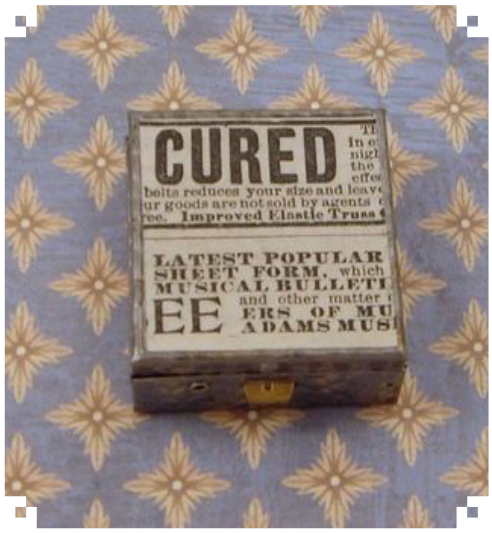
DR. GARBER'S

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



Bradley G. Garber's Board Case Update: 03/01/12

Sharles W. Hill, 64 Van Natta 371 (2012)
(ALJ Reichers)

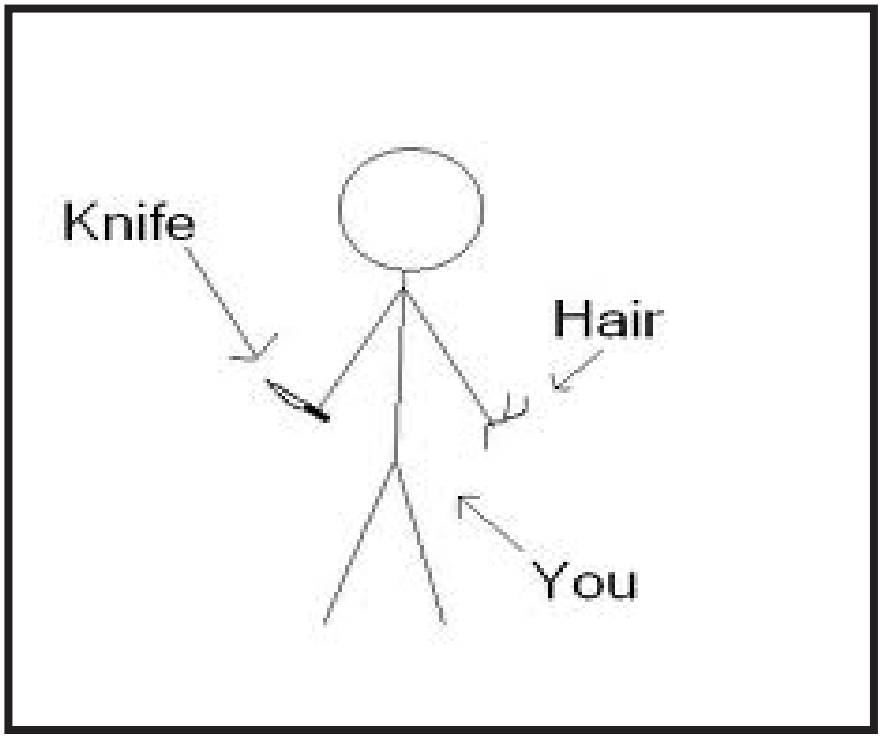
This case illustrates a pitfall that presents itself whenever a claimant makes a frivolous "new" condition claim.

The claimant was compensably injured in 2005, and the employer accepted a right epicondylitis and left lateral epicondylitis. Subsequently, the claimant requested that the employer accept "right common extensor tendon injury" and "right lateral ulnar collateral injury" and new/omitted medical conditions. The employer issued a denial, claiming, in part, that the newly-claimed conditions were already encompassed within the scope of the previous claim acceptance.

After hearing, the ALJ set aside the employer's denial. Relying on Georgiana White, 57 Van

Natta 1943 (2005) and Craig R. Pairan, 59 Van Natta 493 (2007), the ALJ concluded that the employer had effectively rescinded its denial of the claimed new/omitted medical conditions by agreeing that the denied "conditions" were the same as what had previously been accepted.

WARNING: Do not state, in the denial (and there MUST be a formal denial) that you are denying the alleged "new" conditions because they have already been "encompassed" within the scope of a previous claim acceptance; state, instead, that the alleged "new" conditions are not "new." This is splitting hairs, but splitting hairs is what the Board does. If you deny the "new" condition on the basis that it has already been encompassed within the scope of prior claim acceptance, and you generate medical evidence that what you have just denied is something you already accepted, you may be found guilty of rescinding your own denial. In Michael L. Long, 63 Van Natta 2134 (2011), SAIF issued a denial, contending that the claimant's request for "new" medical conditions sought "acceptance of unspecified conditions which are not new or omitted medical conditions pursuant to ORS 656.267." The Board held that, as SAIF's denial was worded, it was not denying the condition, but rather it was denying the character of the condition as "new" or "omitted." This was fine.



Affirmed, for other reasons

Washington Court of Appeals

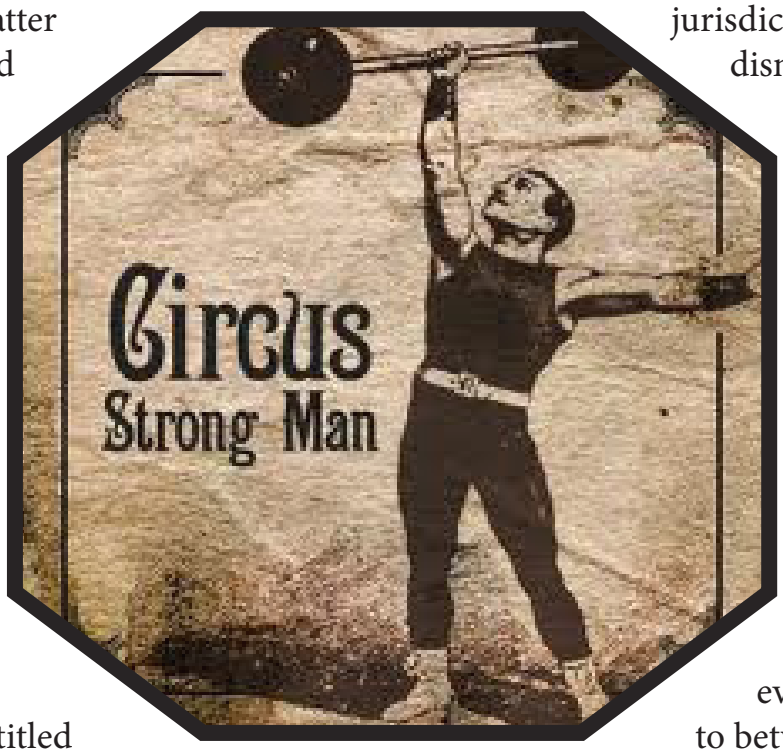
Singletary v. Manor Healthcare Corp., No. 40808-2-II (February 28, 2012)

In this procedurally complicated case, litigated, briefed and argued by Dr. Garber, claimant alleged that, because a claim closing order from the Department was not "communicated" to her (it was sent to the wrong address), the closure was void, as was everything that transpired after that. Her claim was initially closed on June 26, 2002. Claimant received no time loss or permanent impairment award. A year later, on June 20, 2003, claimant filed an Application to Reopen. In her application, she stated that her claim was previously closed on June 27, 2002.

The application for reopening the claim was granted by the Department.

Two years later, on July 29, 2005, the Department closed claimant's claim, after she had received time loss and medical benefits. Claimant protested the closure, seeking additional time loss, PPD and medical benefits. The protest was allowed by the Board of Industrial Insurance Appeals. During the course of a discovery deposition, claimant raised, for the first time, the issue of non-communication of the 2002 closing order. She alleged that, because she never received the order, it was void, as a matter of law, and that the Department/Board had no jurisdiction over her claim.

The Board scheduled trial times to allow claimant to put on evidence regarding her entitlement to further benefits. Instead of putting on evidence, however, she decided to rest her case on her assertion that the Board was without subject matter jurisdiction. The Board decided otherwise and dismissed claimant's case for failure to carry her burden of proof.



Claimant appealed the Board's dismissal to Superior Court. The employer filed a Motion for Summary Judgment. On the day before hearing, claimant showed up with a Cross-Motion for Summary Judgment, which was granted by the Court. By the terms of the Court's order, however, the matter was remanded to the Board to allow claimant to put on evidence of what benefits she might be entitled to between the original date of claim closure (June 20, 2002) and the date of the reopening of her claim (June 12, 2003). Claimant's attorney drafted the order that was signed by the Superior Court judge. After the Order was entered, claimant's attorney file an appeal with the Washington Court of Appeals! HUH?

After briefing and oral argument (September 15, 2011) the Washington Court of Appeals affirmed the Superior Court's order. The matter will go back to the Board for evidence taking on claimant's entitlement to benefits during the period 6/20/02 – 6/12/03. This, of course, was never at issue. It will be interesting to see what happens next.

This is a published opinion. The value of the decision, for future litigants, is summarized in the following footnote, from the written decision:

*"Under analogous facts to Singletary's appeal, the Board issued a significant decision stating that the Department retains subject matter jurisdiction to adjudicate a reopening application even if it makes an error of law by adjudicating a reopening application on a claim for which there is no final closing order. In re Jorge C. Perez-Rodriguez, No. 06 18718, 2008 WL 1770918, at *1(Wash. Bd. of Indus. Ins. Appeals Feb 13, 2008). Further, the Board concluded that because the Department retained subject matter jurisdiction to adjudicate the reopening application, the unappealed orders the Department issued relating to the reopening application were not void when entered and were final and binding on the parties. 2008 WL 1770918 at *1-2. Thus, those unappealed final orders precluded relitigation of the the same claim. 2008 WL 1770918 at *1-2, 8. Although this Board decision is not binding on us, we agree with the Board's analysis."*

The Court of Appeals found that, because claimant did not appeal the order that reopened her claim, in 2003, it was "res judicata" that her claim was closed sometime before that order.

I will keep you posted….