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BOARD NEWS

Five-Year Review: OAR 438-015-0115 "Fees for Attorneys Representing Insurers and Self-Insured Employers" – Public Comment

At its February 27, 2025, public meeting, the Board began its five-year review of OAR 438-015-0115 under ORS 183.405. OAR 438-015-0115 describes the requirements for a client-paid fee. 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 Board Members in their review of this rule, they are seeking written comments from the public that address the following questions:

1. Did the rule achieve its intended effect?
2. Was the anticipated fiscal impact of the rule underestimated or overestimated?
3. Have any subsequent changes in the law required that the rule be repealed or amended?
4. Is there a continued need for the rule?
5. 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 April 15, 2025.

ALJ Anonymous Survey

Consistent with ORS 656.724(3)(b), attorneys who regularly participate in workers' compensation cases were sent a link by email on February 28, 2025, to participate in the annual administrative law judge (ALJ) anonymous survey. The survey plays an important role in our evaluation of the performance of the Workers' Compensation Board's ALJs, and your feedback is appreciated. Please look for your invitation to participate in this valuable survey tool and take a few minutes to complete the survey, which can be done from your computer, smartphone, or tablet.

Board Member Jenny Ogawa to Retire July 1, 2025

After a fulfilling and dedicated career spanning 40 years within the workers' compensation system, including more than 25 years of state service, Board Member Jenny Ogawa has announced her retirement, effective July 1, 2025.

Member Ogawa has been a Board Member since October 2022. She served as acting Board Chair from July 2023 until October 2023. Before her appointment to the Board, she was an ALJ for 17 years.

Member Ogawa received her juris doctor degree from Lewis and Clark Law School. Following law school, she clerked for SAIF Corporation, worked as a WCB staff attorney, was the legal issues coordinator at the Workers' Compensation Division, and represented insurers and employers at the hearing and appellate levels.

Member Ogawa served as a member of the Executive Committee of the Oregon State Bar (OSB) Workers' Compensation Section from 2014 to 2022. She was also on the OSB Legal Publications Department's editorial review board for the Workers' Compensation Bar books. In 2023, she received the section's Professionalism and Service Award.

Member Ogawa said, "This decision comes with a mix of emotions as I prepare to embark on a new chapter of my life. I look forward to travelling, improving my pickleball, playing leisurely rounds of golf, kayaking, enjoying the outdoors, and reading anything but case law or medical reports.

"I would like to extend my gratitude to the entire workers' compensation community. To those who have appeared before me when I was an ALJ, your professionalism and courtesies were greatly appreciated. To my colleagues and everyone I had the privilege to work with, your support made my journey truly memorable.

"Thank you all for being part of this long chapter in my life story. New adventures await. I wish you all continued success and enjoyment."

CASE NOTES

SURVIVOR BENEFITS: On Remand – Claimant Was Not a Beneficiary Under ORS 656.005(2) Because He and the Decedent Were Living in a State of Abandonment for More than One Year at Time of Fatal Injury

Maribeth T. Corrigan, DCD, 77 Van Natta 50 (February 5, 2025). On remand from the Court of Appeals, the Board concluded that the claimant, the spouse of the deceased worker, was not a beneficiary under the 2019 version of ORS 656.005(2)(b)(A) because he was "living in a state of abandonment for more than one year" before the decedent's fatal injury.

The Board explained that, in determining whether the claimant and the decedent were living in a state of abandonment for more than one year, the court had directed it to consider whether the parties had, through their conduct, demonstrated an intent to end marital obligations for more than one year before the decedent's fatal injury. In applying that standard, the Board noted that the decedent had filed for separation 15 months before the fatal injury, had not received financial support from the claimant, and had moved out of the marital home. Under such circumstances, the Board found that the claimant was living in a state of abandonment for more than one year and was not a beneficiary under ORS 656.005(2)(b)(A).

Because the Board found that the claimant was not a statutory beneficiary, it declined to award a penalty and a penalty-related attorney fee.

EXTENT OF PERMANENT IMPAIRMENT: On Remand – Claimant Was Entitled to the Full Measure of Impairment for Impairment Findings that Were 10 Percent Attributable to the Accepted Conditions or Sequelae

Eugene Walters, 77 Van Natta 102 (February 24, 2025); Steven G. Hall, 77 Van Natta 114 (February 24, 2025). On remand from the Court of Appeals, the Board modified those portions of its previous orders that affirmed Orders on Reconsideration that apportioned permanent partial disability (PPD) awards between accepted conditions and denied, noncompensable conditions. In both cases, the physicians' opinions attributed 10 percent of the claimants' impairment findings to the accepted conditions and 90 percent to denied conditions.

On remand, citing ORS 656.214(1)(a) and *Johnson v. SAIF*, 369 Or 579 (2022), the Board reiterated that if a worker's impairment is due in material part to the compensable injury, the worker is entitled to the full measure of the total impairment, without apportionment, including that portion attributed to noncompensable conditions. Applying that legal principle under the particular circumstances of these cases, the Board concluded that the claimants' impairment findings were caused in material part by the compensable conditions and, therefore, that the claimants were entitled to the full measure of their total impairment without apportionment.

In *Walters*, Member Ogawa dissented. She disagreed with the majority opinion's conclusion that claimant's impairment was due in material part to the accepted condition when only 10 percent of it was attributable to that condition. Reasoning that the medical opinion regarding the impairment findings indicated that the impairment attributable to the accepted condition was "minimal," the dissent concluded that it did not establish that the impairment was due in material part to the compensable injury. Consequently, the dissenting opinion would not have awarded the full measure of impairment in this particular case.

In *Hall*, Member Curey dissented, reasoning that 10 percent did not constitute a "material contributing cause." In addition, the dissent encouraged the

court to reconsider its decision not to recognize an exception that would allow for the apportionment of impairment when a portion of the impairment was attributable to a denied condition. Alternatively, the dissent recommended that the legislature create such an exception.

APPELLATE DECISIONS COURT OF APPEALS

OCCUPATIONAL DISEASE: Board Order Supported by Substantial Evidence and Reason

Fisher v. SAIF, 338 Or App 155 (February 20, 2025). In a nonprecedential memorandum opinion under ORAP 10.30, the court affirmed the Board's order that upheld a denial of the claimant's occupational disease claim for bilateral sensorineural hearing loss. Reviewing the Board's order for substantial evidence and reason, the court found that the Board's order satisfied those standards. ORS 183.482(8)(c); *Dorn v. Teacher Standards and Practices Comm.*, 316 Or App 241, 243 (2021).

The court first addressed the claimant's contention that the Board erred in declining to analyze the claim as a combined condition under ORS 656.802(2)(b). In doing so, the court found that substantial evidence supported the Board's finding that the claimant had conceded that the claim was properly analyzed under ORS 656.802(2)(a), rather than as a combined condition under ORS 656.802(2)(b) .

Additionally, the court held that substantial evidence supported the Board's determination that the examining physician's opinion did not persuasively establish that employment conditions were the major contributing cause of the claimant's hearing loss condition. The court cited the examining physician's statement that 60 percent of claimant's hearing loss was attributable to nonwork-related causes.