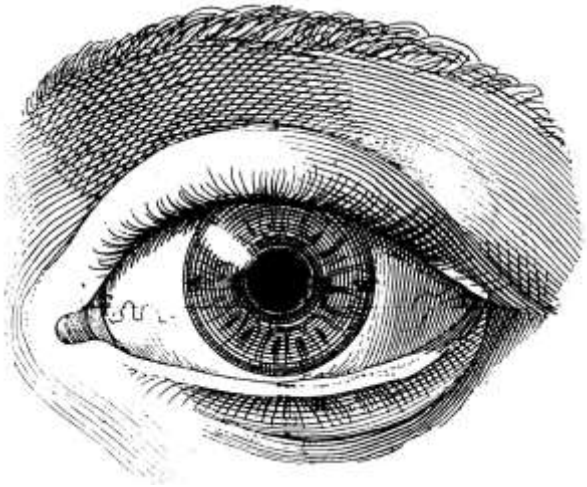
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 10/22/2013

Craig A. Olsen, 65 Van Natta 1976 (2013) (ALJ Naugle)

Claimant requested review of an order that: (1) found that the self-insured employer was not responsible for a medical bill from a worker-requested medical examiner for an addendum report; and (2) declined claimant's request for penalties and fees.

The Board astutely recognized the central issue, at the outset, observing as follows:

"Jurisdiction is a threshold issue that must be considered, even if it is not raised by the parties. *See Southwest Forest Inds. v. Anders*, 299 Or 205 (1985)(even if jurisdiction is not raised by the parties, it is our duty to raise lack of jurisdiction *sua sponte*); *Schlect v. SAIF*, 60 Or App 449 (1982)(subject matter jurisdiction may be raised at any time).

"Jurisdiction to resolve disputes over medical bills rests exclusively with the Workers' Compensation Division (WCD). *See* ORS 656.248(12); ORS 656.704(3)(a), (b)(B); *see, e.g., Beverly M. Helmken*, 55 Van Natta 3174, 3178 (2003)(Board and Hearings Division do not have jurisdiction over disputes regarding the nonpayment of interim medical benefits under ORS 656.247); *Byron Phillips*, 52 Van Natta 1294, 1295 (2000)(when the dispute is over either the amount of the fee or the nonpayment of bills for compensable medical services, jurisdiction lies with the Director)."

Even though neither party raised the issue of subject matter jurisdiction, the Board was required to analyze the issue. It found that exclusive jurisdiction over the issue resided with the Department and appropriately vacated the Opinion & Order and dismissed claimant's request for hearing. **Vacated**

And from the Court:

Alcutt v. Adams Family Food Svcs., Inc., (CV091364; CA A147515) (October 9, 2013)

This case relied upon the Oregon Supreme Court's holding, in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001), to find that claimant (plaintiff) had a constitutional right to sue his employer in civil court, notwithstanding the exclusive remedy provision of ORS 656.018.

First, a little background. As you may all recall, the Oregon Supreme Court, in *Smothers*, found that, because the injured worker could not prove that the major contributing cause of his occupational disease was his workplace exposure, he had no "remedy" under Article I, section 10 of the Oregon Constitution. Because the Constitution was interpreted as protecting "absolute common-law rights" in existence on the date of its creation, and because the right to a remedy for injury was imbedded in that Constitution, the Court determined that the elevated burden of proof under ORS 656.802 effectively denied the worker a constitutionally-

guaranteed remedy. It declared, therefore, that the exclusivity provision of ORS 656.018 did not apply and the worker could sue its employer in civil court.

In this latest case to invoke the *Smothers* decision, the Oregon Court of Appeals extended the right to proceed in civil court to an injured worker who could not carry his burden of proof in a combined condition case.

ORS 656.266 (as amended in 2001) provides, in part, "Once the worker establishes an otherwise compensable injury, *the employer shall bear the burden of proof to establish the otherwise compensable injury is not, or is no longer, the major contributing cause"* of the disability or need for treatment of the combined condition. In this case, the claimant established that he suffered an "otherwise compensable injury." The employer, then, successfully carried its burden of proving that there was a combined condition and that the otherwise compensable condition was no longer the major contributing cause of the combined condition. So, the claimant sued the employer in Circuit Court. The Court dismissed the complaint, finding that the exclusivity provision of the Workers' Compensation Act precluded such an action.

The employer argued that, because it was the party with the burden of proof to overcome, the *Smothers* rationale did not apply. The Court of Appeals determined otherwise, stating as follows:

"…[D]efendant misses the essence of *Smothers.* Although that case was decided prior to the aforementioned amendment to ORS 656.266 respecting the burden of proof as to major contributing cause, its ultimate conclusion – that the exclusive remedy provision of ORS 656.018 was unconstitutional as applied to a worker left 'with no process through which to seek redress for an injury for which a cause of action existed at common law' – is no less applicable where the burden of proof before the agency is shifted to the employer." **Judgment reversed**

NOTE: For an incredibly intelligent and exhaustive discussion of the faulty reasoning underlying the *Smothers* decision, and a possible foreshadowing of what might happen in the future, read Justice Landau's excellent concurring opinion in

Klutschkowski v. Peacehealth, et al., (CC 160615518; CA A138722; SC S059869) (September 26, 2013)

After *Smothers* was issued, there was some fear that it would open up floodgates and employers would find themselves in court for negligence arising out of occupational exposure/diseases. There is little evidence that this has happened. Similarly, from a practical standpoint, the Court of Appeals holding in this case may have little practical effect. Discussions are currently ongoing as to whether this case will be appealed to the Oregon Supreme Court.