# Dr. Garber's

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

## Bradley G. Garber's Board Case Update: 11/15/2013

### Alan L. Hull, 65 Van Natta 2134 (2013) (Order on Remand)

This is a case that went up to the Court of Appeals and was remanded to the Board for application of the proper burden of proof.

Claimant appealed an Opinion & Order that upheld the self-insured employer's denial of his occupational disease claim for a myocardial infarction (MI). Claimant was a fire district chief and argued that his MI claim was subject to the "firefighters' presumption" under ORS 656.802(4). The Board (first time around) bought that argument and reversed the Opinion & Order, setting aside the employer's denial. Employer took the issue up to the Court of Appeals and the court held that the "mental disorder" standard set forth in ORS 656.802(3) applied to the claim, rather than the firefighters' presumption. The matter was remanded to the Board for analysis under ORS 656.802(3).

Claimant suffered his MI at home, after undergoing some stress about an embezzlement issue that arose in his department that caused public uproar. Medical evidence was split as to whether his MI was caused, in major part, by preexisting coronary artery disease, or by his mental stress. The Board, however,

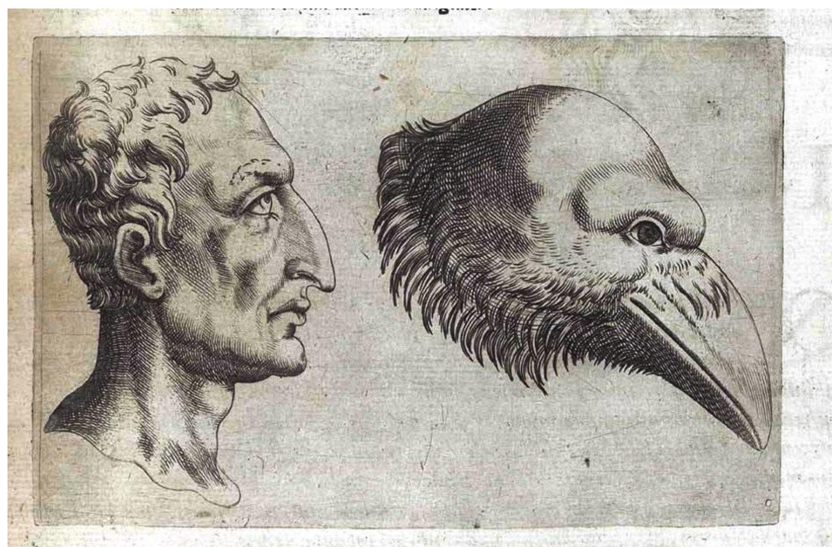
was constrained to considering compensability under the mental stress section of the statute. Ultimately, the medical evidence was not “clear and convincing” that claimant’s MI was caused by work-related stress. **ALJ’s Order Affirmed**
**Moral:** The fact that you are a firefighter does not always give you the benefit of a statutory presumption of compensability.

## David M. Williams, 65 Van Natta 2144 (2013) (ALJ Otto)

SAIF requested review of an Order that set aside its denial of claimant’s “new/omitted” condition claim for a thoracic spine “Tarlov” cyst.

Claimant was injured when he fell through some rotting boards while walking across a ramp. He described the instant pain as “like being kicked in the back by a horse.” SAIF accepted a thoracic strain. Eventually, claimant was declared medically stationary without impairment, but he still suffered from pain in his midback.

A Notice of Closure awarded no PPD. Then, two years after the accident, claimant underwent an MRI scan that revealed a nerve root sheath cyst (Tarlov cyst) on the left, at T5-6. In fact, the MRI scan revealed several Tarlov cysts throughout claimant’s thoracic spine. So, claimant filed a new condition claim for his T5-6 Tarlov cyst. SAIF denied it, relying in part on an IME report from Dr. Rosenbaum.

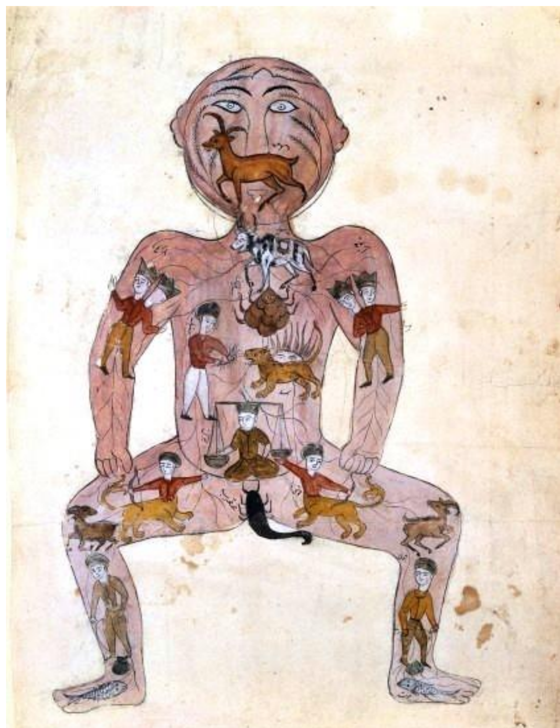


While the Board observed that Dr. Rosenbaum has much more experience than claimant’s attending physician, it did not find Dr. Rosenbaum’s opinions persuasive, primarily because he expressed the opinion that Tarlov cysts are not symptomatic.

Conversely, claimant's attending physician had written a book, wherein he observed that most Tarlov cysts are asymptomatic but, that in a minority of cases, they can produce symptoms. The fact that surgical removal of the cyst improved claimant's symptoms was also important. Claimant's attending physician opined that his industrial injury caused his Tarlov cyst to become symptomatic. Because the Board discounted Dr. Rosenbaum's opinions because of his assertion that such cysts were never symptomatic, claimant's AP carried the day. **Affirmed**

## Dalia R. Lopez, 65 Van Natta 2173 (2013) (ALJ Ogawa)

Claimant requested review of an Order that found that her employer did not have knowledge of a work-related injury within 90 days of the work incident. Claimant used her car to make home visits to assist her clients. After she left her office, she was involve in a motor vehicle accident and suffered serious injuries. She was transported to the hospital by Life-Flight. At the hospital, she told her supervisor that she was on the way home when the accident occurred. This was in June 2012.



On January 15, 2013, claimant completed an "Incident Analysis Report Form," reporting that she was driving to a home visit to one of her clients when she was involved in the MVA. She filed a workers' compensation claim on the same date. SAIF denied the claim, as untimely.

In upholding SAIF's denial, the ALJ determined that the employer did not have knowledge of a work-related injury within 90 days of the accident, as required by ORS 656.265(1). Failure to give notice of an injury within that time frame bars a claim unless notice is given within one year of the accident and the employer had knowledge of the injury within that 90-day period. Furthermore, knowledge of the injury must include enough facts as to lead a reasonable employer to conclude that workers' compensation liability is a possibility and that further investigation is appropriate.

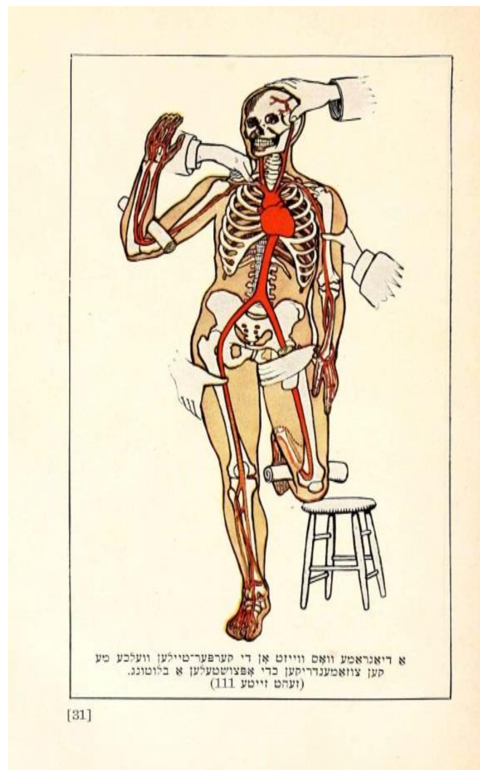
In this case, claimant was clearly injured and her employer knew of her injury. Claimant told her employer, however, that she was injured while driving home. In that case, the “going and coming” rule would apply and the injury would not be a compensable work-related injury. So, the employer did not conduct any investigation and essentially forgot about the incident until claimant filed a claim, six months later.

The ALJ decided that claimant had reported her claim far too late. The Board agreed. **Affirmed**

## Jeremy Schaffer, 65 Van Natta 2191 (2013)
## (ALJ Naugle)

Claimant requested review from an Order that upheld SAIF’s denial of a new/omitted condition claim for a right hand “crush injury.”

Here’s what SAIF accepted: (1) scalp abrasion; (2) left chest wall contusion; (3) left elbow contusion; (4) left hip dislocation; (5) left hip transverse acetabular fracture; (6) right superior and inferior pubic rami fractures; and (7) C7 anterior wedge fracture. Claimant, however, wanted his right hand “crush injury” to be included within the scope of claim acceptance. SAIF *de facto* denied that condition.




There was a big fight about whether “crush injury” or “contusion” was the correct diagnosis. Unfortunately, SAIF counsel explained the dispute, as follows:

“It’s our contention that Claimant hasn’t proven a true crush injury. That was the opinion in Exhibit 60 of Dr. Lewis when he looked at this case and said there’s never been a description of a crush injury; probably did have a contusion. **We’d be happy to accept a contusion to the right hand, but I don’t think that’s going to satisfy the worker.”** (emphasis added)

In other words (to paraphrase), “We agree that claimant sustained a right hand injury; we just don’t agree with the diagnosis.”

The Board observed, "…[T]he question before us is not what diagnosis would *best* describe claimant's right hand injury, but whether the claimed "crush injury" exists as a new/omitted medical condition, the disability or need for treatment of which was caused in material part by the work accident." **Reversed**