2024 Legal Update

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CASE UPDATE

*** Indicates an appeal

Jurisdiction:

Salvador A. Mendoza, 75 Van Natta 515 (September 22, 2023). Applying *Price v. SAIF*, 296 Or 311 (1984), *Lindamood v. SAIF*, 78 Or App 15 (1986), and *Christopher R. Norris*, 54 Van Natta 2013 (2002), the Board dismissed claimant's request for review of an Administrative Law Judge's (ALJ's) order that had deferred the matter pending a medical arbiter examination. The Board explained that the ALJ's order was not a final order because it neither finally disposed of, nor allowed, the claim. The Board stated that the ALJ's order, which had directed the parties to contact the Director to schedule a medical arbiter examination and to contact the Hearings Division after the completion of that examination, was, instead, interim in nature. Accordingly, the Board found that jurisdiction continued to rest with the Hearings Division and remanded to the ALJ.

Hearing Procedure/"Good Cause" for Untimely Filing:

Michael T. Jones, 75 Van Natta 452 (August 15, 2023). 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 established good cause for claimant's untimely filed hearing request. Viewed in the light most favorable to claimant, the Board stated that the late filing was a result of a mistake or inadvertence due to claimant's lack of sophistication and confusion regarding the claim requirements and procedures. Turning to the compensability issue, the Board found that the record established that the work event was a material contributing cause of claimant's disability or need for treatment. The Board stated that a treating chiropractor's well-explained opinion was more persuasive than a reviewing physician's opinion that was based on an inaccurate history. Accordingly, the Board reinstated claimant's hearing request and set aside the carrier's denial. This order is final.

Remand to the Hearings Division:

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 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 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.

Gilbert E. Vilca-Inga, 75 Van Natta 108 (February 28, 2023). Applying OAR 438-006-0095(5), the Board denied claimant's request for remand based on alleged bias. Contending that the ALJ was biased because he found that a physician's opinion was unpersuasive for reasons not specifically articulated in the carrier's closing argument, claimant requested remand for a new hearing with a new ALJ. The Board stated that if claimant believed that the ALJ was biased, it was incumbent upon him to have objected and requested a change of ALJ at the hearing level, which he did not do. Further, citing ORS 656.286(6), *Hugh J. O'Donnell*, 51 Van Natta 1394, 1394 n 1 (1999), and *Edison L.Netherton*, 50 Van Natta 771, 772 (1998), the Board noted that the ALJ was free to evaluate the persuasiveness of the physician's opinion irrespective of the specific reasons articulated by the carrier. Accordingly, the Board found that remand was not appropriate. This order is final.

Administrative Notice:

Kiera L. Ervin, 75 Van Natta 530 (October 10, 2023). Applying ORS 656.295(5), the Board held that an Oregon Medical Board (OMB) decision regarding claimant's treating physician, which was not a part of the hearing record, was not subject to administrative notice and the self-insured employer's references to that decision in its appellant's brief were stricken and not considered. Citing *Groshong v. Montgomery*, 73 Or App 403 (1985), the Board explained that it was limited to the record developed at the hearing with the exception that it "may take administrative notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See SAIF v. Calder*, 157 Or App 224, 227 (1989).

Turning to the case at hand, the Board declined to take administrative notice of the OMB decision because it was not the type of document appropriate for administrative notice. The Board acknowledged that, in previous cases, it had taken administrative notice of Board and Workers' Compensation Division (WCD) orders involving the same claimant. *See, e.g., Timothy C. Gould*, 68 Van Natta 741, 743 n 3 (2016). In declining to take administrative notice of the OMB decision, the Board explained that the decision did not involve an agency order concerning the same claimant. Rather, the Board concluded that it was a medical board decision regarding a physician. Moreover, the Board found that, even if it were to take administrative notice of the OMB decision, it would not have affected the outcome of the case.

Accordingly, the Board granted claimant's motion to strike references to the OMB decision in the employer's appellant's brief. The Board adopted and affirmed the remainder of the ALJ's order. This order is final.

Subject Worker:

Mendoza v. Ron Dickson Corporation, 327 Or App 692 (August 30, 2023). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court held that an Administrative Law Judge's (ALJ's) order (issued on behalf of the Workers' Compensation Division/Director under ORS 656.740(5)(a)), which found that an alleged worker was not a "subject worker" pursuant to ORS 656.005(30) (2019) for a construction company and, therefore, the construction company was not a "subject employer," because substantial evidence and reason supported the ALJ's determination that the alleged employer (the construction company) had not provided remuneration for the worker's services. Reasoning that the officer of the construction company had been acting as the agent for the homeowner (who funded the project), the ALJ had determined that the construction company had not provided "remuneration" to claimant and, as such, the worker could not be considered a "subject worker" because the construction company was not his employer.

Judge Hellman dissented. Hellman contended that the ALJ's determination was not supported by substantial evidence and reason because the record supported a conclusion that the alleged employer (the construction company) was the contractor for the homeowner and had provided remuneration to the worker through the business account of the construction company, which had been funded by the homeowner for the remodeling project. In reaching this conclusion, Judge Hellman reasoned that the contractor's belief that he was not acting in his role as an officer of the construction company during the project was irrelevant in the legal analysis of whether the worker had received remuneration from the construction company.

Course and Scope:

Vilca-Inga v. SAIF, 327 Or App 430 (August 9, 2023). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court affirmed a Board order that held that claimant's abdominal injury claim was not compensable because it did not arise out of his remote work as a sheepherder. In reaching its conclusion, the Board had found that the record lacked any medical evidence that claimant's abdominal condition (acute appendicitis with a perforation) was caused by his work activities or work environment.

On appeal, claimant contended that his geographically remote work environment "exposed him to an increased risk or extent of harm due to delay caused in obtaining medical care resulting in his appendix rupturing and developing complications of that rupture." The court concluded that the Board had not erred in reaching its determination.

Citing *Phil A. Livesley Co. v. Russ*, 236 Or 25, 28 (1983), the court stated that a claimant has the burden of proving that the injury arose out of and in the course of employment. Relying on *Schleiss v. SAIF*, 354 Or 637, 643 (2013), the court reiterated that the phrase "arising out of employment" means that a

workplace injury must be a material contributing cause of disability or need for medical treatment in order to be compensable.

Referring to *Bruntz-Ferguson v. Liberty Mutual Ins*., 310 Or App 618, 626 (2021), the court repeated that to meet the threshold for the "arising out of" prong, there must be a causal connection between the injury and the employment. Citing *Clark v. U.S. Plywood*, 288 Or 255, 260 (1980), the court noted that the Supreme Court has explained that an appendicitis attack that occurs while an employee is working does not arise out of employment because "[t]here was no causal connection between the work and the attack."

Under such circumstances, the court clarified that claimant bore the burden of connecting his abdominal condition to his remote work environment. *See Redman Industries, Inc. v. Lang*, 326 Or 32, 36 (1997). After conducting its review, the court determined that the record did not support claimant's contention that his geographically remote work environment increased the likelihood of his abdominal condition by delaying his access to treatment. To the contrary, the court emphasized that a physician had testified that he could not determine when claimant's appendicitis began, when his appendicitis ruptured, or whether his appendix would have ruptured if he had sought medical treatment sooner.

Consequently, the court concluded that the Board's finding of a lack of a causal link between claimant's abdominal condition and his remote work environment was supported by substantial evidence and that the Board's determination that the claimed injury did not arise from claimant's employment was supported by substantial reason. This case is currently before the Board on remand.

******Shawn Wiley***, 75 Van Natta 521 (September 26, 2023). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that claimant's injury, did not occur "in the course of" his employment because the parking lot exception to the going and coming rule did not apply. Citing *Cope v. West Am. Ins. Co*., 309 Or 232, 239-40 (1990), *Adamson v. The Dalles Cherry Growers*, 54 Or App 52, 58-59 (1981), and *John D. Thompson*, 58 Van Natta 476, 478-81 (2006), the Board reasoned that the parking lot exception did not apply because the injury occurred on a public roadway rather than in an employer-controlled area.

Further, because the Board determined that the "in the course of" prong was not satisfied, it was unnecessary for the Board to determine whether the injury "arose out of" claimant's employment. *See Krushwitz v. McDonald's Rests*., 323 Or 520, 531 (1996). Accordingly, the Board found that claimant's injury claim was not compensable.

<u>Unexplained Injury</u>

******Mengesha Kelkay***, 75 Van Natta 460 (August 16, 2023). Applying ORS 656.005(7)(a) and ORS 656.266(1), the Board held that claimant's injury occurred "in the course of" and "arose out of" his employment, because it resulted from an unexplained syncope. *See Sheldon v. U.S. Bank*, 364 Or 831, 844 (2019*); Guill v. M. Squared Transp., Inc.*, 277 Or App 318, 323-24 (2016). In reaching this conclusion, the Board determined that the opinions of a primary care physician and an examining internal medicine

physician, who identified possible causes of claimant's syncope/near syncope but were unable to identify the actual cause, did not establish facially nonspeculative idiopathic explanations for claimant's syncope. *See Sheldon*, 364 Or at 847; *Guill*, 277 Or App at 323-24; *Maxim Glodyanu*, 71 Van Natta 1381, 1384-85 (2019).

Moreover, the Board concluded that even assuming the record established facially nonspeculative explanations for the syncope, the record persuasively established that those explanations were, in fact, speculative. *See Sheldon*, 364 Or at 847; *Francheter Harvey*, 75 Van Natta 65, 70 (2023). Accordingly, the Board found that claimant's injury claim was compensable.

Occupational Disease: Firefighter Presumption

City of Salem v. Stadeli, 327 Or App 396 (August 7, 2023). Analyzing ORS 656.802(4) and (5)(b), the court affirmed the Board's order in *Maurice Stadeli, DCD*, 73 Van Natta 994 (2021), which held that a deceased firefighter's tonsillar cancer was compensable because the carrier had not rebutted the presumption, by clear and convincing medical evidence, that his claimed condition was not caused or contributed to in material part (*i.e*., "a fact of consequence") by his firefighting employment. On appeal, the carrier contested the Board's determination that the carrier had not rebutted the "firefighter's presumption" of ORS 656.802(5)(b).

The court held that the Board had not erred as a matter of law in construing the standard for the carrier to rebut the "firefighter's presumption" and that the Board could permissibly find that the record did not meet the carrier's burden of persuasion under that standard.

Addressing the standard for rebutting the "firefighter's presumption," the court determined that ORS 656.802(5)(a) requires clear and convincing evidence that the firefighter's employment was not a "fact of consequence" of any amount in causing or contributing to a claimant's condition or impairment. In reaching its conclusion, the court relied on its reasoning in *Mize v. Comcast Corp.- AT&T Broadband*, 208 Or App 563, 569-70 (2006), that "in material part" refers to a fact of consequence, without regard to the amount of causation or contribution beyond being a fact of consequence.

Applying the aforementioned standard to the case at hand, the court stated that, because it was undisputed that claimant had proved the predicate facts to support the "firefighter's presumption," the burden of production and persuasion shifted to the carrier to prove by clear and convincing medical evidence that the deceased firefighter's claimed tonsillar cancer was not a fact of consequence of any amount in causing or contributing to his condition or impairment.

Reviewing for substantial evidence/reasoning, and following the model used by the Supreme Court in *SAIF v. Thompson*, 360 Or 155, 157-58 (2016) (which analyzed the original "firefighter's presumption" in ORS 656.802(4)), the court concluded that the Board reasonably could have been persuaded: (1) by a physician's opinion that something other than the human papillomavirus-16 (HPV-16) was likely involved in the development of the decedent's tonsillar cancer; and (2) that contrary opinions (which were based only on the close connection between HPV and tonsillar cancer) had not detracted from the first physician's opinion.

Furthermore, noting that the contrary opinions were based on a lack of medical literature showing an association between firefighting and tonsillar cancer, the court found that the Board's conclusion (that such opinions did not persuasively explain how the lack of such empirical data ruled out firefighting as a fact of consequence in causing or contributing to the decedent's tonsillar cancer) was reasonable and supportable.

North Douglas Cnty. Fire & EMS v. Shannon, 329 Or App 448, and ***Marion Cnty. Fire Dist. #1 v. Smith***, 329 Or App 452 (December 6, 2023). Analyzing the "firefighter's presumption" under ORS 656.802(5)(b), the court affirmed two Board decisions, *Stephen Smith*, 73 Van Natta 955 (2021); *Robert M. Shannon*, 73 Van Natta 949 (2021), which had set aside two carriers' occupational disease denials for prostate cancer, holding that the carriers had not proven by "clear and convincing medical evidence that the [claimed] condition or impairment was not caused or contributed to in material part by the firefighter's employment." Reiterating that "in material part" as used in ORS 656.802(5)(b) refers to "a fact of consequence," the court concluded that to rebut the presumption that firefighting had contributed to the firefighter's cancer required the carrier to establish by clear and convincing medical evidence that the firefighter's employment was not a fact of consequence in any amount in causing or contributing to his cancer.

The court disagreed with the carriers' contentions that the Board orders had: (1) erroneously accorded the "firefighter's presumption" its own "evidentiary weight" to be weighed against contrary evidence; and (2) erroneously discounted a physician's opinion on the basis that the physician considered the causes of prostate cancer to be unknown. Concerning the carriers' first contention, the court concluded that the Board decisions had correctly stated the function of the statutory "firefighter's presumption"; *i.e*., after the firefighter had proven the predicate facts to establish the presumption, the Board had reviewed the medical opinions to determine whether the carrier had established by clear and convincing medical evidence that the firefighter's cancer was not caused or contributed to in material part by his employment.

Regarding the carriers' second contention, the court reasoned that an opinion that the cause of a condition is unknown is "a confession of an inability to identify a cause," rather than evidence that the condition was not related to employment. Applying that rationale, the court concluded that the Board's assessment of the physician's opinion was reasonable and supported by substantial evidence.

<u>Occupational Disease: ORS 656.802(7)(b) Presumption</u>

******Camille Smicz***, 75 Van Natta 497 (September 19, 2023). Applying ORS 656.802(7)(b), the Board held that claimant, a covered employee, did not meet her burden to establish the rebuttable presumption that her occupational disease claim for post-traumatic stress disorder (PTSD) was compensable. The Board stated that the record did not establish through a preponderance of persuasive medical evidence from a psychiatrist or psychologist that claimant more likely than not satisfied the DSM-5 diagnostic criteria for PTSD. In reaching that conclusion, the Board found a psychologist's opinion unpersuasive

because it was based on an inaccurate and incomplete history. In addition, the Board noted that the psychologist had not reviewed or addressed the persuasive, contrary opinions of an examining psychiatrist and examining psychologist. Moreover, the Board concluded that the record did not otherwise establish (without the presumption) that the claimed PTSD condition was compensable under ORS 656.802(3). Accordingly, the Board upheld the carrier's denial of claimant's occupational disease claim for PTSD.

Combined Condition:

Mark S. Mooney, 75 Van Natta 563 (October 27, 2023). Applying ORS 656.262(6)(c) and ORS 656.266(2)(a), the Board affirmed the ALJ's order that upheld the employer's "ceases" denial of claimant's combined cervical spine condition. On review, claimant contended that the employer could not prove that his accepted condition ceased to be the major contributing cause of the disability or need for treatment for his combined cervical spine condition because he received a permanent impairment award related to his condition.

Yet, the Board noted that compensability and impairment are separate inquiries. *See* ORS 656.262(6)(c); ORS 656.266(2)(a); ORS 656.214(1)(a). Specifically, the Board explained that permanent impairment relates to the loss of use or function of a body part, whereas the employer's "ceases" denial pertains to the major contributing cause of the disability or need for treatment of the combined condition. *See* ORS 656.214(1)(a); ORS 656.262(6)(c); ORS 656.266(2)(a). Thus, the Board declined to conclude that the employer could not issue a "ceases" denial simply because claimant received a permanent impairment award for his previously accepted condition. *Id*.

Moreover, after evaluating the evidence, the Board found that the record persuasively established that claimant's "otherwise compensable injury" (*i.e*., the previously accepted condition), ceased to be the major contributing cause of claimant's disability or need for treatment of his combined condition. *See Debra A. Mangine*, 68 Van Natta 1438, 1442-43 (2016) (physician's opinion that described a surgery's impact on the claimant's combined condition persuasively established that the claimant's otherwise compensable injury was no longer the major contributing cause of the condition); *Kurtis L. Kohl*, 66 Van Natta 1796, 1802 (2014) (physician's opinion as a whole, read in context, persuasively established a change in the claimant's condition sufficient to meet the carrier's burden of proof under ORS 656.266(2)(a)). Accordingly, the Board found that the employer met its burden of proof under ORS 656.266(2)(a) and upheld the employer's "ceases" denial of claimant's combined cervical spine condition. This order is final.

Temporary Disability:

Paul D. Sadler, 75 Van Natta 596 (November 21, 2023). Applying ORS 656.268(10), the Board held that a worker was entitled to temporary disability benefits for the period he was enrolled and actively engaged in an Authorized Training Program (ATP) until the claim was closed, even though his condition was medically stationary before claim closure. The ALJ found that ORS 656.268(10) did not apply and that

claimant was medically stationary before the disputed temporary disability dates. Accordingly, the ALJ concluded that such benefits temporary disability benefits were not due. *See* OAR 436-030-0036(2).

Although the Board affirmed the medically stationary determination, it nevertheless modified the temporary disability dates, finding that claimant was entitled to the ATP-related temporary disability benefits under ORS 656.268(10). Citing *Intel Corp. v. Batchler*, 267 Or App 782, 786 (2014), the Board explained that ORS 656.268(10) contains two substantive rules for entitlement to ATP-related temporary disability compensation: (1) A Notice of Closure must have been issued and the worker must become enrolled and actively engaged in training in accordance with the rules; and (2) a worker must remain enrolled and actively engaged in training to receive such compensation. *Id*. at 788.

Applying *Batchler's* reasoning to the present matter, the Board explained that claimant must show that a Notice of Closure had issued before the ATP and that he was actively enrolled and engaged in the ATP. Here, the carrier had issued a November 2020 Notice of Closure before the September 2021 ATP. Although the November 2020 Notice of Closure was ultimately rescinded as premature, the Board found that the express language of ORS 656.268(10) had been satisfied because the ATP took place after the issuance of a Notice of Closure. Moreover, there was no dispute that claimant's ATP was approved and that he actively engaged in the ATP on September 27, 2021 through November 17, 2021. Therefore, the Board concluded that the ORS 656.268(10) requirements for ATP-related temporary disability compensation for that period were met. This order is final.

******James Hibbs***, 75 Van Natta 538 (October 17, 2023). The Board held that statutory limitations regarding claimant's entitlement to temporary disability benefits did not violate his rights under the Oregon or United States constitutions.

Additionally, applying ORS 656.262(4)(h), the Board determined that claimant was not entitled to additional temporary disability benefits following the expiration of his nurse practitioner's statutory authority to authorize such benefits. *See* ORS 656.245(2)(b)(D)(ii); *Ana Galvan*, 67 Van Natta 1055, 1057 (2015).

Finally, applying 656.262(4)(g), the Board determined that claimant was not entitled to retroactive temporary disability benefits because the attending physician's authorization did not constitute contemporaneous evidence of entitlement. *See Reed v. Labor Force*, 155 Or App 595, 599 (1998); *David M. Williams*, 69 Van Natta 593, 604 (2017).

Tracy Gay, 75 Van Natta 447 (August 15, 2023). Applying ORS 656.325(5)(b), the Board held that claimant was terminated for a violation of work rules. Citing *Hipolito Coria*, 71 Van Natta 742 (2019), and *Robert P. Krise*, 74 Van Natta 911 (2002), the Board explained that when there is a dispute as to whether a claimant was terminated for violation of work rules or other disciplinary reasons, it is authorized to examine the factual issues to determine whether claimant was, in fact, terminated for violation of a work rule.

In this particular case, the Board found that the record demonstrated concerns with claimant's driving safety. Claimant's employer's "Termination Form" also stated that claimant was terminated because he had not shown the ability to operate a truck safely or efficiently and he struggled with general

awareness, trip planning, securement, execution, and following directions. Thus, based on its review of the record, the totality of the circumstances, and for the reasons stated in the ALJ's order, the Board found that claimant was in violation of the employer's safety policies and was terminated for violation of work rules. *See* ORS 656.325(5)(b). This order is final.

Permanent Disability (Impairment):

Gramada v. SAIF, 326 Or App 276 (June 7, 2023). Analyzing ORS 656.214(2), the court affirmed the Board's order in *Viorica Gramada*, 73 Van Natta 969 (2021), that affirmed an Order on Reconsideration that did not award permanent disability for claimant's compensable low back injury because a medical arbiter had not attributed any of her impairment to her accepted lumbar strain (but instead had related 100 percent of her impairment to preexisting degenerative conditions). On appeal, claimant argued that she was entitled to a permanent disability award under ORS 656.214 because she suffered a "compensable injury" in her work accident, notwithstanding the undisputed medical evidence that her accepted lumbar strain had fully resolved and in no part contributed to her loss of use or function of her low back. In doing so, she asserted that "compensable injury" pursuant to ORS 656.214 refers to more than just the accepted condition, but rather refers to the "full measure" of impairment in the injured body part regardless of whether the impairment is the result of the accepted condition.

The court stated that resolution of the disputed issue required a determination of whether a claimant's "accepted condition" is the same as a "compensable injury." *See* ORS 656.262(6)(b); ORS 656.214(2). Although acknowledging that no Oregon appellate decision had expressly decided the question, the court noted that the Supreme Court had nevertheless decided several cases that, when knitted together, led it to the conclusion that a claimant's accepted condition constituted the compensable injury for purposes of ORS 656.214.

After summarizing the Supreme Court's decisions in *Robinette v. SAIF*, 369 Or 767 (2022), *Johnson v. SAIF*, 369 Or 579 (2022), and *Garcia-Solis v. Farmers Ins. Co*., 365 Or 26 (2019), the court reached the following conclusions. First, a finding of impairment requires: (1) that there is a loss of use or function of the body part or system; and (2) that the loss is due to the compensable injury. *Robinette*, 369 Or at 781-82. Second, the court reasoned that each loss of use or function is to be considered separately, and a loss is "due to the compensable injury" when the accepted condition is found to be a material cause of the loss. *Johnson*, 369 Or at 603; *Robinette*, 369 Or at 784.

Turning to the case at hand, the court reasoned that claimant's compensable injury for purposes of ORS 656.214 was her accepted lumbar strain. Noting that the medical arbiter had not attributed any findings to the accepted lumbar strain (but rather had related 100 percent of the findings to her degenerative preexisting conditions), the court concluded that the strain was not a material contributing cause of claimant's permanent impairment. Consequently, the court found no error in the Board's determination that claimant was not entitled to a permanent disability award.

In reaching its conclusion, the court rejected claimant's assertion that because the carrier had failed to process her accepted lumbar strain claim under ORS 656.268(1)(b) by denying a "combined condition," apportionment of her permanent impairment was not permissible. Because the medical arbiter had not

attributed any loss of use or function in claimant's low back to her fully resolved accepted lumbar strain, the court reasoned that there was nothing to apportion.

Finally, the court acknowledged that claimant had established that "there is a loss of use or function of the body part or system." *See* ORS 656.214. Nonetheless, because the medical arbiter's findings established that the loss of use or function was in no part "due to the compensable injury," the court determined that there was no "impairment" under ORS 656.214. This order is final.

Michael K. Spurgeon, 75 Van Natta 648 (December 15, 2023). Analyzing OAR 436-035-0019(1), the Board held that the claimant was not entitled to a chronic condition impairment award for his lumbar strain and L4-5 disc protrusion conditions because the record did not establish that he was "significantly limited in the repetitive use of a body part." Citing *Godinez v. SAIF*, 269 Or App 578 (2015), and *SAIF v. Donahue-Birran*, 195 Or App 173 (2004), the Board found that the Appellate Review Unit's (ARU's) interpretation of OAR 436-035-0019(1) (*i.e*., that a worker is not "significantly limited in the repetitive use of a body part" unless the worker is restricted from using the body part for more than two-thirds of a period of time) was plausible and entitled to deference. Applying the ARU's plausible interpretation of the rule, the Board concluded that the record did not establish that the claimant was "significantly limited in the repetitive use of a body part" because his attending physician had found that he was restricted from the repetitive use of his low back and left leg for only 50 percent of an 8-hour period. Accordingly, the Board found no error in a reconsideration process that did not award a chronic condition impairment value.

Member Ousey concurred. Although he agreed that the ARU's interpretation of OAR 436-035-0019 was plausible, he noted that the rule was not clear or readable. Member Ousey explained that the rule's lack of clarity was demonstrated by the ALJ's interpretation in this case and the court's interpretation in *Broeke v. SAIF*, 300 Or App 91 (2019) (*i.e*., that OAR 436-035-0019 authorizes a chronic condition award if a worker is able to use a body part for up to, but not more than two-thirds of a period of time), which differed from that intended by the Workers' Compensation Division (WCD). Ousey noted that the rule's lack of clarity was also represented by the extensive litigation regarding the rule and the multiple industry notices necessary to explain its meaning and to respond to court decisions that had interpreted the rule differently. Finally, Member Ousey encouraged the WCD to amend OAR 436-035-0019 to clarify its meaning and to avoid further confusion. This order is final.

<u>Claim Processing</u>:

Giltner v. SAIF, 325 Or App 566 (April 26, 2023). Analyzing ORS 656.230(1), the Court of Appeals affirmed the Board's order in *Vern E. Giltner*, 73 Van Natta 327 (2021), which had held that a carrier was not required to make a lump sum payment of claimant's permanent disability (PPD) benefits awarded by a Notice of Closure (NOC) because, although claimant had waived his right to appeal the adequacy of the PPD award, the time to appeal the NOC under ORS 656.268(5)(e) had not expired. On appeal, relying on *Cayton v. Safelite Glass Corp*., 231 Or App 644 (2009), claimant argued that his waiver of his right to

appeal the adequacy of his PPD award from the NOC was sufficient to trigger the carrier's obligation to make a lump sum payment under ORS 656.230(1).

The court disagreed. Although acknowledging that the *Cayton* decision concerning the former version of ORS 656.230(1) supported claimant's assertion, the court noted that the current version of the statute is significantly different. Specifically, the court observed that the statute prescribes four exceptions to the requirement that a carrier must make a lump sum payment of PPD benefits, one of which is when the PPD award "has not become final by operation of law." *See* ORS 656.230(1)(b).

Turning to the case at hand, the court found that, when claimant applied for approval of the lump sum PPD payment, the 60-day period to appeal the NOC under ORS 656.268(5)(e) had not expired. Under such circumstances, the court concluded that the context of ORS 656.230(1) supported the Board's decision that the carrier was not required to make the lump sum payment based on claimant's waiver.

In reaching its conclusion, the court disagreed with claimant's contention that the 2007 legislative history regarding ORS 656.230(1) showed that the amendments were merely a "regulatory streamlining bill" whose "sole purpose" was to eliminate the Director from the lump sum payment process. To the contrary, the court stated that the legislative history indicated that, if any one of the four exceptions prescribed in the amended statute applied, a carrier was not required to immediately make a lump sum payment.

Finally, the court recognized that claimant's waiver of his right to appeal the adequacy of the PPD award from the NOC had coincided with the expiration of the carrier's 7-day "post-NOC" right to request reconsideration of the NOC. Nonetheless, reasoning that a worker can challenge a NOC in ways other than by appealing the adequacy or amount of the PPD award (*e.g.*, arguing that the NOC was prematurely closed and should be rescinded), the court considered it sensible to conclude that a PPD award from a NOC is not final by operation of law until the expiration of the 60-day appeal period. This order is final.

<u>Worker-Requested Medical Examination (WRME)</u>:

Michelle L. Knowlden, 75 Van Natta 505 (September 20, 2023). Analyzing ORS 656.325(1)(e) and OAR 436-035-0147(1), the Board held that claimant was not entitled to a worker-requested medical examination (WRME) because, at the time of her WRME request before the Workers' Compensation Division (WCD), the carrier's claim denials were not based on an independent medical examination (IME) report.

Citing *Julie A. Dellinger*, 72 Van Natta 35, 36 (2020), and *Lorinda A. Gauthier*, 70 Van Natta 96 (2018), the Board noted that a claimant's WRME entitlement depends on whether a denial is based on an IME report at the time of claimant's WRME request. Further, citing ORS 656.325(1)(e) and *Denise Amos*, 65 Van Natta 2100 (2013), the Board noted that a report does not constitute an "IME" in the absence of an in-person examination.

Turning to the case at hand, the Board concluded that a pre-denial physician record review was not an IME because it did not include an in-person examination of claimant. Additionally, the Board found that

the post-denial IME did not entitle claimant to a WRME, because the carrier's denial was not based on that examination at the time of claimant's WRME request. Finally, the Board noted claimant's argument that the pre-denial record review had been originally scheduled as an IME with an in-person examination, but the examination had been cancelled due to the COVID-19 pandemic. Nonetheless, the Board concluded that the circumstances of the pandemic did not constitute grounds for an exception to the ORS 656.325(1)(e) requirement that an IME include an in-person examination. Under such circumstances, the Board concluded that claimant had not established her entitlement to a WRME.

Based on stare decisis, Member Ceja concurred with the lead opinion's application of *Dellinger*, *Gauthier*, and *Amos* to the particular facts of the case. Noting the potential of broader access to WRME's to address the financial disparity between carrier's and injured workers in the litigation of workers' compensation cases, Member Ceja proposed that the legislature consider revisions to ORS 656.325(1)(e) and OAR 436-060-0147(1) to expand access to WRME to include cases where an insurer utilizes a record review or post-denial IME. This order is final.

Penalties:

Coria v. SAIF, 371 Or 1 (April 20, 2023). The Supreme Court reversed the Court of Appeals opinion, 315 Or App 546 (2021), that had reversed that portion of the Board's order in *Hipolito Coria*, 71 Van Natta 742 (2019), which had awarded penalties and attorney fees under ORS 656.262(11)(a) when the carrier ceased the payment of claimant's temporary disability (TTD) benefits pursuant to ORS 656.325(5)(b). In reversing the Board's assessment of penalties and attorney fees, the Court of Appeals had determined that the record did not establish that the carrier's claim processing decision to cease claimant's TTD benefits (based on the employer's termination of claimant's employment for violation of a work rule or other disciplinary action) had been unreasonable. In reaching its decision, the Court of Appeals noted the absence of a Board finding of employer misconduct in terminating claimant's employment and, as such, reasoned that there was no employer misconduct to "impute" to the carrier.

Before the Supreme Court, claimant contended that the Board's penalty/attorney fee assessment had been based on a finding that the carrier's claim processing, irrespective of any employer misconduct, had been unreasonable. In contrast, the carrier asserted that: (1) the Board's determination had been based on information that was not known by the carrier when it ceased paying claimant's TTD benefits; and (2) an employer's knowledge or conduct cannot be imputed to a carrier as the Board had determined.

After considering the parties' respective positions, the Supreme Court was unable to determine the basis for the Board's decision. In support of its determination, the Court noted that, if as claimant argued, the Board had based its penalty imposition without relying on an "imputed knowledge" or "imputed conduct" theory, it had not explained why the carrier's conduct was unreasonable given what the carrier knew when it ceased paying claimant's TTD benefits. Furthermore, the Court observed that the Board had not explained why the information that the carrier had received from the employer that claimant had been terminated for violation of a work rule or other disciplinary reasons had not given the carrier a legitimate doubt concerning its liability when it ceased paying the TTD benefits. Likewise, the court

reasoned that, if as the carrier asserted, the Board had relied on the "imputed knowledge/conduct" theory, it had not explained what knowledge/conduct concerning claimant's termination had been imputed to the carrier and how that knowledge led to a conclusion that the carrier had not been terminated for disciplinary reasons.

Under such circumstances, the Supreme Court concluded that the Board order lacked substantial reason because the order failed to articulate a rational connection between its findings of fact and legal conclusions. Consequently, the Court reversed and remanded for an explanation of the Board's reasoning. *See Jenkins v. Board of Parole*, 356 Or 186, 195 (2014).

Finally, the Supreme Court noted several disagreements between the parties concerning procedural and substantive requirements for the imposition of a penalty and attorney fee under ORS 656.262(11)(a): (1) which party bears the burden of proof; (2) what that party must show to establish that claim processing was unreasonable; and (3) in what circumstances, if any, an employer's knowledge or conduct can be imputed to a carrier. Expressing no opinion on those disagreements, the Court raised them so the Board could clearly set out its understanding of the legal requirements in its eventual order on remand.

Justice Bushong concurred. Bushong agreed with the carrier that its reliance on the employer's statement that claimant had been terminated for a work rule violation/disciplinary reason was enough to cause the carrier to "doubt" whether it should continue paying TTD benefits. *See Norgard v. Rawlinsons*, 30 Or App 999, 1003 (1977). However, Bushong also agreed with claimant's contention that the carrier's reliance on the employer's statement, standing alone, was insufficient to establish that the carrier's "doubt" was "legitimate." *Id*.

Because the question under ORS 656.262(11)(a) was whether the carrier had acted unreasonably, Justice Bushong did not consider the Board's decision that there was insufficient evidence that claimant was terminated for a work rule violation or other disciplinary reason was enough, standing alone, to establish that the carrier had acted reasonably or unreasonably. Given such circumstances, Bushong reasoned that the issue should be resolved by clearly identifying and applying the burden of proof.

Noting that ORS 656.262(11)(a) does not address which party has the burden of proof, Justice Bushong opined that where the carrier has failed to establish that it properly denied compensation (or correctly terminated TTD benefits), the burden should rest with the carrier to establish that its actions were nonetheless reasonable. Bushong further observed that placing the burden with the carrier provides an incentive for the carrier to conduct an investigation into whether it can cease paying TTD benefits, instead of just relying on the employer's statements. This case is before the Board on remand.

<u>Attorney Fees</u>:

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, *recons*, 73 Van Natta 322 (2021), 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 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 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. This case is before the Board on remand.

Taylor v. SAIF, 329 Or App 135 (November 15, 2023). The court reversed the Board's order in *Christopher Taylor*, 73 Van Natta 439 (2021), that held that claimant's counsel was not entitled to an attorney fee award under ORS 656.386(1) for services before the Board and the Court of Appeals in litigating the amount of a reasonable attorney fee award for a pre-hearing rescinded denial. Relying on *Peabody v. SAIF*, 326 Or App 132, *rev den*, 371 Or 511 (2023), the court explained that the Board's authority under ORS 656.386(1) extends to awarding reasonable attorney fees incurred in determining the amount of the fee award to which claimant is entitled.

The court acknowledged that the present case concerned the third sentence of ORS 656.386(1) (involving fee awards for a denial rescinded prior to the hearing) whereas *Peabody* concerned the second sentence of the statute (involving fee awards for prevailing over a denial before the ALJ or Board). However, the court found no indication in the text or context of ORS 656.386(1) that the legislature intended the third sentence of the statute to depart from the general Oregon practice of allowing fees for litigating the amount of a fee award. Consequently, the court concluded that the Board was authorized to award a reasonable fee for claimant's counsel's services litigating the amount of the rescinded denial attorney fee award before the Board and the court.

Senior Judge DeVore dissented. The dissenting opinion noted that the sole issue before the Board and the court was the amount of the attorney fee award for the rescinded denial under ORS 656.386(1)(a). Because there was no "denied claim" at issue before the Board or the court, the dissent reasoned that ORS 656.386(1) did not authorize the Board to award an attorney fee for services before the Board and court in litigating the amount of the attorney fee award. Further, the dissent noted that ORS 656.382(3) provides for an attorney fee award for claimant's counsel's services in litigating the amount of a reasonable fee award when the carrier appeals a claimant's attorney fee award and the fee award is not disallowed or reduced. In the dissent's view, the legislature's adoption of ORS 656.382(3) demonstrates that the legislature intended attorney fees to be awardable for litigating the amount of a reasonable attorney fee in workers' compensation matters only under the circumstances set forth in that statute and not when claimant initiates an appeal regarding the amount of a reasonable attorney fee award. Supreme Court review denied.

Fillinger v. City of Portland, 329 Or App 824 (December 28, 2023). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, applying ORS 183.482(8)(c), the court held that a Board's attorney fee award under ORS 656.386(1) (which was based on the Board's overturning of a carrier's denial of a new/omitted medical condition claim) was supported by substantial evidence and reason. On appeal, the court acknowledged the worker's contention that her counsel's declaration of his noncontingent hourly rate "was uncontradicted and no contrary evidence was submitted to rebut it." Nonetheless, the court reiterated that, under its "substantial evidence/reason" standard of review, it looks to the whole record with respect to the issue being decided to determine whether the Board's findings of fact are supported by substantial evidence. Furthermore, the court stated that, although the Board must consider a worker's counsel's fee request, it is not required to credit the information provided by counsel to support a proposed contingent hourly rate, even if that information was uncontradicted.

After conducting its review, the court acknowledged that the Board's attorney fee award for the worker's counsel's services on review ($7,200) was a significant departure from counsel's $19,000 request. Nevertheless, after considering the Board's explanation for its decision (*e.g.*, 10 pages of the worker's 23-page appellate briefs merely duplicated excerpts from the record and counsel's prior written objections and asserted an argument that "was not well supported and did not aid in [the Board's] analysis"), the court concluded that a reasonable person could find that the record as a whole supported both the Board's finding that the requested fee was "excessive" and that the Board's award was reasonable. This order is final.

******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, *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.

Settlements:

Matthew E. Owens, 75 Van Natta 152 (March 15, 2023). Applying ORS 656.236(1)(a)(A), the majority opinion found a proposed CDA between a pro se claimant and the carrier was unreasonable as a matter of law. In doing so, it noted several potential areas of permanent (including impairment and work disability) and temporary disability benefits that would well exceed the proposed $2,494.26 in CDA proceeds. This information was based on additional information that was requested by the Board from the parties. Citing *Bradford Sexton*, 49 Van Natta 183, 183-84 (1997) (CDA was unreasonable as a matter of law on its face because it released the surviving spouse's substantial monthly benefits, which involved a minimum value of $34,414,80, in exchange for a consideration of $1), and *Louis R. Anaya*, 41 Van Natta 1843, 1844 (1990) (a CDA must be rejected under ORS 656.236(1)(a) if it exceeds the bounds of existing statutes, rules or applicable case law, or if a reasonable fact-finder could only conclude that the agreement was unreasonable as a matter of fact), and in the absence of a closing examination, the majority was persuaded that the agreement was unreasonable as a matter of law on its face. Thus, it disapproved the proposed disposition.

Member Curey dissented. Given the limited information available to the Board regarding the settlement, she would not have found the proposed CDA unreasonable as a matter of law pursuant to ORS 656.236(1)(a)(A). This order is final.

Third Party Disputes:

Juliane M. Nichols, 75 Van Natta 383 (July 12, 2023). Analyzing ORS 656.576, the Board held that the carrier was a "paying agency" at the time of the third-party settlement, which took place after the

parties entered into a Claims Disposition Agreement (CDA) and the carrier issued a "current condition" denial that became final. Specifically, the Board found that the claim remained compensable despite not actually paying benefits at the time of the third-party settlement, entering into a CDA, which had preserved medical services-related benefits, and the carrier's issuance of a "current condition" denial that had denied the "current" condition, need for treatment, and disability as of the date of the denial.

In reaching this conclusion, the Board cited *Sedgwick CMS, Inc. v. Dover*, 318 Or App 38 (2022), in which the court stated that a "paying agency" means the self-insured employer or insurer "paying benefits" to the worker or beneficiaries at the time of the third-party settlement. It further acknowledged that "paying benefits" did not require that the self-insured employer or insurer literally be making payments to the worker at the time of settlement; rather, it must be responsible for paying benefits to the worker on a compensable claim. *Dover*, 318 Or App at 48-49. Finally, it noted that the underlying public policy of the third-party distribution statutes and the purpose of the statutory liens is to allocate whatever a claimant recovers from a third party between claimant and the paying agency and to provide reimbursement to those responsible for statutory compensation of injured workers when damages for settlements are obtained against the persons whose act caused the injuries. *See Allen v. American Hardwoods*, 102 Or App 562, 567, *rev den*, 310 Or 547 (1990); *Schlecht v. SAIF*, 60 Or App 449, 456 (1982).

Ultimately, the Board distinguished *Dover's* facts from the present matter. In particular, the Board reasoned that the noncomplying employer's processing agent in *Dover* was not a "paying agency" for purposes of ORS 656.576 at the time of the third-party settlement when it had denied the claim and affirmed the noncomplying employer's challenge to the processing agent's claim acceptance through an earlier Disputed Claim Settlement (DCS). Thus, the claim in *Dover* was determined not to be compensable ab initio and the processing agent was no longer responsible for paying benefits at the time of the third-party settlement. *Compare Dover*, 318 Or App at 48 (addressing the definition of "paying agency" under ORS 656.576, the court noted that the statutory definition implicitly contemplated a compensable claim). Moreover, the Board noted that the parties in the present matter did not enter into a DCS (as in *Dover*), but rather a CDA, which ensured that the carrier remained responsible for medical services-related benefits. ORS 656.236(1)(a). Finally, concerning the "current condition" denial, the Board explained that, although broad, it did not encompass the initial compensability of the claim for which benefits were paid, unlike the DCS in *Dover*, and noted that claimant could initiate a new or omitted medical condition claim, or assert the compensability of the medical services-related benefits that were preserved by the CDA, at any time. *See* ORS 656.267(1); ORS 656.236(1); ORS 656.245(1).

Because the carrier remained responsible for paying benefits at the time of the third-party settlement, the Board determined that the carrier was a "paying agency." Thus, it analyzed the "just and proper" distribution of the third-party settlement pursuant to ORS 656.593(3), finding that the application of the distribution scheme in ORS 656.593(1) was appropriate. In particular, the Board concluded that it was "just and proper" for the carrier to partially recover its "claim costs" lien from remaining settlement proceeds after the distribution of the attorney fee, litigations costs, and claimant's statutory share. This order is final.

Exclusive Remedy:

Bundy v. Nustar GP, LLC, 371 Or 220 (July 7, 2023). Analyzing ORS 656.018 and ORS 656.019, the Supreme Court affirmed a Court of Appeal's opinion, 317 Or App 193 (2021), that had affirmed a trial court's order granting an employer's motion to dismiss a worker's negligence action for somatization disorders under the "exclusive remedy" provisions of ORS 656.018. The Court reasoned that, although a prior Board order had upheld the employer's denials of the worker's new or omitted medical condition claims for the conditions under the workers' compensation system (finding that a previously accepted "gasoline vapor exposure" was not the major contributing cause of the alleged "consequential" conditions), his workers' compensation claim as a whole had been accepted and, as such, ORS 656.019 did not entitle him to pursue civil damages for medical conditions deemed non-compensable on "major contributing cause" grounds.

In reaching its conclusion, the Supreme Court noted that, in enacting ORS 656.019, the 2001 legislature did not intend that the statute constituted a substantive exception to the "exclusive remedy" provisions of ORS 656.018, but rather enacted ORS 656.019 as a procedural statute to regulate a process that the legislature believed it would be required to accommodate in response to *Smothers v. Gresham Transfer, Inc*., 332 Or 83 (2001), overruled in part by *Horton v. OHSU*, 359 Or 168 (2016), until such time as it could provide workers with an adequate, substantive remedy when their workers' compensation claims were found non-compensable in a final litigation order because their work was not the major contributing cause of their claimed condition.

Emphasizing that the worker had not contended that he was constitutionally entitled to an exception of the "exclusive remedy" provisions of ORS 656.018 (to pursue a remedy for his claimed conditions), the Supreme Court expressed no view on that question. Instead, the Court confined its decision to a conclusion that the worker had not established the existence of a statutory exception to the "exclusive remedy" provisions of ORS 656.018 through ORS 656.019.