Legal update: Weathering the wild and stormy world of the latest workers' compensation cases!

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Coverage and subjectivity

Subjectivity—worker. *Held: Claimant was a "worker" within the meaning of ORS 656.005(30), at the time of her injury.* Claimant applied for a telemarketing position with SAIF's insured. She completed a written application and an interview. Claimant called to inquire about her application and was then invited to attend an "orientation" and paid training to take place on January 21, 2013. On January 21, 2013, claimant walked through an office building lobby toward the employer's offices to begin the orientation and training. She went to the door to take the stairs to the mezzanine level where the office was located. As she approached the door, one of the employer's workers opened the door, which struck claimant and caused her to fall and break her hip. At the hearing, claimant testified that she came to the employer's premises with the understanding that she would participate in a paid training at nine dollars per hour. The employer testified that claimant would have been required to complete the orientation paperwork before participating in paid training. The ALJ determined that claimant was not a subject worker because, at the time of her injury, she only had the possibility of future employment, rather than an agreement with the employer to provide services for remuneration. The ALJ reasoned that the employer required prospective employees to review and agree to a set of workplace policies, including the employer's productivity expectations, wages and hours, and dress code, to present photo identification and a Social Security card, and to complete I-9 and W-2 federal forms. Accordingly, the ALJ concluded that, without claimant's agreement to such policies and completion of the forms, her employment had yet to begin when she sustained her injury. The board agreed. The court reversed. The court reasoned that, but for claimant's injury, she would have completed the orientation and began the paid training. The court remanded to the board. SAIF also appealed the court's order. The Supreme Court remanded the case to the Court of Appeals for reconsideration in light of *Gadalean v. SAIF*, 364 Or 707 (2019). On remand, the Court of Appeals distinguished *Gadalean*, finding unlike in *Gadalean*, claimant had been invited to the orientation and paid training, which would have taken place immediately after the orientation. Thus, it concluded, at the time claimant arrived for the orientation, she had a reasonable expectation of remuneration; i.e., the paid training. Accordingly, the court adhered to its prior opinion, which had reversed and remanded the case to the board "for an order determining that the claim is compensable." On remand, the board held claimant was a subject worker at the time of her injury. Because there was no dispute concerning medical causation, the January 2013 injury claim was compensable. An additional $850 attorney fee was awarded, on top of the $62,793.79 amount awarded by the court, even though no brief was filed to the board. *Mary K. Meyers, Dcd,* 73 Van Natta 676 (2021). [1]

Subjectivity—worker. *Held: Delivery driver was not an independent contractor.* Applying ORS 656.005(30), the board held claimant, a delivery driver, was a "worker" that should not be excluded from coverage. Citing *S-W Floor Cover Shop v. Nat'l Council on Comp. Ins.*, 318 Or 614 (1994), the board explained that, in determining whether an individual is a "worker" under ORS 656.005(30), the "right to control" test and the "nature of the work" test are applied. Turning to the case at hand, the board reasoned because the employer exercised significant control over the manner of claimant's job performance, including requirements that claimant work every day and follow company policies, the "right to control" weighed in favor of an employment relationship. The board also analyzed the employer's right to terminate employment,

[1] Cases marked with were discussed at the oral presentation of the agent seminar.

finding the employer was free to fire claimant without liability, which also favored the existence of an employment relationship. Moreover, the board explained claimant's work as a driver did not require advanced skills or highly specialized knowledge which would be indicative of an independent contractor relationship. The board further determined that, even if claimant's skills as a truck driver and parts distributor were considered "specialized," the "nature of the work" test supported a finding claimant was a "worker" because the delivery of automotive parts was part of the employer's regular business, claimant's work was continuous and ongoing, and claimant did not have time or days off to perform other jobs or deliver for other companies. Under such circumstances, the board found that claimant was a "worker" under ORS 656.005(30), and affirmed the ALJ's decision. *Kevin A. McCallum,* 73 Van Natta 979 (2021).

Course and scope

Course and scope—imported risk. *Held: Worker who brought energy drink to work which exploded causing eye injury arose out of employment.* In this course and scope case, the court affirmed the board's determination that claimant's eye injury arose out of and in the course of employment. Claimant, a painter, was required to stay on the work site during mandatory paid work breaks. In the absence of a place to sit during his break, he sat in the cab of the employer's truck. Claimant's eye was injured when, as he was opening an energy drink bottle, its contents exploded and the bottle cap shot into his eye. SAIF denied the claim asserting that the injury did not arise out of work because the exploding beverage was a "personal instrumentality" (i.e. a danger that claimant brought into the workplace). SAIF argued that the risk of injury posed by an exploding drink brought into the workplace was not a risk of claimant's work environment. The employer did not supply the drink, direct him to consume it in the truck, or create or contribute to any risk that claimant would be injured by the object. The causal connection between claimant's injury and his employment was absent. Agreeing with the board, the court rejected SAIF's contention and analyzed the exploding bottle as a "neutral risk," one that was neither personal nor employment-related in nature. Even assuming that claimant bringing his own drink to the work site was an imported risk, claimant's consumption of the drink was a feature of his employment because the employer required claimant to take his paid breaks at the job site and did not provide drinks. Thus, the court concluded that claimant's employment placed him in a position to be injured and that the injury therefore arose out of the employment. *SAIF v. Chavez-Cordova,* 314 Or App 5 (2021).

Course and scope—mixed risk. *Held: Worker's hip that gave out while standing in line was a mixed risk with prior injury and therefore arose out of employment.* In this course and scope case, the court affirmed the board's determination claimant's prosthetic hip failure arose out of and in the course of his employment. Claimant, a mechanic, had received a left hip prosthesis eight years prior to the work-incident. While standing in line to use a work computer to clock out for a mandatory work break, claimant's prosthetic hip failed when he rested the tip of his boot on the floor behind him "to relax it." Claimant was diagnosed with a "left hip total hip arthroplasty with displacement of the femoral shaft" and underwent surgery to repair the prosthesis. SAIF denied the claim and contended claimant's injury was not within the course and scope of his employment, because the "arising out of" prong was entirely absent. There was no causal connection between claimant's hip dissociation and his work: the risk that claimant's hip would shift out of its socket when he placed his foot down was an entirely personal risk. SAIF also argued the risk could not properly be characterized as a "mixed risk" because the act of moving his leg while standing was

not an "employment risk." The court rejected SAIF's arguments. The court applied the "mixed-risk doctrine for the first time and concluded the injury resulted in part from a personal risk (i.e. presumably the faulty prosthesis) and an employment risk (i.e. standing in line while waiting to log out of work). While the court acknowledged that claimant's injury could "could have happened anywhere and did not depend on the unique circumstances of claimant standing in line at work at the computer," it categorized claimant's standing activity as "movement about the work areas in carrying out job duties," which is generally considered to be work-related. Since the mixed-risk doctrine counsels that when an injury is caused in part by an employment risk, it arises out of the employment, the court held claimant's injury arose out of employment and was compensable. *SAIF v. Blankenship,* 314 Or App 34 (2021).

Course and scope—parking lot. *Held: Worker's slip and fall in parking lot compensable.* In this course and scope case, the court affirmed the board's application of the parking lot exception to the going and coming rule to find claimant's slip and fall compensable. Claimant was injured on her way to work when she slipped and fell on ice in the employer's annex parking area, next door to the employer's building. SAIF denied the claim because claimant's injury did not "arise out of and in the course of employment" as required by ORS 656.005(7)(a). The board disagreed, concluding that the injury arose "in the course of" her employment, by way of the "parking lot" exception, because the employer had "some control" over the annex parking. On judicial review, SAIF argued that the issue of control turns on the employer's legal control of the premises, such as through its lease, its payment of rent, or a right or obligation to maintain or repair the premises. The court disagreed, highlighting that the parking lot exception only requires that the employer exercise "some control" over the area. The court did not outline a concrete test for determining "some control," but did clarify that a showing of legal control or an obligation to maintain or repair the premises is not always required. The court concluded that the board's finding of "some control" was supported by substantial evidence. Specifically, the court highlighted the following factors as weighing in favor of the employer exercising "some control" over the annex parking lot: the annex was exclusive to the employer, the landlord acquired the annex for $1,000 a month because the employer required additional parking, the employer had an oral agreement with the landlord to use the annex, the employer strongly encouraged its employees to use the annex so its customers could use the office parking lot, and the employer's testimony that she would have informed the landlord if there had been snow or ice in the annex. Since the parking lot exception applied, the court held that claimant's injury arose "in the course of" employment. The court further determined that the injury arose out of claimant's employment because she was encouraged to park in the annex parking area for the convenience of the employer's patients, thereby serving employer's interests. The board's order was affirmed, and the claim found compensable. *SAIF v. Lynn,* 315 Or App 720 (2021).

Course and scope—course of employment. *Held: Off duty manager in course of employment when injured while removing patron.* In this course and scope case, the court reversed the board's determination that claimant's injury was not in the course and scope of his employment. Claimant, a manager at a pool hall, was off duty and came to the pool hall to shoot some pool. The manager on duty asked claimant to eject a troublesome person who was bothering customers, and claimant did so by "verbally" pushing the person out the door. On the sidewalk in front of the pool hall, claimant flicked a cigarette out of the person's hand and pushed him, and the person punched claimant in the face, causing injury. SAIF denied the claim on the grounds that the injury did not occur in the course and scope of claimant's job. The board upheld the denial, noting that while removing the troublesome person who injured claimant was reasonably within the range of claimant's regular duties, the injury did not occur in the course of his employment because claimant was not on duty or being paid, the injury

occurred off of employer's premises, and claimant "exceeded the bounds" of his employment by using force. The court disagreed. The court focused on the fact that removing troublesome people was part of the claimant's job as a manager and that claimant was asked by the manager on duty to remove the troublesome person. Thus, the task of removing the troublesome person was within the course and scope of claimant's employment because it was for the employer's benefit even though claimant was not "on the job." Claimant's chosen method of removing the person – i.e. pursuing the person outside and using physical force – did not deprive the task of a work connection or remove the activity from the course of claimant's employment. Further, the claimant satisfied the arising out of prong because the risk of claimant being injured while removing a person was a risk of claimant's employment. The case was reversed and remanded back to the board to address SAIF's contention that the injury fell within the assault exclusion under ORS 656.005(7)(b)(A). *Davis v. SAIF*, 316 Or App 301 (2021).

Course and scope—personal comfort doctrine. *Held: Off-premises trip and fall did not arise out of employment.* In this course and scope case, the court affirmed the board's determination that claimant's off-premises trip and fall during a personal comfort activity did not arise out of her employment. Claimant participated in an employer-sponsored wellness program that encouraged employees to move during the day and to take walks on their breaks. During a paid break, claimant took a walk through a residential neighborhood, on a route that she and coworkers regularly used. She was approximately one block from work when she tripped and fell over a section of cracked sidewalk and injured her hand. SAIF denied the claim as not within the course and scope of claimant's employment. The board upheld the denial, reasoning that while claimant's walk was a personal-comfort activity incidental to her employment and therefore satisfied the "in the course of" prong, the risk of injury caused by the cracked sidewalk was not employment-related and that claimant's work environment had not placed her in a position to be injured—employer had not mandated the walk or directed claimant to follow a particular route on her walk. On appeal to the court, claimant argued that an injury which occurs during a personal-comfort activity satisfies both the "in the course of" and "arising out of" prongs of the unitary work-connection test. Conversely, SAIF asserted that the court's precedent places the personal-comfort doctrine squarely within the "in the course" prong, and that the doctrine's application does not abrogate the claimant's burden to prove the injury "arose out of" employment. Agreeing with SAIF, the court rejected claimant's contention and clarified that the reference in *Mandes* and *Pohrman* to "course and scope" did not obviate the need to address the "arising out of" prong in the context of claims involving the personal-comfort doctrine. The court further agreed with the board that the cracked sidewalk was a "neutral risk" and, notwithstanding employer's encouragement of activity, there was nothing about claimant's employment that exposed claimant to the risk of being injured by the cracked sidewalk during her off-premises walk. *Watt v. SAIF*, 317 Or App 105 (2022).

Injuries, consequential conditions, and objective findings

Injury—combined condition. *Held: A symptomatic worsening of a preexisting condition is not a combined condition.* Claimant, who works as a custodian, filed an injury claim based on symptoms he experienced in his left shoulder after a day of heavy lifting at work. SAIF denied the claim, asserting that the work injury had combined with preexisting conditions and was not the major contributing cause of the combined condition. See ORS 656.005(7)(a)(B). Claimant filed a request for hearing. The board found that claimant has a preexisting condition in his left shoulder as defined by ORS

656.005(24), and that finding was supported by substantial evidence. There was also substantial evidence in the record to support the board's finding that the day of heavy lifting was a material contributing cause of claimant's disability and need for treatment of the preexisting condition. The board also found that SAIF presented persuasive evidence that the work-related injury incident was not the major contributing cause of claimant's disability and need for treatment of the combined condition, and concluded the claim therefore was not compensable under ORS 656.005(7)(a)(B). While on appeal, the Supreme Court issued its decision in *Brown v. SAIF*, 361 Or 241 (2017), prompting the Court of Appeals to remand the case back to the board to reconsider its order in light of the reasoning in *Brown*. On remand, the board adhered to its conclusion SAIF had met its burden that there was a combined condition and the claim was not compensable because the work injury was not the major cause of the need for treatment or disability for the combined condition. On appeal a second time, the court reversed, ruling that under the narrow issue of whether symptoms of a preexisting condition brought on by work activity can "combine" with a preexisting condition to give rise to a combined condition; it could not. The court noted that a combined condition occurs when a new injury combines with an old injury or pre-existing condition to cause or prolong either disability or a need for treatment." Id. at 634. *See Fred Meyer, Inc. v. Evans*, 171 Or App 569 (2000) ("The operative principle of ORS 656.005(7)(B) is that multiple conditions combine to create a disability or need for treatment."); *Luckhurst v. Bank of America*, 167 Or App 11 (2000). ("In order for there to be a 'combined condition,' there must be two conditions that merge or exist harmoniously * ** rather than one condition made worse" by a work-related injury.). The court held that a preexisting condition and its symptoms are not separate conditions and so there could be no combining. The court therefore reversed and remanded. *Carrillo v. SAIF,* 310 Or App 8 (2021).

Injury—burden of proof. *Held: Bee sting was major cause of resulting ulnar nerve condition*. Claimant sustained a bee sting at work. Thereafter, she developed an allergic reaction and swelling of the left hand and forearm. The employer denied claimant's new claimed condition for a left ulnar neuropathy condition. The ALJ set aside the denial, relying upon a treating physiatrist who opined the bee sting was the major contributing cause of a worsening of left ulnar radiculopathy. The employer appealed, contending the treating physician was not aware of a prior bee sting and therefore the opinion was unpersuasive. Moreover, an expert neurologist opined the bee sting was not in a location that could have caused the ulnar condition. The board upheld the ALJ decision. The board determined the claim was compensable under a consequential condition theory. Despite the fact the treating physician was not aware of the prior bee sting, the board ruled it was this particular bee sting that worsened claimant's underling condition and was not only a temporary "provocation of symptoms." The board discounted other doctors who were rebutted by the rationale of the physiatrist who explained his opinion in detail. The board awarded a $6,000 attorney fee for services on review. *Laurie L. Whitley,* 73 Van Natta 738 (2021).

Injury—burden of proof. *Held: Influenza claim analyzed as an injury and material contributing cause standard applied.* In this influenza injury case, the court reversed the board for not explaining why an expert's lack of knowledge of one potential exposure at the grocery store rendered his opinion unpersuasive under a material contributing cause standard. In February 2019, claimant, a bus driver, became ill with the flu during the height of flu season and required a short hospitalization. She was exposed to passengers who were coughing and sneezing and hugged a coworker who was subsequently diagnosed with the illness during the typical four- to six-day incubation period for the flu. Off work during that same period, claimant ran several errands that included a regular trip to the doctor and quick trips to a department store, a pharmacy drive-up window, and a grocery store. Both claimant's and the employer's

experts agreed that any time claimant was in a public place she was potentially exposed to the flu, either on the job or off the job. In upholding the employer's denial, the board rejected claimant's expert's opinion, reasoning that it was based on an incomplete history because the expert was not aware that claimant went to the grocery store in the days before she became ill. On appeal, claimant argued that her expert's knowledge of one specific exposure at the grocery store was not necessary to his evaluation of material contributing cause because, unlike the major contributing cause standard applicable in the occupational disease claim, the material cause standard does not require a weighing of every possible off-work exposure against the work exposure. The court noted that the case presented a unique variation on the material cause standard because both medical experts explained that it was not possible to determine with certainty where claimant "caught" the flu. The compensability of the claim thus depended on evidence that it was more likely than not that claimant's exposure at work was a material cause of her disability or need for treatment. The court reasoned that claimant's expert's opinion supported the conclusion that claimant's exposure at work was a "fact of consequence" that could satisfy the material contributing cause standard of proof despite his lack of knowledge of claimant's trip to the grocery store. The court specifically noted that the grocery trip omission would have been significant *if* the occupational disease major contributing cause standard of proof were applicable. The case was reversed and remanded for the board to consider whether claimant's expert's opinion satisfied claimant's burden that it was more likely than not that claimant's exposure at work was a material cause of her illness. *Rogers v. Corvel Enterprise Comp, Inc.*, 317 Or App 116 (2022).

New and omitted conditions

New condition—burden of proof. *Held: Insufficient evidence that combined condition existed*. In this combined condition case, the court reversed the board's determination claimant's L4-5 disc protrusion was part of a combined condition. SAIF initially accepted the claim for a lumbar strain. Claimant made a new/omitted condition claim for "L4-5 disc protrusion." SAIF conceded material cause, but denied the condition as a combined condition based on the medical opinion of Dr. Button, which focused on the role the work incident played in claimant's need for treatment of the protrusion. SAIF argued the court's recent analysis in *Hammond v. Liberty Northwest Ins. Corp.*, 296 Or App 241 (2019), which allowed for a combined condition analysis without two discrete medical conditions, supported the board's decision. In rejecting SAIF's argument and narrowing the application of *Hammond* to initial compensability, the court articulated the combined condition defense in new/omitted cases as requiring the insurer to introduce evidence showing, "(1) how the L4-5 disc protrusion combined with claimant's preexisting arthritis to result in a disability or need for treatment; and (2) that the L4-5 disc protrusion was not the major cause of the disability or need for treatment resulting from that combined condition." Ultimately, there was no substantial evidence to support the formation of a combined condition because Dr. Button did not address the combining of the claimant's arthritis with the new/omitted protrusion. *Pedro v. SAIF,* 313 Or App 34 (2021).

New condition—encompassed. *Held: Claim must be reopened when new claimed condition is compensable even if it is encompassed within accepted condition.* In this 656.262(7) claim reopening and processing case, the court concluded a closed claim must be reopened for processing when a compensability denial is set aside even if the newly determined compensable conditions are "encompassed within" the scope of the original accepted conditions. The employer initially accepted a rotator cuff tear.

After claim closure, the worker made new/omitted condition requests for multiple sub tears within the accepted rotator cuff condition. Factually, these conditions were encompassed within the previously accepted condition. The employer, however, denied the newly claimed conditions on compensability grounds. The compensability denial was set aside. Despite the order setting aside the denial of compensability, the employer argued they were not required to reopen and process the newly accepted conditions because those conditions were encompassed within an already accepted closed claim. The court rejected the employer's argument. The court construed the "if a condition is found compensable after claim closure" language in 656.262(7)(c) to mean the relevant date on which the denied conditions were "found compensable" was the date of the ALJ's order. Accordingly, the court concluded ORS 656.262(7)(c), by its plain terms, required reopening of claimant's claim. Thus, an employer must reopen a claim to process newly found compensable conditions even if those conditions are encompassed within a previously closed claim. *Simi v. LTI Inc. — Lynden Inc,* 386 Or 330 (2021).

Occupational disease

Occupational disease—burden of proof. *Held: Series of discreet events can cumulatively be considered to establish compensable occupational disease.* Analyzing ORS 656.802(2)(a) on remand, the board concluded the claimant's occupational disease claim for several right shoulder conditions were compensable, based on a persuasive medical opinion that the conditions were caused over time by a series of work-related injuries. Citing ORS 656.802(1)(a)(C), the board reiterated that to establish the compensability of an occupational disease, the claimant must prove "employment conditions" were the major contributing cause of the disease. The board noted work-related injuries constitute "employment conditions" for purposes of the statute. Further relying on the court's opinion, the board explained an occupational disease can be established by medical evidence that discrete work-related injuries have caused a separate condition, arising over time as a result of the cumulative effect of those injuries. Here, the board observed the medical evidence attributed major causation of the claimed occupational disease to a series of work injuries, as part of the natural history of rotator cuff tears, in which tears progress and recur with time and further injury. Although the medical evidence focused on one particular injury as the major cause of a "recurrent or worsened" right rotator cuff tear, it persuasively established the overall right shoulder pathology resulted from multiple work-related injuries over time. Accordingly, the board found the occupational disease claim compensable. Regarding the attorney fee award, the board applied ORS 656.386(1) and ORS 656.388(1) and determined that $28,050 was a reasonable attorney fee award for claimant's counsel's services at the hearing, on board review, and on remand. *Randy G. Simi,* 73 Van Natta 526 (2021).

Occupational disease—compensability. *Held: Claimant's exposure with a prior employer can be considered despite the worker entering into a DCS for that condition.* On remand from the court (*Fleming v. SAIF*, 302 Or App 543 (2020)), the board held claimant's employment exposure with a previous employer, which was subject to a disputed claim settlement (DCS) for then-current right shoulder conditions, could be considered in determining the compensability of his occupational disease claim for a current right shoulder condition against a subsequent employer. The board found persuasive the opinion of claimant's attending physician, who addressed the relative contribution of different potential causes of claimant's condition and opined that claimant's overall work activities at both employers were the major contributing cause of the right shoulder condition. In contrast, the physician relied on by the carrier did not

address all of claimant's work exposure and did not explain how preexisting and age-related conditions contributed more than the work activities. Accordingly, the board found the occupational disease claim compensable. *Lloyd R. Fleming,* 73 Van Natta 1006 (2021).

Occupational disease—compensability. *Held*: *A reasonable inference was sufficient to establish compensable toxic exposure to mold at work.* Analyzing ORS 656.266, and ORS 656.802(2)(a), the board held a worker's occupational disease claim for chronic mold toxicity was compensable because she produced persuasive affirmative evidence from her treating physician that permitted a reasonable inference that there was a causal connection between her work exposure to consistent water leaks and that this exposure was the major contributing cause of her condition The board acknowledged that, pursuant to ORS 656.266, it is precluded, as a matter of law, from finding a claim compensable if the credible evidence only disproves the existence of other potential causes for the claimed condition. Nonetheless, the board reiterated a worker's burden of production of evidence under ORS 656.266 is satisfied provided that there is some affirmative evidence that permits a reasonable trier of fact to infer a causal link between the claimed disease and the worker's employment. *Jean E. Runkle,* 73 Van Natta 1018 (2021).

Mental Stress

Stress—compensability. *Held: Each alleged stress-inducing circumstance or condition must be evaluated separately.* In this mental stress claim, the court upheld the board's determination that claimant's mental disorder was not compensable. Claimant, a software validation engineer, was assigned as the point-of-contact on an intensive project testing computer hardware. Challenges arose during the project, including inconsistent requirements from management, workstation and material shortages, work schedule inflexibility, and disorganization. Claimant began having difficulties with her managers and was admonished for poor attendance and a failure to provide timely status reports. Ultimately, claimant stepped down from her point-of-contact position, was taken off the project, placed on a PIP, and laid off due to a staff reduction. Claimant filed a claim for a mental stress disorder diagnosed as adjustment disorder with anxiety, which was denied. The ALJ and board upheld the denial, rejecting claimant's assertion that the various alleged stress-inducing circumstances of work should be considered together, as a single injurious, hostile, and abnormal workplace. The board also discounted claimant's medical expert for erroneously weighing statutorily excluded factors that were generally inherent in every work environment, such as management's changing expectations, management's aggressive style, and conflicting instructions. On review to the court, the worker argued the board should have evaluated whether the work environment as a whole was injurious and the major contributing cause of claimant's mental disorder, and erred as a matter of law in separately considering each allegedly causative aspect of the work environment. Specifically, claimant asserted that when the overall work environment, described by her medical expert as "hostile and abnormal," is considered as a single stress-inducing factor, the conditions of employment, *in toto*, are not generally inherent. The court disagreed. First, based on *Liberty Northwest Ins. Camp. v. Shotthafer*, 169 Or App 556 (2000), the court reasoned that each alleged stress-inducing circumstance or condition must be evaluated separately to determine whether it falls within an excluded or non-excluded category. It rejected claimant's "work environment as a whole" approach because the overall work environment could include stress-inducing factors that are excluded under ORS 656.802(3). Second, the court concluded that the board is delegated responsibility under ORS 656.802(3)(b) to determine whether the "conditions

[are] generally inherent in every working situation" for purposes of assessing the work connection of alleged stress-inducing circumstances. The board's determination that inconsistent direction from management and workspace inadequacy are generally inherent stressors was supported by substantial evidence and reason. Finally, the court determined that substantial evidence supported the board's conclusion that claimant's medical expert incorrectly weighed excluded causative factors and was, therefore, unpersuasive. *King v. Gallagher Bassett Insurance Services*, 316 Or App 24 (2021).

Attorney fees

Attorney fees—entitlement. *Held: Attorney entitled to a fee under both ORS 656.383 and 656.268 when additional time loss obtained for the worker.* In this temporary disability/recon/attorney fee case, the court concluded claimant attorneys are allowed an assessed fee under ORS 656.383(1) when an Order on Reconsideration establishes a claimant is entitled to more temporary disability than provided for at claim closure. The Order on Reconsideration modified claimant's medically stationary date and awarded two weeks of additional temporary disability benefits. The order also suspended claimant's benefits because she did not attend the arbiter examination. Claimant's attorney appealed the order seeking an assessed attorney fee under ORS 656.383(1) for being "instrumental in obtaining temporary disability benefits" pursuant to ORS 656.268 prior to an ALJ's decision. The ALJ agreed with claimant's position and assessed a $2,500 attorney fee. The board reversed, holding that the term "obtaining" in ORS 656.383(1) indicates the claimant's counsel must have been instrumental in procuring the additional temporary disability benefits independent from a "pre-ALJ" administrative decision for an assessed fee to be warranted. Before the court, SAIF argued the legislature intended to exclude the reconsideration process from the assessed-fee provisions of ORRS 656.383(1). Specifically, that applying ORS 656.383(1) to the reconsideration process inappropriately permits duplicative fees and that ORS 656.268(6)(c) is the more specific provision regarding reconsideration fees and, therefore, displaces the general fee provision in ORS 656.383(1). The court disagreed. Under a plain-text reading of ORS 656.383 the court held an award of temporary disability benefits on reconsideration is one made "pursuant to" ORS 656.268 without limitation. The legislature's choice of the broad term "obtain" reflects an intention to allow a fee for benefits regardless of how they are attained. The court further declined to read a conflict into the statutory text, reasoning a fee award under both ORS 656.383(1) and ORS 656.268(6)(c) was consistent with the legislature's intention to provide more attorney fees for claimants' attorneys to ensure claimants would have access to representation. The court remanded the case back to the board to determine whether the claimant's failure to attend the arbiter examination and consequent suspension of benefits affected her attorney's right to an assessed fee. *Dancingbear v. SAIF,* 314 Or App 538 (2021).

Attorney fees—amount. *Held: Attorney entitled to $24,000 attorney fee in mental stress claim as opposed to request of $65,000*. At the hearing level, claimant's counsel requested a $65,000 attorney fee for her services regarding claimant's occupational disease claim for a mental disorder. Applying the factors set forth in OAR 438-015-0010(4), the ALJ determined that $20,000 was a reasonable attorney fee for claimant's counsel's services at the hearing level. In doing so, the ALJ noted that the case involved the depositions/testimony of multiple medical experts and that there was a significant risk that claimant's counsel would go uncompensated due to the complexity of the case. Claimant appealed. The board ruled claimant's counsel's

$65,000 attorney fee request is in the high range of fee requests for services performed at the hearing level, even for complex cases. Claimant's counsel reported 79 hours spent on the case at the hearing level (73 hours in preparation and 6 hours at the hearing). Claimant's counsel prepared for and participated in two telephonic depositions of medical experts who did not support compensability. One deposition lasted approximately one hour and the other lasted approximately 30 minutes. The hearing lasted six hours, which is longer than a typical hearing. Claimant and one medical expert testified. The board noted a significant portion of claimant's counsel's case preparation, deposition questioning, and closing argument concerned the application of the statutory presumption in ORS 656.802(7)(b), an argument that was ultimately unsuccessful and that was not well supported by the record. Considering the extensive attention accorded to this unsuccessful theory by claimant's counsel, it was reasonable to significantly discount the number of estimated hours in prevailing over the denied claim. After considering attorney fee awards in similar cases, and applying the OAR 438-015-0010(4) factors to the particular circumstances of this case, the board considered a reasonable attorney fee for claimant's counsel's services at the hearing level to be $24,000, an increase of $4,000 over the original award. *Paul F. Johnson,* 73 Van Natta 1070 (2021).

Settlements

Disputed claim settlement—propriety. *Held: Extreme circumstances did not warrant rescission of the approved Disputed Claim Settlement.* Claimant agreed to the terms of the disputed claim settlement (DCS) on September 9, 2020, and sent a letter to the ALJ informing her of the settlement agreement on October 14, 2020 (five weeks after the "date of settlement" and the same date that claimant signed the agreement). The agreement resolved a claimed Achilles tendon tear for $1,500. Claimant explained that, by coming to a settlement agreement and signing the DCS, he was hoping the ALJ would approve the settlement and "it would be a closed case." Thereafter, claimant appealed the Order of Dismissal and asked the Judge to find in his favor contending he had several health issues that caused him to settle the claim. The board noted absent a showing of extreme circumstances, it declined to set aside the DCS. See *Floyd D. Gatchell*, 48 Van Natta 467 (1993). The grounds for setting aside an approved DCS include mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct of an adverse party. In this case, the board held although claimant may have significant health concerns, the record does not establish such circumstances rise to the level of "extreme" necessary to set aside the approved DCS. To the contrary, claimant reiterated those health issues to the ALJ and explained he decided to focus on his health, rather than the unfinished business of his claim. Additionally, while claimant stated he did not completely or absolutely understand all of the terms of the DCS, he acknowledged that the Ombudsman's office was able to answer some of his questions. Moreover, pursuant to the DCS, claimant also confirmed that he declined to consult an attorney and he voluntarily waived the assistance of an attorney. Finally, claimant expressly agreed he understood to his own satisfaction enough to voluntarily sign the DCS and he would take the money offered in exchange for his case being dismissed. *Daniel C. Carroll,* 73 Van Natta 545 (2021).

Evidence and discovery

Evidence—testimony. *Held: Demeanor-based credibility testimony not a basis for resolving an issue that turns on expert opinion.* Claimant suffered a compensable back injury at work and contended her opioid use disorder occurred as a consequence of the injury. The ALJ and board found otherwise and affirmed the partial denial. Claimant appealed to the court contending substantial evidence did not support the board's finding that her opioid use disorder predated her workplace injury. Claimant argued that she did not have an opioid use disorder before the work injury based on her testimony, and the ALJ expressly found her to be a credible witness based on her demeanor. She argued the board's express acceptance of that credibility determination was not linked by substantial reason to its ultimate finding, based on the IME doctor's opinion claimant's opioid use disorder predated the work injury. The court deferred to the board who ruled under these particular circumstances, the compensability of the opioid use disorder condition must be established by the opinion of a persuasive medical expert. Consequently, the ALJ's 'demeanor-based' credibility finding was not determinative and the board's decision was upheld. *Deleo-Bundy v. SAIF*, 313 Or App 393 (2021).

Evidence—credibility. *Held: Worker's history supports compensability even if not entirely reliable.* Claimant filed an injury claim for a left wrist condition, specifically a work related right thumb wound that became infected and caused an infection. The employer denied the claim because claimant had a history as an IV-drug user and his use of methamphetamines was the cause of the infection according to the employer's medical expert. In setting aside the employer's denial, the ALJ found the opinion of Dr. Fawcett, more persuasive than the opinion of Dr. Leggett, an infectious disease specialist. In doing so, the ALJ reasoned that Dr. Fawcett's opinion persuasively established that, to a reasonable degree of medical probability, claimant's work-related right thumb wound was the portal for an infectious G streptococcus bacterium, which entered claimant's blood stream and caused a left wrist infection. Moreover, the ALJ discounted Dr. Leggett's inconsistent opinion. Finally, the ALJ found claimant's testimony credible based on his demeanor. A $20,000 attorney fee was awarded. On review, the employer argued that Dr. Fawcett's opinion was unpersuasive because it was based on an inaccurate history concerning claimant's drug use and the existence of a left wrist abrasion. In doing so, the employer asserted claimant was not a credible witness because the record indicated that he was an IV drug user and that he had a nonwork-related left wrist abrasion, which was a more likely source of infection than the work-related right thumb laceration. The employer also alleged the time frame was inconsistent with claimant's statement that he "probably" used methamphetamine sometime during the week after starting his position with the employer on October 1, 2018. The board found, however, that claimant's testimony was reliable in that he advised taking illicit drugs orally and not intravenously. The board noted initial examination notes did not document any obvious wounds or sources of infection on claimant's left upper extremity. While Dr. Fawcett acknowledged that a scratch or abrasion could have occurred and resolved before his own November 9, 2018, examination, he considered an infection from claimant's work-related right thumb laceration to be the "most likely scenario" based on his interactions with claimant and the history he provided. The board further advised any discrepancy regarding testimony is not relevant to the issue of whether claimant used substances intravenously (i.e., a potential portal of entry for infection). A $6,700 attorney fee was awarded for services on review. *Steven E. Smith,* 73 Van Natta 192 (2021).

Penalties

Penalties—entitlement. *Held: Penalty awarded for failure to perform a reasonable investigation prior to denying the claim.* The board determined claimant was entitled to a penalty and penalty-related attorney fee based on the carrier's failure to perform a "reasonable investigation." Citing ORS 656.262(11)(a) and *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991), the board observed whether a carrier has unreasonably delayed or refused to pay compensation depends on whether the carrier had a legitimate doubt as to its liability. The board explained that "unreasonableness" and "legitimate doubt" are considered in light of all the evidence available to the carrier at the time of the denial. The board also noted a "legitimate doubt" does not exist when the carrier denies a claim without conducting a reasonable investigation. The board defined a "reasonable investigation" under OAR 436-060-0140(1) as consisting of "whatever steps a reasonably prudent person with knowledge of the legal standards for determining compensability would take in a good faith effort to ascertain the facts underlying a claim. Here, the board acknowledged the initial treatment records, MRI report, and claim filing document raised doubt concerning the claimant's delay in seeking medical treatment and notifying the employer regarding the injury. However, the board concluded the carrier's review of those documents did not constitute a "good faith effort to ascertain the facts underlying the claim." In particular, the board noted that, although the carrier had 60 days in which to accept or deny the claim under ORS 656.262(6), the carrier issued its denial only 5 days after receiving the claim. The board noted the carrier had several options for making a "good faith effort" to ascertain the facts underlying the claim before its decision was required. The board reasoned the carrier could have waited to obtain additional medical records, interviewed the claimant, contacted the attending physician to obtain further information, or obtained an insurer-requested medical examination before denying the claim. Noting the carrier did not take any of these investigative steps, or any other steps, the board concluded that the carrier's investigation was not a "good faith effort" to ascertain the facts underlying the claim. Accordingly, the carrier did not conduct a reasonable investigation and did not have a "legitimate doubt" regarding the compensability of the claim when it issued the denial. Consequently, the board awarded the claimant a penalty and penalty-related attorney fee. *Hobby L. Brooks,* 73 Van Natta 494 (2021).

Claim filing and timeliness

Claim filing—timely notice. *Held: Clam timely filed*. In this timely notice case, the court affirmed the board's order that claimant timely provided notice of her workplace accident. Claimant worked as a housekeeper for the employer. Sometime in January 2016, claimant injured her left shoulder at work. After about a week, she orally informed the employer of her injury. Another worker was assigned to assist claimant with her job duties, but no paperwork was filled out at that time for a workers' compensation claim. Claimant commenced a course of medical treatment and eventually underwent surgery in 2017. On March 9, 2017, claimant filed a written claim for compensation. The employer denied the claim on the basis of untimely notice under ORS 656.265(4). Before the ALJ, the worker argued she gave timely notice within 90 days after the work event pursuant to ORS 656.265(1). In response, the employer contended that although claimant provided notice of the accident, the claim was untimely because claimant failed to submit a formal notice of a claim within one year of her injury, as required by ORS 656.265(4). The ALJ rejected the employer's timeliness defense, holding that ORS 656.265(4) does not require notice of a claim within one year of an injury. The board adopted the ALJ's Opinion and Order. On review to the court, the employer argued that the "notice" in subsection (4) refers to notice of a claim, not notice of an accident. Accordingly, subsection (4) contemplates a one-year time limit for

giving notice of a claim independent of the period for providing notice of an accident resulting in an injury under ORS 656.265(1). The court disagreed. Applying the analytic framework set forth in *State v. Gaines*, the court held that the plain and unambiguous text of the statute shows that the only plausible reading of the phrase "notice as required by this section" under subsection (4) is that such notice refers to the "notice of an accident" described in the preceding subsections (1), (2), and (3). Since the employer conceded that it had timely notice of an accident under ORS 656.265(1)(a), the employer received timely notice. The board's order was affirmed. *Double Tree Hotel v. Ansarinezhad*, 316 Or App 51 (2021).

Temporary disability

Temporary disability—entitlement. *Held: Open-ended time-loss authorization continued time-loss benefits.* After an Order on Reconsideration awarded various periods of temporary disability between the date of injury and the medically stationary date, claimant requested a hearing. Asserting that he had an attending physician's requisite time-loss authorization, claimant sought continuous temporary disability benefits from the date of injury through the medically stationary date. The board explained that when an objectively reasonable carrier would understand contemporaneous medical records to excuse claimant from work, its duty to pay temporary disability benefits is triggered. Moreover, the board noted that an open-ended time-loss authorization continues after a change of attending physicians, as long as the new attending physician does not take affirmative steps to stop it. Turning to the case at hand, the board determined that an objectively reasonable carrier would understand the contemporaneous medical records to excuse claimant from work, triggering its obligation to pay temporary disability benefits. In her chart notes, claimant's initial attending physician restricted claimant from any "heavy lifting and repetitive movements," and the chart notes of claimant's next attending physician reported claimant needed additional rest and that this type of injury can take from 8 to 10 weeks to heal. Furthermore, chart notes from various other attending physicians corroborated claimant's inability to return to his regular work duties, releasing him only to modified work. Claimant was not released to his regular work duties until his accepted conditions were found medically stationary. Under such circumstances, the board concluded that, from the date of injury to the medically stationary date, open-ended time-loss authorization required the carrier to pay temporary disability compensation. *Frank A. Monta,* 73 Van Natta 463 (2021).