Dr. Garber's

DISPENSARY OF COUGH SYRUP, BUFFALO LOTION, PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE & WORKERS' COMPENSATION CASES

Bradley G. Garber's Board Case Update: 12/30/2015

Dennis L. Corkum, 67 Van Natta 2220 (2015)
(Order on Remand)

The Court of Appeals reversed and remanded the Order on Review that upheld the self-insured employer's denial of claimant's injury claim for a right groin condition. Determining that the Board erred in concluding that claimant's abdominal wall weakness was a "preexisting condition" within the meaning of ORS 656.005(24), the Court remanded the matter so the Board could apply the correct statutory standard.

At hearing, the employer conceded that claimant's January 2011 work injury was a material contributing cause of his groin condition, a symptomatic right inguinal hernia. But, the employer argued that the otherwise compensable injury (the hernia) combined with a preexisting condition (congenital abdominal wall weakness) to cause disability or need for treatment, and that it was the abdominal wall weakness that constituted the major contributing cause of the combined condition. Claimant contended that, although he had weakness in his abdominal wall tissues, such weakness merely rendered him more susceptible to a hernia, and was therefore not a statutory "preexisting condition" under ORS 656.005(24).

That ALJ agreed with the employer's position and affirmed its compensability denial. The Board affirmed. Claimant took things up to the Court of Appeals. The Court disagreed with the Board's analysis, as follows:

"[T]he text, context, and legislative history of ORS 656.005(24)(c) show that a condition merely renders a worker more susceptible to the injury if the condition increases the likelihood that the affected body part will be injured by some other action or process but does not actively contribute to damaging the body part."

The Court concluded that claimant's abdominal wall weakness merely rendered him more susceptible to injury, without itself contributing to disability or need for treatment, and was therefore not a statutory "preexisting condition." Because there was no preexisting condition, there was nothing for claimant's "otherwise compensable injury" to combine with and the burden of proof was, therefore, the material contributing cause standard. Employer has already conceded that claimant's injury was a material contributing cause of his hernia. **Reversed**

And from the Court of Appeals:

Federal Express Corporation v. Estrada, 11-06447; A153964 (December 9, 2015)

Employer petitioned for review the Board's Order on Review in which the Board determined (1) that claimant established good cause under ORS 656.265(4) to report a workplace injury more than 90 days after the injury occurred and (2) that the claimant met his burden to prove that his injury was a material contributing cause of his disability and need for treatment. On appeal, the employer only disputed the first finding regarding the timeliness of claimant's claim.

As a delivery truck driver for employer, claimant regularly loaded and unloaded items from his truck; those items had varying weights of up to 150 pounds. On April 27, 2011, claimant felt a "weird pull" and pain in his left testicle while he

was loading heavy equipment onto his delivery vehicle. Claimant kept working and did not report an injury until he noticed a scrotal bulge had developed and sought treatment in October. It turns out that he had an inguinal hernia.

Claimant testified, at hearing, that although he had never felt the "weird pull" and pain before, he did not report the incident to his employer because he attributed his symptoms to "soreness" from extra work and "did not realize he had sustained an injury." The pain gradually worsened over the subsequent months leading up to his decision to seek treatment. When he finally found out that he had a hernia, he determined that it was caused on April 27, 2011.

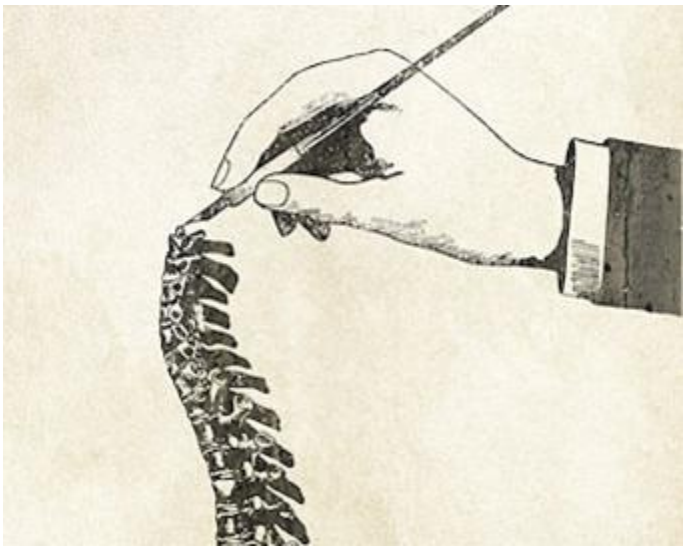
Employer denied the compensability of claimant's claim for benefits on the ground that claimant had failed to file his claim within the 90-day time period allowed by ORS 656.265(1). At hearing, claimant acknowledged that he had not notified employer of his injury within 90 days. He argued, however, that his claim was nonetheless not time-barred because he gave employer notice within one year after the injury occurred and he had good cause for failing to give notice within 90 days.

The ALJ rejected claimant's argument, finding that two of claimant's assertions – that he did not know that he was injured, and that he could pinpoint the exact date and time of his injury – were irreconcilable. The ALJ concluded that claimant was aware of his injury when it occurred, and did not have good cause for failing to give timely notice. The Board reversed the ALJ's Opinion & Order and set aside employer's denial, reasoning that claimant's lack of knowledge that he had incurred a work-related injury provided him with "good cause" for his failure to provide the employer with timely notice of injury. Employer appealed the Board's Order on Review.

The Court examined the Board's order to see if it could discern a rational connection between the Board's findings and its conclusion. The Court observed, "The board's order does not explain how claimant could be aware of the date and time at which he felt a distinct painful sensation in his body while lifting a heavy object at work, and could have soreness in the same area that made work more difficult for him over the next few months, yet still "lack * * * knowledge" that he

had suffered a work-related injury." Because the Court could not reconcile the facts with the Board's conclusions…**Reversed and Remanded**

E. Hutchings v. Amerigas Propane, 10-03960, 10-03489; A151719 (December 23, 2015)



In this 21-page rambling dissertation, the Court found, contrary to what the Board had determined, that the condition of claimant's post-surgical cervical spine (he had undergone a non-work related fusion at C5-6 and C6-7) did not constitute a "preexisting condition" under ORS 656.005(24) and that there could not, therefore, be a combined condition. The Court discussed its previous decision in *Corkum v. Bi-Mart Corp.*, 271 Or App 411, 350 P3d 585 (2015)(see review, above), and decided that claimant's post-surgical spine was accurately characterized as a condition that merely rendered claimant "susceptible" to further injury. **Reversed**

Nacoste v. The Halton Company – Halton Co., 11/03172; A154040 (December 23, 2015)

In this case, argued by yours truly in September 2014, the issue was whether claimant's post-surgical chondromalacia was accurately characterized as a consequential condition or whether it formed the basis of aggravation claim. On judicial review, claimant argued that a consequential condition can be the basis of an aggravation claim.

Claimant suffered a work-related medial meniscus tear in his right knee. The condition was accepted and processed to closure in 2009. In April 2011, claimant filed an aggravation claim, alleging that recently-discovered chondromalacia in the right knee was necessarily part of the accepted claim. The employer denied the aggravation claim, asserting that claimant was required, instead, to file a "new" or "omitted" condition claim. Several doctors involved in the claim described chondromalacia as wear or damage to the cartilage of the knee and stated that chondromalacia is a separate condition from a medial meniscus tear. After

hearing, the ALJ determined that claimant's chondromalacia was a consequential condition and could not be the basis of an aggravation claim. The Board agreed.

On judicial review, claimant contended that the conclusion that ORS 656.273 does not apply to consequential conditions is incorrect as a matter of law. I argued, in response, that claims under ORS 656.273 are limited to the worsening of an underlying accepted condition and do not include the development of a distinct condition. In *Johansen v. SAIF*, 158 Or App 672 (1999), the Court had previously concluded that the legislative history of the new or omitted conditions statute, ORS 656.267, demonstrated that the legislature intended that an aggravation claim is one involving the worsening of an underlying condition identified in a notice of acceptance. The Court revisited the legislative history, even though neither party to the appeal raised it, and determined that even in light of *Brown v. SAIF*, 262 Or App 640, *rev allowed*, 356 Or 397 (2014), the holding in *Johansen* was still good law. **Affirmed**