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## BOARD NEWS

### Biennial Review of Attorney Fee Schedules Under ORS 656.388(4)

In October 2024, the Board began its biennial review of its attorney fee schedules under ORS 656.388(4). In advance of its October 8 and November 19, 2024, meetings, the Board sought written public comment from stakeholders. The Board also provided an opportunity for public comment at both meetings. The Board did not receive any written or verbal public comment. Having received no comment, the Board closed the 2024 biennial review at the November 19 meeting. The next biennial review will begin in 2026.

The Board had tentatively scheduled an additional Board meeting in December 2024 if it was necessary to complete the biennial attorney fee review. However, because the biennial review was closed and the Board does not have other meeting agenda items for December, the December meeting has been cancelled.

## CASE NOTES

### HEARING PROCEDURE: Record Did Not Establish "Good Cause" for Untimely Hearing Request - Lack of Diligence in Filing the Request When Claimant Understood Appeal Period - Employment Loss, Seeking and Obtaining New Employment, and Subsequent Surgeries Did Not Constitute Excusable Neglect Given the Timeline of Events

*Lance Ford*, 76 Van Natta 676 (November 5, 2024). Applying ORS 656.319(1)(b) and *Goodwin v. NBC Universal Media - NBC Universal*, 298 Or App 475, 485 (2019), the Board held that the record did not demonstrate "good cause" for the claimant's untimely filed hearing request.

In doing so, the Board noted that, unlike the claimant in *Goodwin* who did not understand the deadline for a hearing request, the claimant in this case was aware that he had only 60 days from the date of the denial to request a hearing. Thus, the Board stated that his failure to request a hearing was not based on a mistaken understanding regarding the hearing request deadline.

Further, the Board found that the claimant's conduct after the appeal period expired was not consistent with his contention that he was "too overwhelmed" to request a hearing. The Board noted that, instead of exercising due diligence and requesting a hearing after his knee surgeries, the claimant left for a vacation to Hawaii.

Additionally, the Board was not persuaded that any delay in requesting a hearing due to his medical treatment and lack of legal representation supported a finding of excusable neglect, surprise, inadvertence, or mistake. Consequently, the Board found that the claimant did not establish "good cause" for his untimely hearing request. See ORS 656.319(1)(a).

Member Ceja dissented because he disagreed with the majority's conclusion that the claimant's failure to timely request a hearing was not due to mistake, inadvertence, or excusable neglect. In support of that conclusion, he cited the claimant's mistaken belief that he was required to obtain "proper medical evidence," before requesting a hearing and his surgeries and hospitalization before the hearing request deadline. Further, Member Ceja disagreed with the majority's reliance on the claimant's activities after the hearing request deadline had passed.

## PENALTIES: Board Lacked Jurisdiction to Award Penalty For Allegedly Unreasonable Closure – Correctness of Notice of Closure Was Not at Issue at Hearing – Claimant Did Not Request Hearing "From" Reconsideration Order

*John Calvi*, 76 Van Natta 687 (November 6, 2024). The Board adopted and affirmed an Administrative Law Judge's order that declined to award a penalty under ORS 656.268(5)(f) and an attorney fee under ORS 656.382(1) for the carrier's allegedly unreasonable closure.

Member Ousey concurred. He affirmed the ALJ's order based on prior Board decisions holding that a claimant does not put the correctness of a Notice of Closure at issue in a hearing for purposes of ORS 656.268(5)(f) unless they request a hearing "from" the reconsideration order. But he expressed concern that such a requirement creates an unnecessarily cumbersome process for requesting a penalty for an unreasonable closure. Specifically, he noted that requiring the claimant to request a hearing from a favorable reconsideration order to obtain a penalty award for an unreasonable closure is burdensome for claimants and inconsistent with the legislative intent behind ORS 656.268(5)(f). Accordingly, Member Ousey urged the Management Labor Advisory Committee and the legislature to review the statutory scheme to remove the requirement that a claimant put the correctness of the Notice of Closure at issue in a hearing.

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## APPELLATE DECISIONS

EXTENT: No Additional Impairment Awarded - Impairment Findings Invalid; STANDARDS: No Work Disability Award – Released to Regular Work

*Vilca-Inga v. SAIF*, 336 Or App 349 (November 20, 2024). In a nonprecedential memorandum opinion under ORAP 10.30, the court affirmed a Board order that did not award additional permanent impairment or work disability benefits for the claimant's accepted concussion. Concerning work disability, the court determined that the Board's conclusion that the attending physician had released the claimant to regular work was supported by substantial evidence and reason. In doing so, the court reasoned that the attending physician ultimately concurred with an examining physician's opinion that the claimant's concussion had resolved with no material contribution to work limitations or impairment findings.

Turning to the permanent impairment issue, the court reiterated that, under OAR 436-035-0007(11), no impairment is awardable for invalid impairment findings.

COURSE AND SCOPE: Injury Arose Out of Employment – Syncope Was Unexplained Injury – Record Established That Any Facially Nonspeculative Explanation For Syncope Was Speculative in Light of Record as a Whole

*SAIF v. Kelkay*, 336 Or App 444 (November 27, 2024). The court affirmed the Board's order in *Mengesha Kelkay*, 75 Van Natta 460 (2023), previously noted 42 NCN 8:2, which held that the claimant's syncope arose out of his employment because it was unexplained.

Citing *Sheldon v. US Bank*, 364 Or 831 (2019), the court summarized the analytical framework for determining whether an injury is unexplained (and thus, arises out of employment). Specifically, the court reiterated that an injury is unexplained if: (1) the record does not establish that there is a facially nonspeculative explanation for the injury; or (2) if the record establishes a facially nonspeculative explanation for the injury, then the claimant establishes that the facially nonspeculative explanation was, in fact, speculative in light of the record as a whole.

Turning to the case at hand, the court first noted that the Board had not determined whether the record established a facially nonspeculative explanation for the syncope. However, the court explained that the Board concluded that, based on the record as a whole, any facially nonspeculative explanation for claimant's syncope was speculative. Finding that the Board's conclusion was

supported by substantial evidence and reason, the court affirmed the Board's decision.

Finally, relying on its decision in *Guill v. M. Squared Transportation, Inc.*, 277 Or App 318, 323-24 (2016), the court disagreed with the carrier's assertion that the unexplained injury doctrine applies only to unexplained "falls" rather than other unexplained injuries.