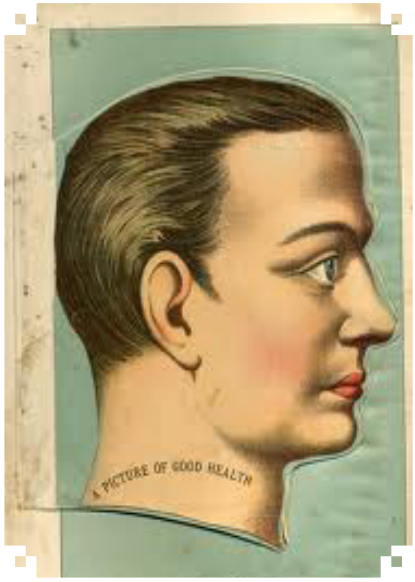
# DR. GARBER'S

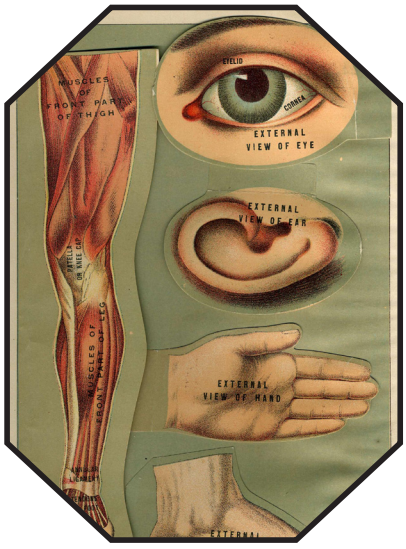
Dispensary of Cough syrup, Buffalo Lotion,
Pleasant Pellets, Purgative Pectoral, Salve
& Workers' Compensation Cases




## Bradley G. Garber's Board Case Update: 10/14/11

### Victor Alicea, 63 Van Natta 1964 (2011)
### (ALJ Pardington)

Claimant requested review of an order that upheld the self-insured employer's denial of his left wrist condition on the basis that the condition did not arise out of and in the course of employment.




Claimant was a bus driver. On June 27, 2010, he began a "split shift." When he ended his shift, he had to board another bus as a passenger, to return to the station to begin his next shift. As he was waiting to get off the bus, at the station, another passenger (Mr. Ford) walked up to him and said, "Get the [f***] out of my way, you [f***ing b***]." (Note: happens to me all the time) Claimant responded, "Dude, you need to be respectful. Show a little respect." The passenger then said, "I don't have to be respectful."

Claimant finally exited the bus and went into the station to check the work schedule. He was scheduled to start at 2:46 p.m. At about 1:40 p.m., he walked out of the station and was heading to where he would pick up his next bus. Guess who was waiting for him!

You guessed it…Mr. Ford. Mr. Ford ended up punching Claimant in the face and Claimant eventually made his way to a hospital. He was treated for several injuries, including a fractured left wrist. He file a claim for benefits.

On the date of injury, Claimant was paid wages under the collective bargaining agreement from 7:59 a.m. to 1:05 p.m., and would have received wages for the second shift from 2:46 p.m. until the shift ended. Mr. Free, workers' compensation manager for the employer, reported that Claimant would not be paid wages for the period between shifts, i.e., between 1:05 p.m. and 2:46 p.m. In other words, Claimant was not working when he was injured. His claim was denied on the basis that his injuries did not arise out of and in the course of his employment.

The ALJ upheld the employer's denial, finding that Claimant was an active participant in an assault or combat that was not connected to his job duties, and that the combat with Mr. Ford amounted to a "deviation from customary duties" under ORS 656.0005(7)(b)(A). The Board analyzed things differently.

The Board noted the following facts: (1) Claimant did not receive wages between shifts; (2) he was free to go wherever he wanted between shifts; (3) he was not required to go to a station between shifts; (4) he could chose any method of getting from one job to the next; and (5) he was not within "road relief" when the injury occurred. Based on these facts, the Board found that Claimant's injuries did not occur "in the course of" his employment. They applied the "going and coming" rule (without exception) and upheld the employer's denial. **Affirmed**

## Moral:

*Make sure to make people hit you in the face while you are working.*

### William A. Drey, 63 Van Natta 2010 (2011) (ALJ Brown)

Claimant requested review of an order that upheld the insurer's denial of his current combined low back condition and declined to award penalties and fees for various allegedly unreasonable actions.

Claimant sustained an injury on July 11, 2008 and his claim was accepted for the condition of low back strain. In February of 2009, the insurer modified the scope of claim acceptance to include an L3-4 annular tear. On April 23, 2010, the insurer issued a Modified Notice of Acceptance, whereby it accepted the following: "L3-4 annular tear, lumbar strain, combined with preexisting degenerative disc disease/arthritis of the lumbar spine at multiple levels." Three days later, on April 26, 2010, the insurer issued a current condition denial.


At hearing, the insurer further modified its denial by stating "this is a denial of claimant's current combined condition." (emphasis added). This apparently made a big difference to the Board. The Board wrote, as follows:

"Here, although the insurer accepted a combined condition on April 23, 2010, its denial did not refer to the 'combined condition.'

The denial stated that claimant's 'current need for treatment and disability is no longer related to [his] compensable injury.' (citation omitted). However, even assuming that the denial had to refer to a 'combined' condition in order to comply with ORS 656.262(7)(b), the insurer amended its denial at hearing to pertain to claimant's current combined condition and claimant agreed to proceed on that basis."

Claimant's counsel had tried to argue that the denial was procedurally defective, under ORS 656.262(7)(b) because it did not expressly state that the accepted injury was no longer the major contributing cause of the combined condition. Because the scope and character of the denial was modified at hearing, however, and the parties proceeded without objection to the modification, the Board found that the denial, as modified, was not defective.

ORS 656.262(7)(b) provides: "Once a worker's claim has been accepted, the insurer or self-insured employer must issue a written denial to the worker when the accepted injury claim may be closed."

Because the insurer modified its denial at hearing (which is acceptable), the Board found that the requirements of ORS 656.262(7)(b) had been satisfied. The Board went on to affirm the Opinion & Order, except that it awarded Claimant's attorney a penalty-related fee of $1,000.

## Moral:

*Moral: If you've accepted a combined condition, you need to deny a combined condition before you close the claim, unless you want to get tagged for all of the impairment related to noncompensable preexisting pathology. You can deny the combined condition, based on medical evidence that the combined condition has ceased to constitute the major contributing cause of the originally-accepted combined condition. Do not simply issue a "current" condition denial.*

**Richard G. Boyce, 63 Van Natta 2024 (2011)**
**(ALJ Naugle)**

Claimant appealed an order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claim.

Claimant had an accepted claim for right CTS. In June 2010, he filed a new/omitted condition claim for "pain in thumb and next finger" and "numbness in right three fingers." Huh?

At hearing, the parties agreed that the issue was compensability of "right hand pain and neuropathy." During closing arguments, Claimant conceded that he could not establish the compensability of his newly-claimed conditions. Nevertheless, he wanted the employer's **denial set aside. I'm sure.** He tried to argue that the employer's denial was "procedurally defective." He argued

that because he made a claim for the acceptance of "symptoms," he did not really file a claim and, therefore, employer's denial was null and void. In other words, he argued that the employer should have, simply, ignored his claim. We know what happens when we do that!

After three pages of case citations -- **Affirmed**

**Miguel A. Rivera, 63, Van Natta 2028 (2011)**
**(ALJ Sencer)**

Claimant requested review of an order the declined to award additional temporary disability benefits.

Claimant was hired by the employer as a "Crop Laborer." He weeded onion fields. He sustained a compensable injury. On January 27, 2011, he was released, by his attending physician, to regular work, based on a job description provided by the employer. That job description indicated that Claimant did not reach at or above shoulder level while performing his work activities. Claimant disagreed, however, and signed an affidavit in which he indicated that he had to work above-shoulder. At hearing, however, he testified inconsistently, agreeing that his regular work consisted of pulling weeds in onion fields. He agreed that his affidavit to the contrary, "had problems." The Board relied upon his testimony. **Affirmed**

Moral: Make sure your client knows what he's signing.