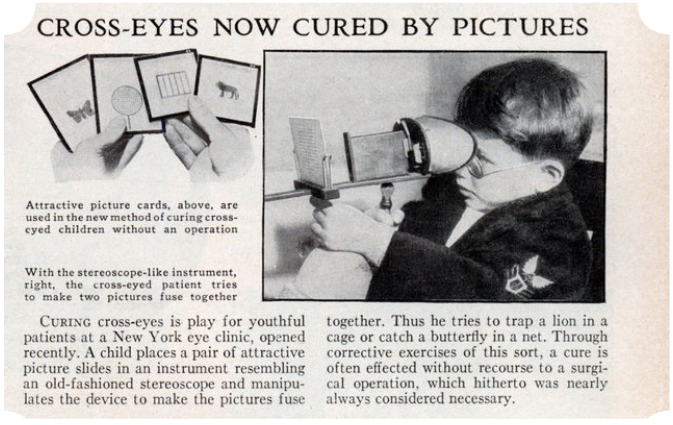
DR. GARBER'S

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

Bradley G. Garber's Board Case Update: 04/26/2012

CASE 1:

Juan Jacobo, 64 Van Natta 725 (2012) (ALJ Crumme')



CROSS-EYES NOW CURED BY PICTURES

Attractive picture cards, above, are used in the new method of curing cross-eyed children without an operation

With the stereoscope-like instrument, right, the cross-eyed patient tries to make two pictures fuse together

CURING cross-eyes is play for youthful patients at a New York eye clinic, opened recently. A child places a pair of attractive picture slides in an instrument resembling an old-fashioned stereoscope and manipulates the device to make the pictures fuse together. Thus he tries to trap a lion in a cage or catch a butterfly in a net. Through corrective exercises of this sort, a cure is often effected without recourse to a surgical operation, which hitherto was nearly always considered necessary.

SAIF requested review of the ALJ's order that increased the claimant's PPD award to 88 percent. In so doing, the ALJ relied upon the impairment findings of the attending physician, rather than utilizing the findings of the medical arbiter.

The "boilerplate" language is as follows:

"On reconsideration, where a medical arbiter is used, impairment is established based on objective findings of the medical arbiter, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician are more accurate and should be used. OAR 436-035-0007(5).

"Only findings of impairment that are permanent and caused by the accepted compensable condition may be used to rate impairment. OAR 436-035-0007(1); Khrul v. Foremans Cleaners, 194 Or App 125, 130 (2004). In the absence of other evidence showing a different level of impairment or that impairment is not related to

the injury, we are not free to reject a medical arbiter's unambiguous opinion as to the cause of impairment merely because we find the opinion unpersuasive. Hicks v. SAIF, 194 Or App 655, adh'd to as modified on recons, 196 Or App 146, 149 (2004)."

In this case, SAIF accepted an "intraocular foreign body to the right eye." In other words, Claimant had something in his eye. It had to be surgically removed. The surgery left a residual corneal scar. There was no dispute between the parties that the claimant was entitled to a PPD award for visual impairment caused by the scarring. They disagreed as to whether Claimant was entitled to additional PPD resulting from a loss of "visual field" of the right eye. See OAR 436-035-0260(3).

The medical arbiter, while finding some disturbance of the visual field, went on to state, "There is likely functional overlay in [claimant's] symptoms with the visual field test being unreliable on the right side with irregular responses. There are no findings on his examination that would explain loss of peripheral vision on the right."

In O'Connor v. Liberty Northwest Ins. Corp., 232 Or App 419 (2009), the court explained:

"* * * OAR 436-035-0007 *require[s] that, on reconsideration, the impairment must be based on the medical arbiter's objective findings. There are two exceptions: (1) where the medical arbiter states that those findings are invalid; or (2) where a preponderance of the evidence demonstrates that different findings are more accurate."*

The Board determined that the medical arbiter's findings were similar to those of the attending physician's findings and that a bald statement that her findings were invalid did not negate her actual findings because she did not adequately explain why. In other words, it is not enough to throw out the term "functional overlay" as the basis of a determination of invalidity. The arbiter should have contrasted her findings with those of the attending physician and explained why the difference, if any, made her findings invalid. **Affirmed; $3,000 attorney fee**

CASE 2:

Diane Pohrman, 64 Van Natta 752 (2012) (ALJ Dougherty)

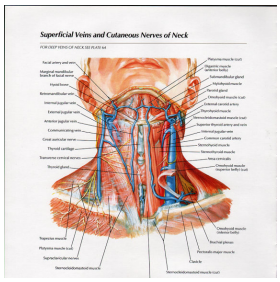
Claimant requested review of an Opinion & Order that upheld the employer's denial of her head, neck and upper extremity injury claim. The issue was whether Claimant's injury occurred within the course and scope of her employment. (NOTE: Why the term "course and scope" continues to be used is curious; the statutory test is whether an injury "arises out of and in the course of" a worker's employment exposure).

Claimant worked in a tall building (referred to, in the Order on Review as the "Tower" building). She worked on the sixth floor. On the bottom floor are a number of shops. Pursuant to its lease, the employer had a nonexclusive right to use the bottom floor, but it had no proprietary interest in the bottom floor (called the "Lobby") and it was not responsible for maintenance or upkeep.

Claimant would take breaks, during the day, and she often coordinated her breaks to accompany other co-workers on their breaks. While there was a break room in her employer's office space, on the sixth floor, Claimant usually went down to the Lobby. She figured her employer knew she was doing that, and had no objection.

On February 24, 2011, Claimant went down to the Lobby, on break, for some coffee. After she exited the elevator and started walking across the Lobby floor, she slipped and fell. She filed a claim for benefits with her employer. Compensability of the claim was denied on the basis that Claimant's injury was not sustained in the "course and scope" of her employment. Claimant appealed the denial.

After hearing, the ALJ found: (1) that the injury occurred while Claimant was engaged in a social activity performed, primarily, for her personal pleasure; and (2) that the injury did not arise out of, and in the course of, Claimant's employment. On review, Claimant argued that her activity, when injured, was not the type of social or recreational activity contemplated by the exclusionary rule under ORS 656.005(7)(b)(B), because the break she was on was part of her regular work day. She argued, alternatively, that the injury occurred during a mandatory paid break in a place where the employer reasonably expected her to be.



The Board bought the alternative argument, as follows:

"Here, claimant was injured while on a paid, mandatory break, in a place that the employer reasonably expected her to be. She was required to take two 15-minute breaks every day, as a part of her regular work schedule. On the day of injury, the employer had told claimant to take her break after her coworkers returned from their breaks, which she did. [citation to record omitted] On her way out, she received a free gift card from one of the officers, which she intended to use that day. Moreover, the employer acquiesced to employees going to the lobby for coffee breaks during their breaks. Claimant estimated that she had coffee in the lobby during her breaks 80 percent of the time. Thus, at the time of injury, she was on an employer-mandated paid rest break, going to an area where she and other employees were accustomed to going, at a place where the employer reasonably expected her to be, and using a gift card furnished by a superior for whom she performed services." **Reversed**

QUERY: What if the paid breaks are mandatory, under Oregon employment law, and the worker is killed on the way to her car, where the employer knows she goes to knit?

MORAL: Do not allow your employees to leave the office during working hours. Keep them locked up.

CASE 3:

Michael D. Chilcote, 64 Van Natta 766 (2012)
(ALJ Brown)

Claimant appealed an Order that held: (1) that Claimant did not establish "good cause" for the untimely filing of his injury claim for a low back condition; and (2) upheld the employer's denial of the injury claim.

At hearing, Claimant testified that he knew he injured himself on June 14, 2010. He felt sharp pain in his low back while bending over to lift a heavy bucket of wall texture. He did not report his injury, however, until February 3, 2011. He tried to argue that he did not know that he was supposed to report all injuries to his employer, regardless of how small. He testified that, after the incident, his low back symptoms worsened to the point that, when he finally went to his primary care physician, in December 2010, he sought care. The Board distinguished the facts of this case from those in Corey A. Otterson, 63 Van Natta 156 (2011), in which it found that the claimant's lack of knowledge about the severity of his injury constituted "good cause" for his failure to timely report his injury to his employer. In that case, the worker had sought medical care four days after he was injured. In this case, however, Claimant waited six months before seeking any treatment, even though he was aware that he injured himself on June 14, 2010. The Board concluded that he did not show "good cause" for the late filing of his claim. **Affirmed**

COURT OF APPEALS CASES

SAIF V. MIGUEZ, CA A147585 (APRIL 18, 2012)

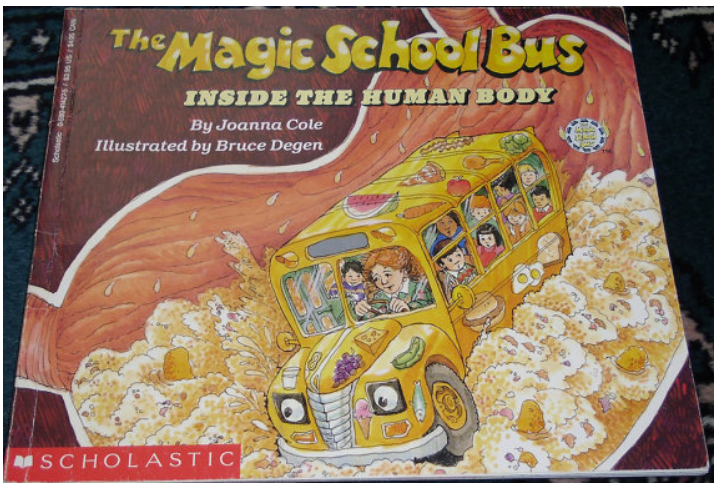
The Board applied OAR 436-035-0007(12) and increased Claimant's PPD award, from 15 percent to 26 percent. The employer appealed, asserting that the Board erroneously interpreted and applied the rule. What happened in this case is similar to what happened in Juan Jacobo, above.

In this case, a closing IME was conducted and, as part of that examination, the physicians were provided with a video surveillance that showed claimant using his injured body part (right arm) normally. Based on their examination of Claimant and review of surveillance, the examiners determined that their range of motion findings were invalid.

The attending physician conducted his own closing examination, a month later. He reported that Claimant was medically stationary and that his range of motion measurements **were** valid. This was after he had reviewed the same video surveillance that was reviewed by the independent examiners.
The claim was eventually closed on September 17, 2009. SAIF rated Claimant's impairment based on PCE findings that were concurred in by the attending physician. SAIF immediately requested its own Notice of Closure and asked for the appointment of a medical arbiter panel.

The arbiter panel examined Claimant on January 22, 2010. Based on their examination and review of records, the arbiter panel found reduced range of motion in Claimant's shoulder. They determined, however, that their findings were invalid for purposes of rating, stating as follows:

"It is our impression that the ranges of motion seen on today's exam are not valid for the purpose of measuring permanent impairment. [Claimant] demonstrated significantly improved motion at prior exams and during surveillance video. There were some pain behaviors during the exam that suggest his motion may have been self-limited due to symptoms and fear of re-injury. For these reasons, it is our opinion that the ranges of motion seen today are not valid for the purpose of measuring permanent impairment[.]"



In affirming SAIF's Notice of Closure, the Appellate Review Unit found that the arbiter's report was "based on sound medical principles and the most objective findings" and that it was "expressed in clear and concise reasoning and provides an accurate history." Based on the arbiters' findings and conclusions the ARU reduced claimant's PPD award, eliminating the amount allocated to range of motion findings, and reducing Claimant's total PPD award from 26% to 15%.
After hearing, an ALJ bumped the award back up to 26%, and the Board affirmed.

On appeal, Claimant contended that the medical arbiters did not adequately explain why their findings (and the key is their findings) were invalid. The court agreed. The court observed that the arbiter panel opined that its range of motion finding were invalid because Claimant had exhibited better range of motion findings in prior examinations and in video surveillance. In short the arbiter panel used evidence outside of their examination to determine that their range of motion findings were invalid.

The court held, "[T]he rule [OAR 436-035-0007(12)] require[s] the arbiters both to identify the medical observations or information on which their invalidity determination was based and to discuss the reasoning – i.e., the logical analysis—that led them to conclude that those observations conflicted with their own range-or-motion measurements (or otherwise called those measurements into question) in a medically significant way." Affirmed
Moral: Just because an arbiter says impairment findings are invalid, it doesn't mean they are. The arbiter has to explain why. The problem is that the parties cannot seek clarification from an arbiter or arbiter panel. The ARU is the only entity that can communicate and "clarify" an arbiter's findings. If you catch a problem, you may contact the ARU to express your concerns; otherwise, you are left hoping the department is not asleep at the switch.

AND, IN THE "WHY WOULD YOU TAKE THIS TO HEARING" CATEGORY:

Wagner v. Jeld Wen, Inc., CA A147644 (April 25, 2012)

Claimant sought judicial review of an Order from the Board that found he failed to establish a compensable groin injury.

THE FACTS:

"While claimant, who is a carpenter, was performing the duties of his job, a coworker, in a teasing gesture, pulled a tape measure out to arm's length and let the heavy end swing and strike claimant in the groin. [Oh, those silly boys!!] Claimant fell to his knees but, at the time, experienced only mild and temporary discomfort. He continued performing his regular work duties that day and did not experience any other pain or symptoms. The next day, a Thursday, claimant began the day without pain or other symptoms. He reported to work and completed his shift. During that day, however, claimant noticed that his right testicle began to swell and cause him some discomfort. Although claimant did not experience pain Thursday night and had no trouble sleeping, he awoke Friday morning to find his right testicle red, swollen, and extremely painful."

Claimant sought medical care and was diagnosed with a bacterial infection. He was hospitalized and placed on a course of antibiotics. His doctor, and a urologist, agreed that the infection was due to a bacterial or viral disease and was not related to being struck in the groin with a tape measure. Nevertheless, Claimant persisted in his attempt to prove a compensable work-related injury. Claimant's argument was that he sustained an injury, at work, and subsequently sought medical treatment. Therefore, he argued, getting hit in the groin with a tape measure was a material cause of his need for treatment. He skipped the part, under ORS 656.005(7), that required him to prove that the material cause of the need for treatment was geting clobbered between the legs with a tape measure. The medical evidence did not establish the requisite connection. **Affirmed**