Dr. Garber's

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

Bradley G. Garber's Board Case Update: 03/26/2013

Kent C. Rogers, 65 Van Natta 523 (2013)
(ALJ Sencer)

The self-insured employer requested review of an order that set aside its denial of claimant's combined cervical spine condition.

On July 23, 2009, the employer accepted a "cervical facet syndrome combined with preexisting multilevel cervical spondylosis (arthritis)." Three days later, the employer issued a current condition denial. Claimant requested a hearing.

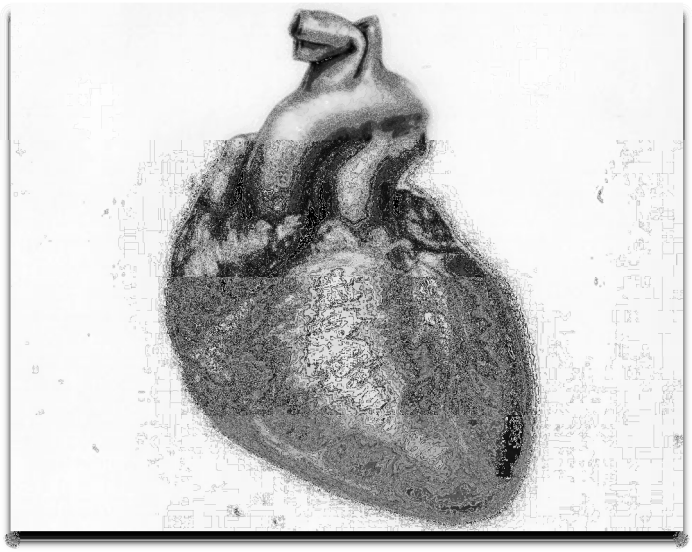
At the hearing, claimant's counsel argued that claimant's preexisting multilevel cervical spondylosis did not qualify as "arthritis" within the definition set out in *Hopkins v. SAIF*, 349 Or 348 (2010) and was, therefore, not a statutory "preexisting condition." His contention was that the *Hopkins* definition of

"arthritis" requires "a causal chain" with joint inflammation occurring first, followed by "structural change."

After considerable mental gymnastics, the Court, in *Hopkins,* defined arthritis as "inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change." In *Rogers*, claimant's counsel argued that inflammation had to precede structural change and that osteoarthritis (characterized by structural change leading to inflammation) could not fit the definition. The Board did not buy it, stating, "[W]e disagree with the assertion that *Hopkins* requires that all three 'core elements' of 'arthritis' occur in a specific chronological progression." **Affirmed**

Kevin W. McClellan, 65 Van Natta 560 (2013) (ALJ Lipton)

SAIF appealed an order that set aside its notice of closure, as premature. SAIF had accepted cervical, thoracic and lumbar strains. Claimant's attending physician, Dr. Tran, concurred with a closing IME report, agreeing that all of claimant's accepted strains were medically stationary. Shortly, thereafter, Dr. Tran recommended work hardening. SAIF closed the claim and claimant requested reconsideration. The Notice of Closure was affirmed, on reconsideration, and claimant requested a hearingClaimant's argument was that, because Dr. Tran recommended work hardening, there was an expectation of material improvement in his accepted conditions and he was not, therefore, medically stationary. The ALJ bought the argument and set aside the closure, as premature.



The Board did not buy the argument, observing, as follows:

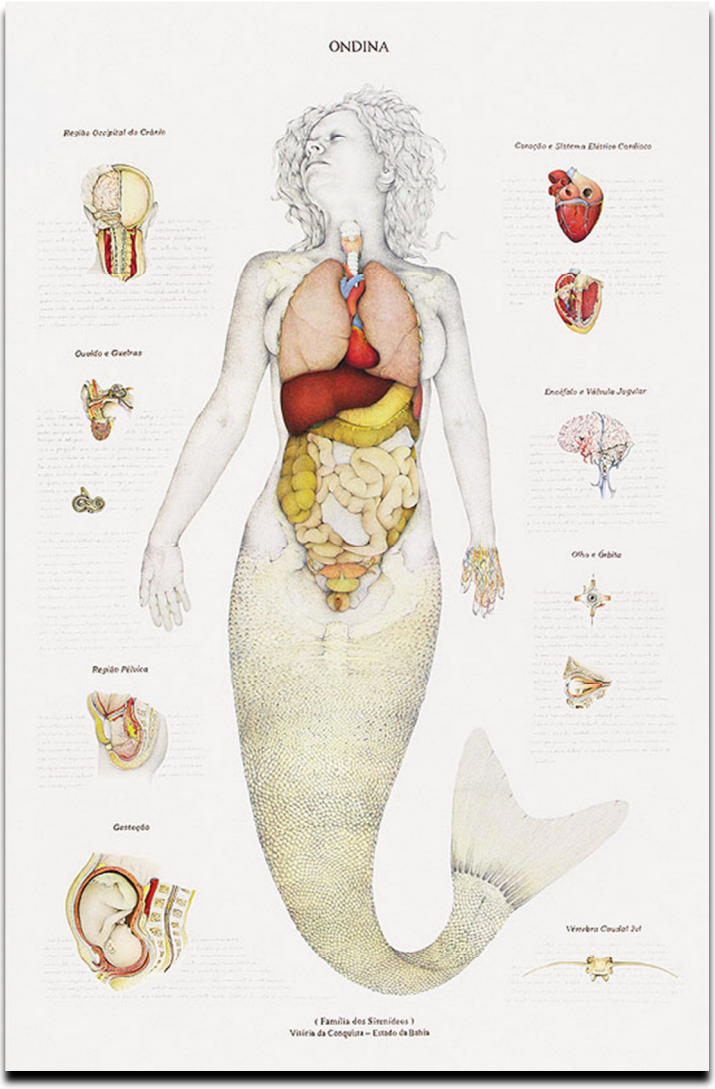
"The term 'medically stationary' does not mean that there is no longer a need for continuing medical care. *Maarefi v. SAIF*, 69 Or App 527, 531 (1984); *Pennie Richerd-Puckett*, 61 Van Natta 336 (2009). Medical treatment prescribed solely to improve a claimant's functional abilities is not pertinent to the determination of a

claimant's medically stationary date under ORS 656.005(17). *SAIF v. Ramos*, 252 Or App 361, 375 (2012); *Clark v. SAIF*, 120 Or App 11, 13-14 (1993)."

The Board concluded that Dr. Tran's recommendation for additional physical therapy did not support the conclusion that claimant's accepted strains were not medically stationary on the date of claim closure. **Reversed**

Juan Estrada, 65 Van Natta 613 (2013) (ALJ Fulsher)

Claimant requested review of an order that found that he did not establish good cause, under ORS 656.265(4)(c) for the untimely filing of his injury claim for a left hernia.



A claimant is required to give the employer notice of an accident resulting in an injury within 90 days after the accident. ORS 656.265(1). Failure to give notice within that time frame bars a claim unless the notice is given within one year of the accident and the employer had knowledge of the injury within the 90-day period. ORS 656.265(4)(a); *Keller v. SAIF*, 175 Or App 75, 82 (2001), *rev den*, 333 Or 260 (2002). Failure to give notice within the 90-day time frame also bars a claim unless the notice is given within one year of the accident and the worker establishes that he or she had "good cause" for the failure to give notice. ORS 656.265(4)©. In this case, claimant was lifting something on April 27, 2011 when he felt a pull in his groin. He first reported his injury to the employer in October 2011. The ALJ ruled that the report of

injury was too late and that the claim was time-barred. On review, the Board identified the issue as whether claimant had "good cause" for not timely notifying his employer of his injury.

Claimant testified that he felt a "weird pull" in his left testicle area, while lifting a heavy item into a truck on April 27, 2011. He did not report the incident because he thought "it" (apparently, the "weird pull") was just soreness from extra work. He testified that he did not know he was injured. He did not seek medical treatment until saw a swelling in the left testicle area in July or August. In between April and late July, he sporadically noticed increased pain and soreness in when he moved in certain ways, or lifted heavy items.

The Board held that the claimant's lack of knowledge of an injury constituted "good cause" under the statute and excused his late claim filing. **Reversed**