Workers' Compensation Board
Overview and litigation update

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Workers' Compensation Board

1977 - The Board has a complex history, in which it was initially created as part of the State Industrial Accident Commission. However, since 1977, the Board (including its Hearings Division) has existed as an independent adjudicative agency.

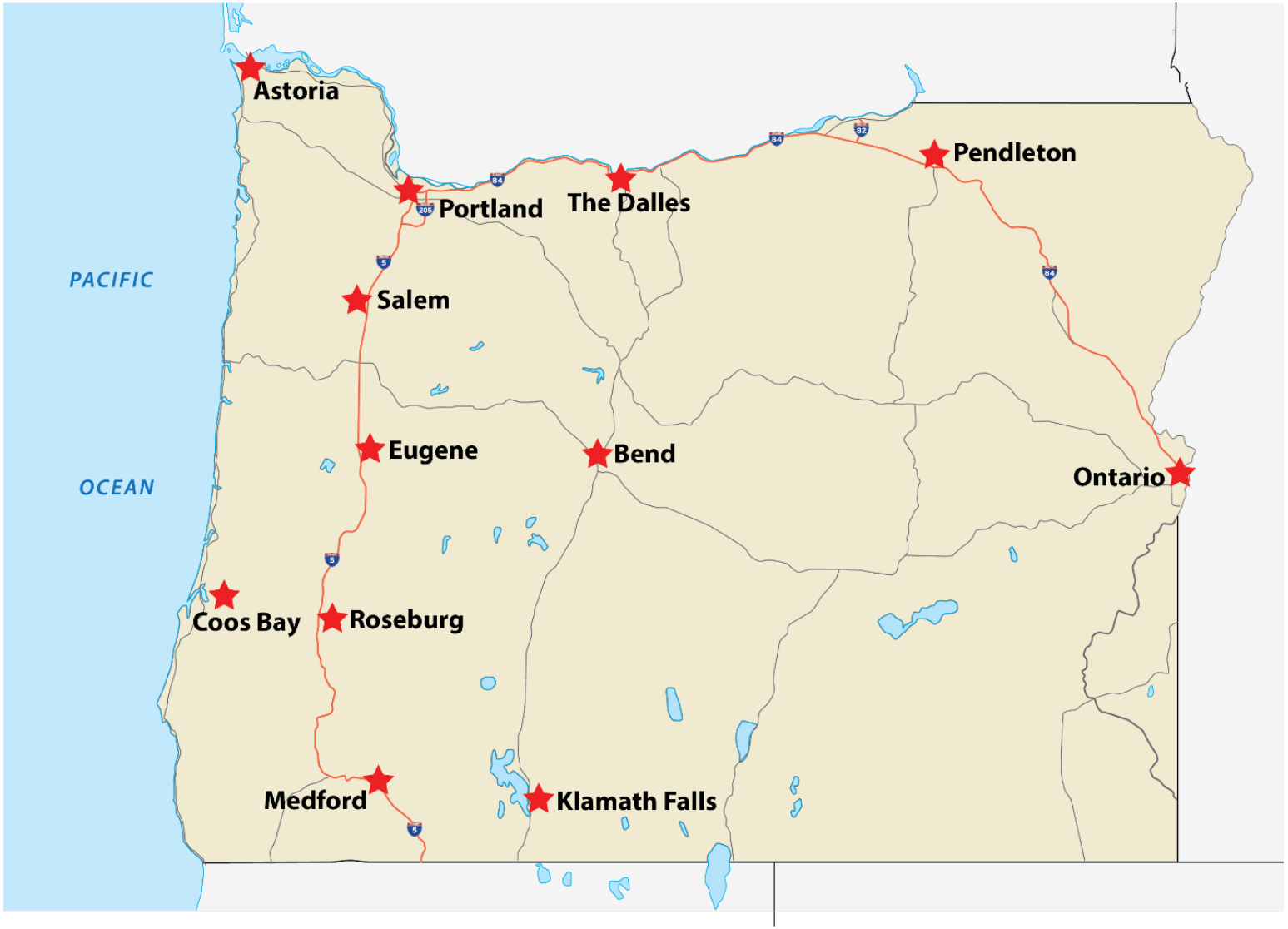
1987 – DIF (as of 1993, DCBS) was created, and both WCD and WCB were transferred to the agency. However, in both '87 and '93, the legislature specified that WCB was to continue as an independent adjudicative agency.

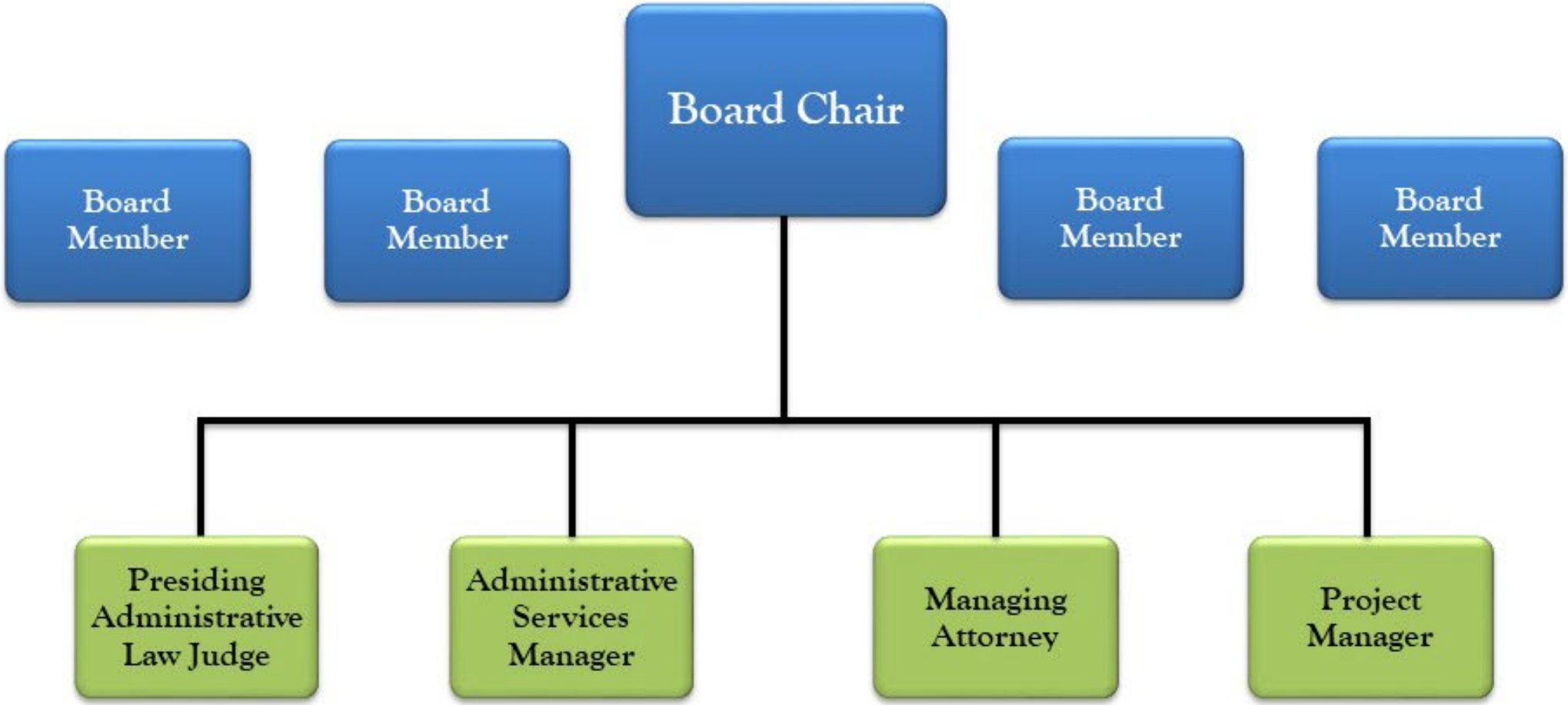
Today – WCB remains an independent adjudicatory agency which partners with DCBS for shared services.

Workers' Compensation Board

- Administrative law judges (ALJs):
  - Hold due process hearings of workers' compensation and Oregon OSHA disputes
  - Provide mediation services
- Board members:
  - Provide appellate review of ALJ decisions
  - Approve claim disposition agreements
  - Exercise own motion jurisdiction

Hearing locations




Board Chair
Board Member
Board Member
Board Member
Board Member
Presiding Administrative Law Judge
Administrative Services Manager
Managing Attorney
Project Manager

Workers' Compensation Board

Access to Justice for all Oregonians

- Interpreters provided at no cost for hearings and mediations.
- We provide electronic access to WCB through a web portal.
- We come to you – In-person hearings and mediations set in the location of the injured worker.
- During COVID-19, pivoted to telephonic and videoconference hearings and mediations.

Survivor's benefits – impact of HB 4086

- ***Antonio Mendoza, DCD*, 73 Van Natta 578 (2021)**
- Claimant and decedent, plus children, lived together in California, and decedent would travel to Oregon for jobs.
- Denial of benefits upheld because claimant and decedent had not cohabited in Oregon for more than a year prior to work fatality.
- Concurring opinion noted policy purpose to protect the family unit. Decedent financially supported the claimant and children. Cohabitation in Oregon requirement produces unfair outcomes in modern society, where workers commute from homes in other states.
- ORS 656.226: "In case two unmarried individuals have cohabited *in this state as spouses who are married to each other for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation*, the surviving cohabitant and the children are entitled to compensation under this chapter the same as if the individuals had been legally married." (Italicized language removed in HB 4086).

Survivor's benefits – impact of HB 4086

- ***Herbert Williams, DCD*, 72 Van Natta 517 (2020)**
- Claimant and decedent were not married but lived together with claimant's 3 children from a prior relationship.
- Board affirmed on case precedent, but urged the court or legislature to fix it. Discriminatory to same-sex couples, among other reasons.
- Dissent contended Board should not apply a precedent that is unlawful or unconstitutional.
- AWOP by Court of Appeals. Supreme Court denied review.
- ORS 656.266: "In case two unmarried individuals have cohabitated in this state as spouses who are married to each other for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and *children are living as a result of that relation,* the surviving cohabitant and the children are entitled to compensation." (Italicized language removed in HB 4086).

TTD benefits – impact of HB 4138

- ***Johanna Southard,* 71 Van Natta 660 (2019)**
- In a January 2018 report, the attending physician agreed that claimant was medically stationary back in June, 2017.
- Although the AP's chart notes did not declare claimant medically stationary until January 2018, the AP expressly agreed that claimant became stationary in June, 2017.
- Concurring opinion noted that physicians can only authorize temporary disability retroactively for two weeks, but no prohibition on designating a medically stationary date retroactively.
- HB 4138 limits retroactive med-stat determination to 60 days.
- ***Karl Meink,* 53 Van Natta 942 (2001)**
- Carrier paid TTD based on numerous authorizations from a PA. At closure, five months of the TTD was considered an overpayment because the PA's authorization period expired, and the AP could not retroactively authorize beyond 14 days.
- HB 4138 has notice provisions, and expanded retroactive authorization.
- Overpayments now get a fresh look, not just decided by the closure. ***Bledsoe v. City of Lincoln City,* 301 Or App 11 (2019).**

Claimant's costs reimbursement

- ***Kevin Siegrist*, 72 Van Natta 491 (2020)**
- Reimbursement of costs under ORS 656.386(2)(d) is limited to $1,500 absent "extraordinary circumstances."
- Denial was set aside, and claimant submitted cost bill of $1,550 (report from physician).
- Board found extraordinary circumstances to exceed $1,500 cap, but Court of Appeals reversed and remanded for explanation.
- Although obtaining a report may be necessary, it does not make it extraordinary.
- Concurring opinion noted law was enacted in 2007, when $1,500 would approximate the expense of securing a report. Now more common to exceed that threshold.
- Consider use of a COLA. Threshold would have risen to $2,097 in 2020.
- Also consider expanding access to WRME to include any situation when carrier uses a medical opinion in support of denial (including a record review).

Worker requested medical examination

- ***Thomas Cardoza*, 71 Van Natta 1033 (2019)**
- Request for worker-requested medical examination (WRME) denied.
- Insurer denied the claim, and then obtained an IME, which concluded that work was not a cause of the low back condition.
- ORS 656.325(1)(e): "If the worker has made a timely request for a hearing on a denial of compensability as required by ORS 656.319(1)(a) *that is based on one or more reports of examinations* *** and the workers' attending physician *** does not concur with the report or reports, the worker may request an examination to be conducted by a physician selected by the director from the list described in ORS 656.328.
- Claimant also sought to exclude the IME report, or for the carrier to amend its denial. Although denial did not state it was based on an IME, there is no authority to exclude the report from the record.
- WRME also not available when IME is a record review. *Denise Amos*, 65 Van Natta 2100 (2013).

Notice of Closure appeal deadline

- ***Juan Lopez-Ciro*, 72 Van Natta 166 (2020)**
- WCD denied claimant's request for reconsideration of a Notice of Closure (NOC). Filed after the expiration of 60-day appeal deadline.
- ORS 656.268(5)(e) provides: "If a worker, a worker's beneficiary, an insurer or a self-insured employer objects to the notice of closure, the objecting party first must request reconsideration by the director under this section. A worker's request for reconsideration must be made within 60 days of the date of the notice of closure."
- Concurring opinion noted that the employer need not prove claimant received the NOC, and that there is no "good cause" exception, as there is in other statutes (request for hearing, timely notice of a work injury).

Combined condition

- ***Carrillo v. SAIF,* 310 Or App 8 (2021)**
- Board found a combined condition – symptomatic flareup of a preexisting condition – and upheld the denial. "Two medical problems simultaneously" (*McAtee,* 1999).
- Court reversed, citing *Brown v. SAIF* (2017), that in the context of a denial involving an accepted claim, a combined condition is two separate conditions that combine.
- Clarified that an "initial claim" can be a combined condition when a work incident and a preexisting condition cause an injury.

Combined conditions

- ***Ineriano v. SAIF,* 315 Or App 588 (2021)**
- Low back combined condition claim.
- Board found "two medical problems simultaneously" (spondylosis and low back/radicular symptoms).
- Citing *Carrillo* (2021), court reiterated that a preexisting condition and its symptoms are not separate conditions.
- Therefore, not a "combined condition." Remanded to WCB.

Combined conditions

- ***Gibson v. ESIS*, 703 Or App 703 (2022)**
- Board upheld a denial of combined knee condition, and parties agreed that osteoarthritis was the major cause.
- Dispute is whether it was a combined condition under *Carrillo v. SAIF* (2021) – "two separate conditions."
- Employer contended "new and old" merging components can qualify.
- What combined with osteoarthritis?
  - Onset of symptoms.
  - Hyperextended knee, causing the rough surfaces to pop over one another.
  - Work-related knee pain.
  - Work-related exacerbation.
- Court reasoned that none of those amounted to a "separate medical condition." Reversed and remanded.

Infectious disease

- ***Rogers v. Corvel*, 317 Or App 116 (2022), *Recons* 318 Or App 641 (2022)**
- Bus driver with influenza A.
- Attending physician cited studies that drivers of public transportation are at increased risk. But denial upheld because AP was unaware of claimant's outings to the grocery store, where she could have been exposed prior to the onset of the illness.
- Court of Appeals reversed and remanded, noting that the claim was litigated as an "injury" under the "material contributing cause" standard.
- Under a "major cause" standard (such as an occupational disease), the failure to consider the grocery trip would be significant.
- But under "material cause," the question is: "Is it more likely than not that employment is a substantial cause that is more than a minimal cause of claimant's illness."

Course and Scope

- ***Miles v. Bi-Mart*, 316 Or App 481 (2021)**
- Parked in designated employee parking, tripped on broken pavement.
- Parking lot exception to the going and coming rule.
- Board upheld denial, relying on the employer's lease which assigned landlord with responsibility for the parking lot.
- But other factors are relevant: Employer could restrict employee parking to designated areas, could request maintenance, and proscribe activities (skateboarding). *Some control*.
- Employer also benefited by designating employee parking.
- Reversed and remanded.

Course and Scope

- ***Watt v. SAIF*, 317 Or App 105 (2021)**
- On a walk during break, part of employer's wellness program.
- Fell over cracked sidewalk in a residential neighborhood.
- Personal comfort doctrine applied for "course of" employment (time, place, circumstances).
- Court disavowed any interpretation that injury during "personal comfort" activity does not also require analysis of "arising out of" (risk of employment).
- Agreed with Board that sidewalk was a "neutral risk" and employer did not require claimant to leave the premises.
- Employment did not expose claimant to the cracked sidewalk. Denial upheld.

Permanent Disability

- ***Caren v. Providence*, 365 Or 466 (2019)**
- Bottom line: Workers fully compensated for impairment due in "material part" to the injury unless employer issues a combined condition denial.
- Traditionally, "material cause" test for injuries (*Olson v. SIAC*, 1960).
- What does impairment "due to" the injury mean? *Barrett v. D&H Drywall* (1985) – if injury causes preexisting to light up, impairment is "due to" the compensable injury.
- "Combined conditions" are the exceptions.
- Employer has burden of proof on combined conditions.
- Denial of a combined condition allows claimant to appeal
- Not plausible that employers can "deny" compensation without notice.

Permanent Disability

- ***Johnson v. SAIF,* 307 Or App 1 (2020)**
- Issue was loss of grip strength for accepted hand injury.
- Grip loss was due in part to denied shoulder conditions.
- Arbiter noted strength loss was due to a "combined condition."
- Supreme Court remanded to COA to consider *Caren*.
- *Caren* did not address whether claimant gets "full measure of impairment" caused in material part when a noncognizable preexisting condition has been denied outright.
- Here, claimant's gets the full PPD awarded because:
  - Although carrier denied the shoulder, they had not denied the combined condition that resulted in the ROM impairment of the hand.

Permanent Disability

- ***Robinette v. SAIF*, 307 Or App 11 (2020)**
- Part of claimant's PPD (impairment findings) were due to preexisting conditions that were not identified until the claim was closed.
- Record did not show whether those conditions were legally cognizable preexisting conditions.
- None of the ROM loss or instability were attributed to the work injury.
- COA cited reasoning from the SC in *Caren* that claimant is entitled to notice if employer contends impairment is not compensable.
- Even if there is not a combining.
- Because there was no denial issued, claimant is entitled to the PPD.

Claims processing

- ***Brooks v. Tube Specialties*, 300 Or App 361 (2019)**
- *Pro se* claimant filed a hearing request.
- Denial rescinded after claimant obtained an attorney.
- No fee awarded – attorney not instrumental. Rescinded following an IME.
- Remanded by court to address the penalty issue.
- Board said "not a good faith effort" to obtain additional information about the claim. Board noted that "legitimate doubt" does not exist without a reasonable investigation, citing OAR 436-060-0140(1).
- Penalty and attorney fee awarded for carrier not conducting a reasonable investigation before denying the claim. *Hobby Brooks*, 73 Van Natta 494 (2021).

Oh, c'mon now!

- Respiratory condition not compensable despite exposure to particulate matter including dust and rat feces without a respirator or mask. *Ralph Dunnington,* 72 Van Natta 294 (2020).
- Because claimant's cultured bacteria was not the type found in rat feces.
- Comparison of markings claimant himself made on pain diagram disproved claimant's theory of decline in symptoms when off work (ah-ha!). *Thomas Aukland,* 72 Van Natta 390 (2020).
- But the markings included a large section of notes in "shorthand medical terminology."
- Dr. Keiper signed two concurrence letters – one said injury was the ***major cause***, and one that it was ***not even a material cause.*** *Joaquin Quintero*, 72 Van Natta 710 (2020).
- Both letters were signed on the same day. ***Not persuasive.***