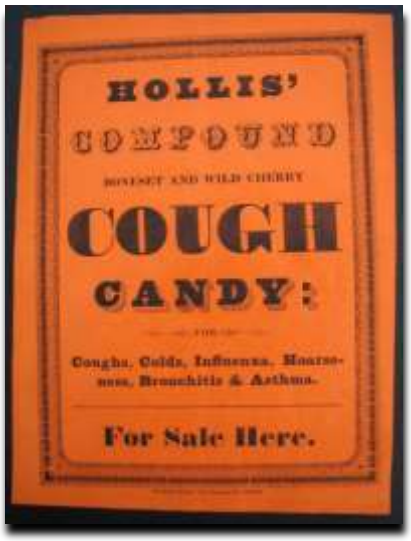
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 09/30/2013

Sheila M. Williams, 65 Van Natta 1850 (2013)
(ALJ Dougherty)

SAIF requested review of a portion of the ALJ's Opinion & Order that awarded supplemental disability benefits.

Claimant, a schoolteacher for the employer-at-injury, also worked as the aquatic director for two golf clubs during the summer of 2011. The pools where she worked were open from Memorial Day weekend through the end of September, and she was paid for her work during the summer "season."

Claimant was compensably injured on March 7, 2012, while working as a teacher, and was unable return to her teaching job. She was, also, unable to return to work as an aquatic instructor. She sought supplemental disability benefits and, by Opinion & Order, those were granted. The ALJ reasoned that claimant's aquatic director jobs had been continuous. On review, SAIF disputed this finding, arguing

that claimant's pool jobs were seasonal, ending after the summer season in 2011, and that she had not, yet, begun her new seasonal jobs when she was injured.

Under ORS 656.210(2)(a)(B), if claimant was employed "in more than one job at the time of injury," her weekly wage would be calculated by adding "all earnings [she] was receiving from all subject employment." Her combined disability rate would be based on the total wages from all employers. OAR 436-060-0035(8). The issue was whether claimant was "employed in" both jobs "at the time of injury."

The Board contrasted *Tye v. McFetridge*, 342 Or 61 (2006)(no contractual arrangement that suggested the claimant would be entitled to return to work at the end of a seasonal layoff), with *Garcia v. SAIF*, 194 Or App 504 (2004)(substance of employment relationship based on claimant's previous pattern of returning to work after seasonal layoff), and decided that there was an understanding between claimant and her golf club employer (based on a 10-history) that she would be returning as soon as the season re-opened. Under the circumstances, the Board found that there was a "continued agreement between claimant and the golf clubs that the golf clubs would remunerate claimant for work as aquatic director, subject to the golf clubs' direction and control." Claimant was, therefore, "employed in" her aquatic director jobs at the time of her March 7, 2012 injury. **Affirmed**

Carol Caylor, 65 Van Natta 1856 (2013)
(ALJ Wren)

The employer requested review of an Opinion & Order that set aside its denial of claimant's left knee injury.

Claimant was stocking merchandise, on the date of alleged injury. She allegedly sustained and injury to her left knee when she fell forward and struck the knee on the edge of a box. Claimant cried out in pain and showed everyone her swollen knee. The claim was denied.

At the hearing, a bookkeeper for the employer testified that, the day before the alleged injury, claimant told her that her left knee had "popped out" that morning, at home, when she was getting out of bed. She told the bookkeeper that her husband had to help her "pop" the knee back into place. The bookkeeper testified that she witnessed claimant limping around that day. Claimant told her that the knee was really sore. The bookkeeper suggested to claimant that she go and buy a knee brace. Claimant replied that she could not afford one.

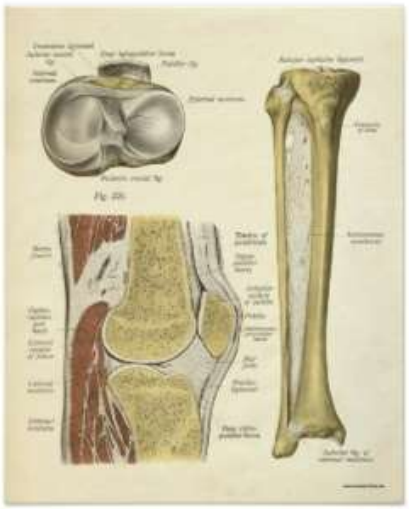
Another witness, the store manager, testified that claimant told her that her knee had "popped out" at home, that morning, and that her husband helped her "pop" it back into place. The store manager recalled that when she asked claimant is she should continue at work, claimant replied that "once it's popped back in, it's fine."

The ALJ concluded that claimant had established a compensable injury, and set aside the employer's denial. The fact that claimant did not tell her attending physician about her knee "popping out" on the day before her alleged work-related injury was not a significant problem for the ALJ.

On review, before the Board, SAIF attacked claimant's credibility. While the ALJ determined, based on demeanor, that claimant was a credible witness, the Board decided it did not have to defer to the judge's determination. The Board observed, "Because the issue of credibility concerns the substance of claimant's testimony, we are equally qualified to make our own credibility determination. * * * Here, we find that inconsistencies in the record raise such doubt that we are unable to conclude that claimant's material testimony is reliable."

Ultimately, the Board found claimant's account of the relevant events not reliable. **Reversed.**

Jose Mukul-Yeh, 65 Van Natta 1887 (2013) (ALJ Lipton)



Claimant requested review of an Opinion & Order that upheld SAIF's denial of his injury claim for a right abdominal wall strain. Because claimant was unable to prove legal causation, i.e., he was not credible, the ALJ affirmed the denial. Here's the boiler plate language from the Board:

"In determining the credibility of a witness's testimony, we generally defer to an ALJ's credibility determination when it is based on the ALJ's opportunity to observe the witness. *See Erck v.Brown Oldsmobile*, 311 Or 519, 526 (1991)(on *de novo* review, it is good practice to give weight to the factfinder's credibility assessments). However, we do not do so where inconsistencies in the record raise such doubt that we are unable to conclude that material testimony is reliable. *George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005)."

Here are the facts:

"Claimant testified that he did not have an identification card in the name of Jose Mukul-Yeh and that he had never used that name for other employment. [citation omitted]. However, when he was shown a copy of an identification card in the name of Jose Mukul-Yeh [citation omitted], claimant explained that he had used that identification card to obtain employment with another employer.

"In addition, in a May 3, 2012 statement to SAIF's investigator, claimant stated that he worked for the employer until April 6, 2012, and indicated that he had no other source of income. [citation omitted]. Yet, the record indicates that claimant began working for another employer on April 24, 2012."

In short, claimant is a liar. **Affirmed**