DR. GARBER'S

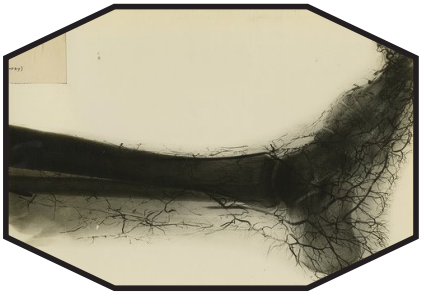
Dispensary of Cough syrup, Buffalo Lotion,
Pleasant Pellets, Purgative Pectoral, Salve
& Workers' Compensation Cases

Bradley G. Garber's Board Case Update: 11/15/11

Matthew E. Barrall, 63 Van Natta 2218 (2011)
(ALJ Rissberger)

Claimant requested review of that portion of Judge Fisher's Opinion & Order that declined to award an attorney fee under ORS 656.262(11) for SAIF's alleged unreasonable claim processing.

Claimant injured his knee. SAIF accepted a right knee patellar fracture. After some haggling about medical services, Claimant made a "new" condition claim for "pedal edema." SAIF responded that Claimant's request to accept "pedal edema" did not qualify as a claim under ORS 656.267 because it sought acceptance of a body part, procedure, and/or symptom, which was not a new or omitted medical condition. Claimant requested a hearing. (I think we know where this is going)



Interpreting SAIF's response to constitute a "denial," the ALJ concluded that it should be upheld because Claimant requested the acceptance of a symptom. With regard to Claimant's attorney's request for a penalty-related fee, the ALJ did not consider SAIF's response to be unreasonable and, therefore, did not assess a fee.

On review, the Board found SAIF's response to be unreasonable. Because SAIF did not issue a formal acceptance or denial, within 60 days, it's processing was found to be unreasonable. Therefore, even though the condition was not compensable, Claimant's attorney was awarded a fee of $500. Compare, Nichole M. Robinson, 63 Van Natta 1475 (2011)(no medical evidence differentiating "lumbar strain" from

"lumbosacral strain" but no acceptance or denial deemed unreasonable).

Moral:

Deny, even if you think you don't need to.

Matthew E. Barrall, 63 Van Natta 2218 (2011) (ALJ Rissberger)

Claimant requested review of the portion of Judge Rissberger's Opinion & Order that upheld SAIF's denial of compensability of his right shoulder injury. Claimant injured his foot and shoulder while riding a dirt bike during a motocross event at a raceway. He was a sales employee for an employer that sold motorcycles. The employer was a sponsor at the event and promoted its bikes at the motocross event. Claimant was there to "represent the company." He was off the clock and was not paid for attending the event. At the event, he entered an event, allegedly to promote the interests of his employer. (He probably really hated riding the bike). While racing, he crashed, flipping over the handlebars and landing on his right shoulder.

SAIF denied his claim on the basis that Claimant was involved in an activity for his own personal pleasure, and that the injury, therefore, did not arise out of and in the course of his employment. ORS 656.005(7)(b)(B) provides an exclusion for any "[i]njury incurred while engaging in or performing * * * any recreational or social acitivities primarily for the worker's personal pleasure." In Kaiel, v. NCE Cultural Homestay Inst., 129 Or App 471 (1994), the Court found that "[t]he fact that a worker derives pleasure from a work activity does not necessarily mean that the worker engages in the activity primarily for personal pleasure." In this case, Claimant testified that his reason for attending the races was to generate sales and for advancement in the company. It appears from the Board's order that Claimant did not testify that he enjoyed riding the motorbike on the night of his injury. According to him, it was all done to support his employer's business. Thus, the Board found that SAIF did not prove that Claimant's participation in the motocross event was "primarily" for his personal pleasure. Reversed; $10,000 attorney fee

Think about it…How would an employer prove the standard of proof (aka, "primarily")? Is that a material, major, or clear & convincing standard?

Pedro O. Peraza, 63 Van Natta 2227 (2011)
(ALJ Fisher)

Claimant requested review from the ALJ's Opinion & Order that found Claimant's injury claim for a hernia was untimely filed under ORS 656.265(1) and dismissed Claimant's request for hearing.

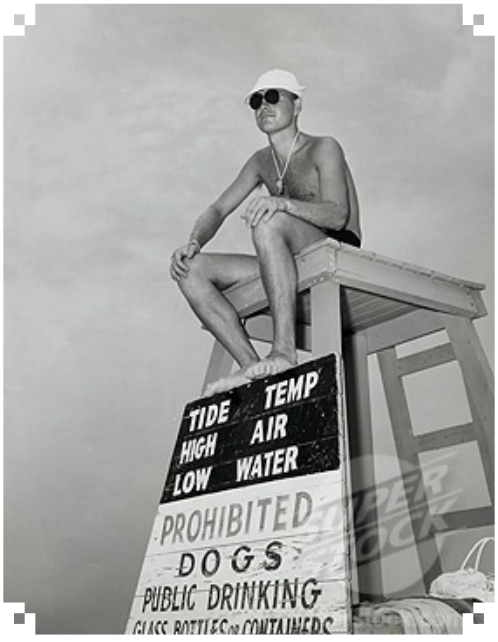
ORS 656.265(4) bars an injury claim unless notice of the claim is given within a year of the accident AND the employer had knowledge of the injury. In this case, Claimant's hernia came about in July 2007. He did not report the injury until May 2010. Claimant testified that he reported the injury to his employer in November 2010. That, of course, would have been over 90 days from the injury. So, ORS 656.265(4) did not apply, and the Board agreed that Claimant's claim was not timely. Why this one went up on appeal…. ?? So, you have an injury in 2007, and you don't report it until 2010?

Warning: *Leaping from lifeguard station into shallow water during vigilance awareness training may irritate one's heels.*

Robert M. Ellertson, 63 Van Natta 2234 (2011)
(ALJ Fulsher)

Claimant requested review to the ALJ's order that upheld the employer's denial of his injury claim for bilateral heel fractures.

Claimant was a college student who worked as a lifeguard. In upholding the employer's denial, the ALJ addressed "two possible explanations" of Claimant's bilateral heel fractures: (1) Claimant jumped off his porch, at home, before going to work; and (2) Claimant slipped and fell off a chair/locker, at work, and landed straight-legged on his heels while attempting to retrieve items from the top of a locker. Reasoning that it was equally possible that Claimant injured himself at home or at work, the ALJ was not persuaded that the claim was compensable.



On review, Claimant offered yet another theory. He argued that he jumped from his lifeguard station into shallow water, during a "vigilance awareness training," and "irritated" his heels. He argued that the employer did not present persuasive testimony that his heel fractures resulted from jumping off his porch the morning before his alleged work-related injury. The Board observed, however, that it was not the employer's burden of proof. Possibilities were not enough. **Affirmed**