

**APPELLATE UPDATE/
NOTEWORTHY COURT & BOARD CASES**

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APPELLATE UPDATE

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COURT CASES

Appellate Procedure: Remand From Court – “Unpreserved” Issue – “Untimely Claim” Issue Not Considered – W/I Board Discretion Not to Consider

Fred Meyer Stores v. Godfrey, 218 Or App 496 (March 19, 2008). The court held that the Board did not abuse its discretion in declining to consider a carrier’s argument on remand that a worker’s injury claim was untimely under ORS 656.265(4) for not being filed within one year of the injury because the carrier had neither preserved the argument during the initial Board review (which had concerned the issue of whether the worker had given his employer notice of his injury within 90 days of the work event) nor before the court. Noting the lack of any rule, officially stated position, or prior Board practice that was inconsistent with the Board’s ruling, the court found no abuse of discretion in the Board’s refusal to consider the carrier’s argument raised for the first time on remand from the court. A dissenting opinion asserted that the Board’s “preservation of error” principle was insufficient to determine whether the Board’s policy or rule was “outside the range of discretion delegated to the agency by law.” See ORS 183.483(8)(b)(A). Consequently, the dissent concluded that the Board’s ruling constituted an abuse of discretion.

Claim Preclusion: Unappealed Denial (With Injury Date “Typo”) – Later Claim From Same Incident Precluded

Mills v. The Boeing Co., 212 Or App 678 (May 16, 2007). The court held that a worker’s claim for his right hip labral tear was precluded by a prior unappealed denial of his right hip condition because, even though the previous denial misidentified the date of his injury, the denial had responded to the only injurious work event that had occurred and had denied his claim on the basis that he had not sustained *any* injury or occupational disease arising out of course and scope of his employment. Reasoning that it was permissible to consider, for contextual purposes, the fact that the worker had filed only one claim when the carrier issued its prior denial, the court concluded that the prior denial’s typographical error regarding the injury date could only be understood to identify the only claim he had filed. Finding that there was only one injurious work event upon which the worker’s claim could have been based, the court determined that the carrier’s prior denial did not deny a “nonexistent” claim and, as such, the denial was not a legal nullity. Because the unappealed prior denial had legal effect in denying that the worker had experienced *any* work-related injury, the court held that he was precluded from relitigating whether his labral tear was work-related.

Course & Scope: “005(7)(b)(B)” – Compensability “Exclusion” – “Social” Activity – “Sake of Companionship”

Washington Group International v. Barela, 218 Or App 541 (March 19, 2008). Applying ORS 656.005(7)(b)(B), the court held that in determining whether a worker’s foot injury, which occurred during an unpaid lunch break when he assisted a co-worker in jostling a vending machine to remove a candy bar, was excluded from compensation, the pivotal inquiry was whether the worker was engaged in a “recreational or social activity” primarily for his “personal pleasure.” Relying on existing case precedent, the court stated that, if there was not a work-related reason for the activity that resulted in the worker’s injury, the activity, necessarily, was personal. Moreover, the court noted that “social” means “marked or passed in pleasant companionship with one’s friends or acquaintances * * * taken, enjoyed, or engaged in with friends or for the sake of companionship.” Reasoning that the worker’s injury occurred after toil, arguably for the sake of his companions, and while he was on a break and not while working, the court remanded the case to the Board for a determination whether his activity was recreational or social.

Course & Scope: “Traveling Employee” – Brief Social Visit – Not a “Distinct Departure”

SAIF v. Scardi, 218 Or App 403 (March 12, 2008). The court held that an “in-home” care provider’s injury, which occurred after she tripped and fell while carrying her daughter-in-law’s baby during a brief visit as she was waiting to transport her client home from a nearby grocery store, arose out of and in the course of her employment. Determining that the care provider’s work entailed travel away from her employer’s premises (even if local and of limited duration) and noting that she was required to wait to transport her client home after shopping, the court concluded that the care provider was a traveling employee. Furthermore, reasoning that the care provider’s visit to her daughter-in-law’s home (which also included notifying her of the client’s schedule so that the daughter-in-law could fill in during the care provider’s upcoming absence) was reasonably work-related, the court found that the care provider was not on a distinct departure on a personal errand when she tripped on a tree root while carrying her daughter-in-law’s baby.

Course & Scope: “Ultimate Work” – Trucker Resisting Police Requests – Did Not “Exceed Bounds of Employment”

Sisco v. Quicker Recovery, 218 Or App 376 (March 12, 2008). The court held that a tow truck driver’s injury, which occurred while he was resisting a police officer’s request to exit his employer’s truck after a traffic stop, arose out of and in the course of his employment. Stating that a violation of an employer’s rule “relating to the *method* of accomplishing [the worker’s] ultimate work” is *not* outside the course of employment, the court reasoned that *how* the truck driver interacted with police officers related to the “*method*” of performing his “ultimate work” (which was responding to tow calls and

performing tows). Consequently, notwithstanding the truck driver's violation of his employer's express directive to comply with the police officer's request, the court concluded that the truck driver's injury occurred "in the course of" his employment.

Turning to the "arising out of" prong of the work-connection test, the court explained that where the nature of the work necessarily exposes an employee to proximate interaction with third persons in the course of performing the work, the risk of injury-producing physical contact with such persons is sufficiently related to employment to satisfy the "arising out of" element; the risk of injury from such interaction results from the nature of the employee's work or from the work environment. Identifying a sole qualification to this general principle (*i.e.*, if the motivation of the *assailant* originates entirely separately from the workplace, the risk of injury is not "work-related," but rather is purely "personal"), the court determined that the motivation for the conduct which resulted in the truck driver's injury did not originate "entirely separate from the workplace, [with] the only contribution made by the workplace [being] to provide a venue." Although acknowledging that the truck driver's conduct may have precipitated his injury, the court concluded that the "reasonableness" of his conduct could not be considered and, as such, his injury "arose out of" his employment.

Extent: "Correcting" Notice of Closure – Appeal Period on PPD Award – Ran From "Corrected" NOC

Roseburg Forest Products v. Hardenbrook-Hardy, 216 Or App 112 (November 7, 2007). Interpreting administrative rules from the Workers' Compensation Division (OAR 436-030-0023(8), and (9)), the court held that, when a carrier issued a corrected Notice of Closure (NOC) that included the amount of the worker's scheduled permanent disability award (in addition to correcting an erroneous reference to "unscheduled" permanent disability recited in the initial NOC), the 60-day appeal period to contest the permanent disability award ran from the date of the corrected NOC. Reasoning that the carrier was not required to restate the extent of the worker's permanent disability when issuing the corrected NOC, the court determined that the carrier had unintentionally "corrected" the extent of the worker's permanent disability award and, as such, the 60-day appeal period on the extent of permanent disability issue ran from the date of the corrected NOC, not the initial NOC.

Jurisdiction: Circuit Court – Unjustment Enrichment – Carrier's Claim Costs For "Mistaken" Acceptance

Specialty Risk Services v. Royal Indemnity Company, 213 Or App 620 (July 5, 2007). The court affirmed a trial court's order that denied a carrier's motion to set aside a default "restitution" judgment against it for "unjustment enrichment" which had been awarded to a second carrier (for its claim costs) who had mistakenly accepted a claimant's workers' compensation claim for an injury that occurred during the first carrier's period of coverage. Finding nothing in the text of ORS 656.262(6)(a) that provided the Workers' Compensation Board with the authority to "equitably" shift

responsibility from the carrier who had mistakenly accepted the claim to the other carrier, the court could not say that there was a basis to conclude that the legislature intended to replace or “negate” the second carrier’s restitution claim.

Turning to ORS 656.307, the court determined that the case at hand could not have been litigated under the statute (and that the “necessary monetary adjustments” remedy under the statute would not have been available to the second carrier). Consequently, the court held that the statute did not constitute an administrative remedy that was intended to replace the second carrier’s unjust enrichment claim. Concluding that the workers’ compensation law did not divest the circuit court of jurisdiction over the second carrier’s unjust enrichment claim, the court held that the circuit court’s default judgment was not void.

Medical Service: “245” – New “Modified” Van for Paraplegic

Sedgwick Claims Management Services v. Jones, 214 Or App 446 (August 15, 2007). Applying ORS 656.245, the court held that a van, modified to accommodate an injured worker’s wheelchair and paraplegic-related devices, constituted a compensable medical service for his work-related injury. Reasoning that the worker’s “attending physician – prescribed” replacement van was a necessary extension of the worker’s wheelchair (a prosthetic device) without which his ability to be self-sufficient outside the home would be severely limited, the court concluded that the van itself was a compensable medical service. Nevertheless, noting that the Workers’ Compensation Division’s (WCD’s) order which found the carrier responsible for the van had not expressly considered the carrier’s argument that, pursuant to WCD rules (OAR 436-010-0230(1) and (10)), sufficient justification for a new van (as opposed to repairing the worker’s current van or purchasing a used van) had not been supplied, the court remanded to WCD for consideration of those arguments.

Medical Services: “245” - Not Limited to Accepted Conditions – Due in Material Part to Compensable Injury

SAIF v. Martinez, 219 Or App 182 (April 9, 2008). Applying ORS 656.704(3)(b)(C), and ORS 656.245(1)(a), the court held that the Board was authorized to resolve a dispute regarding whether a proposed arthroscopy was a compensable medical service for an accepted medial ligament sprain and meniscal tear condition. The court reasoned that the condition for which medical treatment is sought need not be the accepted condition, but rather the treatment must be necessitated in material part by the “compensable injury,” which means the previously accepted condition. Consequently, the court rejected the carrier’s contention that the Board could not determine the compensability of the medical service claim because the surgery was for an unclaimed and unaccepted condition (osteonecrosis). Instead, the court affirmed the Board’s determination that the surgery was necessary, as a diagnostic tool, to explore whether the worker’s symptoms were caused by his accepted meniscus tear and to determine the extent of his compensable injury.

Own Motion: “278” – Suspension of TTD Benefits – Board W/O Authority – Power Rests With Director – “325(2)”

Jordan v. SAIF, 343 Or 208 (August 30, 2007). Applying ORS 656.278 (1999) and ORS 656.325(2) (1999), the Supreme Court held that the Board did not have “Own Motion” authority to suspend a worker’s temporary disability benefits that a carrier was paying under an Own Motion claim. Reasoning that the legislature had not provided suspension authority to the Board for claims reopened under ORS 656.278 (1999), the Court concluded that such authority rested with the Director pursuant to ORS 656.325(2) (1999). Noting that the Director’s suspension authority under ORS 656.325(2) (1999) expressly applies “[f]or any period of time,” the Supreme Court determined that the particular provision (ORS 656.325(2) (1999)) controlled over the general Own Motion granted to the Board under ORS 656.278 (1999) (which did not expressly address the Board authority to suspend a worker’s benefits). Finally, although the Board had adopted an administrative rule (OAR 438-012-0035(5) (1997)) governing the suspension of temporary disability benefits under an Own Motion claim, the Court found that the promulgation of such a rule was not “reasonably required” in the performance of the Board’s duties and, as such, was beyond its authority.

Penalty: “268(5)(d)” – Based on “NOC” PPD Award, Less “Offset”

Johnson v. SAIF, 219 Or App 82 (March 26, 2008). Applying ORS 656.268(5)(d), the court held that a penalty under for a carrier’s unreasonable refusal to close a claim was based on a worker’s permanent disability award granted by the eventual Notice of Closure, offset by an overpayment of temporary disability benefits authorized by the Notice of Closure. Noting that the statute provides that the penalty is based on “all compensation determined to be then due,” the court concluded that the amount “due” is the amount the worker was entitled to be paid (*i.e.*, the permanent disability award, less the offset for overpaid temporary disability) as a result of the Notice of Closure.

PTD “Revocation” – W/O “Pre-Termination” Hearing – Federal “1983” Claim – SAIF Considered “Person”

Johnson v. SAIF, 343 Or 139 (July 26, 2007). The Supreme Court held that, for purposes of a worker’s civil action under Section 1983 of the U.S. Code (which alleged that SAIF’s termination of his permanent total disability (PTD) benefits without a hearing violated his rights to due process under the 14th amendment to the U.S. Constitution), SAIF was a “person” and, as such, could be sued in circuit court. After examining SAIF’s characterization in Oregon statutes and cases, the Supreme Court noted that some statutes treat SAIF as an “arm of the state” (like other agencies of state government, which would suggest it was not a “person” who could be sued under Section 1983), whereas other statutes pointed toward a more independent status of an entity that was not subject to immunity as an “arm of the state.” Applying factors the United States Supreme Court identified as important in making this “characterization” determination, the Court concluded that the factors indicating that SAIF was not an “arm of the state”

outweighed those in favor of immunity from a Section 1983 claim. In doing so, the Court also observed that the state treasury was not at risk for SAIF's liabilities, which provided further support for the conclusion that SAIF was not immune from a Section 1983 claim.

The Supreme Court rejected SAIF's contention that the worker was precluded from bringing the 1983 claim because he could have, but did not, raise the claim during his workers' compensation proceeding (in which, following a hearing on SAIF's termination of the PTD award, an ALJ, the Board, and the Court of Appeals had affirmed). In doing so, the Court reasoned that, by the time of the worker's hearing, SAIF had already terminated his PTD benefits (which the worker alleged violated his "due process" rights).

Finally, the Supreme Court acknowledged that SAIF may be correct that the Due Process clause does not require that a worker receive a pre-termination hearing. Nevertheless, the Court determined that this substantive issue was not present before it (*i.e.*, it was a question for another day). Consequently, the Supreme Court reversed the circuit court's summary judgment that had dismissed the worker's 1983 claim and remanded the case to the circuit court for further proceedings.

Responsibility: LIER – "Onset of Disability"

AIG Claim Services v. Rios, 215 Or App 615 (October 31, 2007). Applying the last injurious exposure rule for purposes of identifying the presumptively responsible carrier for a worker's hearing loss claim, the court held that the "onset of disability" for the worker (who had not experienced time loss in connection with his hearing loss) did not occur while he was working during an earlier carrier's coverage when he visited a hearing aid retailer to buy earplugs and the retailer recommended the purchase of hearing aids. The court determined that substantial evidence supported the Board's finding that the worker did not seek treatment for his hearing loss (but rather intended to purchase earplugs). Alternatively, even if such a recommendation could be considered "treatment," the court reasoned that there was also substantial evidence for the Board's finding that the record did not establish that the retailer's employee was authorized under the workers' compensation law to provide medical treatment (*i.e.*, was an audiologist or a licensed hearing aid specialist). Consequently, the court held that presumptive responsibility for the worker's hearing loss claim rested with the last carrier because it was providing coverage when the worker retired and filed his claim.

Subject Employer: "029(1)" – "Normal/Customary" Trade/Business" – "Homeowner" Not "General Contractor"

Sorenson v. Latour, 217 Or App 373 (December 26, 2007). Applying ORS 656.029(1), the court held that a homeowner was not responsible as a "subject employer" for a mason's injury, which occurred while he was employed by a sub-contractor who had not obtained workers' compensation coverage, because the homeowner's trade or business (farming and horse training) did not include home building construction and

the mason's labor was not a customary "day-to-day" activity that was necessary to the homeowner's trade or business. Reasoning that conducting a "trade or business" requires recurring activities that are commercial, rather than personal, in character, the court determined that the homeowner's construction of a house on his "horse training" farm for his personal use did not enroll him in the trade or business of commercial house construction for purposes of ORS 656.029(1). Because the worker's masonry labor and the construction of the homeowner's residence had no functional relationship to the homeowner's farming and horse training activities, the court concluded that construction on the homeowner's residence was not a "normal and customary" part of the homeowner's trade or business and, as such, the homeowner was not responsible for the mason's injury while he was employed by the noncomplying sub-contractor.

Subject Worker: "126(1)" – "Permanent Employment Relation" Test – N/A When Worker Permanently "Out-of-State"

Nelson v. SAIF, 212 Or App 627 (May 16, 2007). Interpreting ORS 656.126(1), the court held that a sales manager for an Oregon employer who permanently worked outside of Oregon was not a "subject worker" and, as such, was not entitled to compensation resulting from his out-of-state injury. Reasoning that the statutory scheme provides for coverage to workers for Oregon employers who are injured while *temporarily* working outside of Oregon, the court concluded that the Act does not provide coverage regarding employees for Oregon employers who are injured while working *permanently* outside of Oregon.

Subject Worker: "Right to Control"/"Nature of Work" Test

Bovet v. Law, 214 Or App 349 (August 1, 2007). Applying ORS 656.005(30), the court held that a husband and wife (who owned acreage on which they were building a home) were not subject employers of a teenager, who had agreed to perform "forest cleanup" work for them at a specified hourly wage on a schedule that he was authorized to set, because the record was inconclusive whether the husband and wife had the right to control his activities and they were not engaged in a business. Addressing the "right to control" test, the court found that the record was inconclusive because although the teenager provided his own tools, set his own work hours, and performed his work in accordance with a contract that he had proposed (all factors indicative of a nonemployment relationship), he was also paid on a hourly basis and the husband and wife retained the right to terminate his employment and to monitor his work activities (factors which supported an employment relationship). Turning to the "nature of the work" test to determine whether there was an employment relationship, the court reasoned that, based on the premise of the test (*i.e.*, the proper distribution of the costs of doing business), the "nature of the work" test did not apply to the husband and wife because there was no evidence that they intended to engage in a business in contracting with the teenager. Considering the inconclusiveness of the "right to control" test and

the inapplicability of the “nature of the work” test, the court held that the teenager had not carried his burden of establishing that he was a worker within the meaning of ORS 656.005(30).

TPD: “325(5)(a)”/“060-0030(8)” – Termination From “Unapproved” Modified Job

SAIF v. Vivanco, 216 Or App 210 (November 28, 2007). Interpreting ORS 656.268(4), and ORS 656.325(5), the court held that a carrier was entitled to continue paying temporary partial disability (TPD) benefits to a worker who had been terminated from his modified job (for reasons unrelated to his compensable injury), even though the modified job had not been approved by the worker’s attending physician. Noting that ORS 656.268(4) unambiguously provides that temporary total disability (TTD) benefits only continue until the worker returns to regular or modified employment, the court reasoned that once the worker began his modified job with his “at injury” employer (at his “pre-injury” wage), the carrier was obligated to continue paying TPD benefits (which equaled zero). Furthermore, observing that ORS 656.325(5) concerns a worker who *does not return to a modified job* that has been offered and approved by the worker’s attending physician, the court concluded that the statute had no application where the worker has actually returned to modified work at the time of his termination from employment.

BOARD CASES

Appellate Procedure: “Reasonable Expenses/Costs” – “386(2)” – “‘08” Order – Finally Prevailing Against Denied Claim

Barbara Lee, 60 Van Natta 139 (January 30, 2008). Applying ORS 656.386(2) and OAR 438-015-0019, the Board, on its own motion, awarded a worker reasonable expenses and costs, if any, incurred during the litigation of a carrier’s denial. Reasoning that the amended statute and administrative rule became effective on January 1, 2008 and applied to all claims in which the order on compensability had not become final on or before January 1, 2008, the Board considered it appropriate to reconsider its January 3, 2008 order that had affirmed an ALJ’s compensability decision and to award reasonable expenses and costs, if any, to the worker and her attorney. Consistent with OAR 438-015-0019(2), (3), and (4), the Board stated that it was authorized to grant an “unspecified” award, from which the worker and her attorney could file a cost bill within 30 days after the compensability decision became final, and, in the event of a dispute, a hearing request could be filed. A dissenting opinion contended that, in the absence of a specific request from the worker for an award of expenses and costs, the Board should adhere to its longstanding practice of refraining from addressing issues that had not been raised by the parties. The dissent further noted that the method for processing cost bills could lead to more litigation and delay in the dispute resolution process; *i.e.*, a second hearing to determine the reasonable expenses and costs.

Attorney Fee: “262(11)(a)” – Awardable W/O “Amounts Then Due”

Nancy Ochs, 59 Van Natta 1785 (July 25, 2007). Applying ORS 656.262(11)(a), the Board held that a worker’s attorney was entitled to a fee when a carrier untimely denied the worker’s claim, even though there were no “amounts then due” on which to base a penalty. After reviewing the text and context of the statute, the Board determined that a “penalty” (*i.e.*, “an additional amount up to 25 percent of amounts then due”) was not a necessary prerequisite for an attorney fee award. In doing so, the Board reasoned that an unreasonably delayed denial (as described in the statute) did not necessarily mean that compensation was delayed or that there were “amounts then due” on which to base a penalty, but to refuse to award a carrier-paid attorney fee would give no effect to the statute’s express provision for a fee for this specific unreasonable conduct.

Addressing the amount of the attorney fee award (the statute’s “proportionate to the benefit” requirement), the Board concluded that there was a significant benefit to the worker in obtaining a hearing on his claim that had never been denied and eventually securing a ruling that the carrier had unreasonably delayed its denial of the claim. Finding that the worker’s counsel had devoted two hours to the claim processing issue (based on the worker’s attorney’s uncontested request), the Board awarded a \$500 fee.

A concurring opinion noted that the legislature used the word “any” attorney fee when amending ORS 656.262(11)(a), which suggested that an attorney fee is not granted automatically every time a carrier “unreasonably delays acceptance or denial of a claim.” The concurrence reasoned that under other circumstances (*e.g.*, when a claim acceptance is late, but all bills have been paid and a worker’s attorney’s hearing request is filed *after* the acceptance), any “benefit to the injured worker” would be extremely modest.

A dissenting opinion asserted that, considering the legislature’s use of the word “plus” (rather than the word “or”) between the “penalty” and “attorney fee” portions of the statute, the most logical assumption was that a penalty assessment was a prerequisite to an attorney fee award under ORS 656.262(11)(a). Furthermore, after reviewing the legislative history of the statute, the dissent noted that no legislator had rejected testimony from the Administrator from the Workers’ Compensation Division and a representative of the Oregon Trial Lawyers Association, which suggested that there would not be just a stand-alone attorney fee and that an attorney fee award is warranted “when entitlement to penalties is proven.”

Attorney Fee: “386(1)” – “Pre-’95” CDA – Did Not Release “Atty Fees” – CDA Expressly Released Specific Benefits – Did Not Include An “Any & All” Provision

Kyung B. Deblock, 60 Van Natta 618 (March 21, 2008). Applying the “pre-1995” version of ORS 656.236(1), the Board held that a “pre-’95” claim disposition agreement (CDA) did not release a worker’s rights to attorney fees for prevailing over a carrier’s medical services denial. The Board noted that, unlike the “post-’95” version of ORS 656.236(1), the “pre-’95” version of the statute did not provide that, unless “non-medical

service” benefits were specifically retained, a CDA resolves all rights to compensation, including attorney fees and penalties potentially arising out of a claim. Reasoning that the parties’ “pre-’95” CDA only expressly released the worker’s rights to temporary and permanent disability, vocational assistance, and survivor’s benefits (and did not refer to attorney fees or include a provision releasing “any and all” other “non-medical service” benefits), the Board rejected the carrier’s contention that the CDA should be interpreted to have released the worker’s rights to future attorney fees.

Claim Processing: “262(14)” – “Noncooperation” Denial – Lack of WCD “Suspension” Order – Denial Invalid – No “Hearing Request” Time Limit

James B. Harris, 59 Van Natta 2967 (December 14, 2007). Applying ORS 656.262(14), the Board held that, despite a worker’s failure to request a hearing from a carrier’s “noncooperation” denial within 60 days, it was authorized to set aside the denial as invalid because the denial had not been preceded by a Workers’ Compensation Division order suspending the worker’s compensation as statutorily required. Reasoning that the carrier’s “noncooperation” denial had no basis in law, the Board concluded that the worker was not required to request a hearing from the statutorily invalid denial within the 60-day period prescribed by ORS 656.319(1)(a). A dissenting opinion argued that the “noncooperation” denial was voidable (not void) and could only be challenged through a direct and timely appeal. Because the worker had neglected to timely request a hearing challenging the “noncooperation” denial and had not established “good cause” for failing to do so, the dissent contended that the Board lacked authority to consider the validity of the denial.

Claim Processing: “325” – WCD Suspension Order Overturned – Invalid “Suspension” Request – Did Not Strictly Comply With WCD Rules

Debra R. Cawrse, 59 Van Natta 1917 (August 8, 2007). Applying ORS 656.325 and OAR 436-060-0105(5), the Board held that a worker’s compensation should not have been suspended (for her alleged failure to comply with her physician’s surgery recommendation) because the carrier’s “suspension” request to the Workers’ Compensation Division (WCD) had not complied with a WCD administrative rule, which required such a request to include the worker’s explanations for her behavior. Finding that shortly after receiving the carrier’s “warning” letter (which notified her that the carrier would seek suspension of her compensation if she did not schedule an appointment with her surgeon) the worker had contacted the carrier’s claim examiner explaining that she had an appointment and was hoping to be referred to another surgeon, the Board determined that the carrier’s “suspension” request to WCD had not included this information from the worker regarding her explanation. Reasoning that the “suspension” request did not strictly comply with a WCD administrative rule (OAR 436-060-0105(5)) which required “suspension” requests to include workers’ explanations for their behaviors, the Board concluded that the suspension of the worker’s compensation was not justified.

Claim Processing: Claim Filing – “265(2)” – Notice to Employer W/I 90 Days – Despite Refusal to Seek Medical Care

Jose Amador, 59 Van Natta 1538 (June 20, 2007), *on recon* 59 Van Natta 2115 (August 31, 2007). Applying ORS 656.265(1), the Board held that a worker’s injury claim was timely filed because he notified his employer of his work accident (including showing him the bump on his head from the accident) on the day it occurred, even though he did not seek medical treatment or file his written claim until some 17 months later. Noting that the statute only requires that the worker’s report to the employer concern a work accident that “may involve a compensable injury,” the Board reasoned that the statute does not require that the involvement of a compensable injury be more probable than not, but rather that only some degree of likelihood is required. Consequently, notwithstanding the worker’s rejection of the employer’s suggestion to seek medical care on the date of the accident, the Board concluded that the employer was aware of some degree of likelihood that the worker’s accident would require medical care and, as such, constituted timely notice of his injury under ORS 656.265(1).

On reconsideration, the Board rejected the carrier’s argument that, regardless of the timeliness of the worker’s accident report, his claim was barred because his written claim was not filed within one year after the accident. Noting that the only “notice” described in ORS 656.265 is “notice *of an accident* resulting in an injury or death,” the Board reasoned that ORS 656.265(4) simply explains the circumstances under which a worker’s failure to give notice of the injury within 90 days (as required by ORS 656.265(1)) does not bar the claim and, as such, does not impose a separate notice requirement, but rather prescribes an *alternative* means of providing notice if the notice requirements of section (1) have not already been satisfied.

Combined Condition: “Ceases” Denial – “262(6)(c)” – Based on “Accepted” Combined Condition

Catherine Reid, 60 Van Natta 814 (April 8, 2008). Applying ORS 656.262(6)(c), the Board held that a carrier’s “combined condition” denial was procedurally invalid because the carrier had not previously accepted a combined condition. Reasoning that the carrier’s denial (which stated that the worker’s compensable injury was “no longer” the major contributing cause of her combined condition) implied that the combined condition was compensable for an indefinite period, the Board concluded that the carrier was attempting to circumvent the claim processing system by attempting to deny a combined condition that had not been previously accepted. A concurring opinion noted that had the carrier either denied the worker’s combined condition from the inception of the claim or amended its denial by removing the “no longer” language, the procedural infirmities would have disappeared and the compensability standards of ORS 656.005(7)(a)(B) and ORS 656.266(2)(a) would have applied. Nevertheless, because the carrier’s denial represented a position that the compensable injury “ceased” to be the

major contributing cause of a combined condition, the concurrence agreed with the majority's decision that the denial was procedurally invalid under ORS 656.262(6)(c) because the combined condition had not been accepted.

Course & Scope: "Arising Out Of" Employer's Parking Lot – Twisted Knee While Exiting Car – Dark, Narrow Parking Space – "Neutral" Risk – Sufficient Work Connection

Sandra L. Blythe, 60 Van Natta 311 (February 19, 2008). The Board held that a nurse's knee injury, which occurred when she twisted while departing her vehicle from a narrow parking space in her employer's darkened parking lot to begin her work shift, arose out of her employment. Finding that the nurse's work "environment" involved a dark, crowded area in her employer's parking lot, the Board concluded that the "environment" exposed her to the type of condition which put her in the position of injuring her knee. Reasoning that there was a causal connection linking the nurse's injury to a risk to which her work environment exposed her, the Board determined that the nurse's knee injury was compensable.

Course & Scope: "Employment-Related" Risk – "Knee Pop" While Performing "Safety Check"

William H. Schaefer, 59 Van Natta 3029 (December 21, 2007). The Board held that a truck driver's knee injury, which occurred when his knee locked while he was returning to his cab after conducting a safety inspection, arose out of and in the course of his employment. Reasoning that the truck driver was following the usual means for accomplishing his work task of conducting a safety inspection of his truck when his knee "popped," the Board concluded that a condition of his employment put him in a position to be injured and, as such, his knee injury arose out of his employment.

Course & Scope: "Exclusion" – Bus Driver Fight With Passenger – Connected to Job Assignment – Did Not Exceed Bounds of Employment

Frederick C. Moreland, 59 Van Natta 2991 (December 19, 2007). Applying ORS 656.005(7)(b)(A), the Board held that a bus driver's injury, which occurred as a result of a physical altercation with a passenger, was connected to his job assignment because the subject matter of their confrontation concerned a bus stop dispute, and, as such, his injury claim was not excluded from compensation. Finding that the dispute that eventually led to their physical confrontation pertained to the passenger's displeasure at the bus driver's failure to stop the bus at the passenger's destination, the Board reasoned that the subject matter of the dispute was related or linked to the bus driver's job duties and, as such, the statutory requirements for exclusion from compensation had not been satisfied because the dispute was connected to his job assignment. Furthermore, determining that the record did not establish that the bus driver's conduct had violated any enforced policy by his employer, the Board concluded that there was a sufficient work connection between his injury and his employment.

Course & Scope: Fall in Public Crosswalk – Coming to Work From Employer Parking Lot – No “Employer Control” Over Crosswalk

Philip C. Bumgarner, 60 Van Natta 541 (March 11, 2008). The Board held that a worker’s injury, which occurred when he slipped and fell in a public crosswalk while coming to work from his employer’s parking lot, did not arise out of and in the course of his employment because his employer did not exercise control over the crosswalk. Although acknowledging the existence of some evidence that the employer provided electrical power to a caution light located over the crosswalk, the Board reasoned that the employer neither played any role in the installation of the light nor controlled the light’s operation. Consequently, the Board concluded that the employer did not exercise control over the crosswalk where the worker was injured. A concurring opinion determined that, because the caution light presented no hazard to the worker and did not contribute in any way to his slip and fall injury, any evidence suggesting that the employer provided power to the light was irrelevant. A dissenting opinion contended that the employer’s actions in providing electrical power to the caution light over the public crosswalk and directing its employees to apply “de-icer” to the crosswalk following the worker’s injury persuasively established that the employer exercised control over the area where the worker was injured and, as such, was sufficient to bring his injury within the course of his employment.

Course & Scope: Idiopathic Fall – No “Employment Risk” – Head Injury Did Not “Arise Out of” Employment

Alfred L. Hillard, 60 Van Natta 254 (February 12, 2008). The Board held that a truck driver’s head injury, which occurred when he fell to the ground after an idiopathic seizure disorder, did not arise out of his employment. Finding that the medical and lay evidence persuasively established that the worker’s head injury was caused by his fall from a non-work related seizure disorder, the Board concluded that his head injury was not compensable because the injury was not associated with an “employment risk”; *i.e.*, the injury was not related to an instrumentality associated with his work environment.

Course & Scope: “Post-Shift” “Parking Lot” Fight With Co-Worker – “Work Rule” Violation – Exceeded Bounds of Employment

Michael C. Van Der Vaarte, 59 Van Natta 1370 (June 5, 2007). The Board held that a warehouseman’s injury, which resulted from his fight with a co-worker in their employer’s parking lot, did not occur in the course of his employment. Noting that fighting was prohibited by his employer’s work rules and that he had been warned against fighting with his co-worker, the Board concluded that the worker’s “parking lot” fight (which occurred after the end of his work-shift) exceeded the boundaries of his employment and, as such, was not compensable. A dissenting opinion contended that the worker’s actions (whose disagreement with the co-worker involved a work-related dispute) were not a distinct departure from his work duties sufficient to sever the work connection. Furthermore, reasoning that focusing on “misconduct” carried a connotation

of fault (which had no place in the workers' compensation scheme), the dissent asserted that the activity which resulted in the worker's injury was within the boundaries of his ultimate work and, consequently, occurred in the course of his employment.

Course & Scope: "Special Errand" Exception – Injury While Shortening "Break" – Supervisor "Stand By" Request

Ryan K. Gibson, 60 Van Natta 6 (January 8, 2008), *second order on remand* 182. The Board held that a pizza worker's injury, which occurred when he was struck by a car while returning to his employer's business during his break, was compensable under the "special errand" exception to the "going and coming" rule because, at the time of his injury, he was shortening his break at his supervisor's request to "stand by" if he was needed. Although finding that the worker and his supervisor expected that he would have his full 30-minute unpaid break, the Board was also persuaded that the worker was nevertheless expected to return to his employer's store as soon as he could to assist his supervisor if "something unforeseen happened." Reasoning that the worker's injury was incurred while he was acting in furtherance of his employer's business, the Board concluded that his injury arose out of and in the course of his employment under the "special errand" exception to the "going and coming" rule.

Dismissal: Attorney Withdrew Hearing Request – Authorized to Withdraw – Despite Claimant Disagreement

Casey W. Evans, 59 Van Natta 2720 (November 6, 2007). The Board held that the dismissal of a worker's hearing request from a carrier's denial was appropriate because the worker's attorney had withdrawn the request and the attorney was authorized to take such an action by the worker's retainer agreement. Finding nothing in the retainer agreement that required the worker's attorney to consult with, or receive approval from, the worker before withdrawing the hearing request, the Board concluded that the ALJ's dismissal of the hearing request was justified. Noting that the worker disagreed with his then-attorney's decision to withdraw the hearing request, the Board stated that such a dispute was a matter for another forum.

Evidence: Continuance/"Depo" Denial Upheld – Based on a Report Offered by Same Party – Record Sufficiently Developed – Despite ALJ's Lack of Explanation

Rick Sandeno, 59 Van Natta 2779 (November 27, 2007). Applying ORS 656.295(5), and OAR 438-006-0091, the Board found that the record was sufficiently developed to determine that there was no abuse of discretion in an ALJ's denial of a worker's request to continue a hearing to schedule the deposition of a physician whose report the worker had submitted for admission into the hearing record. Although acknowledging that the ALJ had not provided an explanation for denying the worker's continuance motion, the Board concluded that remand to the ALJ was not necessary because the parties' arguments and the record established the basis for the ALJ's decision to close the record without granting the worker's motion to keep the record open for the

requested deposition. Turning to the merits of the ALJ's continuance denial, the Board found no error in the ALJ's ruling because the worker was essentially requesting the opportunity to directly examine, rather than cross-examine, the author of a medical report that the worker had submitted into evidence. A concurring opinion reasoned that, because the Board's administrative rules do not require an ALJ to state any reason for denying a continuance motion, the lack of such an explanation does not require remanding the case to the ALJ. Instead, applying the principles from a Supreme Court decision (*SAIF v. Kurcin*), the concurrence concluded that the record supported the proposition that the ALJ's ruling allowed the hearing proceedings to be conducted in a manner that would achieve substantial justice.

Hearing Request: Untimely Filing From Recon Order – No “Good Cause” Exception – Affidavits Did Not Overcome “Postage Due” Stamps

Jerry M. Mouser, 59 Van Natta 904 (April 10, 2007), *on recon* 59 Van Natta 1161 (May 8, 2007). Applying ORS 656.319(4), the Board held that a worker's hearing request from an Order on Reconsideration was untimely filed because he had not mailed his request to the Board within 30 days of the reconsideration order. Noting that the statute did not include a “good cause” provision for an untimely filed hearing request from a reconsideration order under ORS 656.268, the Board determined that such a request must be filed within the 30-day statutory period. Furthermore, finding that statements and affidavits from the worker's attorney's legal assistant and a U.S. postal carrier (which stated that the hearing request had been timely and properly mailed) did not overcome a “return for postage due” stamp on the envelope containing the hearing request, the Board concluded that the worker had not rebutted the presumption of an untimely filed hearing request under the Board's administrative rules (OAR 438-005-0046(1)(c)).

Jurisdiction: “Apportionment” of Concurrent Responsibility – Director Authority

Tami L. Crittendon, 60 Van Natta 89 (January 17, 2008). Applying OAR 436-060-0195(1), the Board held that the authority to apportion concurrent responsibility for a worker's compensable claim between two employers rested with the Director. Affirming an ALJ's determination that two employers (for whom the worker had been employed during an overlapping period) were concurrently responsible for the worker's compensable claim, the Board denied one of the employer's request to apportion responsibility between the two employers. Reasoning that “apportionment” authority rested with the Director, the Board concluded that the employer's request should be presented to the Director and through the appropriate appellate channels.

Jurisdiction: “Lump Sum” Payment Dispute – Hearings Division – Carrier Not Required to Pay Pending its Decision to Contest PPD Award

Anthony D. Cayton, 59 Van Natta 1455 (June 13, 2007). Analyzing ORS 656.230(1) and ORS 656.268(6)(g), the Board held that a carrier's failure to respond to

a worker's "lump sum payment" application within 14 days did not obligate the carrier to pay his permanent disability (PPD) award in a lump sum before the PPD award had become final by operation of law. Noting that ORS 656.268(6)(g) authorizes "any party" to request a hearing within 30 days of an Order on Reconsideration if they object to the order, the Board reasoned that the worker's waiver of his right to appeal the reconsideration order's PPD award did not eliminate the carrier's statutory right to appeal the adequacy of the worker's award. Because the worker's "lump sum payment" application had been filed within the carrier's 30-day statutory appeal period from the reconsideration order, the Board concluded that the carrier's delay in making the lump sum payment of the PPD award until the reconsideration order became final by operation of law was not unreasonable.

Noncooperation Denial: "262(13) & (14)" – Worker Left Depo With Attorney – Justifiable Reason For Not Cooperating

Marvin E. Lewis, 60 Van Natta 224 (February 8, 2008). Applying ORS 656.262(13) and (14), the Board held that, because a worker left a deposition at his attorney's direction, any failure to cooperate in the carrier's investigation of the worker's claim was for reasons beyond his control and, as such, a denial of his claim based on his alleged "noncooperation" was not justified. After reviewing the legislative history of the statutory scheme, the Board concluded that: (1) a represented worker had the absolute right to have an attorney present during any interview or deposition; (2) if an attorney was unreasonably unavailable to attend an interview or deposition, Section (13) provided a sanction remedy for the carrier to pursue with the Director against the attorney; and (3) the statutory remedy does not mandate a represented worker's participation in an interview or deposition without an attorney. In reaching its conclusion, the Board noted that an initial version of the proposed statutory amendment (which had indicated that a worker must attend a deposition without an attorney under certain circumstances) had received criticism from several legislators and was subsequently removed from the version that the legislature subsequently adopted. Because the worker's attorney's departure from the deposition prevented claimant from exercising his right to an attorney's presence at the deposition, the Board determined that any failure to cooperate in the carrier's claim investigation was for reasons beyond the worker's control and that the carrier's "noncooperation" denial must be overturned.

A dissenting opinion asserted that, although the worker may have been justified in terminating the deposition, he was still required to cooperate in the investigation of his claim, particularly after the Director had warned him that a failure to cooperate would lead to a suspension of his benefits (which had subsequently occurred). Contending that the worker had not established that he had fully and completely cooperated or that his failure to cooperate was for reasons beyond his control, or that the carrier's investigative demands were unreasonable, the dissent considered the carrier's "noncooperation" denial to have been justified.

Own Motion: Carrier Request to Rescind Voluntary Reopening – “Post-Closure” Request Denied as Untimely

Brian C. Smallwood, Dec’d, 60 Van Natta 113 (January 23, 2008). In an Own Motion order, the Board declined a carrier’s request to authorize rescission of its voluntary reopening of an Own Motion claim for a “post-aggravation rights” new medical condition. Although acknowledging that existing case law supported the proposition that a surviving spouse lacked standing to initiate a new medical condition claim for “death,” the Board noted that the present case was distinguishable because the carrier had already accepted, reopened, and closed the Own Motion claim. Because the time for appealing the Notice of Closure had expired, the Board determined that the carrier was not authorized to rescind its voluntary reopening of the claim, regardless of whether the deceased worker’s surviving spouse had standing to request acceptance of the new medical condition claim.

Penalty: “268(5)(d)” – Based on “NOC,” Not “Recon Order”

Anthony D. Cayton, 60 Van Natta 653 (March 25, 2008). Applying ORS 656.268(5)(d), the Board held that a penalty for an unreasonable refusal to close a claim is based on the compensation determined to be due by the eventual Notice of Closure, not a subsequent Order on Reconsideration. Reasoning that the issuance of the Notice of Closure was the action that the worker was seeking when the penalty for the carrier’s unreasonable refusal to close the claim was assessed, the Board concluded that the statute’s description of the penalty as an amount “determined to be then due” refers to the Notice of Closure, rather than to a subsequent Order on Reconsideration. In reaching its conclusion, the Board observed that a separate penalty under ORS 656.268(5)(e) is available if an Order on Reconsideration increases a worker’s permanent disability award granted by a Notice of Closure in the proportions prescribed by that statute.

Penalty: “268(5)(e)” – Increased PPD Award From Recon Order – “Post-Closure” Information – Carrier Could Not Have Reasonably Known

Rafael L. Ortiz-Lopez, 59 Van Natta 1564 (June 20, 2007). Applying ORS 656.268(5)(e), the Board held that a penalty from the increased permanent disability (PPD) award between an Order on Reconsideration and a Notice of Closure was not justified because the increased award was based on information that the carrier could not reasonably have known at claim closure. Finding that the attending physician’s report (which contained the impairment findings on which the reconsideration order’s PPD award was based) was not received by the carrier until some three weeks after it issued its Notice of Closure, the Board concluded that the carrier could not reasonably have known that the increased PPD award from the reconsideration order would be based on that report. Consequently, the Board determined that a penalty under ORS 656.268(5)(e) was not warranted.

Preexisting Condition: “005(24)” – “Arthritis/Arthritic Condition” – No Persuasive Medical Opinion of “Joint Inflammation”

Adam M. Karjalainen, 59 Van Natta 3076 (December 31, 2007). Applying ORS 656.005(24), the Board held that, because the medical evidence did not establish that a worker’s low back degenerative disc disease was an “inflammation of a joint,” the disease was not “arthritis or an arthritic condition” and, as such, did not constitute a “preexisting condition.” Although persuaded by the medical evidence that the worker’s disease which affected the intervertebral disc space and adjacent lumbar vertebrae constituted a “joint,” the Board did not consider the medical evidence sufficient to establish the presence of “inflammation.” Lacking the existence of a “preexisting condition,” the Board determined that the “major contributing cause” standard for a “combined condition” under ORS 656.005(7)(a)(B) and ORS 656.266(2)(a) was not applicable, but rather that the worker had successfully met a “material contributing cause” standard in establishing the compensability of his injury claim for a L5-S1 disc herniation. In reaching its conclusion, the Board declined the worker’s invitation to declare that degenerative disc disease was not “arthritis” as a matter of law, reasoning that a court ruling had only held that the definition of “arthritis” must be uniformly applied to all cases and, as such, the issue of whether a particular record satisfies that definition is made on a case-by-case basis.

Remanding: “Post-Hearing” Indictment/Guilty Plea – Compelling Reason to Remand

Kliffon Ferguson, 59 Van Natta 2672 (November 2, 2007). Applying ORS 656.295(5), the Board held that remanding a case was warranted because an employer’s witness, who had contradicted the worker’s testimony at hearing regarding the reasons for the worker’s failure to undergo a drug test, had been indicted and pled guilty to a felony charge for aggravated theft from his employer. Reasoning that the indictment and guilty plea had occurred after the hearing and concerned the credibility of the employer’s witness (whose testimony related to the worker’s failure to take a drug test and thereby his termination from employment and the termination of his temporary disability benefits), the Board concluded that such evidence was not obtainable with due diligence at the hearing and, as such, remand was justified.

Standards: ‘05 Injury – “Work Disability” – Due to Compensable Injury – Noncompliance With Physician’s Advice

Dale E. Vanbibber, 59 Van Natta 1962 (August 14, 2007). Evaluating a worker’s permanent disability under ORS 656.214(5) and ORS 656.726(4)(f)(D), the Board held that he was entitled to a “work disability” award because, by the time of a Notice of Closure, he had neither returned nor was released to his regular work by his attending physician, even though his physician had attributed his limitations to his noncompliance with a work conditioning program. Although the worker’s attending physician had initially released him to his regular work and he had actually returned for a brief time, the Board found that, by the time the Notice of Closure issued, he had stopped working and

his physician had rescinded the release. Consequently, the Board determined that the worker's initial return to work did not disqualify him from a "work disability" award. The Board further acknowledged that the worker's physician had related his limitations to his noncompliance with a work conditioning program. Nonetheless, reasoning that the worker's compensable injury caused the need for his medical treatment, the Board concluded that his inability to work remained the result of his compensable injury. In reaching its conclusion, the Board noted that the Director was authorized to reduce or suspend a worker's compensation based on a failure to participate in a physical rehabilitation program. *See* ORS 656.325(2); OAR 436-060-0105.

Standards: "Brain Injury"/"Psychiatric Impairment" – Disability Not Addressed by Standards – Temporary Rule Referral

Sandra A. Ainsworth, 59 Van Natta 2695 (November 6, 2007). On remand, the Board held that, because the court had determined that the worker's loss of earning capacity from a compensable injury included psychiatric damage that was not also brain damage, the Director's permanent disability standard that failed to provide compensation for psychiatric disability that was not also brain damage as defined in the standards was invalidated insofar as it pertained to the worker's permanent disability. Reasoning that the worker's permanent disability was not adequately addressed in the Director's disability standards, the Board concluded that remand to the Appellate Review Unit for consideration of the promulgation of a temporary rule to address the worker's permanent disability was justified.

TPD: "325(5)(b)" – "AP-Approved" Modified Job/"Fired" Claimant – "Facial" Constitutionality Challenge Rejected

Linda K. Bohna, 59 Van Natta 2957 (December 12, 2007). Applying ORS 656.325(5)(b), the Board held that the SAIF Corporation's conversion of a "fired" worker's temporary total disability benefits to temporary partial disability benefits based on her attending physician's approval of a modified job offer which would have been offered to her pursuant to her former employer's "return to work" program did not constitute an unconstitutional violation of the "due process" clause to the federal constitution. The Board noted that, although a Supreme Court decision (*Johnson v. SAIF*) held that SAIF was a "person" for purposes of civil rights claims for violation of federal constitutional rights, the Court had not ruled that SAIF was a "state actor" whose actions under ORS 656.325(5)(b) were subject to "due process" constraints. In any event, reasoning that the worker's constitutionality challenge to the statute was facial in scope (*i.e.*, a contention that the statute was unconstitutional in its entirety as it applied to all insurers and self-insured employers), the Board rejected such a challenge because, even if SAIF was considered a "state actor" (whose actions would be subject to "due process" constraints), private carriers would not also be "state actors" (and, thus, would not be subject to "due process" constraints).