Workers' Compensation Board

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News & Case Notes

BOARD NEWS

Adoption of Permanent Amendments to OAR 438-005-0055 Regarding Mandatory Denial Language, and OAR 438-015-0050 and OAR 438-015-0052 Regarding Attorney Fee Caps for Disputed Claim Settlements and Claim Disposition Agreements.

At its July 30, 2024, public meeting, the Board adopted permanent amendments to OAR 438-005-0055, OAR 438-015-0050, and OAR 438-015-0052. The adopted amendments include:

- Amendments to OAR 438-005-0055(1) and (2) designed to simplify and improve the readability of the denial appeal language required in denials.
- Amendments to OAR 438-015-0050(1) and OAR 438-015-0052(1) that remove the 10 percent limits on attorney fee awards out of Disputed Claim Settlement (DCS) and Claim Disposition Agreement (CDA) proceeds exceeding $50,000 and provide that a claimant's attorney can received a fee of up to 25 percent of the total DCS or CDA proceeds in the absence of extraordinary circumstances.

The amendments to OAR 438-005-0055 are effective on November 1, 2024, and apply to all denials issued on or after November 1, 2024. The amendments to OAR 438-015-0050(1) and OAR 438-015-0052(1) are effective on September 3, 2024, and apply to all DCSs and CDAs filed with the Workers' Compensation Board on or after September 3, 2024.

The Board's Order of Adoption is posted to the Board's website here. A copy of the order has also been electronically distributed to those individuals, entities, and organizations who have registered for these notifications.

Bulletin No. 1 (Revised) - Annual Adjustment to Attorney Fee Awards Effective July 1, 2024

The maximum attorney fee awarded under ORS 656.262(11)(a), ORS 656.262(14)(a), and ORS 656.382(2)(d), which is tied to the increase in the state's average weekly wage (SAWW), will increase by 2.749 percent on July 1, 2024. On June 6, 2024, the Board published Bulletin No. 1 (Revised), which set forth the new maximum attorney fees. The Bulletin can be found on the Board's website.

An attorney fee awarded under ORS 656.262(11)(a) shall not exceed **$5,973**, absent a showing of extraordinary circumstances. OAR 438-015-0110(3).

An attorney fee awarded under ORS 656.262(14)(a) shall be **$456** per hour. OAR 438-015-0033. This rule concerns the reasonable hourly rate for an attorney's time spent during a personal or telephonic interview conducted under ORS 656.262(14).

An attorney fee awarded under ORS 656.308(2)(d) shall not exceed **$4,308**, absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5).

These adjusted maximum fees apply to attorney fees awarded under ORS 656.262(11)(a) and ORS 656.308(2)(d) by orders issued on July 1, 2024, through June 30, 2025, and to a claimant's attorney's time spent during a personal or telephonic interview or deposition under ORS 656.262(14)(a) between July 1, 2024 and June 30, 2025.

CASE NOTES

PENALTIES: Carrier's Failure to Pay Temporary Disability Benefits Within 14 Days of a Notice of Closure Was Unreasonable – Prior Penalty Award Was for Carrier's Failure to Pay Temporary Disability Benefits Resulting From a Litigation Order, Which Was a Separate Amount Then Due

James D. Hibbs, 76 Van Natta 434 (July 31, 2024). Applying ORS 656.262(11)(a) and OAR 436-060-0150(4)(a)(F), the Board held that the carrier's failure to pay claimant's temporary disability benefits within 14 days of the Notice of Closure was unreasonable. In reaching that conclusion, the Board disagreed with the carrier's contention that a penalty was not awardable because a prior Administrative Law Judge had awarded a penalty involving the same period of temporary disability benefits. Citing *Beverly J. Hills-Wood*, 58 Van Natta 1058 (2006), the Board explained that the prior penalty was for the carrier's failure to pay temporary disability benefits as a result of a final litigation order, which effectively created separate "amounts then due." Accordingly, the Board assessed a penalty under ORS 656.262(11)(a).

OWN MOTION: Penalties – Carrier's Delay in Issuing Notice of Closure was Unreasonable – Carrier Did Not Close New or Omitted Medical Condition Claim Until 30 Days After Receiving Attending Physician's Report – Record Did Not Indicate Complex Rating or Need For Further Claim Investigation

Noel Garcia, 76 Van Natta 413 (July 16, 2024). In an Own Motion Order, the Board held that a carrier had unreasonably delayed the closure of the claimant's new or omitted medical condition claim because it closed the claim 30

days after receiving an attending physician's medically stationary/impairment findings report and 22 days after the carrier had closed the claimant's worsened condition claim based on the same report. The Board acknowledged that the carrier's 30-day delay in closing the new or omitted medical condition claim was not as extensive as other cases where it had found a carrier's delay to have been unreasonable. *See e.g.*, *Rafael Corona-Gambino*, 75 Van Natta 632 (2023); *Rigoberto Gonzalez-Hernandez*, 71 Van Natta 596 (2019); *Billy J. Arms*, 59 Van Natta 2927 (2007). Furthermore, the Board noted that, when a carrier had explained that its delay in closing a claim was due to the complexity of several conditions, medical reports questioning the validity of the claimant's impairment findings, and the need to further investigate the claim, the carrier's delay was not found unreasonable. *See Joseph P. Hapka*, 61 Van Natta 1148 (2009).

Nevertheless, despite the carrier's less extensive delay in closing the new or omitted medical condition claim, the Board observed that its closure notice had issued three weeks after its closure of the claimant's worsened condition claim. Reasoning that both claim closures were based on the same attending physician report and finding no indication that the carrier had sought clarification of the claimant's impairment or engaged in any further investigation, the Board concluded that the carrier's 30-day delay in closing the new or omitted medical condition claim was unreasonable. However, under such circumstances, rather than a 25 percent penalty, the Board assessed a 15 percent penalty.

MENTAL DISORDER: ORS 656.802(7)(b) Presumption of Compensability Applied – Medical Evidence From Psychiatrist or Psychologist Established That Claimant More Likely Than Not Satisfied DSM-5 Diagnostic Criteria for PTSD – Carrier Did Not Rebut Presumption of Compensability

Matthew Hagan, 76 Van Natta 397 (July 11, 2024). Applying ORS 656.802(7)(b), the Board held that the claimant, a deputy sheriff, established the rebuttable presumption that his occupational disease claim for post-traumatic stress disorder (PTSD) was compensable. The Board stated that persuasive medical evidence from a psychiatrist, as supported by a psychologist, established that the claimant more likely than not satisfied the DSM-5 criteria for PTSD. In contrast, the Board was not persuaded by the contrary opinions of a psychiatrist and psychologist because those opinions were not based on a sufficiently accurate history regarding the claimant's trauma-related avoidance. Finding that the carrier had not rebutted the ORS 656.802(7)(b) presumption, the Board concluded that the record persuasively established that the claimant's occupational disease claim for PTSD was compensable.

APPELLATE DECISIONS UPDATE

DEATH BENEFITS: Living Separate and Apart Not a Prerequisite For Living in a State of Abandonment Exception to Survivor Benefits Under ORS 656.005(2)(b)(A)

YRC Worldwide, Inc. v. Corrigan, DCD, 333 Or App 751 (July 10, 2024). Analyzing a former version of ORS 656.005(2)(b)(A), the court reversed the Board's order in *Maribeth T. Corrigan, DCD*, 73 Van Natta 1047 (2021), previously noted in 40 NCN 12:5, which determined that an estranged husband was entitled to survivor benefits concerning his wife's compensable death. In deciding that the husband was entitled to benefits, the Board found that he and his wife had lived "separate and apart" for less than one year before her fatal injury and, therefore, the "living in a state of abandonment for more than one year at the time of the injury" exception for survivor benefits under the statute had not been met.

After reviewing the statute's evolution, as well as Washington court decisions, which involved similar statutory language, the court held that the phrase "living in a state of abandonment for more than one year at the time of the injury or subsequently" as used in the statute's first sentence refers to circumstances in which the parties have, through their conduct, forsaken the marriage for a period of more than a year. The court explained that relevant considerations in making a "state of abandonment" determination include the filing of a separation petition, financial interdependence, and (possibly most significantly) a separate domicile. Nevertheless, the court concluded that a statement in the second sentence of the statute – "[a] spouse who has lived separate and apart from the worker for a period of two years * * * is considered living in a state of abandonment" -- is not a prerequisite for proving that the parties lived "in a state of abandonment" for more than one year.

Applying its reasoning to the case at hand, the court reasoned that the Board order had looked only to whether the parties were living separate and apart and had not engaged in the broader inquiry contemplated by ORS 656.005(2)(b)(A) as to whether the parties had, through conduct, demonstrated an intent to forsake their marital obligations for a period of more than one year. Consequently, the court reversed and remanded to the Board for reconsideration.

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