Workers' Compensation Board

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News & Case Notes

BOARD NEWS

No Board news at this time.

CASE NOTES

WORKER REQUESTED MEDICAL EXAMINATION: Claimant Not Entitled to a WRME – Carrier's Denial Was Based on an Post-Denial IME Report But Attending Physician Concurred With Portion of IME Report Concerning Denial of Claimed Condition.

Sara A. Brown, 76 Van Natta 719 (December 3, 2024). Analyzing ORS 656.325(1)(e) and OAR 436-060-0147(1)(b), the Board held that a worker was not entitled to a worker-requested medical examination (WRME) because the attending physician at the time of the worker's WRME request had concurred with an independent medical examination (IME) report on which the carrier's denial of the worker's claim for a concussion was based. In reaching its conclusion, the Board explained that although the attending physician had not agreed with the IME report's conclusions regarding an unclaimed PTSD condition, he concurred with the portion of the IME report on which the denial was based – the portion concerning the claimed concussion condition.

A dissenting opinion agreed with the majority's determination concerning the identity of the attending physician, but did not consider that physician to have concurred with the IME report. Noting that the attending physician had provided comments clarifying his concurrence with the IME, the dissent did not interpret the attending physician's response as agreement with the IME report. Consequently, asserting that the attending physician had not concurred with the IME report, the dissent would have concluded that the worker was entitled to a WRME.

EXTENT OF PERMANENT DISABILITY: Claimant Was Not Entitled to Additional Permanent Disability Benefits Because Medical Arbiter Panel Unambiguously Opined That No Impairment Was Due to the Accepted Conditions.

Inemesit N. Okon, 76 Van Natta 738 (December 9, 2024). The Board held that the worker was not entitled to permanent disability benefits because the unambiguous findings of the medical arbiter were appropriately used to rate her permanent impairment. The Board explained that under OAR 436-035-0007(5)(b), the medical arbiter's findings are used to rate impairment unless a preponderance of medical evidence establishes that the attending physician's findings are more accurate. It further explained that it is not free to disregard a medical arbiter's unambiguous findings. The Board concluded that because the medical arbiter panel unambiguously determined that the range of motion (ROM) findings were not related to the accepted condition, the arbiter panel's findings were appropriately used to determine the worker's permanent disability benefits.

A dissenting opinion would have concluded that the medical arbiter panel's findings were ambiguous because the panel did not explain why the ROM findings were not due to the accepted conditions. The dissent further concluded that the attending physician's impairment findings were more accurate and should have been used to rate the worker's impairment. Based on the attending physician's findings, the dissent would have awarded permanent disability benefits.

CONSEQUENTIAL CONDITION: Consequential Condition Was Compensable Even Though Treatment That Caused It Was Excluded From Coverage Under OAR 436-009-0010(12); MEDICAL SERVICES: Disputed Services Were Causally Related to Compensable Injury Because They Were Directed To Compensable Condition; TEMPORARY DISABILITY: Record Did Not Demonstrate That Claimant Was Terminated For Violation of a Work Rule; PENALTIES: Carrier's Cessation of Temporary Disability Benefits Was Unreasonable.

Tharin W. Mace, 76 Van Natta 746 (December 13, 2024). The Board held that: (1) the worker's new or omitted medical condition claim for anejaculation/retrograde ejaculation and post-surgical neck, right shoulder, and right arm conditions with cervical radiculopathy was compensable under a consequential condition theory; (2) the worker's medical services claim for physical therapy services was causally related to the work injury; (3) the worker's temporary disability benefits were improperly terminated because the record did not establish that he was fired for the violation of a work rule; and (4) the carrier unreasonably terminated the worker's temporary disability.

Regarding compensability, the parties did not dispute that the claimed conditions were caused by a two-level disc replacement surgery that treated the previously accepted condition. However, the carrier argued that the surgery could not provide the basis for a compensable consequential condition because

the surgery was excluded from coverage under a Workers' Compensation Division rule, OAR 436-009-0010(12)(g). Citing *Angela M. Freemont*, 69 Van Natta 57 (2017), the Board reiterated that whether a medical service is excluded from compensability under OAR 436-009-0010 does not determine whether a consequential condition caused by that service is compensable. Accordingly, the Board concluded that the claimed conditions were compensable.

Turning to medical services, applying ORS 656.245(1), the Board concluded that because the physical therapy services were directed to the claimed cervical radiculopathy condition that it had found to be compensable, the record established that the physical therapy services were directed to a condition caused in major part by the compensable injury.

Next, the Board determined that the carrier had improperly terminated the worker's temporary disability benefits under ORS 656.325(5)(b). The Board reasoned that although there was inconsistent testimony about whether the worker was terminated for a gun incident in violation of the employer's policy against guns in the workplace, the record as a whole established that he was terminated before that incident.

Finally, the Board awarded a ORS 656.262(11) penalty and attorney fee for the carrier's unreasonable termination of the worker's temporary disability benefits. In doing so, the Board concluded that the information the carrier had at the time of the temporary disability termination did not support the employer's assertion that the worker was fired for violating a work rule. Under such circumstances, the Board held that the carrier did not have a legitimate doubt regarding it liability for temporary disability benefits

TEMPORARY DISABILITY RATE: Carrier's Calculation of Average Weekly Wage Was Incorrect – Claimant's Sign-On Bonus Payments Were Wages Under ORS 656.005(27) and Irregular Wages Under OAR 436-060-0005(19).

Terry W. Keffer, Jr., 76 Van Natta 780 (December 18, 2024). The Board concluded that the carrier had incorrectly calculated the worker's temporary disability rate, but declined to award a penalty and related attorney fee for the incorrect calculation. Regarding the temporary disability rate, the Board held that the worker's sign-on bonus payments should have been included in the calculation of his average weekly wage because the payments constituted wages under ORS 656.005(27) and irregular wages under OAR 436-060-0005(19). The Board explained that the statute defines wages as the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident and the rule defines irregular wages as a variable pay rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. The Board reasoned that because the worker's contract at hire provided that the sign-on bonuses would be paid at certain intervals if he worked a certain number of hours and the worker had fulfilled those conditions,

the payments were part of the money rate at which his services were recompensed under his contract, and thus, were wages for purposes of the statute. Further, the Board reasoned that because the worker's contract at hire provided that the bonuses would be paid at different times and in different amounts, it provided for a variable pay rate at which the worker's service was recompensed. Thus, the Board concluded that the bonus payments were irregular wages under the rule.

Turning to the penalty issue, the Board concluded that although the carrier had incorrectly calculated the worker's average weekly wage, it had not done so unreasonably. In so concluding, the Board explained that no prior Board decisions had determined whether such sign-on bonus payments should be included in the average weekly wage calculation and, although administrative rules had previously provided guidance regarding the inclusion of bonus payments, those rules had been changed or repealed. Accordingly, the Board declined to award a penalty and related attorney fee.

FIREFIGHTER PRESUMPTION: Carrier Did Not Rebut Presumption by Clear and Convincing Evidence Under ORS 656.802(5)(b).

Martin Stapleton, 76 Van Natta 769 (December 18, 2024). After applying the firefighter presumption under ORS 656.802(5)(b), the Board held that the carrier had not met its burden to prove by clear and convincing evidence that the worker's chronic myeloid leukemia (CML) was not caused or contributed to in material part by his employment. The Board acknowledged that a physician opined that CML is a specific type of leukemia that requires translocation of specific genes and chromosomes and there was no known relationship between chemical exposure to carcinogens and the gene translocation. But the Board noted that the physician also opined that he was not familiar with all of the agents that the worker was exposed to while firefighting and that it was impossible to determine what caused the genes to translocate. The Board also noted that another physician opined that, considering the state of the medical research regarding CML and the harmful toxins and substances to which the worker was probably exposed, she could not say with a high degree of probability that firefighting was not a fact of consequence in the development of the CML. Accordingly, the Board concluded that given the record as a whole, the level of uncertainty regarding the causes of CML generally and the causes of CML in the worker's circumstances, the carrier had not met its burden to overcome the firefighter presumption.

A dissenting opinion disagreed with the majority's conclusion that the carrier had failed to meet its burden. The dissent reasoned that considering the physician's persuasive and unrebutted opinion regarding the distinct characteristics of CML, the medical research that did not connect firefighting and CML, and the medical research eliminating carcinogens as a cause of CML, the record established by clear and convincing evidence that firefighting was not a fact or consequence in causing of contributing to the worker's CML.

APPELLATE DECISIONS

COURSE AND SCOPE OF EMPLOYMENT: Substantial Evidence Supported Board's Determination That The Parking Lot Exception to the Going and Coming Rule Did Not Apply; But Board's Determination That The Greater Hazard Exception Did Not Apply Did Not Resolve Factual Questions Necessary to That Determination – Remanded to the Board For Consideration of Factual Questions Pertinent to The Greater Hazard Exception.

Wiley v. SAIF, 337 Or App 63 (December 26, 2024). The court reversed the Board order that found that a worker's injury (that occurred when he was struck by a car while jaywalking from a parking space to his work across a public road) had not arisen out of and in the course of his employment. The Board's order concluded that the injury was excluded from coverage under the "going and coming" rule and did not fall within the "parking lot" or "greater hazard" exceptions to that rule. Concerning the "parking lot" exception, the Board determined that the exception was not applicable because the employer did not have any control over the parking space where the worker had parked his car or the public road where he was struck. Regarding the "greater hazard" exception, the Board found that the worker had not been required to park across the road and, further, that crossing the road did not constitute a greater hazard than that to which the general public was exposed.

After conducting its review, the court concluded that the Board's determination that the "parking lot" exception did not apply was supported by substantial evidence and was legally correct. However, the court found that the Board's order did not resolve the following factual questions regarding the "greater hazard" exception that were necessary to resolve the applicability of that exception: (1) was the worker required to park across the busy four-lane road; and (2) was he directed to jaywalk rather than walk a mile to the nearest crosswalk, such that he was exposed to a risk greater than the general public would be.

The court noted that in analyzing the "greater hazard" exception, the Board order had not addressed the undisputed facts that the worker had volunteered to park across the road on the date of the injury because there were not enough spaces in the employer's lot and the employer had directed that someone must park across the road. Similarly, the court observed that the Board's findings did not show whether it had considered evidence that the employer had indicated, by example, that the worker could jaywalk across the busy four-lane road from the parking space.