Appellate Update

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Medical Services dilemma

- "Accepted condition" focus for benefits, such as medical services and permanent disability.
- What about diagnostic tests?
- Difficulty investigating additional conditions if the acceptance is limited.
- Legislative proposals in committee.
- Supreme Court weighs in.
- Facts: Head injury, seeking psychological referral for possible PTSD.

Garcia-Solis v. Farmers, 365 Or 26 (2019)

- "For every compensable **injury**, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the **injury** for such period as the nature of the **injury** or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability.
- It is true that, as a general proposition, we assume that the legislature uses terms consistently.
- ORS 656.245(1)(a) presents a situation where the same term—here, "injury"—is used in different ways, with apparently different meanings, within the same statutory provision.

Garcia-Solis v. Farmers, 365 Or 26 (2019)

- "For every compensable **injury**, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the **injury** for such period as the nature of the **injury** or the process of the recovery requires…
- "In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the **injury.**"
- Court: "…[the] **injury** means work accident is context-specific to exactly two uses in the first and second sentences of ORS 656.245(1)(a). It does not apply to the second use in the first sentence of ORS 656.245(1)(a)."
- (And not necessarily anywhere else, either).

Garcia-Solis v. Farmers, 365 Or 26 (2019)

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- "For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the **work accident** for such period as the nature of the injury or the process of the recovery requires…"
- "In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the **work accident**.

Permanent Disability question

- When can the insurer "apportion" a permanent disability award?
- Existing rule and case law allowed apportion when:
- Combined Condition denial at time of closure.
- Without a denial, apportionment on legally-cognizable pre-existing condition.
- (Previously treated conditions or "arthritis").
- Supreme Court weighs in.

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.
- How we got there:
- Traditionally, "material cause" test for injuries (*Olson v. SIAC*, 1960).
- The exception is "combined conditions."
- Facts: Accepted lumbar strain, with 70 percent of impairment due to preexisting arthritis.
- No combined condition accepted or denied.

Caren v. Providence, 365 Or 466 (2019)

- Apportionment allowed by Board and Court of Appeals because:
- The arthritis was legally cognizable – met the definition of preexisting condition.
- *Schleiss v. SAIF* (2013) ruled that apportionment was not allowed when the other conditions causing impairment did not meet the definition of a "pre-existing condition."
- 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.

Caren v. Providence, 365 Or 466 (2019)

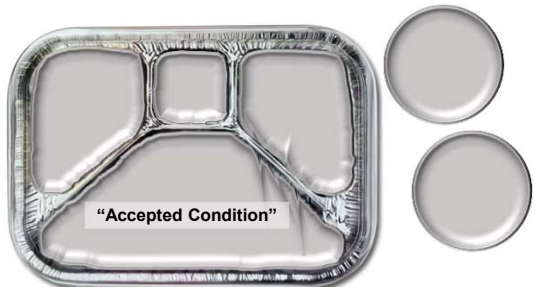
- 1990, 1995 and 2001 legislation analyzed:
- Interplay between combined conditions, notice of acceptance, new/omitted claims, shifting burden of proof.
- Key phrase from *Barnett* ("due to") is unchanged.
- "Combined conditions" are the exceptions.
- Employer has burden of proof on combined conditions.
- Requiring claimant to request acceptance of a combined condition is not a solution – what if claimant disputes that?
- Not plausible that employers can "deny" compensation without notice.

WCD temporary rule changes effective 9/3/19

- Clarified impairment "in material part."
- No award for impairment for pre-existing condition if combined condition accepted and denied.
- For residual functional capacity (work disability), apportionment is allowed if capacity to work is diminished by a superimposed, denied or pre-existing condition denied as part of a combined condition.
- Removed rule that disallowed impairment award for disability caused by an unaccepted pre-existing condition.
- Codifies the *Caren* decision in the paragraph regarding combined conditions. (If combined condition denied, estimate PPD due to component of combined condition that remains related to injury).

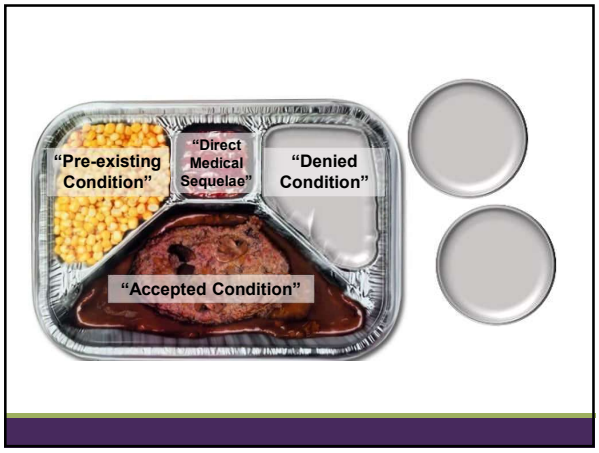
What's on and off the plate?

- On - Impairment "due to" (material cause) accepted condition.
- On - Direct medical sequelae.
- On - Preexisting conditions accepted as a combined condition.
- Off - Denied conditions.
- Off - Preexisting conditions denied as a combined condition.
- Off - Superimposed conditions.
- Off - Work disability from superimposed and denied conditions.
- On/Off - Pain (must result in valid measurable impairment).




"Pre-existing Condition"
"Accepted Condition"


"Pre-existing Condition"
"Direct Medical Sequelae"
"Accepted Condition"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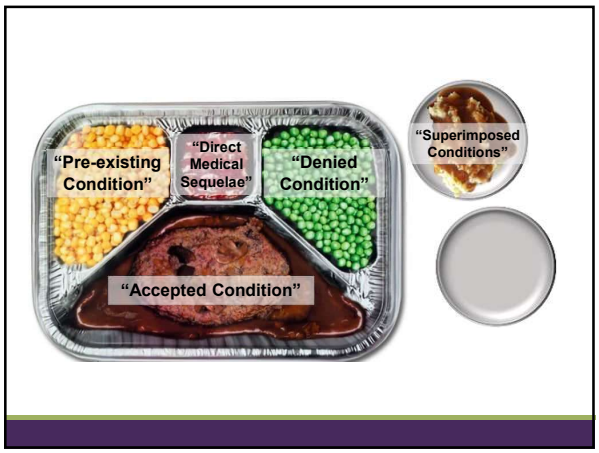

Head Spinners	Thread the Needle	Quotes	Free Spin	The Court Sayeth	The Board being The Board
Primary is secondary	*Landlord's job*	Proper restraint	*Lease back arrangement*	*Known unknowns*	If you say so
Fred's journey	Board does the math	*It's my day off*	Head Lock	Everyone knows this	*Unring the bell*
What is it "for?"	*FNP v. Ortho*	Long par 5	When in doubt, mumble	Win it Twice	No favor at all
All unless none	*Them's the breaks*	The over-under	Better late than never	Just the facts, ma'am	Voice mail is full
What's in, What's out	Lost and Found	*Can't have one without the other*	*Team Player*	Pretty Please	*A long road back*

Cassandra Sumner, 71 Van Natta 624 (2019)

- Program manager for developmentally disabled.
- Always "on call" and must be a "team player."
- Supervisor called her in on day off to wrap gifts for party.
- Supervisor picking up pizzas, forgot to bring petty cash.
- Called another employee, who saw claimant driving.
- Claimant bypassed office, drove to Rickreall with own cash – MVA.
- Employer testified they would not have approved of claimant delivering money on her day off.
- Oh, really?

Return

Spurger v. SAIF, 292 Or App 227 (2018)

- **Chronic condition** issue – "difficulty" repetitively performing certain tasks.
- Significant limitation is one that is "meaningful" or "important."
- Board's conclusion that "difficulty" is not "meaningful or important" lacks reasoning.
- Not required that it be a complete inability, and AP recommended change of work schedule.

Return

Arms v. SAIF, 292 Or App 217 (2018)

- Compensability of C6-7 surgery.
- C5-6 fusion accepted.
- Claimant conceded C6-7 was not a compensable consequential condition.
- Can the worsening of a preexisting condition be a consequential condition?
- "If injury is major cause of the worsened condition, then surgery is compensable even if it also addresses the pre-existing condition."

Return

Williams v. SAIF, 291 Or App 328 (2018)

- NOC's impairment award calculated incorrectly, and was unreasonable.
- Claimant sought penalty under ORS 656.268(5)(f).
- Penalty calculated based on total amount of compensation due at time of closure.
- Even though "unreasonable" calculation was small part of award.

Return

Cecelia Jacobson, 70 Van Natta 970 (2018)

- Compensable ankle sprain.
- Active half marathon runner.
- Persistent pain and swelling – CT scan showed heel fracture and osteopenia.
- 10 months after surgery – ran two half marathons, pain increased.
- **Disuse osteopenia or micro trauma from running**?
- Immobilization greater cause of osteopenia in injured foot.

Return

Schommer v. Liberty and *Shearer's Foods v. Hoffnagle,* 294 Or App 417 (2018)

- Entitlement to an attorney fee under 656.386(1) does not turn on filing of a brief or arguments.
- If dispute involves a denied claim, and claimant "finally prevails," claimant is entitled to an assessed attorney fee.
- Amount of fee may be impacted by services performed.

Return

Alison Laurance, 70 Van Natta 1016 (2018)

- Struck head on van's doorjamb.
- Vision changes, CT and MRI normal.
- IME optometrist – preexisting vision loss, and may have caused injury.
- Neurologist and ophthalmologist support causation.
- Peripheral loss previously unnoticed?
- Credibility issue? Board relies on lack of support from imaging tests.

Return

Timothy Ogden, 70 Van Natta 1039 (2018)

- After rollover accident, claims for **PTSD and adjustment disorder**.
- PTSD caused directly by MVA – analyzed as OD under 656.802(3).
- Adjustment disorder due to chronic pain from accepted conditions – "consequential condition" standard.
- Both compensable based on psychologist's opinions.

Return

SAIF v. Massari, 291 Or App 349 (2018)

- Physician employed by clinic, which contracted services to a hospital.
- Make rounds and be available by pager.
- Has office at his home with access to computer and phone.
- Shift began at 7 am, turned on his pager and drove to hospital.
- Slipped on ice in hospital parking lot.
- Going to work or at work? Parking lot?
- Shift had begun, responsibility to answer a page.

Return

Torrey Wolbert, 71 Van Natta 645 (2019)

- Carpenter out drinking on a Friday night.
- Text from boss – come in on day off at 7 a.m.
- Kept drinking until 2 a.m.
- Went to work on a couple hours of sleep and a cup of coffee.
- Passed out shoveling snow (dehydration and hypoglycemia).
- Combination of snow shoveling and "suboptimal physical condition."
- "Mixed Risk" doctrine applies.

Return

Sherrie Miles, 71 Van Natta 40 (2019)

- **Coming and going**: Retail worker fell in a crack in parking lot while waving at co-worker.
- Lot maintained by the landlord.
- Employer uses lot for exterior displays.
- No authority to fill cracks.
- Employer: Landlord would not have done repair even if it was reported.
- Periodical removal of trash or hazards did not establish employer control of the lot.

Return

Sheldon v. US Bank, 364 Or 831 (2019)

- Walking at work when she slipped and fell somehow.
- Possible causes – diabetes, obesity, ankle weakness, medication.
- Unexplained fall case law.
- "Positional risk doctrine" – compensable if unexplained fall while in course of employment.
- What is "unexplained?"
- Claimant must eliminate FNSI causes.
- "Facially non-speculative idiopathic."

Return

Lori Watt, 70 Van Natta 755 (2018)

- Fell on public sidewalk while **on break**.
- Employer endorsed walking for health.
- Monetary incentive for participation.
- Personal comfort – course of.
- "Coffee break type activity."
- Risk of tripping on public sidewalk not connected to work.
- Employer did not designate walking route.

Return

Vladmir Ghelan, 70 Van Natta 1277 (2018)

- Employer appealed acceptance.
- Claimant buying a truck from NCE.
- Not subject worker if "ownership or leasehold interest" in the truck.
- Title had not transferred and NCE had not notified lender.
- But claimant signed on as independent contractor and insurance application said "owner-operator."

Return

Carl Ward, 71 Van Natta 484 (2019)

- Truck driver leased a truck from the employer.
- "Lease back" arrangement with employer to avoid subject worker status.
- Lease payments, insurance, maintenance paid by worker.
- But employer directed routes, performance, and rules.
- Employer's logo on the truck, employer paid for fuel.
- Did claimant really have a leasehold interest in the truck?
- Claimant had no proprietary rights, ownership or equity in the vehicle.
- Therefore, no "lease back" arrangement, claimant was "subject."

Return

Gustav Schenk, 71 Van Natta 178 (2019)

- Non-cooperation denial for failure to submit to an interview (no contact).
- Never gave claimant certain time, date, place for interview.
- Board reversed – OAR requires specificity if based on failure to submit to interview. **Strict compliance** required with rule.
- "Other investigation requirements" not the basis of denial.

Return

Fred Harris, 70 Van Natta 1105 & 1113 (2018) & 71 Van Natta 46 (2019)

- 2015 injury – eye/rib/chest/forearm contusion, wrist sprain, CTS.
- January 2016 wrist fusion and CTS release.
- WCB # 17-02961 - February 2017 NOC – no PPD. Board affirms in September 2018, finding that impairment was due to arthritis.

Fred Harris, 70 Van Natta 1105 & 1113 (2018) & 71 Van Natta 46 (2019)

- WCB #17-04398 - Ceases denial May 2017, followed by NOC. MA finds sensory loss of 3 percent. ALJ increases it to 19 percent for fusion surgery. Board reverses – ceases denial issued prior to NOC, leaving 3 percent PPD.
- Meanwhile, #17-02766 and #17-00666 (ceases denial and medical services for hardware removal surgery).
- Board order January 2019. Ceases denial affirmed, hardware removal compensable. Surgery directed to pain from accepted combined wrist condition, and proposal for removal was prior to effective date of ceases denial.

Return

Liberty v. The Lynch Company and Alcorn, 295 Or App 809 (2019)

- Final (presumptively responsible) employer on hearing loss claim.
- Must prove impossibility for contribution or sole cause elsewhere.
- No change in hearing loss – 5 decibel difference is not measurable.
- More probable than not it was impossible to have contributed.
- **"Probably impossible"** is good enough.

Return

Herman Rambo, 70 Van Natta 514 (2018)

- Truck driver slipped on ice, drove 800 more miles. Pop in back vacuuming.
- Bone fragment found at surgery.
- Fall was a more violent injury.
- IME: No symptoms following fall on ice (not consistent with testimony).
- IME: Symptoms no different than in 2010 (didn't account for 5 years of heavy work).

Return

Angelo Melo-Lira, 70 Van Natta 1011 (2018)

- Employer tried to submit disciplinary records regarding the AP.
- Alleged "pattern of relying on patient assessment of etiology."
- Board: Issue is whether doctor was persuasive in this case.
- AP's opinion relied on another doctor's comparison of MRIs. But it was a "review of the reads."

Return

Imelda Bradshaw, 70 Van Natta 542 (2018)

- Knee injury – emergency room reports "landing" on knee.
- Testimony was a twisting of the knee when standing on a chair, then chair slipped.
- Mechanism of injury important.
- AP surgeon noted communication was difficult. Material cause established.

Return

Kellie Johnson, 70 Van Natta 1265 (2018)

- Thumb OD claim – **AP understood 714 scoops by hand** in 2-hour period.
- Production analyzed: scoops per bag, weight of the bags, and number of bags filled in a half-day.
- Came out closer to 300.
- AP's "overtime" note also unclear.
- Board could not read AP's opinion as being general in nature.

Return

Lyubov Ledneva, 71 Van Natta 236 (2019)

- IME: Can't tell if there is a combining.
- Received prior medical records.
- Medically probable it was a combining.
- Oops – the records were not about claimant.
- IME: **Does not change my opinion**, and those records never formed basis for opinion.

Return

David Montgomery, 71 Van Natta 8 (2018)

- Rotator cuff tear.
- IME noted that MRI showed no edema, greater retraction, and rounded (not jagged) edges to tear.
- Pre-existing tear?
- AP more persuasive – claimant could not have installed wood stoves and lifted heavy pipes above head with a rotator cuff tear.

Return

Shelby Zoon, 70 Van Natta 701 (2018)

- 19-year old pulling up a 400 lb. patient with a draw sheet.
- Strain accepted, released regular.
- Later had leg and hip pain, large L5-S1 disc herniation.
- IME said it was degenerative.
- AP: Injured annulus and disc material gradually extruded.
- Board: IME based on generalities.

Return

Christopher Stumper, 70 Van Natta 764 (2018)

- Epicondylitis from cleaning 1-2 inch thick grease with putty knives, wire brushes, floor scrapers and pneumatic chippers.
- IME: Subjective pain, bad attitude towards employer, anxiety disorder.
- Had surgery – good results.
- AP surgeon more persuasive.

Return

Dowe Dejong, 70 Van Natta 604 (2018)

- "**Uncertain** plantar fasciitis caused by injury."
- "Changed gait **may** have contributed."
- "Relying on other leg **perhaps** contributed."
- "Even though you are not certain."
- "**More likely than not** caused by injury."
- Did not address contrary opinions.

Return

Jeanne Clemons, 70 Van Natta 1242 (2018)

- Kitchen worker moving and arranging boxes of **frozen turkey**.
- IME: idiopathic "frozen shoulder."
- FNP found more persuasive.
- FNP said ortho IME would have been in a better position to analyze if:
- He had reviewed the MRI and the chart, **as she did**.

Return

Justin Swint, 70 Van Natta 451 (2018)

- Employer paid "wage continuation" in lieu of TTD for 2 ½ years.
- Claimant challenged AWW rate more than 2 years later.
- ALJ: each payment a separate act of improper claims processing.
- Board: first payment triggered the 2-year limitation of ORS 656.319(6).

Return

Gadalean v. SAIF, 364 Or 707 (2019)

- Pre-employment driving test (unpaid) for applicant.
- Injured while participating in an actual delivery.
- Court of Appeals said he was a worker and should have been paid at least minimum wage. Implied-in-law contract.
- Supreme Court reversed – "Worker"… engages to furnish services "for" a remuneration.
- "For" means "expected result of."
- Statute requires that claimant expects remuneration, which he did not in this case.

Return

Jose Segovia-Funes, 70 Van Natta 1823 (2018)

- 8 months in, carrier recalculated AWW $1,200 to $390.
- 14 months later, recalculated it to $428.
- OOR reduced PPD award (overpaid), but increased TTD award.
- Carrier applied the **underpayment to the overpayment**.
- "Substantive" TTD not overpayment.
- Carrier can only offset 25 percent at a time, not all at once.

Return

Edgar Sanchez-Torres, 71 Van Natta 202 (2018)

- Entitlement to ongoing TTD after PA's authority expired.
- Chart notes were **signed by PA "for" the MD**.
- Notes reflected MD would be following claimant, as would "we."
- "Advance activity as tolerated" was open-ended authorization.

Return

Scott Richardson, 70 Van Natta 734 (2018)

- Employer appeal on **work disability**.
- BFC – both sides with job description.
- Medical records described heavier job than employer description.
- On RFC, AP and PCE said "medium," but actual weight in PCE was less.
- Medium-light assigned.
- Concession on SVP reduced overall award, but fee granted for defense of employer appeal to eliminate WD.

Return

Sandra Ocapan-Pantoja, 70 Van Natta 817 (2018)

- MA said impairment related to all accepted conditions, including (new) biceps tendinopathy.
- ALJ reversed PPD award. Findings not clearly related to new condition.
- OAR 436-035-0007(3) – **redetermined**.
- If no unaccepted, denied, superimposed, preexisting, all PPD redetermined.
- Unless no PPD for new condition.

Return

Michael King, 71 Van Natta 558 (2019)

- Wrestling coach demonstrating a headlock move.
- Symptoms later that evening – developed a stroke.
- Head lock dissected the left vertebral artery.
- Director of the Oregon Stroke Center testified for claimant.
- Preexisting HBP and elevated cholesterol were speculative.
- Also seen in football injuries, and chiropractic quick manipulation of the neck.

Return

Craig Schommer, 71 Van Natta 123 (2018)

- On remand from court, claimant is **entitled to attorney for prevailing**, even if brief was filed untimely.
- Board analyzed the factors.
- Substance of the untimely brief not considered, but considered for confirmation of time spent.
- $3,500 awarded.

Return

Cascade In Home Care, LLC, v. Hooks, 295 Or App 695 (2019)

- Claimant prevailed on mental disorder.
- Statement of services submitted, seeking $13,304.20 - no objection by carrier.
- Court: Board still has discretion.
- Some factors suited to Board assessment.
- Some factors determinable from record.
- Time devoted is well-suited as evidence.
- **Board must articulate** the application of the factors. Remanded.

Return

Tuan Tran, 70 Van Natta 1160 (2018)

- ALJ's evidentiary ruling affirmed.
- Hearsay testimony not admitted for compensability, but allowed in for penalty issue.

Sharon Nelle, 70 Van Natta 463 (2018)

- After off-the-record discussion, objection to exhibits and ALJ declined to admit a post-hearing report.
- No deference to evidentiary ruling where the record lacked explanation by the ALJ.

Return

Ronald McAllister, 71 Van Natta 590 (2019)

- Terminated for violation of work rule, TTD stopped.
- Board will not examine propriety of termination.
- Is there a work rule? Was it violated?
- Must provide work status after appointments.
- Voice mail of supervisor full, slipped note under door.
- No call/no show? (Voicemail left).
- Claimant's testimony unrebutted.
- Evidence of "no call/no show" policy was only in termination letter.

Return

Judy Munstenteiger, 70 Van Natta 637 (2018)

- SI joint sprain closed with no PPD.
- Decreased ROM documented.
- But reports did not document pathological worsening.
- Medical evidence said no new objective findings.
- "Actual worsening" not established.
- Board will not infer worsening by reduced ROM.

Return

Randy Simi, 70 Van Natta 929 (2018)

- Carrier denied causation on shoulder new/omitted conditions.
- Later argued they were encompassed.
- ALJ set aside denial – "remain encompassed in rotator cuff tear."
- Did not remand for processing.
- Claimant filed to have claim reopened, processed.
- Board: Conditions not "found compensable" after closure.

Return

Joshua Ryan, 70 Van Natta 2054 (2018)

- ARU order rescinded the NOC and ordered 10% out-of-comp fee.
- ALJ dismissed hearing request filed regarding the attorney fee.
- Board reinstated hearing request. Jurisdiction – "arises out of reconsideration order."
- But no entitlement to assessed fee on Recon order.

Return

Bradley Yonker, DCD, 71 Van Natta 145 (2018)

- NOC issued and OOR affirmed closure, stating no beneficiaries.
- Goes final, then claimant files RFH.
- De facto denial of survivor's benefits.
- **Board finds jurisdiction** – RFH filed within 2 years.
- ARU order not preclusive – they are not authorized to address who is a beneficiary.
- On merits, survivor benefits awarded.

Return

Tawnya Knight, 70 Van Natta 673 (2018)

- ALJ upheld denial on credibility case.
- Employer **credible by demeanor**.
- Board reversed – employer witnesses had preconceived notions about claimant's veracity.
- Overbroad, unresponsive statements.
- Disagreed with claimant on all issues.
- "Rife with hyperbole."

Return

Fred Meyer v. DeBoard, 291 Or App 742 (2018)

- "Even if" thoracic "bulge" at issue, not compensable.
- 2nd order found bulges compensable.

Griffin v. Dish Network, 296 Or App 233 (2019)

- Parties litigated initial injury in combined condition context.
- Denial set aside – "strain" accepted.
- In both cases, Court stated the **Board reasonably interpreted its prior orders**.

Return

Pilling v. Travelers Ins. Co., 365 Or 236 (2019)

- Husband - wife team, with coverage purchased for one employee.
- Husband was actually more of a partner than an employee.
- Husband injured, claim denied for failure to elect coverage.
- Board and Court of Appeals agreed he was factually a partner.
- Supreme Court looked at the statute:
- "Written application to an insurer to become entitled as a subject worker to compensation benefits."
- No requirement in statute that applicant identify as "partner."

Return

Pena v. Travelers, 294 Or App 199 (2018)

- MA reviewed surveillance – zero PPD.
- AP had not seen all of surveillance, contrary to OAR requirement.
- Board: No basis for exclusion of MA.
- Court reversed – mandatory precondition for AP to see surveillance.
- Restriction on MA is **not hortatory**.
- ("Marked by exhortation or strong urging").

Return

Timothy Ogden, 70 Van Natta 1039 (2018)

- Compensable injuries from tractor trailer rollover.
- PTSD and adjustment disorder claims.
- PTSD directly due to injury itself – full requirements of 656.802(3) apply.
- Adjustment disorder was consequential condition due to chronic pain – simple "major cause" test.
- Claimant won both on the merits.

Return

Timothy Poppleton, 70 Van Natta 1197 (2018)

- Compensable neck injury closed.
- Recon order found 80 percent of impairment due to pre-existing.
- Consequential condition of depression.
- No "preclusion" from Recon order.
- Emotional reaction to pain and disability **factored "in."**
- Reaction to claim processing **factored "out."**
- Claimant prevailed.

Return