M E M O R A N D U M

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To: Andrea Cooper, Governor's Office; and
Members of MLAC

From: Connie Wold, Workers' Compensation Board Chair

Subject: WCB Update

SIGNIFICANT/NOTEWORTHY CASES
(OCTOBER 2022 – DECEMBER 2022)

Court of Appeals

Canchola-Morgan v. SAIF, 323 Or App 482 (December 29, 2022). In a nonprecedential memorandum opinion pursuant to ORAP 10.30, the court held that a Board order did not err in analyzing the compensability of a worker's new/omitted medical condition claim when it determined that physicians' opinions had not persuasively established that a work injury was a material contributing cause of a worker's disability/need for medical treatment of his hematuria (blood in urine) condition.

The court disagreed with the worker's contention that the Board's shorthand "disability/need for treatment" phrase mistakenly merged two possible ways to establish the compensability of an injury claim (*i.e.*, disability or need for treatment) into a single standard. The court instead concluded that the Board had understood that compensability could be established by showing *either* that the work injury was a material contributing cause of disability or that the work injury was a material contributing cause of the need for treatment. Reasoning that the Board had correctly focused on the adequacy of the evidence connecting the worker's hematuria to his work injury, which proof was essential to proving whether either any disability, or any need for treatment, was compensable, the court determined that the Board's analysis was correct.

Deschutes County v. Leak, 322 Or App 396 (October 19, 2022). Analyzing OAR 436-035-0400(3), the court held that a deputy sheriff was entitled to Class 2 permanent

mental impairment for his post-traumatic stress disorder (PTSD) condition because his attending physician had opined that, if the deputy returned to his "job at injury" as a patrolman, he would experience deterioration or decompensation of his mental condition as described in the administrative rule. The court acknowledged that the Appellate Review Unit (ARU) had determined that, because the deputy was not working at the time his claim was closed, its evaluation of the deputy's mental impairment was limited only to his current symptoms (rather than the effects his return to his "at injury" job would have on his condition). Nevertheless, the court concluded that such an interpretation of OAR 436-035-0400(3) would be inconsistent with the rule's unambiguous text, which requires an evaluation of a permanent condition, not merely a worker's current symptoms.

Noting that, under the administrative rule, a physician is required to evaluate "permanent changes" of an accepted illness, the court reasoned that, even if a person is not working at the time of claim closure, the physician's evaluation would still encompass whether (if the worker were to be exposed to work or a work-like setting), the worker would experience deterioration of decompensation of his mental condition as described in OAR 436-035-0400(3) for a Class 2 impairment rating. Determining that ARU's interpretation of the administrative rule was not plausible, the court held that the Board had correctly found that the attending physician's opinion concerning the probability that the deputy would experience deterioration or decompensation of his mental condition in a work, or a work-like, setting was both relevant, and supported a Class 2 level of permanent impairment.

Martinez-Munoz v. Kendal Merchandizing, 323 Or App 11 (December 7, 2022). The court held that a prior Board order (which had upheld a carrier's denial of a worker's new/omitted medical condition claim for a thumb condition) did not preclude her from subsequently initiating an occupational disease claim for the same condition. The court acknowledged the carrier's contention. However, the court noted that the prior Board order concerning the new/omitted medical condition claim had expressly reserved the worker's right to maintain an occupational disease claim for her thumb condition. Therefore, the court concluded that the doctrine of claim preclusion was not applicable to the worker's current occupational disease claim.

<u>Workers' Compensation Board</u>

John C. Cole, 74 Van Natta 692 (November 2, 2022). Analyzing ORS 656.383(1), the Board held that a worker's counsel was not entitled to a carrier-paid attorney fee when an Order on Reconsideration set aside a Notice of Closure as

premature. The Board reiterated that the statute authorizes a carrier-paid attorney fee award if the worker's counsel is instrumental in obtaining temporary disability benefits during the reconsideration proceeding. Reasoning that a determination that a claim was prematurely closed does not constitute an award of temporary disability benefits, the Board concluded that the worker's counsel was not entitled to a carrier-paid attorney fee award under ORS 656.383(1) for services performed during the reconsideration. The Board noted that, if the worker subsequently obtained additional temporary disability benefits after the issuance of the Order on Reconsideration's "premature closure" determination, he might be entitled to an attorney fee under ORS 656.383(1) at that time.

Reina Cruz-Salazar, 74 Van Natta 683 (October 25, 2022). The Board held that, in rating a worker's permanent disability, although a medical arbiter had attributed 80 percent of her arm/shoulder impairment findings (*e.g.*, significant limitation of the repetitive use of arm/shoulder, lost range of motion, and strength/sensation loss) to "undiagnosed conditions" (rather than to her accepted conditions and their direct medical sequela), she was entitled to the full measure of her impairment (without apportionment) because all of her impairment findings were caused in material part by her compensable injury and the carrier had not issued a "combined condition" denial before closing the claim pursuant to ORS 656.268(1)(b).

While acknowledging that the record had not established that the "undiagnosed conditions" noted in the arbiter's report constituted legally cognizable "preexisting conditions" that could be denied as part of a "combined condition," the Board applied court precedent which had held that apportionment of a worker's permanent impairment was not appropriate when the record established that her total impairment was caused in material part by her compensable injury and no "pre-closure" "combined condition" denial had been issued by the carrier.

Charles E. Davis, 74 Van Natta 726 (December 2, 2022). Analyzing the "mutual combat" affirmative defense of ORS 656.005(7)(b)(A), the Board held that the carrier had not established that a pool hall manager's injury (which resulted from an assault by a patron he was removing from the premises) was excluded from compensation, because the assault was connected to his job assignment and did not amount to a deviation from his customary duties. Finding that the removal of a patron from the pool hall was part of his job as a manager and reasoning that he had removed the patron at the request of the on-duty manager at the time, the Board concluded that the manager was acting for the benefit of his employer. Thus, the Board determined that, even if the manager was an active participant in the assault with the patron, the assault had been connected to his job

assignment and, as such, an element for establishing the statutory exclusion from compensability of the worker's injury had not been met.

Diane M. Rogers, 74 Van Natta 762 (December 21, 2022). The Board held that, based on the attending physician's persuasive opinion, a bus driver had established that her employment exposure (*i.e.*, close contact with passengers and a coworker) was a material contributing cause of her disability/need for treatment for her Influenza A condition and, as such, her injury claim was compensable under ORS 656.005(7)(a). The Board noted the carrier's contentions that the attending physician was not an infectious disease specialist and had not expressly addressed whether the bus driver had contracted her disease during a personal trip to the grocery store. Nonetheless, reasoning that no physician had criticized the attending physician's opinion for not discussing the bus driver's "grocery store" trip, and finding nothing in the record to suggest that the attending physician's experience in occupational medicine had detracted from his opinion, the Board was persuaded that the record had established that the bus driver's work was a material (*i.e.*, substantial) cause of her disability/need for treatment of her claimed Influenza A condition.

Danny L. Sharer, 74 Van Natta 667 (October 12, 2022). Analyzing OAR 436-035-0005(9), and OAR 436-035-0019(1)(b), in reviewing an Own Motion Notice of Closure regarding a worker's new/omitted medical condition claim for a osteoarthritic knee condition, the Board held that: (1) because claimant had undergone a total knee replacement, he was not also entitled to a separate impairment value for a previous partial lateral meniscectomy; and (2) because a medical arbiter had unequivocally opined that the worker was not significantly limited in the repetitive use of his knee, there was no entitlement to a "chronic condition" impairment value.

The Board acknowledged the worker's contentions that he was entitled to a surgery impairment value for a meniscectomy he had undergone several years before the reopening of his Own Motion claim for a new/omitted osteoarthritic knee condition (which had resulted in a total knee replacement), as well as a "chronic condition" impairment value based on his knee instability/limitations and inability to return to his "at-injury" job as an auto body technician. However, relying on OAR 436-035-0005(9), the Board determined that a separate surgery value for a meniscectomy is not allowed when a worker undergoes a total knee arthroplasty. Furthermore, noting that the medical arbiter had unambiguously explained that the worker was not significantly limited in the repetitive use of his knee, the Board concluded that he was not entitled to a "chronic condition" impairment value. *See* OAR 436-035-0019(1)(b).

Randy G. Simi, 74 Van Natta 675 (October 25, 2022). Analyzing ORS 656.262(7)(c) and (11)(a), the Board held that a carrier had unreasonably neglected to reopen and process a worker's new/omitted medical condition claim following a prior ALJ's order finding the claim compensable. Although the prior ALJ had determined that the claimed condition was "encompassed" in the worker's previously accepted conditions, the carrier's denial (that the claimed condition was not compensable) had been set aside by the prior ALJ's order. The Board acknowledged that the prior ALJ's order had not expressly directed the carrier to further process the worker's new/omitted medical condition claim. Nonetheless, relying on ORS 656.262(7)(c) and its existing case precedent, the Board determined that the carrier was obligated to reopen and process the worker's new/omitted medical condition claim to closure because the prior ALJ's order had set aside the carrier's denial. Therefore, the Board reasoned that the carrier did not have a legitimate doubt concerning its ongoing claim processing responsibilities and, as such, an assessment of penalties and attorney fees under ORS 656.262(11)(a) was justified.

Randy G. Simi, 74 Van Natta 740 (December 8, 2022). Analyzing ORS 656.262(7)(c), the Board held that, pending a carrier's request for review of an ALJ's order that had found an omitted medical condition claim compensable, the carrier was required to process the ordered-accepted claim, pending appeal. Because the carrier had not done this within the 30-day appeal period (but rather some 53 days after the ALJ's order and only after the worker had requested another hearing challenging the carrier's failure to process the claim), the Board found its claim processing was unreasonable. The Board relied on *Providence Health Sys. Or. v. Walker*, 252 Or App 489, 502 (2012), rev den, 353 Or 867 (2013), in which the court held that ORS 656.262(7)(c), requires carriers to reopen and process omitted medical condition claims that have been found compensable after claim closure, even while an appeal of that finding is pending. The Board found also that the carrier's unreasonable delay justified an award of penalties and attorney fees under ORS 656.262(11)(a).

Randy G. Simi, 74 Van Natta 747 (December 8, 2022). Analyzing ORS 656.268(1)(a), (5)(f), and OAR 436-030-0020(2), the Board held that a carrier had prematurely and unreasonably closed a worker's shoulder claim, because an attending physician's concurrence with another physician who had opined that there was no permanent disability *beyond* that awarded for a previously accepted condition did not constitute a "qualifying statement" of "no" permanent disability. The Board found the carrier had not obtained a "qualifying closing report" of the worker's newly accepted shoulder conditions before closing the claim. Relying on the aforementioned administrative rule, the Board reiterated that "sufficient information" to close a claim

requires either a "qualifying statement of no permanent disability" or a "qualifying closing report" and that the "qualifying statement" must clearly indicate that there is no reasonable expectation of permanent impairment or permanent work restrictions due to the accepted condition.

Because the carrier had not obtained a "qualifying closing report," the Board concluded that the claim had been prematurely closed. In addition, finding that the carrier had not strictly complied with the "claim closure" requirements prescribed in OAR 436-030-0020(2), the Board awarded penalties under ORS 656.262(11)(a) and attorney fees pursuant to ORS 656.382(1).

Gary A. Woodruff, 74 Van Natta 760 (December 16, 2022). Applying ORS 656.289(4), the Board held that a noncomplying employer (NCE) was not entitled to request review of an ALJ's approval of a Disputed Claim Settlement (DCS) between a worker and the assigned statutory claim processing agent under ORS 656.054(1). The Board acknowledged that, pursuant to ORS 656.005(21), "party" generally includes an "employer" and, as such, is authorized to request review of an ALJ's order under ORS 656.295(2). Nonetheless, referring to ORS 656.289(4)(c), the Board determined that an NCE (an employer who has not obtained workers' compensation coverage for its employees) does not constitute a "party" concerning a DCS between a worker and statutory claim processing agent assigned to process a worker's claim on behalf of the NCE. Under such circumstances, the Board concluded that it was not authorized to consider the NCE's request for review of the ALJ-approved DCS.