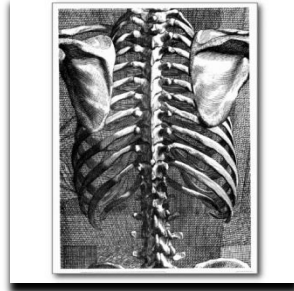


Dr. Garber's
DISPENSARY OF COUGH SYRUP, BUFFALO LOTION,
PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE
& WORKERS' COMPENSATION CASES



Bradley G. Garber's Board Case Update: 06/10/2013

David A. Fulcer, 65 Van Natta 979 (2013)
(ALJ McWilliams)

SAIF requested review of a portion of an Opinion & Order that awarded claimant additional TPD benefits.

Claimant had an accepted claim. The claim was closed on November 2, 2011. The Notice of Closure awarded TTD and TPD for various periods from October 30, 2006 through July 17, 2008, as well as some PPD. The Notice of Closure stated, "We may deduct overpaid workers' compensation benefits from any current or future workers' compensation benefits you are due under ORS 656.268."



On November 4, 2011, SAIF requested reconsideration of its Notice of Closure and raised the only issue it could under ORS 656.268(5)(C), degree of impairment. On November 14, SAIF submitted a supplemental request for reconsideration, requesting permission to offset any overpayment from any award of benefits.

On March 22, 2012, the Appellate Review Unit issued its Order on Reconsideration in which it reduced claimant's PPD award, but otherwise affirmed the Notice of Closure. It also stated, "The deduction from this amount of any overpaid temporary disability benefits or previously paid permanent partial disability benefits is authorized."

Claimant requested a hearing and raised an issue with regard to entitlement to temporary disability benefits for time periods not mentioned in the Notice of Closure. SAIF objected, asserting that claimant had not disputed the time loss periods indicated in the Notice of Closure.

The ALJ reasoned that a dispute over time loss periods had been raised by SAIF's preservation of its right to offset. She went on to award TTD/TPD benefits for the period July 18, 2008 through January 12, 2011. On review, SAIF argued that the time loss issue had not been preserved because claimant did not dispute the periods in question during the reconsideration process.

ORS 656.268(5)(c) requires a party who objects to a Notice of Closure to first seek reconsideration by the Director. Issues not raised by a party to the reconsideration may not be raised at hearing unless that issue arises out of the reconsideration order itself. ORS 656.268(9); ORS 656.283(6). Those statutes preclude a claimant from raising an issue at hearing if that issue stems from an objection to a Notice of Closure that was not preserved by mandatory reconsideration. *Venetucci v. Metro*, 155 Or App 559 (1998).

With regard to SAIF's preservation of its right to offset benefits awarded against its overpayment, the Board found that the preservation was not intended to raise any dispute with regard to the periods of time loss awarded by the Notice of Closure. Indeed, an insurer's right to offset is preserved by statute and SAIF's statement was really superfluous. **Affirmed**

Keli Wilson, 65 Van Natta 1011 (2013)
(ALJ Jacobson)

In this case, Claimant requested review of an Opinion & Order that upheld the employer's compensability denial and declined to award penalties and fees for an alleged discovery violation. The main issue, on appeal, was whether the employer should be penalized for failing to disclose information (a surveillance video) which

it believed could be used for impeachment. The Board found that the judge did not err in declining to assess a penalty and penalty-related fee. It observed, as follows:

“Evidence need not be relevant solely for impeachment purposes. *Marilyn L. Hunt*, 49 Van Natta 1456 (1997). But if it is withheld, it may be used only for impeachment purposes. Also, the determination of whether evidence has impeachment value comes not at the hearing, but rather at the time to duty to provide discovery arises. *Herbert L. Lockett*, 50 Van Natta 154, 156 (1998).”

The Board reviewed the surveillance video and determined that it really did not reveal much of evidentiary value. Nevertheless, it concluded that it was not unreasonable for the employer to consider the evidence as impeaching, at the time of its duty to provide discovery. **Affirmed**

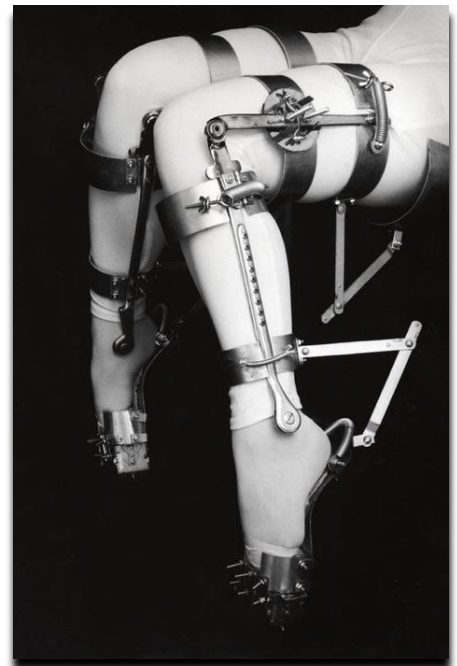
Beware: Even though, at the time the duty to provide discovery arises, you might think something can be used as impeachment, the duty to provide discovery is ongoing and there may come a time when it is no longer reasonable to think that the withheld evidence constitutes impeachment.

Michael D. Razavi, 65 Van Natta 506 (2013)
(ALJ Crumme')

The self-insured employer appealed an Opinion & Order that set aside its denial of claimant's occupational disease claim for a low back disc protrusion at L5-S1.

Claimant was a server in a restaurant for eight years. As part of her work activities, she had to bend over, from time to time, and lift up to 20-pound trays of glassware, from time to time. She had to serve customers and wipe tables....you know, the usual waiter-type stuff. Based on Dr. Brett's understanding of claimant's lifting, bending, stooping and standing activities, he felt her work activities constituted the major contributing cause of her L5-S1 disc.

Dr. Rosenbaum did not agree with Dr. Brett's analysis



and he assessed a degenerative lumbar spondylosis. He based his opinion on causation, in part, on a review of “medical literature.”

On review, the employer argued that, because Dr. Brett did not dispute or respond to Dr. Rosenbaum’s summary of medical literature that refuted the notion that claimant’s work activities were the cause of her disc condition, his opinions were conclusory and not well-reasoned, and insufficient to carry claimant’s burden of proof. The Board pointed out, however, “...Dr. Rosenbaum did not specify the ‘medical literature’ to which his summary referred. Under such circumstances, the absence of an express response from Dr. Brett regarding Dr. Rosenbaum’s summary does not cause us to discount his opinion.” **Affirmed**

Practice Tip: If your expert bases an opinion on medical literature, be sure to have him/her cite the source, with specificity. An oblique reference to “medical literature” is not sufficient.

