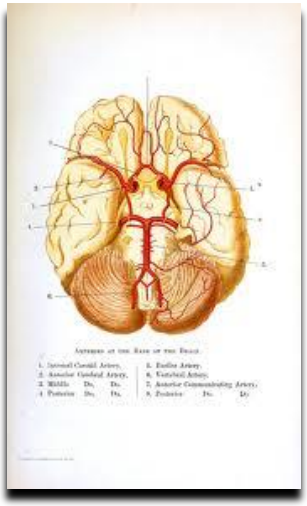
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 03/17/2014

Daniel B. Slater, 66 Van Natta 335 (2014)
(ALJ Fulsher)

SAIF requested review of an Order that set aside its denial of claimant's combined left knee condition, set aside its denial of claimant's medical service claim for a left knee MRI, and awarded a penalty and penalty-related fee for an alleged unreasonable combined condition denial.

Claimant injured his knee and subsequently underwent surgery. SAIF accepted a **left knee medial collateral ligament strain**, and a **left medial meniscus tear**. The claim was subsequently closed, on June 26, 2006, with a 2% whole person permanent impairment award.

Five years later, claimant filed a new/omitted condition claim for "prominent medial compartment degenerative changes – left knee." On December 8, 2011, SAIF modified the acceptance to include a "combined condition as of October 27, 2005 consisting of left medial collateral ligament strain and left medial meniscus tear combined with pre-existing left knee osteoarthritis." On the same date, SAIF

issued a Notice of Voluntary Reopening Own Motion Claim for the newly-accepted combined condition.

On February 3, 2012, SAIF denied the combined condition on the basis that, as of July 22, 2011, the accepted injury was no longer the major contributing cause of the combined left knee condition. Subsequently, a Notice of Closure did not award any additional permanent disability.

Then, on February 29, 2012, claimant sought treatment from Dr. Koon, who wanted to perform an MRI scan. SAIF denied the request for authorization. Claimant requested medical director review and the matter was transferred to the Hearings Division to determine whether the proposed left knee MRI scan was causally related to the accepted combined condition.

After hearing, the ALJ set aside the employer's combined condition denial because the medical evidence was not sufficient to establish that claimant's osteoarthritis was a statutory preexisting condition, or an arthritic condition, as defined in *Hopkins v. SAIF*, 349 Or 348 (2010).

For purposes of determining a "preexisting condition" under ORS 656.005(24)(a)(A), the Supreme Court has determined that the legislature intended the term "arthritis" to mean the "inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change." *Schleiss v. SAIF*, 354 Or 637 (2013). If there is no evidence of inflammation, there can be no arthritis. *See Staffing Services, Inc. v. Kalaveras*, 241 Or App 130 (2011); *Michael Kelson*, 65 Van Natta 32 (2013).

In this case, defense counsel submitted into evidence, a concurrence letter from Dr. DiPaola, in which the doctor agreed that claimant suffered from "a classic case of arthritis in his left knee involving the inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration or structural change." This opinion was backed up by Dr. DiPaola's examination findings, surgical findings and review of diagnostic films. Why the

ALJ did not think this opinion sufficient to meet the *Hopkins/Kalaveras* criteria is difficult to understand. The Board, however, found the evidence sufficient and determined that the major contributing cause of claimant's left knee pathology and need for treatment was his preexisting left knee osteoarthritis. The combined condition denial was affirmed, as well as SAIF's denial of authorization for an MRI scan. **Reversed**

Lynda S. Sinnott, 66 Van Natta 346 (2014) (ALJ Rissberger)

Claimant requested review of an Order that declined to assess a penalty and penalty-related attorney fee for the self-insured employer's allegedly unreasonable refusal to close claimant's left elbow claim. The employer cross-appealed, alleging that the ALJ erred in not allowing the submission of additional evidence, along with its written closing argument. The Board found the employer's refusal to close unreasonable and, so, assessed a penalty and penalty-related fee. It is the evidentiary issue that is more informative.

In this case, the parties agreed to conduct the "hearing" by written closing arguments, based on the record. Before written arguments, the employer submitted exhibits 1-46. There was no objection to those records.

On December 10, 2012, claimant submitted her opening brief, along with additional exhibits. There was no objection to the additional exhibits.

On January 14, 2013, the employer submitted its responding brief, along with additional exhibits 43A, 47, 48 and 49. Claimant's counsel did not object to exhibits 43A and 48, but did object to exhibits 47 and 49. The basis for the objection was stated by claimant's counsel, as follows:

"[The employer] *created* exhibits 47 and 49 one month after [claimant] submitted her opening brief. [The employer's] response brief was initially due on December

24, 2012. On December 20, 2012, [the employer] asked for a three-week extension, thereby making it brief due on January 14, 2013. On January 8, 2013, [the employer] emailed [a Workers' Compensation Division employee]: the contents of this email chain comprise Exhibit 47. Exhibit 49 is a January 14, 2013 affidavit of [the employer's claims examiner. The employer] took advantage of [claimant's] attorney's acquiescing to a three-week extension to create exhibits 47 and 49. These were not exhibits that [the employer] simply failed to submit into the record; these exhibits did not even exist until on month *after* [claimant] submitted her opening argument."

Suffice it to say that the ALJ's and the Board do not appreciate gamesmanship. The extension requested by the employer was not granted so that new evidence could be generated after claimant submitted her opening brief.

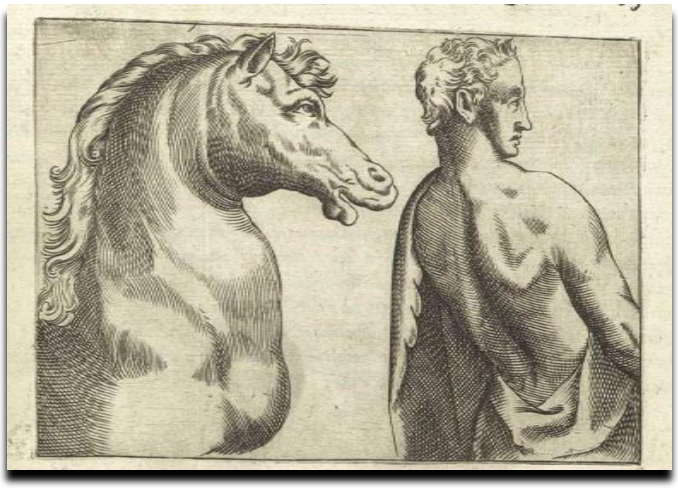
The Board cited *Cindy M. Penturf*, 50 Van Natta 1718 (1998), wherein it explained that, when parties present their cases on the written record, the written (or oral) arguments are not considered to be part of the "hearing." Instead, the presentation of the written record, prior to the commencement of written (or oral) closing arguments, is the "hearing." The Board went on, as follows:

"As illustrated by *Penturf* and its progeny, when cases are submitted on the written record, it is incumbent upon the ALJ and the parties to clarify the evidentiary record, as well as the issues, before commencement of written arguments. *See Kerry K. Hagen*, 61 Van Natta 370, 371 n 2(2009). Here, the record does not include the clarification regarding the closing of the record or specification of the disputed issues. Thus, consistent with *Penturf* rationale, the record supports the conclusion that the evidentiary record, at the latest, on December 10, 2012, with the submission of claimant's written closing argument. **Evidentiary issue affirmed**

Joshua Albers, 66 Van Natta 387 (2014)
(ALJ Kekauoha)

Claimant requested review of an Order that upheld the employer's denials of claimant's new/omitted condition claims for metatarsophalangeal (MTP) joint sprain/"turf toe" and hallux valgus deformity.

The employer accepted a "right great toe sprain." Claimant filed a new/omitted condition claim for MTP joint sprain. The employer denied the claim, contending that the condition was already encompassed within the scope of claim acceptance. The ALJ upheld employer's denial. On review, claimant contended that the case was similar to *Crawford v. SAIF*, 241 Or App 470 (2011), in which the carrier was required to accept, as a new/omitted medical condition, a diagnosis that was "more precise" than the condition already accepted. The Board disagreed and discussed its involvement in the *Crawford* case, as follows:



"In *Crawford*, the carrier had not issued a denial of the new/omitted medical condition claim, but, instead, issued a 'No Perfected Claim' letter asserting that the claimed condition did not involve a condition other than the conditions previously accepted. *Ronald Crawford*, 60 Van Natta 1585, 1585-86, *recons*, 60 Van Natta 2831 (2008). We noted that under ORS 656.262(7)(a) and *Rose v. SAIF*, 200 Or App 654 (2005), the carrier was required to issue a written notice of acceptance or denial of the claim within 60 days, and that no other response would satisfy this requirement. *Crawford*, 60 Van Natta at 1587. Because the carrier did not respond to the claim as ORS 656.262(7)(a) required, we reasoned that its response constituted *de facto* denial. *Id.* at 1589. The court agreed with our reasoning in this respect, although it reversed on other grounds. [citiations omitted]."

In this case, claimant contended that the diagnosis of "MTP joint sprain" was more specific than the accepted condition of "right great toe sprain," and that *Crawford* required that a more specific diagnosis be accepted. The Board disagreed, relaying on the medical opinions of Dr. Yodlowski who opined that the "great toe sprain"

necessarily encompassed and included the diagnosis of "MTP joint sprain."
Affirmed

Marcelina Quiroz-Garcia, 66 Van Natta 474 (2014) (ALJ Poland)

Claimant requested review of an Order that found her claim was untimely filed and dismissed her request for hearing regarding the insurer's AOE/COE denial.

On December 6, 2011, claimant, who works as a temporary worker for a staffing agency, was injured in a motor vehicle accident. Claimant didn't have her own car, so she was traveling with co-workers en route to a job assignment. On the morning of the MVA, claimant was traveling with a co-worker, in a vehicle owned by the co-worker's sister. At no time did the employer reimburse the co-worker for gas or insurance, as he ferried other co-workers around.

Claimant was injured on December 6, 2011, but she did not file a claim for benefits until December 6, 2012. The Board declined to address the timeliness issue because, regardless of whether the claim was filed timely, the Board found that the injury did not arise out of and in the course of employment.

Claimant relied on the Board case of *Juan A.Renteria*, 60 Van Natta 866 (2008), in which the Board applied the "employer's conveyance" acceptance to the "coming and going" rule. The exception has been described, as follows:

"When the journey to or from work is made in the employer's conveyance, the journey is in the course of employment, the reason being that the risks of the employment continue throughout the journey. * * *

"If the trip to and from work is made in a truck, bus, van, car, or other vehicle under the control of the employer, an injury during that trip is incurred in the course of employment." 1 *Larson's Workers' Compensation Law,* secs. 15.00 – 15.01 (2003)

The focus of the inquiry is whether the employer was directing where the vehicle should go, or requiring the use of the vehicle. *William A. Hedger*, 58 Van Natta 1330 (2006). In this case, the employer had absolutely no control over the vehicle in which claimant was injured, and claimant was not required to ride with the co-worker (whose sister owned the car). **Affirmed**

Joseph Wagner, 66 Van Natta 485 (2014) (ALJ Fisher)

Claimant requested review of an Order that affirmed an Order on Reconsideration that awarded 13 percent whole person impairment and no work disability award.

The primary issue with respect to impairment concerned apportionment. The ALJ affirmed the Order on Reconsideration that apportioned 50% of claimant's impairment based on reduced range of motion (ROM) in the lumbar spine due to preexisting lumbar spondylosis. Total impairment was measured, by a medical arbiter, at 8%, but the arbiter determined that 50% of that impairment was due to preexisting pathology, so the injury-related impairment was reduced to 4%. Claimant disputed the apportionment, relaying on the recent Supreme Court decision in *Schleiss v. SAIF*, 354 Or 637 (2013).

In *Schleiss*, the court analyzed the Director's "apportionment" rule (OAR 436-035-0013(1)) and determined that the rule was inconsistent with the statutory scheme in that it included non-statutorily-recognized "preexisting conditions" when rating impairment. The court decided that only the contributions of component parts of a combined condition (*i.e.*, the otherwise compensable injury and preexisting conditions) should be compared in identifying the major cause of any disability (including impairment) of the combined condition. The only preexisting conditions that could be considered are those defined in ORS 656.005(24)(a).

In this case, the claimant suffered from preexisting "lumbar spondylosis," but that condition is not recognized as a preexisting condition, unless there has been prior

treatment for the condition or it fits within the definition of "arthritis." There was no evidence of prior treatment for the condition, and there was no medical opinion that the condition was arthritic, within the *Hopkins/Kalaveras* definition. Because of this, apportionment was not allowed under the decision in *Schleiss.* Claimant's impairment award was increased to 8%, plus 9% for disc surgery.

The Board went on to find that claimant had not, in fact, been released to return to regular work, so he was, also, entitled to a substantial work disability award.
Modified

Practice Tip: Almost everyone has DDD/spondylosis in their low back. I almost every low back injury claim (certainly, in every occupational disease claim), there should be a medical opinion in the record that the preexisting DDD/spondylosis is an arthritic condition (utilizing the language in *Hopkins/Kalaveras*).