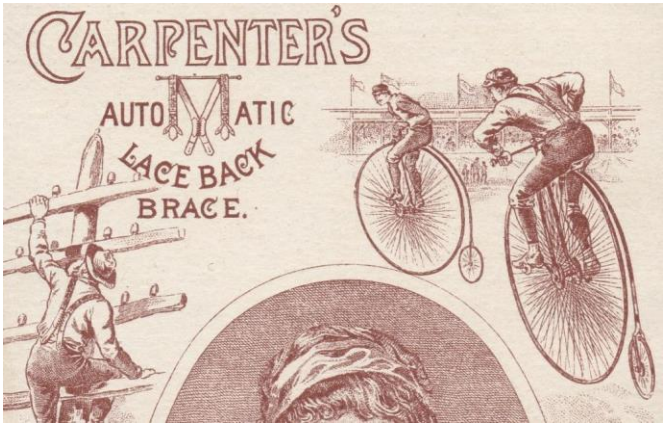
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 12/30/2013

One Oregon Supreme Court Case:

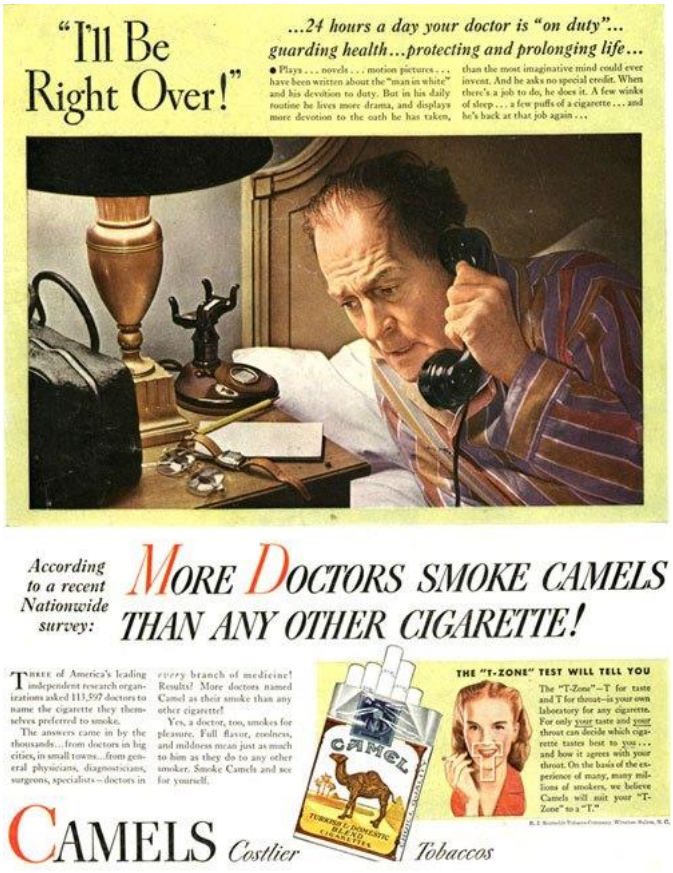
Schleiss v. SAIF, (WCB 09-05174; CA A146996; SC S060774)

This is a case in which the Oregon Supreme Court used definitions in the Oregon Workers' Compensation Act to conflate compensability and disability issues, to the potential detriment of any employer with an accepted injury claim on its books.

In essence, if an injured worker has a condition that preexists his or her injury, it will be considered in rating disability unless: (1) the condition meets the statutory definition of a preexisting condition; or (2) litigation has established that the condition is not compensable and could not, possibly, contribute to injury-related disability.

FACTS:

The worker injured his low back. He filed a claim for benefits. The claim was accepted for the condition of **lumbar strain**. Because of symptoms suggestive of lumbar radiculopathy, the attending physician ordered an MRI scan. The MRI films revealed "no significant abnormalities." The AP declared claimant medically



stationary with no permanent impairment. Claimant was release to regular work, with no restriction. SAIF closed the claim with no PPD award.

Claimant requested reconsideration and the appointment of a medical arbiter. The medical arbiter made some loss of range of motion measurements, but attributed 67% of his impairment findings to claimant's cigarette smoking and preexisting degenerative disc disease. So, claimant was awarded some PPD, but he was not satisfied, so he requested a hearing. The ALJ affirmed the Order on Reconsideration, and the Board affirmed the Opinion & Order, and the Oregon Court of Appeals affirmed the Board. So, claimant took his grievance to the Supreme Court.

Before the Supreme Court, claimant argued that his cigarette smoking and preexisting degenerative disc disease could not be used to apportion disability. Cigarette smoking, of course, will never fit within the definition of "preexisting condition," in ORS 656.005(24). Degenerative disc disease will not fit, either, unless all of the hoops have been jumped through to establish that the condition is "arthritis or an arthritic condition."

The Supreme Court took the definition of "preexisting condition" out of context and applied it to the assessment of disability. It took great effort to try to discern the meaning of "due to," in its intellectual journey. After using a dictionary, instead of legislative history, it figured out that the phrase "due to," in the context of OAR 436-035-0013(1), means that a compensable injury must have "materially contributed" to a worker's total impairment.

OAR 436-035-0013(1) provides, in part, as follows"

"The physician describes the current total overall findings of impairment, then describes those findings that are due to the compensable condition. In cases where a physician determines a specific finding (e.g. range of motion, strength, instability, etc.) is partially attributable to the accepted condition, only the portion of those impairment findings that is **due to** the compensable condition receives a value." (emphasis added)

The Supreme Court decided that the second sentence went beyond what the statutes directed and, essentially, chopped that sentence out of the Department's rule. From now on, in order for physical impairments totally unrelated to a claimant's injury to be taken into account, when rating disability, those physical impairments must be identified, by a medical expert, as preexisting and either disabling (to some degree) or the basis of treatment prior to the work-related injury. Otherwise, no apportionment.

Practice Tip:

Before closing a claim, ask the closing examiner (whether it be independent examiner or attending physician) whether there is ANY historical evidence of impairment or treatment for DDD that shows up on MRI scans, post-injury, or ANY historical evidence of any physical condition that may have any effect on total disability and, then, make sure that preexisting condition falls within the definition in ORS 656.005(24). Then, the next question is whether, there is any objective evidence that a condition in existence before the injury has ANY bearing on the current impairment findings. Better yet, petition your legislators to fix this stupid problem. Arguably, the definition of "preexisting condition" was never intended, by the legislators, to apply to the ultimate determination of injury-related disability.