DR. GARBER'S

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

Bradley G. Garber's Board Case Update: 04/06/2012

CASE 1:

Erin M. Garred, 64 Van Natta 434 (2012)
(ALJ Lipton)

The claimant filed an occupational disease claim for a mental disorder. She had an argument with her supervisor after she requested a change in her work schedule. She filed a claim and saw a psychologist who diagnosed her with PTSD and major depressive disorder. SAIF appropriately denied the compensability of her claim. The boilerplate legal language is instructive:

"Claimant must prove that employment conditions were the major contributing cause of her mental disorder. ORS 656.266(1); ORS 656.802(2)(a). There must be a diagnosis of a mental or emotional disorder generally recognized in the medical or psychological community, and the employment conditions producing the mental disorder must exist in a real and objective sense. ORS 656.802(3)(a), (c). The evidence that the mental disorder arose out of and in the course of employment must be 'clear and convincing.' ORS 656.802(3)(d). To be 'clear and convincing,' the truth of the facts asserted must be highly probable. SAIF v. Brown, 159 Or App 440 (1999); Howard T. Jodenschwager, 59 Van Natta 1428, 1429 (2007)."

Finally, the employment conditions producing the mental disorder must not be conditions generally inherent in every working situation, reasonable disciplinary, corrective, or job performance evaluations by the employer, or cessation of employment or employment decisions attendant upon ordinary or financial cycles. ORS 656.802(3)(b).

The Board found observed that interpersonal conflict is a common stressor that is generally inherent in every working situation. Leanna J. Duchek, 54 Van Natta 1149 (2002); Lynn A. Horton, 45 Van Natta 2203 (1993); Gregory L. Brodell, 45 also generally inherent in every working situation. The Board conceded that interpersonal conflicts can exceed a boundary and no longer be considered generally inherent, but in this case that boundary was not crossed. **Affirmed**

CASE 2:

Barbara A. Easton, 64 Van Natta 480 (2012) (ALJ Donnelly)

The claimant requested review of an Order that upheld SAIF's denial of her medical services claim. SAIF accepted a lumbar strain. The claimant's consulting orthopedic surgeon, Dr. Kitchel, requested authorization for an L4-5 and L5-S1 discogram. SAIF denied the medical service, in part, because it was directed at a condition that was not part of the accepted claim. Because SAIF's denial raised an issue with regard to compensability, the Department referred the matter to the Hearings Division. After hearing, the ALJ found that the proposed discogram was a diagnostic service that was not materially related to the accepted lumbar strain.

On review, the claimant contended that the discogram was materially related to the "compensable injury," because even if it was not materially related to the accepted condition, it was materially related to the work accident. The claimant also tried to argue that the disc conditions were "encompassed" within the accepted condition of lumbar strain. The Board explained, as follows:

> "If diagnostic services are necessary to determine the cause or extent of a compensable injury, those services are compensable whether or not the condition that is discovered as a result of them is compensable. Counts v. Int'l Paper Co.. 146 Or App 768, 771 (1997); see also Roseburg Forest Prods. v. Langley, 156 Or App 454, 463 (1998)(tests were for determining the extent of the original compensable injury rather than for establishing the existence of another condition). Nevertheless, the diagnostic services must be necessitated in material part by the previously accepted condition. SAIF v. Swartz, 247 Or App 515, 525 (2011); Martinez, 219 Or App at 191."

In Swartz, the claimant had sought approval for facet joint injections. The accepted condition was a "low back contusion." The Board found that the need for the injections was not materially related to the accepted

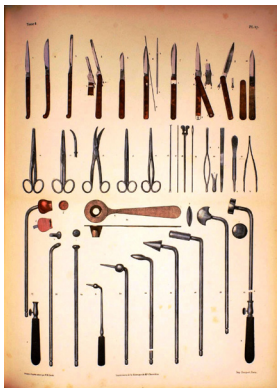
condition. The same result in this case. **Affirmed**

CASE 3:

Virginia B. Kirby, 64 Van Natta 571 (2012)
(ALJ Pardington)

Claimant was injured in 2005 and the employer accepted a right lateral epicondylitis and right forearm extensor muscular strain. In July of 2009, the claimant filed an "aggravation" claim, claiming that her shoulder was injured and that she had injured it, at work, in the past (possibly alluding to her previously-accepted claim). The employer denied the aggravation claim, explaining to the claim. Claimant requested a hearing. Her theory was that her shoulder condition was a "sequela" of her accepted conditions. The ALJ didn't buy it. Citing Steven R. Egbert, 59 Van Natta 1855 (2007), and Kenneth M. Oberg, 58 Van Natta 2409 (2006), the ALJ explained that worsening of a sequela of an accepted condition is not sufficient to prove an aggravation claim. The Board agreed.

The claimant tried to argue that, because the employer had paid for some palliative care of the shoulder, it implicitly agreed that the shoulder condition was a compensable part of her accepted claim. We all know the outcome of that argument. Merely paying or providing compensation cannot be considered as acceptance of a claim or an admission of liability. See ORS 656.262(10); Arthur D. Roppe, 61 Van Natta 1391 (2009), aff'd without opinion, 237 Or App 690 (2010).



The claimant also tried to argue (gotta hand it to ingenuity) that because the employer previously denied her aggravation claim, it implicitly conceded that her shoulder treatment was compensable as palliative care of her accepted condition. The Board concluded, "[E]ven if [the employer] conceded that claimant's right shoulder treatment at that time was 'palliative,' that does not establish that it accepted a right shoulder condition." **Affirmed**

CASE 4:

Warren D. Duffour, 64 Van Natta 619 (2012)

The claimant was compensably injured on February 21, 2010 when he was struck in the head. The employer accepted the following: (1) left temporal parietal subarachnoid hemorrhage; (2) right frontal subarachnoid hemorrhage with intraparenchymal hematoma; (3) nasal fracture; (4) left periorbital ecchymosis and contusion; and (5) scalp laceration.

A month later, claimant's attorney asked that the scope of claim acceptance be expanded to include the

following conditions: (1) traumatic encephalopathy; (2) traumatic brain injury; (3) concussive closed head injury; (4) post-traumatic amnesia; and (5) vertigo.

In response, the employer issued a "Modified Notice of Claim Acceptance" to include the condition of traumatic brain injury." On the same date, the employer wrote to the claimant and asserted that, by adding "traumatic brain injury" to the scope of claim acceptance, it effectively took into account the new/omitted conditions claim and appropriately apprised his medical providers of the nature of his compensable conditions.

Claimant requested a hearing, alleging a de facto denial of several other of his new/omitted conditions.

The ALJ found that the employer complied with ORS 656.267(1) by accepting claimant's "traumatic brain injury." He reasoned that, based on the medical evidence, any reasonable person would believe that acceptance of a traumatic brain injury effectively subsumed any more specific condition. Consequently, he did not agree that there had been any de facto denial.

On appeal, the claimant alleged that the employer was required to accept or deny each and every newly-claimed condition. The Board agreed, but it found that claimant's "post-traumatic amnesia" and "vertigo" were symptoms of the accepted traumatic brain injury. Moving on to the conditions of "traumatic encephalopathy" and "concussive closed head injury," the Board found that the employer's acceptance of a "traumatic brain injury" reasonably apprised the medical providers of the nature of the compensable conditions. The de facto denials were upheld. Affirmed

TIP: If you intention, by issuing a "modified" Notice of Acceptance," is to deny other claimed conditions, it's better to simply deny the conditions that you are trying to avoid.
DON'T GET TRICKY.