Workers' Compensation Appellate Update

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Jurisdiction

Salavador A. Mendoza, 75 Van Natta 515 (2023)

- Administrative Law Judge (ALJ) issued an order deferring the matter pending a medical arbiter exam and directing the parties to contact the DCBS Director to schedule an arbiter exam.

- The Board lacked jurisdiction to review an ALJ's order that was not a "final order."

Hearing Requests/Good Cause for Untimely Filing

Michael T. Jones, 75 Van Natta 452 (2023)

- ORS 656.319(1)(b) and *Goodwin v. NBC Universal Media – NBC Universal*, 298 Or App 475 (2019).
- The Board concluded that, viewed in the light most favorable to the worker, the record established good cause for the untimely filed hearing request due to the worker’s lack of sophistication and confusion regarding the claim requirements and procedures.

Remand to the Hearings Division

Helio Bedolla-Huerta, 75 Van Natta 244 (2023)

- Applying ORS 656.295(5), the Board determined that the record was improperly, incompletely, or otherwise insufficiently developed where claimant contested an ALJ's approval of disputed claim settlement (DCS).
- 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.

Remand, Continued

Gilbert E. Vilca-Inga, 75 Van Natta 108 (2023)

- Applying OAR 438-006-0095(5), the Board denied claimant’s request for remand to the Hearings Division based on alleged bias.

- 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.

Administrative Notice

Kiera L. Ervin, 75 Van Natta 530 (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.
- OMB decision did not involve agency order concerning the same claimant.
- Administrative notice of OMB order would not affect outcome.

Subject Worker

Mendoza v. Ron Dickson Corporation, 327 Or App 692 (2023) (nonprecedential memorandum opinion pursuant to ORAP 10.30)

- ALJ's order found that a 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."
- 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.
- Dissent – 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.

Course and Scope of Employment

Vilca-Inga v. SAIF, 327 Or App 430 (2023) (nonprecedential memorandum opinion pursuant to ORAP 10.30)

- Worker's abdominal injury claim was not compensable because it did not arise out of his work as a sheepherder.
- *Clark v. U.S. Plywood*, 288 Or 255, 260 (1980) - 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."
- 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.

Shawn Wiley, 75 Van Natta 521 (2023)

- Injury did not occur "in the course of" the worker's employment. Parking lot exception did not apply because the injury occurred on a public roadway rather than in an employer-controlled area.

Unexplained Injury

Mengesha Kelkay, 75 Van Natta 460 (2023) and ***Francheter Harvey***, 75 Van Natta 65 (2023)

- Workers' injuries occurred "in the course of" and "arose out of" his employment, because they resulted from an unexplained fall/syncope.
- Applying *Sheldon v. U.S. Bank*, 364 Or 831 (2019).
- Medical opinions did not establish facially nonspeculative idiopathic explanations for syncope/fall.
- Any facially nonspeculative explanations were speculative in light of the records as a whole.

Occupational Disease: Firefighter Presumption

City of Salem v. Stadeli, 327 Or App 396 (2023)

- 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 by his firefighting employment.

- 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.

- 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.

Occupational Disease: Firefighter Presumption

North Douglas County Fire & EMS v. Shannon, 329 Or App 448 (2023); ***Marion County Fire District #1 v. Smith***, 329 Or App 452 (2023)

- Board decisions had correctly stated the function of the statutory “firefighter’s presumption”; i.e., after the worker established the presumption, the Board had reviewed the medical opinions to determine whether the carrier had established by clear and convincing evidence that the worker’s cancer was not caused or contributed to in material part by his employment.

- Physician’s 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.

Occupational Disease: ORS 656.802(7)(b) Presumption

Camille Smicz, 75 Van Natta 497 (2023)

- Worker did not meet her burden to establish the rebuttable presumption that her occupational disease claim for post-traumatic stress disorder (PTSD) was compensable.

- 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.

Combined Conditions

Mark S. Mooney, 75 Van Natta 563 (2023)

- Board upheld the employer's "ceases" denial of claimant's combined cervical spine condition.
- 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).
- 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.

Temporary Disability

Paul D. Sadler, 75 Van Natta 596 (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).
- *Intel Corp. v. Batchler*, 267 Or App 782, 786 (2014): ORS 656.268(10) requires: (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.
- 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.

Temporary Disability, Continued

James Hibbs, 75 Van Natta 538 (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.

- 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.

Temporary Disability, Continued

Tracy Gay, 75 Van Natta 447 (2023)

- Applying ORS 656.325(5)(b), the Board held that claimant was terminated for a violation of work rules.
- 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.

Permanent Disability (Impairment)

Gramada v. SAIF, 326 Or App 276 (2023)

- Analyzing ORS 656.214(2), the court affirmed the Board's order in *Viorica Gramada*, 73 Van Natta 969 (2021), that did not award permanent disability for a compensable low back injury because a medical arbiter had not attributed any of the impairment to the accepted lumbar strain (but instead had related 100 percent of her impairment to preexisting degenerative conditions).

- 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 concluded that a loss of use or function is "due to the compensable injury" when the accepted condition is found to be a material cause of the loss.

Permanent Disability, Continued

Michael Spurgeon, 75 Van Natta 648 (2023)

- The Workers' Compensation Division's (WCD) 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.

- 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.

Permanent Disability, Continued

Michael Spurgeon, 75 Van Natta 648 (2023)

- Member Ousey concurs: rule's lack of clarity was demonstrated 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.

- Member Ousey encourages WCD to amend OAR 436-035-0019 to clarify its meaning and to avoid further confusion.

Claim Processing

Giltner v. SAIF, 325 Or App 566 (2023)

- Carrier was not required to make a lump sum payment of claimant's permanent disability (PPD) benefits awarded by a Notice of Closure (NOC) under ORS 656.230(1) 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.

Worker Requested Medical Examination

Michelle L. Knowlden, 75 Van Natta 505 (2023)

- Worker was not entitled to a worker-requested medical examination (WRME) under ORS 656.325(1)(e) and OAR 436-035-0147(1) because, at the time of her WRME request before WCD, the carrier's claim denials were not based on an independent medical examination (IME) report.
- Board relied on its decisions in *Julie A. Dellinger*, 72 Van Natta 35, 36 (2020), *Lorinda A. Gauthier*, 70 Van Natta 96 (2018), and *Denise Amos*, 65 Van Natta 2100 (2013).
- Member Ceja concurs: Broader access to WRMEs to address the financial disparity between carriers and injured workers in the litigation of workers' compensation cases.

Penalties

Coria v. SAIF, 371 Or 1 (2023)

- The Supreme Court reversed the Court of Appeals opinion, 315 Or App 546 (2021), that had reversed the Board's order awarding 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).

- The Court of Appeals 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 that the Board had not found employer misconduct in terminating claimant's employment and, as such, reasoned that there was no employer misconduct to "impute" to the carrier.

Penalties/Coria, Continued

- Supreme Court: Board order lacked substantial reason; court was unable to determine the basis for the Board's decision.
  - If the Board's penalty award did not rely on an "imputed knowledge/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.
  - If the Board 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 claimant had not been terminated for disciplinary reasons.

Penalties/Coria, Continued

- Justice Bushong concurs:
  - 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.
  - Because ORS 656.262(11)(a) does not address which party has the burden of proof:
    - 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.

Attorney Fees

<u>Peabody v. SAIF</u>, 326 Or App 132 (2023)

- Board held that claimant's counsel was not entitled to an attorney fee for services in litigating the amount of the Board's previous attorney fee award under ORS 656.386(1) when the amount of the attorney fee was the sole issue.

- The court reversed.

  - *Shearer's Foods v. Hoffnagle*, 363 Or 147, 156 (2018), and *TriMet v. Aizawa*, 362 Or 1 (2017): 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."

  - Nothing in ORS 656.386(1) suggests that the legislature intended to depart from the general rule.

Attorney Fees, Continued

Taylor v. SAIF, 329 Or App 135 (2023)

- Board 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.
- Court reversed:
  - Applying *Peabody.*
  - 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).
  - 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.

Attorney Fees, Continued

- Senior Judge Devore, dissenting.
  - *Peabody* was wrongly decided.
  - Because there was no “denied claim” at issue before the Board or the court, 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.

Attorney Fees, Continued

Fillinger v. City of Portland, 329 Or App 824 (2023) (non-precedential memorandum opinion pursuant to ORAP 10.30)

- Board's attorney fee award was supported by substantial evidence and reason.
- Board must consider a worker's counsel's fee request but need not credit the information provided by counsel, even if uncontroverted.
- Board's explanation for its departure from worker's counsel's fee request was sufficient.

Attorney Fees, Continued

Jared R. Zeigler, 75 Van Natta 275 (2023)

- Board analyzed ORS 656.307(5) and ORS 656.308(2)(d).
- 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).
- Because a "307" order was issued in this 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 attorney fee awarded under ORS 656.308(2)(d).

Settlements

Matthew E. Owens, 75 Van Natta 152 (2023)

- Applying ORS 656.236(1)(a)(A), the majority Board found that a proposed claim disposition agreement (CDA) between a *pro se* worker and the carrier was unreasonable as a matter of law.
- Potential areas of permanent and temporary disability benefits that would exceed the proposed $2,494.26 in CDA proceeds.
- Based on additional information that was requested by the Board from the parties.
- Member Curey dissenting: 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.

Third Party Disputes

Juliane M. Nichols, 75 Van Natta 383 (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 CDA and the carrier issued a "current condition" denial that became final.
- Distinguished *Sedgwick CMS, Inc. v. Dover*, 318 Or App 38 (2022).
  - 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 DCS.
  - 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.
  - The "current condition" denial did not encompass the initial compensability of the claim for which benefits were paid, unlike the DCS in *Dover*.

Exclusive Remedy

Bundy v. Nustar GP, LLC, 371 Or 220 (2023)

- The Supreme Court 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.
- Although a prior Board order upheld the employer's denials of the worker's new or omitted medical condition claims for the conditions under the workers' compensation system, his workers' compensation claim as a whole had been accepted and, as such, ORS 656.019 did not entitle him to pursue civil damages.

Round table

- **Good Cause**
  - How has the Board applied the court's *Goodwin* decision?
- **Firefighter Presumption**
  - What evidence might be sufficient to overcome the presumption that the condition was caused by firefighting?
- ***Coria v. SAIF***, 371 Or 1 (2023)
  - How should a carrier proceed to avoid a penalty where the employer tells the carrier that an employee was terminated for violation of a work rule?