Dr. Garber's

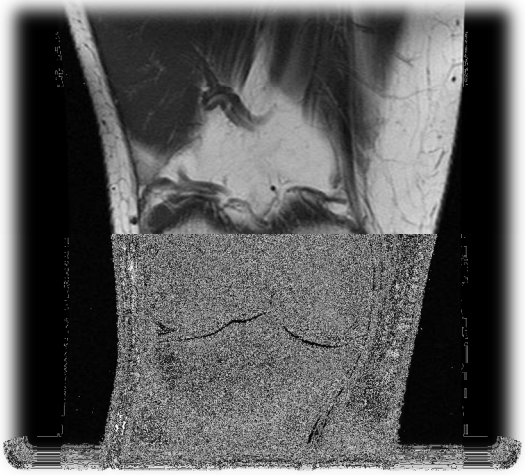
DISPENSARY OF COUGH SYRUP, BUFFALO LOTION,
PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE
& WORKERS' COMPENSATION CASES

Bradley G. Garber's Board Case Update: 11/5/2012

Duane G. Bishop, 64 Van Natta 2096 (2012)
(ALJ Brown)

Employer appealed an Opinion & Order that set aside its denial of a medical service claim for left knee surgery.

(Hey wait! Isn't this something for the Department to decide? If it's, purely, a medical service issue under ORS 656.245 or 656.327, the Department has jurisdiction over the matter. If there's a question regarding compensability of the condition requiring medical services, jurisdiction is with the Board. But, I digress….)



Claimant's claim was accepted for the conditions of left knee contusion, left knee strain and left ankle fracture. Subsequently, claimant's attending physician diagnosed a possible meniscus tear and he sought authorization to perform exploratory arthroscopic surgery. Employer denied authorization for the surgery. The ALJ set aside the denial and awarded claimant's attorney $9,000.

ORS 656.245(1)(a) provides, in relevant part:

"For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in **material part** by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in **major part** by the injury." (emphasis added).

The Board explained the application of this section, as follows:

"If the claimed medical service is 'for' an 'ordinary' condition, the first sentence of ORS 656.245(1)(a) governs the compensability of medical services. *SAIF v. Sprague*, 346 Or 661, 672 (2009); *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010), *aff'd*, 248 Or App 120 (2012). If the claimed medical service is 'directed to' a consequential or combined condition, the second sentence of ORS 656.245(1)(a) applies. *Sprague*, 346 Or at 673; *Horner*, 62 Van Natta at 2905."

The difference, of course, is that the burden of proof is greater if the second sentence is applied. It is a claimant's burden to prove compensability of the disputed medical service. Employer argued that claimant had to prove that his work-related injury was the major cause of his need for treatment; claimant argued that he only had to carry the material cause burden of proof, under the first sentence of ORS 656.245(1)(a). The issue, therefore, was whether claimant's

possible meniscus tear could be considered an "ordinary" condition, or a consequential condition.

Both claimant's attending physician and the employer's expert opined that claimant's current left knee condition was likely caused by a meniscus tear, an unaccepted condition. Neither physician attributed claimant's left knee strain (or any other accepted condition) to his current left knee condition. Because of this, the Board could not consider claimant's possible meniscus tear to be an "ordinary" condition related to claimant's accepted claim. **Reversed**

Note: *This, of course, does not preclude claimant from filing a "new" condition claim for a meniscus tear.*

And from the Court of Appeals

Enterprise Rent-a-Car Co. of Oregon v. Frazer, 0902947; A146596 (October 17, 2012)

Employer appealed a decision from the Board that found claimant's injury sustained in a fall on a parking lot not owned or managed by employer compensable. Employer argued that the Board erred in not applying the "going and coming" rule. The Court agreed and remanded the matter to the Board to address this legal error.

Claimant was employed at employer's call center located in a "strip" mall, next to a number of other business offices. Employer does not own or manage the parking area associated with the strip mall. A covered "smoking hut" is located in the parking lot, approximately 100 feet from employer's front door. Employer does not own the structure, which is open to the public, and is utilized by claimant and other workers in the mall. In March 2009, claimant went to the smoking hut on her break to suck in some smoke. When she was done, she headed back toward employer's office. Her shoe got caught in a crack in the

pavement of the parking lot and she fell, twisting her knee. She sustained a "complex tear of the medical meniscus."

The ALJ found claimant's meniscus tear to be compensable, finding that her injury occurred "in the course of employment." On appeal, employer argued that the Board erred in not applying the "going and coming" rule to the facts. That rule provides that "injuries sustained while an employee is traveling to or from work do not occur in the course of employment and, consequently, are not compensable." *See Krushwitz v. McDonald's Restaurants*, 323 Or 520 (1996).

Query: Why not just talk like the rest of the world and say "coming and going," instead of "going and coming?" Random….

The Board, in deciding not to apply the rule in this case, observed that claimant was only on "a brief" break from work, and that she had only traveled about 100 feet away from her office. In other words, time and distance were the determining factors for the Board. The Court rejected this simplistic analysis. It found no significance in the fact that claimant was only 100 feet from her work site during her break. Similarly, it found nothing particularly meaningful about the time interval involved.

Because it did not consider the "going and coming" rule to be important, nor did the Board consider employer's arguments regarding its lack of ownership and control over the public area in which claimant was injured, the Court found this to constitute legal error. **Reversed and remanded**

BONUS MATERIAL

Karjalainen/Hopkins: The Evolution of Arthritis

ORS 656.005(24)(a) defines "preexisting condition" as:

"any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment, provided that: "(A) Except for claims in which a preexisting condition is arthritis or an arthritic condition, the worker has been diagnosed with such condition, or has obtained medical services for the symptoms of the condition regardless of diagnosis * * *." In 2006, the Court of Appeals decided to define "arthritis." Prior to the decision, in *Karjalainen v. Curtis Johnston & Pennywise, Inc.*, 208 Or App 674 (2006), the Board had considered that the term "arthritis or an arthritic condition" was a term to be defined by medical evidence. For example, if a physician persuasively testified that degenerative disc disease was an arthritic condition, that testimony was enough to prove the existence of a preexisting condition. The significance of this is that, under ORS 656.005(7)(a)(B), if an injury combines with a preexisting condition to cause disability or a need for treatment, the worker's burden is to prove the existence of an "otherwise compensable injury." In assessing the compensability of "new" or "omitted" conditions, a previously-accepted condition in not considered to be the "otherwise compensable injury." *See Joseph D. Pelletier*, 60 Van Natta 1334 (2008). Once a worker establishes the compensability of an "otherwise compensable injury," the burden shifts to the employer to prove that the preexisting condition constitutes the major contributing cause of the combined condition and the worker's disability or need for treatment. Although the employer has the burden of proof, the employer also has the right to the last presentation of evidence.

A "combined condition" requires that an otherwise compensable injury combine with a "preexisting condition." Except for claims in which a preexisting condition is "arthritis or an arthritic condition," for there to be a "preexisting condition," the worker must have been diagnosed with such a condition or obtained medical services for symptoms of the condition, regardless of diagnosis, before the initial injury. ORS 656.005(24)(a)(A); *White v. Boldt Co.*, 212 Or App 59, 64 (2007). In the absence of medical evidence establishing a combined condition, the material contributing cause standard of proof applies. *See Jose C. Agosto*, 57 Van Natta 849 (2005).

In *Paul Brock*, 57 Van Natta 1140 (2005), the Board explained how it interpreted and applied ORS 656.005(24)(a) in its decision in *Adam M. Karjalainen*, 57 Van Natta 172 (2005), as follows:

"In *Adam M. Karjalainen*, 57 Van Natta 172, 173 (2005), we explained that the question of whether the claimant's degenerative disc disease was 'arthritis' or an 'arthritic condition' for purposes of ORS 656.005(24)(a)(A) was a medical issue to be decided by the competing medical opinions in the particular case. We declined to rely on a dictionary definition to decide this complex medical issue."

The Court of Appeals, however, decided that the term was an inexact term that needed judicial definition, seeing as how the legislature did not adequately define it. The result is a definition that characterizes "arthritis" as "inflammation of a joint or a state characterized by inflammation of joints." On remand, the Board determined that Mr. Karjalainen's low back condition involved a "joint." It determined, however, that the medical evidence did not clearly establish that there was "inflammation" present in the joint. Therefore, there was no preexisting condition to combine with Mr. Karjalainen's low back injury, and his injury was found compensable. His burden of proof was to establish material contributing cause, a very low burden.

In *Danny Kalaveras*, 61 Van Natta 964 (2009), the claimant argued that his degenerative/desiccative disc condition was not a legally cognizable preexisting condition under ORS 656.005(24)(a) because it had not been diagnosed or treated before his initial injury, nor was it "arthritis or an arthritic" condition. In response, the employer noted that two unrebutted physicians' opinions had described the claimant's disc condition as "a degenerative *arthritic* condition with natural aging." The Board, however, found the opinions insufficient because they made no reference to inflammation. The opinions referred to degenerative "desiccation." The Board used the dictionary to determine that "inflammation" and "desiccation" are not synonymous.

In *Brett J. Cameron*, 61 Van Natta 1515 (2009), the Board affirmed an ALJ's decision that the medical evidence did not satisfy the statutory/judicial definition of "arthritis." While the IME physician opined that the claimant's preexisting condition was arthritic in nature, he did not explain that the condition involved either a joint or inflammation. In other words, the magic words were not uttered. *See Judy A. Berdechowski-Thurman*, 61 Van Natta 580 (2009)(lumbar spine

degeneration not considered a "preexisting condition" because no physician opined that the degeneration involved inflammation of a joint in the lumbar spine).

If an employer wants to take advantage of the shifting burden of proof in a combined condition circumstance, it must obtain medical evidence that the claimant suffers from a degenerative condition that is arthritic in nature and involves **inflammation** of one or more **joints**. The back, in fact, has joints in it called facet joints, and it is very common for an arthritic process to create inflammation in those joints. An employer's medical expert, however, has to be asked to comment on this pathological process. A simple statement that there is "degenerative arthritis" in the back will not be sufficient. In fact, after the Court of Appeals addressed the issue, again, in *Hopkins v. SAIF*, 215 Or App 356 (2007) the definition of arthritis may have been further expanded.
In *Hopkins*, the Court stated, that for purposes of ORS 656.005(24)(a)(A), "'arthritis' involves inflammation of one or more joints due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change." *See Rodney C. Walters, Sr.*, 63 Van Natta 114 (2011); *Larry S. Shoemaker*, 63 Van Natta 928 (2011).

Representative Cases, Post-Karjalainen/Hopkins

Brett J. Cameron, 61 Van Natta 1515 (2009)
(ALJ Fulsher; Dr Eckman)
Although Dr. Eckman described claimant's alleged preexisting condition as an "arthritic condition," he did not explain that this condition involved either a joint or inflammation. **Employer appeal; O&O affirmed**

Terry L. George, 61 Van Natta 1539 (2009)
(ALJ Spangler; Drs Falk, Fuller, Green)
Although Drs. Fuller and Green alternatively characterized claimant's condition as "degenerative disc disease/degenerative joint disease" or "an arthritic spine," they did not assert that the condition involved an inflammation of the joint. The attending physician, Dr. Falk, asserted that claimant did not have an "inflammatory" arthritic back condition. **Employer appeal; O&O affirmed**

Alesha D. Lilly, 61 Van Natta 2113 (2009)
(ALJ Naugle; Dr Carroll)
Dr. Carroll opined that claimant had preexisting chronic conditions in the thoracic spine characterized by compression fractures and "degenerative spondylosis (arthritis)." Dr. Carroll, however, did not explain that the arthritis involved

"inflammation of one or more joints." The Board found that, under the circumstances, the medical evidence did not establish the existence of a preexisting condition. **Employer appeal; O&O affirmed**

Gail Moon, 62 Van Natta 1238 (2010)
(ALJ Kekauoha; Drs Chang, Yodlowski, McNeill, Borman, Rosenbaum)
In this case, the employer argued that there was no evidence of a combined condition. It had denied a "new/omitted" condition claim for an L4-5 disc protrusion. It tried to establish that claimant's previously-accepted lumbar strain was a distinct and separate condition and that claimant's burden of proof was to show that the major contributing cause of the disc protrusion was her lumbar strain injury. Unfortunately, there was evidence of pre-injury treatment of spondylosis (DDD) and employer's own experts found a combining of claimant's L4-5 disc condition with her preexisting pathology. So, the burden of proof shifted to the employer, and the employer's evidence was not sufficient. **Employer appeal; O&O affirmed**

Lowell P. Hubbell, 62 Van Natta 2446 (2010)
(ALJ Mundorff; Drs Weinman, Bert)
The Board explained the evidentiary roadmap as follows :
"To prevail on his new/omitted medical condition claim for the cervical arthritis/disc degeneration condition, claimant must establish that his work injury is a material contributing cause of the disability/need for treatment for that condition. ORS 656.005(7)(a); ORS 656.266(1). If, however, the otherwise compensable injury has combined with a preexisting condition, SAIF has the burden to prove that the 'otherwise compensable injury' is not the major contributing cause of the disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004)."
While the Board found that SAIF established the existence of a preexisting condition, under the definition set out in *Karjalainen*, it went on to find that SAIF did not, then, carry its burden of proof. **Claimant's appeal; O&O reversed**

Jonathan D. Tallman, 62 Van Natta 2609 (2010)
(ALJ Fulsher; Drs Brett, Bergquist)
Dr. Bergquist described claimant's preexisting degenerative changes at L4-5 as the major contributing cause of his disability and need for treatment. He did not, however, explain that the degenerative changes were the result of joint inflammation in the spine. **Employer appeal; O&O affirmed**

Jessica M. Hernandez, 62 Van Natta 2862 (2010)
(ALJ Ogawa; Drs Thiessen, Berselli)
Based on Dr. Berselli's unrebutted testimony, the Board found that, even though claimant sustained an "otherwise compensable injury," it combined with a preexisting condition that constituted the major contributing cause of the combined condition. **Claimant's appeal; O&O affirmed**

Dexter A. Fick, 63 Van Natta 511 (2011)
(ALJ Smith; Drs Bert, Leighton)
The Board explained the evidentiary roadmap, as follows:
"A 'combined condition' may only exist if an 'otherwise compensable injury' combines with a 'preexisting condition' to cause or prolong disability or need for treatment. ORS 656.005(7)(a)(B). To be a statutory 'preexisting condition,' a condition must either: (1) have been diagnosed or treated before the onset of the initial injury (for new medical condition claims); or (2) constitute 'arthritis or an arthritic condition.' ORS 656.005(24)(a); [*Virginia L. Gould*, 61 Van Natta 2206 (2009)]. For purposes of ORS 656.005(24)(a)(A), preexisting 'arthritis' involves inflammation of one or more joints due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change. *Hopkins v. SAIF*, 349 Or 348 (2010); *Michael R. Walters*, 62 Van Natta 3027, 3029 (2010)('preexisting condition' found where the medical evidence established the existence of arthritic changes characterized by inflammation of one or more joints, resulting from progressive degeneration that manifested in structural changes to the claimant's spine)."

The Board found that claimant did not establish the existence of a combined condition and did not carry his burden of proof. **Claimant's appeal; O&O affirmed**

Larry S. Shoemaker, 63 Van Natta 928 (2011)
(ALJ Riecher; Drs Thompson, McFarland, Farris, Blackstone)
Even though the Board did not decide whether there was a combination of an "otherwise compensable injury" and a "preexisting condition," it decided that the employer did not carry its burden of proof; i.e., that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment. **Employer appeal; O&O affirmed.**

QUERY: Why did the employer have a burden of proof under the circumstances?

Clara A. Zehrt-Shay, 64 Van Natta 961 (2012)
(ALJ Bloom; Drs Barbour, McLean, James)
Drs James, McLean and Barbour all stated that claimant's preexisting chondromalacia combined with his accepted ACL and meniscus tears. In finding that claimant suffered from a preexisting arthritic condition, the Board cited the holding in *Hopkins v. SAIF*, 349 Or 348, 364 (2010) that further expands the *Karjalainen* definition of "preexisting condition" by defining "arthritis" as "inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change." The Board found a combined condition and held that the employer did not carry its burden of proof. **Employer appeal; O&O affirmed**

Query: Do you use the *Karjalainen* definition of arthritis, or the expanded definition in *Hopkins*?"

Efren S. Alonso-Santos, 64 Van Natta 1340 (2012)
(ALJ Wren; Drs Green, Fuller, Woodward, Leadbetter, Puziss)
In this case, the Board defined the "preexisting condition" at issue as "arthritis or an arthritic condition." In turn, it defined the arthritic condition in terms of "inflammation of a joint due to infectious, metabolic, or constitutional causes [that] result in breakdown, degeneration, or structural change." In other words, the *Hopkins* definition. It found that the employer carried its burden of proof.
Employer appeal; O&O reversed

Marshall A. Beachell, 64 Van Natta 1602 (2012)
(ALJ Fisher; Drs Kuether, Puziss, Gullo, Carr, Rosenbaum, Holley)
The *Hopkins* definition was used to find that Employer did not carry its burden of proof. While Dr. Carr opined that degenerative disc disease involves "inflammatory enzymes," he did not identify studies to support the proposition. He did not explain how the enzymes caused inflammation. In addition, the record did not establish that Claimant's discs were inflamed. Drs Kuether and Puziss thought Claimant's synovial facet joints looked "uninflamed" and not painful.
Employer appeal; O&O affirmed

TIP: It may not be enough to obtain medical evidence of inflammation; the medical evidence might have to explain the mechanism of inflammation and support it with supporting medical literature. The mechanism must be explained in terms of "infectious, metabolic, or constitutional" factors.