. It also determined that a potentially responsible employer was not estopped from asserting a position as to its employment relationship with claimant because a contrary “position” was not “successfully asserted” in an earlier proceeding. See *Caplener v. U.S. National Bank*, 112 Or App 401, 415, 831 P2d 22, *rev allowed*, 314 Or 573 (1992) (judicial estoppel bars a party from “asserting a position that is in conflict with a position that it successfully asserted in an earlier judicial proceeding”); *Larry R. Wahl*, 58 Van Natta 526, 530 (2006).

Regarding the attorney fee issue, the Board analyzed ORS 656.307(5) and ORS 656.308(2)(d). It explained that attorney fees are appropriately awarded under ORS 656.307(5) when the Director has issued an order pursuant to ORS 656.307 (a “307” order). Accordingly, because a “307” order was issued in this particular case, the Board held that claimant's counsel was entitled to a \$32,000 attorney fee award under ORS 656.307(5) in lieu of the ALJ's \$32,000 attorney fee awarded under ORS 656.308(2)(d). Moreover, because the ALJ's attorney fee award was not reduced or disallowed, claimant was awarded a \$1,000 attorney fee pursuant to ORS 656.382(3) for defending that award on Board review.

Board awarded same amount, just under different statute.

Compensability: Physician's Opinion Based On Unreliable and Inconsistent Claimant Statements, Therefore Unpersuasive

Diane Cort-Wagner, 75 Van Natta 308 (May 26, 2023). Applying *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987) and *Miller v. Granite Const. Co.*, 28 Or App 473, 476 (1977), the Board held that a physician's opinion, on which

Board discounted a physician's opinion supporting compensability that relied on the claimant's unreliable and inconsistent statements.

claimant relied, was insufficient to persuasively establish the compensability of claimant's left rib, clavicle, and shoulder conditions.

The Board explained that it found claimant's statements regarding her reported injurious work event to be unreliable and inconsistent with the record. Finding that the physician supporting compensability relied on those inconsistent statements, it discounted the physician's opinion. See *Rocio C. Casasola*, 69 Van Natta 893, 896 (2017) (physician's opinion based on the claimant's unreliable history was unpersuasive). As there were no other medical opinions in the record persuasively supporting the compensability of claimant's claimed conditions, the Board affirmed the ALJ's order that upheld the carrier's denial.

Mental Disorder: PTSD and Major Depression Not Compensable – Physician Opinion Did Not Adequately Weigh Excluded/Nonexcluded Work Factors Identified by Contrary Opinion

Jeremy Player, 75 Van Natta 285 (May 23, 2023). Applying ORS 656.266(1) and ORS 656.802(3)(a), the Board concluded that claimant's occupational disease claim for PTSD and major depressive disorder conditions was not compensable. Citing ORS 656.802(3)(b) and *Liberty Northwest Ins. Co. v. Shothafer*, 169 Or App 556, 565-66 (2000), the Board explained that, in establishing the compensability of a mental disorder claim, both statutorily excluded factors (i.e., employment factors that are generally inherent in every working environment) and nonwork factors must be weighed against nonexcluded work factors. Applying that standard, the Board concluded that the physician's opinion on which claimant relied was not persuasive because, although it identified several statutorily excluded and nonwork-related factors as contributing to claimant's conditions, it did not adequately weigh the contribution of those factors against the contribution from nonexcluded work factors. Further, the Board reasoned that the physician's opinion did not consider or weigh other statutorily excluded and nonwork factors that a contrary physician's opinion identified as contributing to claimant's conditions. Accordingly, the Board affirmed the ALJ's order upholding the denial of claimant's occupational disease claim.

Board found physician's opinion was not persuasive because it did not adequately weigh the contribution of statutorily excluded and nonwork-related factors against the contribution from nonexcluded work factors.

Remand: Claimant Requested Review of ALJ Approval of a DCS, But No Record of Circumstances Surrounding the Settlement

Helio Bedolla-Huerta, 75 Van Natta 244 (May 3, 2023). Applying ORS 656.295(5), the Board determined that the record was improperly, incompletely, or otherwise insufficiently developed where the claimant contested an Administrative Law Judge's (ALJ's) approval of Disputed Claim Settlement (DCS). The Board noted that although claimant had timely requested Board review of the ALJ's approval of the DCS, no record existed on which to determine the circumstances surrounding the execution of the settlement. Under those circumstances, citing *Kimberly Coven*, 66 Van Natta 171(2014) and *Deborah Kolb-Witt*, 62 Van Natta 2107 (2010), the Board determined that the

Board determined that the record was insufficiently developed regarding the propriety of the settlement's approval and remand to the ALJ was warranted.

record was insufficiently developed regarding the propriety of the settlement's approval and remand to the Hearings Division was warranted. In doing so, the Board emphasized that it was not vacating the DCS, but rather allowing the ALJ on remand to develop a record regarding the validity of the DCS.

Temporary Disability: Additional TPD Based on Authorization Related to Conditions Related to Series of Injuries Later Accepted as Occupational Disease; TPD Rate Not Zero - Claimant Overcame Presumption that Wages Were Same or Higher Than At Injury

Attending physician's authorization was based on the same conditions that the carrier would later accept as an occupational disease.

Randy G. Simi, 75 Van Natta 262 (May 11, 2023). Applying ORS 656.262(4), the Board held that the claimant was entitled to additional temporary disability benefits based on an attending physician's authorization that was related to the claimant's occupational disease. In response to the carrier's contention that the occupational disease did not exist at the time of the attending physician's authorization, the Board stated that the physician's authorization was based on the same conditions that the carrier would later accept as the claimant's compensable occupational disease. In addition, the Board noted that the work-related injuries comprising the compensable occupational disease had already occurred at the time of the physician's authorization. Under such circumstances, the Board concluded that the physician's authorization related in part to the claimant's occupational disease.

Moreover, applying OAR 436-060-0030(3), the Board found that the claimant overcame the assumption that his wages for a particular time period were the same or higher than his wages at the time of injury. Thus, the Board concluded that the claimant's temporary partial disability (TPD) rate for that period was not zero.

Member Curey dissented. Citing *Simi v. LTI Inc.*, 300 Or App 258 (2019), and *Randy G. Simi*, 73 Van Natta 526 (2021), which had addressed the compensability of the claimant's occupational disease claim, Member Curey stated that the claimant's occupational disease had not yet occurred at the time of the physician's authorization. Member Curey concluded that because the occupational disease had not yet occurred, the physician's work restrictions could not have authorized the claimant's inability to work because of disability caused by the occupational disease.

Turning to the TPD rate issue, Member Curey stated that the claimant had not met his burden to overcome the assumption that his wages for the disputed time period were the same or higher than his wages at the time of injury. Specifically, Member Curey noted that the record did not establish which employer, if any, the claimant worked for during the time period or the amount of wages if any, the claimant earned during that period. Under such circumstances, Member Curey concluded that the claimant's TPD rate for that time period should be zero.

APPELLATE DECISIONS UPDATE

Attorney Fee: “386(1)” – Includes Attorney’s Services on Reconsideration, Appeal, & Remand of Board’s Prior Attorney Fee Award

Peabody v. SAIF, 326 Or App 132 (May 24, 2023). Analyzing ORS 656.386(1), the Court of Appeals reversed the Board’s order in *Karista D. Peabody*, 73 Van Natta 244, *on recon*, 73 Van Natta 322 (2021), previously noted 40 NCN 4:1, which had held that claimant’s counsel was not entitled to a carrier-paid attorney fee for services expended on reconsideration, appeal, and remand of the Board’s previous attorney fee award. In its initial remand order, the Board had increased its previous attorney fee award for claimant’s counsel’s services at the hearing level and on Board review in prevailing over a carrier’s claim denial. However, on reconsideration, the Board rejected claimant’s counsel’s request for attorney fees for services expended on reconsideration, appeal, and on remand regarding claimant’s successful challenge to the Board’s previous attorney fee award. Reasoning that claimant had finally prevailed over the carrier’s denial on Board review (because the carrier had not appealed its compensability decision), the Board concluded that ORS 656.386(1) did not extend to a claimant’s counsel’s services in litigating the Board’s prior attorney fee award when the only issue on appeal was the proper amount of the fee award.

On appeal, the court agreed with claimant’s contention that the Board’s reasoning was contrary to the Supreme Court’s decisions in *Shearer’s Foods v. Hoffnagle*, 363 Or 147, 156 (2018), and *TriMet v. Aizawa*, 362 Or 1 (2017). Summarizing *Aizawa*, the court reiterated that the general rule is that a party entitled to recover attorney fees incurred in litigating the merits of a fee-generating claim may also receive attorney fees incurred in determining the amount of the resulting fee award, unless the statutory provision authorizing fees demonstrates that “the legislature intended to depart from that accepted practice.”

Applying the *Aizawa/Hoffnagle* principle to the case at hand, the court agreed with claimant’s assertion that nothing in ORS 656.386(1) suggests that the legislature intended to displace the aforementioned general rule. Accordingly, the court concluded that when the Board is authorized to award attorney fees under ORS 656.386(1) to a claimant who finally prevails in cases involving denied claims, the Board must also award reasonable fees incurred in determining the amount of fees to which the claimant is entitled for prevailing over the denied claim.

In reaching its conclusion, the court acknowledged that the parameters of the rule allowing for an award of attorney fees incurred in determining the amount of an attorney fee award are not well-defined. Nevertheless, the court considered the clearest articulation of the rule to have been expressed in *Aizawa*’s formulation, which provided that “[o]rdinarily, a party entitled to recover

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attorney fees incurred in litigating the merits of a fee-generating claim also may receive attorney fees incurred in determining the amount of the resulting fee award.” *Aizawa*, 362 Or at 3.

Consequently, in light of *Aizawa*’s formulation, the court determined that the rule broadly contemplates that a reasonable fee award will include any fees reasonably incurred in the process of setting the amount of the attorney fee award. Therefore, the court concluded that the Board was authorized to award attorney fees that included amounts reasonably incurred after the Board’s compensability determination, including amounts that were reasonably incurred litigating before the court.