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BOARD NEWS

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

In October 2024, the Board began its biennial review of its attorney fee schedules under ORS 656.388(4). In advance of its October 8, 2024, public meeting, the Board sought written public comment from stakeholders. At the October 8 meeting, the Members also provided an opportunity for public testimony.

At this time, the Board continues to seek written public comment 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 a public Board meeting, where the Members will also consider public testimony

The next public meeting is scheduled for Tuesday, November 19, 2024, at 10 a.m. in Hearing Room A at the Board's Salem, Oregon office. The Board will accept written public comment and public testimony until the November 19 meeting. 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>.

CASE NOTES

ATTORNEY FEE: Penalty-Related Attorney Fee Awardable Under ORS 656.262(11)(a) for the Claimant's Attorney's Services Defending a Penalty Award on Reconsideration at the Hearing Level.

Trever Cooley, 76 Van Natta 565 (October 2, 2024). Applying *SAIF v. Traner*, 273 Or App 310 (2015), *Samuel Goodwin II*, 72 Van Natta 508 (2020), and *Stanley T. Castle*, 67 Van Natta 2055 (2015), the Board held that the claimant's counsel was entitled to an assessed attorney fee award under ORS 656.262(11)(a) for successfully defending a penalty issue raised by the carrier on reconsideration at the hearing level.

Member Ceja concurred to note that he would have included ORS 656.382(3) as an additional basis for awarding an assessed attorney fee for the

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claimant's successful defense of the penalty issue raised in the carrier's request for reconsideration at the hearing level. In doing so, he relied on a case in which the Board awarded an ORS 656.382(3) attorney fee for the claimant's successful defense of a penalty issue raised by the carrier in a request for reconsideration on Board review. See *Octavio Negrete*, 69 Van Natta 317, 320 (2017).

COMBINED CONDITION: On Remand, Record Established Existence of Combined Condition But the Carrier Did Not Meet its Burden to Establish That the "Otherwise Compensable Injury" Was Not the Major Contributing Cause of the Disability or Need For Treatment; **MEDICAL SERVICES:** Disputed Surgery Was Solely Directed to Preexisting Condition That Was Not Pathologically Worsened by Work Injury

Terry D. Gibson, 76 Van Natta 569 (October 3, 2024). Applying ORS 656.005(7)(a), ORS 656.005(24)(a), and ORS 656.266(2)(a), the Board held that, although the record established the existence of a combined condition, the carrier did not meet its burden to prove that the otherwise compensable injury was not the major contributing cause of the need for treatment or disability for the combined condition. Specifically, the Board found that the claimant's previously accepted strain/sprain combined with a statutory preexisting arthritic condition; *i.e.*, the claimed left knee tricompartmental osteoarthritis. Nevertheless, citing *Braden v. SAIF*, 187 Or App 494 (2003); *Jose H. Pimentel-Hurtado*, 75 Van Natta 603, 611 (2023); *Egbert E. Smoyer*, 71 Van Natta 821, 824 n 4 (2019), the Board concluded that the record established that the otherwise compensable injury was the major contributing cause of the claimant's disability and need for treatment for the combined condition at the outset and, therefore, that the carrier had not met its burden to prove that the otherwise compensable injury was never the major contributing cause.

Turning to the medical services claim, the Board applied ORS 656.225, and held that the medical services claim for a total knee replacement was not compensable where the treatment was solely directed to the claimant's preexisting left knee tricompartmental osteoarthritis condition and that condition had not been pathologically worsened by the work injury.

Member Ogawa dissented in part. She agreed with the majority opinion that the medical services claim for a total knee replacement was not compensable because it was solely directed to the claimant's preexisting arthritis condition. In addition, she agreed that the claimant had a combined condition consisting of a left knee strain and the preexisting osteoarthritis. However, Member Ogawa disagreed with the majority decision to evaluate the major contributing cause of the combined condition because the parties had not challenged that evaluation from the Board's prior order and the court's opinion did not direct the Board to undertake such an evaluation. In any event, Member Ogawa also disagreed with the majority opinion's conclusion that the carrier had

not met its burden to prove that the otherwise compensable injury was not the major contributing cause of the need for treatment for the combined condition. Instead, she concluded that *Braden v. SAIF*, 187 Or App 494 (2003), did not apply to the present circumstances, which involved a new or omitted medical condition claim, rather than an initial injury claim. In doing so, she explained that the carrier did not have a burden to prove under ORS 656.266(2)(a) that the otherwise compensable injury never was the major contributing cause because such a determination was not limited to the initial claim stage.

**GOOD CAUSE: Record Established Good Cause For
Untimely Filed Hearing Request Under ORS
656.319(1)(b); OCCUPATIONAL DISEASE:
Employment Conditions Were Major Contributing
Cause of Conditions Based on Examining Physician's
Persuasive Opinion**

Sandra Ferrusca-Corona, 76 Van Natta 624 (October 15, 2024). Applying ORS 656.319(1)(b) and *Goodwin v. NBC Universal Media – NBC Universal*, 298 Or App 475 (2019), the Board held that the record demonstrated good cause for the claimant's untimely filed hearing request. In so holding, the Board concluded that, viewing the record in the light most favorable to the claimant, her failure to file a timely hearing request was the result of a mistake, inadvertence, or excusable neglect due to her confusion regarding the denial and the hearing request process. Further, the Board determined that the mistake, inadvertence, or excusable neglect constituted good cause for the untimely filed hearing request.

Turning to compensability, The Board applied ORS 656.266(1) and ORS 656.802(2)(a) and concluded that the record established the compensability of the claimant's occupational disease claim. In doing so, the Board found the medical opinion of the physician supporting compensability to be based on a sufficiently accurate history and persuasive.

Member Curey dissented because she disagreed with the majority's conclusion that the record established good cause for the claimant's untimely filed hearing request. Specifically, she would have concluded that although the record indicated that the claimant had some confusion about the workers' compensation process as a whole, it did not demonstrate that she did not understand that she had 60 days to appeal the denial or that she did not know how to do so. Under such circumstances, Member Curey would have concluded that the record did not establish a reasonable excuse for the claimant's untimely hearing request due to mistake, inadvertence, or excusable neglect.

APPELLATE DECISIONS

CLAIM PROCESSING: Denial Procedurally Valid – Lack of Simultaneous Mailing to Attorney and Absence of IME Language Did Not Invalidate Denial – Matters For WCD Civil Penalties.

Gomez v. Costco Wholesale Corp., 335 Or App 809 (October 30, 2024). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court affirmed the Board's order in *Alma Gomez*, 73 Van Natta 617 (2021), previously noted 40 NCN 8:3, that upheld a carrier's denial of the claimant's new or omitted medical condition claim for a bilateral wrist condition. In reaching its conclusion, the Board rejected the claimant's contentions that the carrier's denial was procedurally invalid because it had not been simultaneously mailed to her attorney and lacked language concerning whether it was based on an independent medical examination.

The court agreed with the Board's reasoning that nothing in the governing statutes or administrative rules (ORS 656.262(6), ORS 656.331, ORS 656.325(5)(b), OAR 436-060-0140) indicates that compliance with those statutes and rules is required for a denial to be effective. Consequently, the court concluded that the Board had not erred in determining that the remedy for the violations identified by the claimant would be the possible assessment of a civil penalty under OAR 436-060-0015(2) and OAR 436-060-0200(2) by the Workers' Compensation Division.

EXENT: Impairment Findings – Each Separate Loss of Use or Function Must Be Due in Material Part to the Compensable Injury

Artunyan v. SAIF, 335 Or App 407 (October 9, 2024). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court affirmed a Board order that did not award permanent impairment for the claimant's range of motion (ROM) loss in her shoulder because a medical arbiter had determined that the ROM loss was entirely due to a prior shoulder injury, rather than to the compensable injury. Noting that a Notice of Closure awarded permanent impairment for a shoulder surgery, the claimant contended that, because her total shoulder impairment was caused in material part by her compensable injury, she was entitled to the full measure of her impairment, including the lost ROM in her shoulder.

The court disagreed with the claimant's contention. Citing *Robinette v. SAIF*, 369 Or 767 (2022), and *Gramada v. SAIF*, 326 Or App 276 (2023), the court reiterated that each loss of use or function to a worker's body part is to be considered separately. It further explained that a loss of use or function is "due to the compensable injury" when the accepted condition is a material cause of the loss.

Turning to the case at hand, the court concluded that substantial evidence supported the Board's finding that the claimant's ROM loss was not caused in material part by her compensable injury. Consequently, the court held that the Board had not erred in finding that no impairment award for the ROM loss was warranted.

SUBJECT WORKER: Right to Control / Nature of the Work Tests – Separate Analysis of Each Factor Not Mandated – Independent Contractor Factors Considered; **CREDIBILITY:** Express Credibility Assessment Not Required

Sedgwick CMS v. Barreras, 335 Or App 351 (October 2, 2024). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court affirmed a Board order that found that the claimant was a “worker” under ORS 656.005(30) when he was injured in a motor vehicle accident while transporting horses for his mother's business. In doing so, the court acknowledged that the Board order had not separately analyzed each factor of the right to control and nature of the work tests to determine whether the claimant was a worker. However, the court concluded that the order demonstrated that the Board understood the applicable statute and applied the proper tests.

The court further recognized that the contract between the claimant and his mother's business could be viewed to support the carrier's position that the business lacked a “right to fire” the claimant. Nonetheless, noting that the Board order also considered other evidence in making its finding that the employer had a right to fire the claimant, the court determined that the record viewed as a whole permitted a reasonable person to find that the employer had the right to fire the claimant and, as such, substantial evidence supported that finding. Accordingly, the court concluded that substantial evidence and reason supported the Board's finding that the claimant was subject to the employer's direction and control and, consequently, was a “worker” under ORS 656.005(30).

The court also disagreed with the carrier's assertions that the Board had inaccurately applied the independent contractor factors under ORS 670.600(2) and that its findings were not supported by substantial evidence. Referring to ORS 670.600(2)(b), the court reiterated that a person is considered to be “customarily engaged in an independently established business” if any three of the requirements of ORS 670.600(3) are met. Noting that the Board order found that four of the requirements weighed strongly against a finding that the claimant had an independent business and one requirement was mixed, the court concluded that the facts found by the Board supported its determination that the claimant did not have an independent business. Consequently, the court held that the Board had not erred in finding the claimant to be a subject worker, rather than an independent contractor.

Finally, the court rejected the carrier's argument that the Board had unreasonably failed to make a necessary credibility assessment of competing testimony. Citing *Bird v. Employment Division*, 90 Or App 404, 406 (1988), the

court reiterated that express credibility determinations are not required “when a claimant’s testimony is contradicted by other evidence on which the referee based the findings.” The court explained that under such circumstances, the inference was clear that the claimant’s testimony was not believed and no explanation was necessary. *Id.*

Turning to the case at hand, the court determined that the Board’s findings demonstrated that it credited the claimant’s testimony over his mother’s. Concluding that the record was sufficient to support the Board’s findings, the court determined that express credibility determinations were not necessary.

SUBSTANTIAL EVIDENCE AND REASON: Board’s Compensability Decision Supported By Substantial Evidence and Reasoning

Cort-Wagner v. SAIF, 335 Or App 455 (October 9, 2024). In a *per curiam* opinion, the court affirmed the Board’s order in *Diane Cort-Wagner*, 75 Van Natta 308 (2023), that upheld the carrier’s denial of the claimant’s injury claim for rib and clavicle conditions. Citing ORS 183.482(8)(c), the court concluded that substantial evidence and reason supported the Board’s determination that the claimant had not met her burden of proving that her alleged work injury was a material contributing cause of her disability or need for treatment.

SUBSTANTIAL EVIDENCE AND REASON: Board Not Required to Credit Surgeon’s Opinion – Substantial Evidence and Reasoning Supported the Board’s Conclusion That the Surgeon’s Opinion Was Unpersuasive

Wilson v. St. Helens School District 29J, 335 Or App 695 (October 30, 2024). The court held that the Board’s order in *Krista L. Wilson*, 73 Van Natta 872 (2021), which upheld the carrier’s denial of the claimant’s new or omitted medical condition claim for a triangular fibrocartilage complex (TFCC) tear, was supported by substantial evidence and reason. Noting the Board’s reasoning that the surgeon had not rebutted a detailed contrary opinion from an examining physician, the court concluded that although the Board could have viewed the evidence in more than one way, its findings and conclusions were supported by substantial evidence and reason. Further, the court rejected the claimant’s contention that the Board was required to credit the opinion of the claimant’s surgeon.