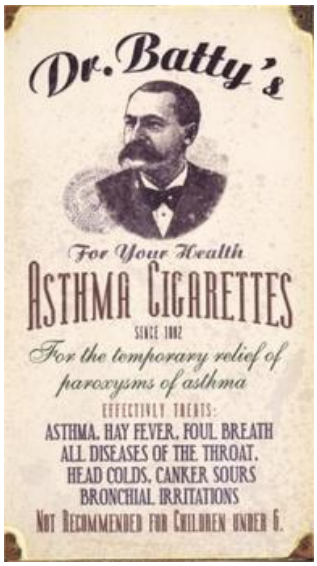
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 04/19/2013

Chrisyne Belden, 65 Van Natta 737 (2013)

(ALJ Rissberger)

Claimant requested review of an Opinion & Order that upheld SAIF's denial of her injury claim for a right shoulder condition. The issue was whether claimant's injury occurred in the course and scope of her employment.

During an unpaid lunch break, claimant tripped on a curb and fell in a parking garage beneath her office building, while looking for a vendor who was delivering her lunch order. She injured her right shoulder, which subsequently required surgery. SAIF denied the compensability of claimant's claim for benefits, alleging that her injury did not arise out of and in the course of her employment.

For an injury to be compensable, it must "arise out of" and "in the course of" employment. ORS 656.005(7)(a). The "arising out of" prong requires a causal link between the worker's injury and the employment. The requirement that the

injury occur "in the course of" employment concerns the time, place, and circumstances of the injury. Both prongs of the judicially created "work-connection" test must be satisfied to some degree; neither is dispositive.

There is another judicially created rule called the "going and coming" (instead of coming and going) rule. That rule provides that injuries sustained while an employee is traveling to or from work do not occur "in the course of" work and are, therefore, not compensable. This rule is applied in situations where a claimant is injured while on a short break, even a paid break, away from work. But, there are a number of exceptions to that rule. One of them, the "parking lot rule" applies when an employee traveling to or from work sustains an injury "on or near" the employer's premises. In that case, the injury may be found to have occurred "in the course" of employment. The employer has to exercise some control over the site of the injury.

In this case, the claimant was walking around in the parking garage (over which her employer exercised no ownership or control) trying to meet up with a vendor who was delivering food for her lunch. She was on an unpaid break. She tripped and fell in the garage, and injured her right shoulder.

The Board found that the "coming and going" rule applied, but the "parking lot exception" did not. **Affirmed**

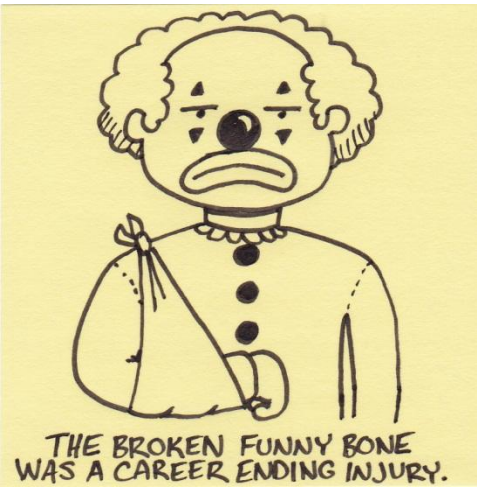
Shawnah J. Green, 65 Van Natta 755 (2013)

(ALJ Bloom)

Claimant requested review of an Order that reversed a Director's order that reclassified her bilateral carpal tunnel syndrome condition, from nondisabling to disabling.

SAIF accepted claimant's bilateral CTS claim as nondisabling. The average weekly wage (AWW) for that claim was $806.85. At the same time, SAIF

accepted another claim for a disabling right elbow condition. The AWW for that claim was $808.66. (Not sure why the AWW differed)



SAIF paid time loss benefits on the elbow claim, but not the CTS claim. Claimant requested reclassification of her CTS claim, but SAIF denied that request, reasoning that, because claimant was being paid time loss under her elbow claim, at a higher rate, there were no amounts "due and payable" as a result of the CTS condition. This seems reasonable; but NO!

The Board reasoned, as follows:

"The medical evidence conclusively establishes that claimant was unable to work due to her bilateral CTS condition. Because she was disabled due to both accepted claims, SAIF was required to calculate temporary disability for both claims and pay those benefits at the highest rate. OAR 436-060-0020(8). As such, there was temporary disability benefits "due and payable" under the CTS claim."

In other words, even if there are no amounts "due and payable" in the real world in which we all live, there are hypothetical amounts "due and payable" in the other world. So, claimant's CTS gets reclassified and she gets to have a Notice of Closure that awards her nothing. **Reversed**

Clarence H. Barker, 65 Van Natta 769 (2013)

(ALJ Fulsher)

The self-insured employer requested review of an Order that set aside its denial of claimant's occupational disease claim for bilateral hearing loss. The reason I report this case is to point out how medical expertise in a particular field does not really mean much when the Board assesses the persuasiveness of medical opinions.

The claimant had an audiologist (someone who tests hearing loss) as an expert; the employer had an otolaryngologist (someone who is an M.D., who actually operates

on ears) as its expert. The Board found the hearing-tester more persuasive. It wrote, as follows:

"We acknowledge that we have deferred to the opinion of an otolaryngologist over that of an audiologist. *See Henry F. Downs*, 48 Van Natta 2094, *recons*, 48 Van Natta 2200 (1996). Nevertheless, we have also found an audiologist's causation opinion more persuasive than that of a physician. *See, e.g., William J. Russelman*, 55 Van Natta 3828 (2003). These cases illustrate that proposition that we evaluate the persuasiveness of medical opinions on a case-by-case basis. *See Giesbrecht v. SAIF*, 58 Or App 218 (1982)(the contribution of one expert's opinion to the preponderance of the evidence in one case has no bearing on the relative weight of the same expert's opinion in another case with a different mix of medical opinions); *Richard W. Nelson*, 48 Van Natta 588, 589 (1996). Likewise, we consider the opinions of other professionals who are not medical doctors where the causation issue is within their area of expertise. *See Rocky L. Gordon*, 58 Van Natta 1127, 11128 (2006)(pharmacist's opinion considered in determining compensability of the claimant's hormone condition); *Manfred Schiller*, 57 Van Natta 2259, 2261 (2005)(opinion of an industrial hygienist considered in determining a causation issue in a responsibility dispute); *Jose C. Agosto*, 57 Van Natta 849, 851-52 (2005)(opinion of physician's assistant considered in determining compensability)"

Affirmed

Lesson: *It's not what you know; it's how you say it. CV's don't mean a thing. Expertise and medical experience don't really matter. Don't count on winning your case just because you have the Surgeon General on your side and the claimant has enlisted the services of a naturopath.*