Dr. Garber's

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

Bradley G. Garber's Board Case Update: 04/15/2014

Trenton Wilson, 66 Van Natta 521 (2014)
(ALJ Pardington)

Claimant requested of an Order that upheld the self-insured employer's denial of his injury claim for a left arm condition.

The ALJ was convinced that Claimant intentionally placed his left hand into the moving rollers of a metallic press machine, at work. (Now, WAIT! What sort of a brain would do this?)…think about it. Anyway, the ALJ reasoned that Claimant knew that this action would result in injury. He also concluded that the employer successfully rebutted the presumption that Claimant's injury was NOT the result of a willful intention to commit self-injury. Consequently, Claimant's injury claim was barred under ORS 656.156(1). See, also, ORS 656.310(1)(b).

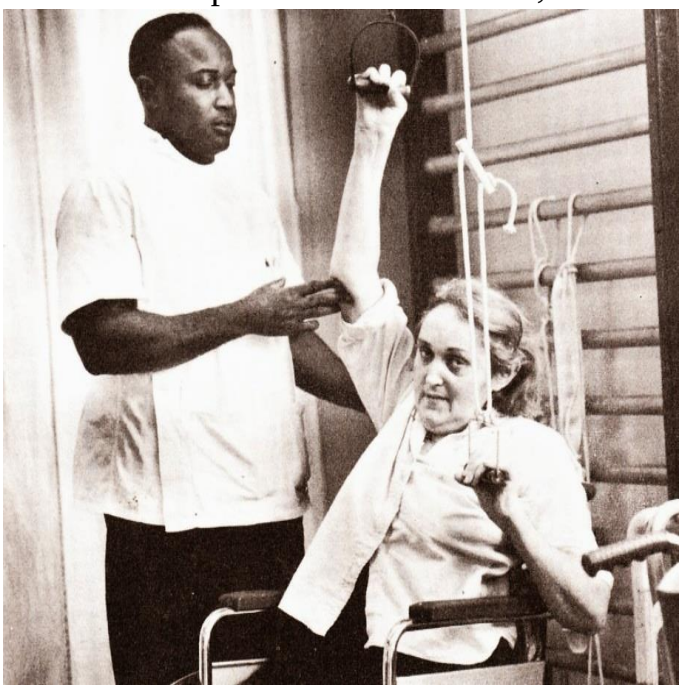
At the hearing, Claimant has no explanation for his action. He merely testified that he did not remember what happened. A surveillance tape showed Claimant looking around, in both directions, before thrusting his left hand into the rollers. Maybe pain makes one forgetful. After viewing the DVD, the Board concluded that: (1) Claimant's condition resulted from his own volitional act; and (2) Claimant had knowledge of the consequences of his act. **Affirmed** (In a dissent,

Board Member Lanning spent five pages trying to explain why Employer did not rebut the presumption that Claimant did NOT intentionally injure himself, based on Claimant's testimony that he LOVED working for Employer).

Ernesto R. Armenta, 66 Van Natta 619 (2014) (On Remand)

The Oregon Court of Appeals remanded this case back to the Board, directing the Board to consider a "post-hearing" report from Dr. Gritzka. See *Armenta v. PCC Structural, Inc., 253 Or App 682 (2012).*

In December 2006, Claimant filed occupational disease claims for **cervical and lumbar radiculopathies**. Employer denied the compensability of the claims and Claimant requested a hearing. At the hearing, on May 16, 2007, Claimant's counsel requested a continuance to submit a medical report from Dr. Gritzka, with whom claimant had a scheduled July 2007 appointment. The ALJ denied the request, finding a lack of "due diligence." Then, Claimant's counsel requested that the record be left open for receipt of Dr. Gritzka's anticipated report as "rebuttal" to a report from Dr. Rabie. On that basis, the ALJ agreed to keep the record open for receipt of Dr. Gritzka's rebuttal report, limiting the report issues raised by Dr. Rabie's report. In other words, Dr. Gritzka's report was not to raise new information based on his examination.



Thereafter, Dr. Gritzka's report was submitted as an exhibit and, not surprisingly, Dr. Gritzka rendered a new diagnosis. Employer objected to consideration of any issues that went beyond the claimed conditions and denials of those conditions. The ALJ limited the evidence and declined Claimant's request to reopen the record to consider the new diagnosis.

On review, the Board affirmed on the evidentiary issues and on the compensability issues. On appeal, the Court of Appeals held that the Board "misinterpreted" Dr. Gritzka's opinion and, therefore, erred in failing to consider it as rebuttal evidence.

Specifically, the court concluded that, at a minimum, Dr. Gritzka's report addressed Claimant's alleged lumbar radiculopathy and its cause. The Court remanded the matter to the Board to consider Dr. Gritzka's report.

On reconsideration, the Board continued to conclude that Claimant's claimed cervical radiculopathy was not compensable. It found, however, that the lumbar radiculopathy was compensable. Interestingly, while finding Dr. Gritzka's opinion better reasoned and most persuasive, the Board never revealed what Dr. Gritzka's "new diagnosis" was. Dr. Gritzka merely attributed claimant's "low back condition" to his work activities. So, ultimately, while Claimant made a claim for "lumbar radiculopathy," and Employer denied "lumbar radiculopathy," we are left wondering what Dr. Gritzka diagnosed, on rebuttal. **Affirmed, in part; Reversed, in part**

Rachel A. Romero, 66 Van Natta 636 (2014) (ALJ Poland)

Claimant requested review of an Opinion & Order that upheld Employer's denial of her injury claim on the basis that it did not arise out of and in the course of her employment.


PLATE XXXV

Transport of Sick and Injured. 1 (top left). Hook-grip forming two-handed seat. 2 (above). Four-handed seat

3. Patient supporting himself on a hand-seat.

4. Helpless patient carried by the fore and aft method

5. Variant of fore and aft method when a leg is injured. 6. Pick-a-back; the patient holds on by his arms

To face page 632

In 2009, Claimant was diagnosed with a mild myopathy of unclear etiology. Over time, she developed progressive muscle aching and weakness, making it difficult for her to climb stairs. She fell and was injured in March 2012. By November 2012, she was having difficulty getting in and out of her car, and putting on her pants. On March 20, 2013, she was going to work when she fell on a sidewalk outside the entrance to Employer's facility.

About an hour after her fall, Claimant called the neurology clinic to report that she had difficulty lifting her leg/foot while walking, and that she had stumbled and fallen. Her attending physician concluded that it was highly probable that Claimant's fall was due to her myopathy.

When Claimant was asked to describe, to her employer, how the fall occurred, she responded that the reason was not apparent. In other words, she did not have a clue as to why she fell.

Lo and behold…here we are at the hearing. Claimant testified that she thought she stubbed her toe on uneven pavement that was under Employer's control! In this decision, you will find discussion of the "unitary work-connection" test, and the "mixed risk" doctrine. But, everything boiled down to Claimant's inconsistent and contradictory recollection of the reason for her fall. The Board concluded, "…[T]he preponderance of the record supports a conclusion that claimant's myopathy caused her difficulty lifting her foot and was the sole cause of her tripping and falling."
Affirmed

"The physician describes the current total overall findings of impairment, then describes those findings that are due to the compensable condition. In cases where a physician determines a specific finding (e.g. range of motion, strength, instability, etc.) is partially attributable to the accepted condition, only the portion of those impairment findings that is **due to** the compensable condition receives a value." (emphasis added)

The Supreme Court decided that the second sentence went beyond what the statutes directed and, essentially, chopped that sentence out of the Department's rule. From now on, in order for physical impairments totally unrelated to a claimant's injury to be taken into account, when rating disability, those physical impairments must be identified, by a medical expert, as preexisting and either

disabling (to some degree) or the basis of treatment prior to the work-related injury. Otherwise, no apportionment.

Practice Tip:

Before closing a claim, ask the closing examiner (whether it be independent examiner or attending physician) whether there is ANY historical evidence of impairment or treatment for DDD that shows up on MRI scans, post-injury, or ANY historical evidence of any physical condition that may have any effect on total disability and, then, make sure that preexisting condition falls within the definition in ORS 656.005(24). Then, the next question is whether, there is any objective evidence that a condition in existence before the injury has ANY bearing on the current impairment findings. Better yet, petition your legislators to fix this stupid problem. Arguably, the definition of "preexisting condition" was never intended, by the legislators, to apply to the ultimate determination of injury-related disability.