# M E M O R A N D U M

April 21, 2023

**To:** Vince Porter, Governor's Office; and
Members of MLAC

**From:** Constance L. Wold, Workers' Compensation Board Chair

**Subject:** WCB Update

**SIGNIFICANT/NOTEWORTHY CASES**
**(JANUARY 2023 – MARCH 2023)**

Court of Appeals

There were no textual "Board-related" court opinions issued during this period.

Workers' Compensation Board

*Cecilia Avila-Morales* (March 13, 2023). Analyzing ORS 656.005(7), the Board held that a worker's new/omitted medical condition claim for a bicipital tendinitis was not compensable because the record did not establish that the claimed condition had resulted in the need for medical services. Noting that the tendinitis had been diagnosed by an examining physician on a single occasion, the Board was not persuaded that the claimed condition had resulted in a need for medical services.

*Adam F. Bruce* (February 22, 2023). In an Own Motion order, the Board set aside a carrier's Notice of Closure (NOC) of a worker's accepted knee condition, finding that a physician's "medically stationary" opinion was not persuasive because the physician had only reviewed the worker's x-rays a year earlier and had never examined the worker or reviewed his medical record. Noting that the carrier's "medically stationary" letter to which the physician had concurred was based on the worker's lack of treatment for one year, the Board observed that the physicians who had previously examined/treated him had never considered his knee condition to be medically stationary, but rather had recommended that he avoid high impact activities and directed him to return to follow-up

treatment. Under such circumstances, the Board concluded that the record did not establish that no further material improvement in the worker's knee condition would reasonably be expected when the carrier issued its NOC.

Furthermore, to the extent that the carrier's issuance of the NOC was premised on the worker's lack of treatment, the Board determined that such an administrative closure would be invalid because the carrier had not complied with the requirements prescribed in OAR 436-030-0034(1).

*Immer Gutierrez* (March 10, 2023). Analyzing ORS 656.386(1), the Board held that a worker's counsel was entitled to a carrier-paid attorney fee for finally prevailing over a carrier's denial (which had contended that the worker should not be considered a "subject worker" under Chapter 656). The Board noted that ORS 656.386(1) provides for a carrier-paid attorney fee for finally prevailing over a claim denial based on compensability and when the denial asserts that the claim "otherwise does not give rise to the entitlement to any compensation." Reasoning that the carrier's "subjectivity" denial (if upheld) would preclude the worker's entitlement to compensation, the Board concluded that the denial constituted a refusal to pay compensation on the ground that the worker was not otherwise entitlement to any compensation and, as such, entitled his counsel to an attorney fee award under ORS 656.386(1) when the denial was overturned.

*Francheter Harvey* (February 1, 2023). The Board held that a door greeter's leg injury (which occurred "in the course of" her employment) also "arose out of" her employment because it resulted from an "unexplained fall" because the record did not establish any "facially nonspeculative idiopathic explanations" for her fall. Although acknowledging the carrier's contentions that physician opinions supported the worker's drug use or a weakened leg as possible contributing factors to the worker's fall, the Board determined that such opinions were speculative in that they were conclusory and unexplained. Consequently, finding that the worker's leg injury resulted from an unexplained fall which had occurred in the course of her employment, the Board concluded that her claim was compensable.

*James Hibbs*, (January 18, 2023). Analyzing ORS 656.325(1)(a) and (6), and ORS 656.262(11)(a), the Board held that the Hearings Division lacked original jurisdiction to consider a worker's request for penalties and related attorney fees for a carrier's scheduling of an insurer-arranged medical examination (IME) that had allegedly not been authorized by the Workers' Compensation Division (WCD) because WCD had the initial authority to determine whether the IME request was statutorily authorized. Although acknowledging that, pursuant to ORS 656.325(6), any party may request a

hearing before the Board's Hearings Division on any dispute under ORS 656.325, the Board reiterated that its authority to consider such disputes concerned review of a WCD order regarding an IME dispute. Noting that a WCD order regarding the IME dispute had not issued, the Board concluded that it lacked original jurisdiction to consider the dispute and, as such, the hearing request was premature.

Likewise, because the worker's request for penalties and attorney fees was premised on an allegedly unreasonable IME request, the Board also determined that it was not authorized to consider the penalty/fee issue under ORS 656.262(11)(a). Accordingly, the Board transferred the worker's request for hearing to WCD for consideration of the disputed issues. *See* ORS 656.704(5).

*Brandon E. Lamb* (March 22, 2023). Analyzing ORS 656.383(1), the Board held that a worker's counsel was not entitled to a carrier-paid attorney fee award for services rendered during a reconsideration proceeding before the Appellate Review Unit (ARU), when an Order on Reconsideration had rescinded a Notice of Closure as premature. Reasoning that the reconsideration order had not awarded temporary disability benefits, the Board concluded that the record did not establish that the worker's counsel was instrumental in obtaining temporary disability benefits. Consequently, the Board determined that the requirements of ORS 656.383(1) for a carrier-paid attorney fee had been satisfied.

*Michael D. Millspaugh* (March 20, 2023). Analyzing ORS 656.278(1)(a), the Board declined to reopen a worker's Own Motion Claim for a worsening of his hernia condition because the record did not establish that he was in the "work force" when his condition became disabling. In reaching its conclusion, the Board rejected the worker's contention that there was a presumption that he was in the "work force." Citing ORS 656.266(1), the Board reasoned that the worker had the burden of proving the nature and extent of disability resulting from his compensable condition.

The Board also denied the worker's request for temporary disability benefits based on his attending physician's work restrictions. Relying on OAR 438-012-0035(4)(a), and (b), the Board reiterated that a carrier's obligation to pay temporary disability benefits is not triggered unless and until an Own Motion claim is reopened (either voluntarily or via Board order).

Finally, the Board admonished the carrier for its untimely submission of its Own Motion Recommendation; *i.e.*, more than 30 days after the worker's claim. Nonetheless, noting that the Own Motion claim had not been reopened, the Board concluded that there

were no "amounts then due" on which to base a penalty for unreasonable claim processing under ORS 656.262(11)(a). Furthermore, reasoning that an Own Motion recommendation does not constitute a "claim denial," the Board further determined that an attorney fee award under ORS 656.262(11)(a) was likewise not justified.

*Matthew E. Owens* (March 15, 2023). Analyzing ORS 656.236(1), the Board disapproved a proposed Claim Disposition Agreement (CDA) as unreasonable as a matter of law. The agreement involved a worker who was not represented by an attorney, whose accepted knee claim had not been processed to closure, and it provided for the full release of the worker's "non-medical service related" benefits in return for proceeds that were less than the permanent and temporary disability benefits potentially available to the worker for his accepted knee condition. Noting that the worker's accepted claim had not been closed, the Board recognized that its reasoning was based on varying degrees of speculation because the record lacked a closing examination report. Nonetheless, reiterating its statutory mandate to apply specified criteria before reaching a determination that a proposed CDA is approvable, the Board concluded that the proposed CDA was unreasonable as a matter of law. In reaching its conclusion, the Board commented that were it considering a proposed CDA submitted after claim closure (preferably including an Order on Reconsideration), its decision regarding such an agreement may have differed from its current disapproval decision.

*Gilbert E. Vilca-Inga* (February 28, 2023). Analyzing ORS 656.295(5), and OAR 438-006-0095(5), the Board declined a worker's request to remand a case to the Hearings Division for a new hearing with another ALJ because such a request had not first been made at the hearing level. Although acknowledging the worker's contention that the ALJ had been biased for finding a physician's opinion unpersuasive for reasons other than those articulated by the carrier, the Board further reasoned that the ALJ could evaluate the persuasiveness of a physician's opinion irrespective of the specific reasons expressed by the parties.

*Katherine A. Whitner* (February 22, 2023). In an Own Motion order, the Board held that a worker's request for review of a Notice of Closure (NOC) was timely filed because, although the request was received by the Board by means of a FAX transmission on the 61st day after the NOC, that day was a Monday, which was the first business day after the 60th day, which was a Sunday. In reaching its conclusion, the Board reiterated that when the last day of an appeal period falls on a weekend or a legal holiday, the period runs until the next business day.

The Board also denied the worker's request to defer review of the NOC (which pertained to her "worsened condition" Own Motion claim for an accepted hernia condition) to await the resolution of a new/omitted medical condition claim (for chronic pain syndrome) that she had recently filed. Noting that the carrier opposed the worker's request and reasoning that the compensability of the new/omitted medical condition claim (as well as its future claim processing if found compensable) remained unresolved, the Board adhered to its general practice of denying the suspension of its review absent the parties' agreement.

Turning to the merits of the worker's request for review, the Board disagreed with her contention that the claim had been prematurely closed because a "direct medical sequela" (*i.e.*, her chronic pain syndrome) was not medically stationary. In reaching its determination, the Board was not persuaded that the chronic pain syndrome constituted a direct medical sequela and, even if it did, that the condition was not medically stationary.

On reconsideration of its initial decision, the Board denied the worker's request for a "fact-finding" hearing. Reasoning that the worker's credibility was not at issue and the record was sufficiently developed to resolve the disputed issues, the Board determined that a "fact-finding" hearing was not necessary.

Finally, the Board rejected the worker's request for permanent total disability (PTD) benefits. Relying on ORS 656.278(1), the Board reiterated that, on closure of an Own Motion claim for a worsened condition under subsection (1)(a), a worker is not entitled to an evaluation of permanent disability benefits (including PTD).