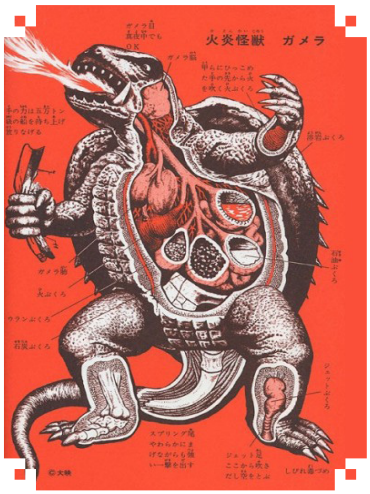
DR. GARBER'S

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

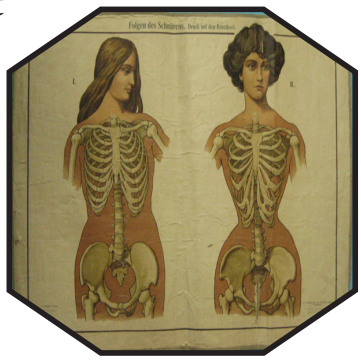


Bradley G. Garber's Board Case Update: 12/05/11

Shirley A. Smith, 63 Van Natta 2354 (2011)
(ALJ Naugle)

SAIF requested review of that portion of Judge Naugle's order that directed it to provide reimbursement under ORS 656.386(2)(a) for claimant's attorney's travel costs.

Claimant requested a hearing from a denial of her aggravation claim. A hearing was held in Salem, and the record was left open for the deposition of claimant's attending physician in Stayton. After the deposition, and before the issuance of the Opinion & Order, claimant's attorney submitted a cost bill in which he sought reimbursement for "Travel to Hearing and Deposition." The ALJ awarded claimant's attorney the travel cost.



ORS 656.386(2)(a) provides, "If a claimant finally prevails over a denial * * *, the court, board or Administrative Law Judge may order payment of the claimant's reasonable expenses and costs for records, expert opinions and witness fees." OAR 438-015-0005(8) defines "expenses and costs" reimbursable under ORS 656.386(2) as "reasonable expenses and costs incurred by the claimant for things and services reasonably necessary to pursue a matter, but do not include attorney fees." (In other words,

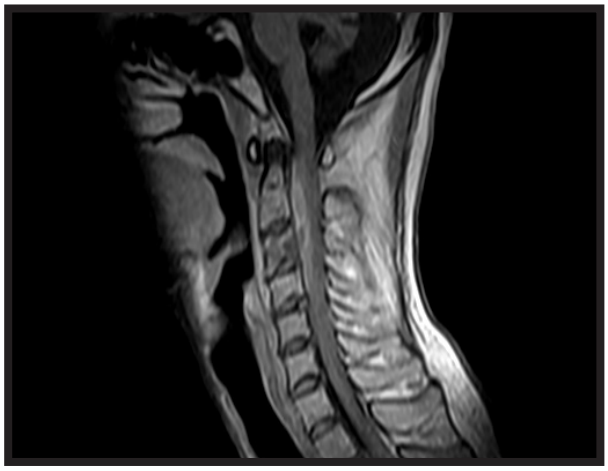
the Board has defined "expenses and costs" as "expenses and costs.") Pursuant to the Board's rule, examples of "expenses and costs" include, but are not limited to, "costs of records, expert witness opinions, witness fees and mileage paid to execute a subpoena and costs associated with travel."

In this case, the Board decided that it could not interpret its own rule in a way that expanded the scope of what the legislature allowed by statute. It wrote, "To effectuate the legislature's intent when it legislated these categories ["records," "expert opinions," and "witness fees"], we must not consider expenses and costs that do not fall into at least one of the three legislatively enumerated categories."

The Board decided that it had to harmonize its rule with the statute. "Therefore, to harmonize the rule and the statute, a 'cost associated with travel' must be associated with one of the three items listed in ORS 656.386(2)(a), i.e., it must be 'for records, expert opinions and witness fees.'" The Board went on to find that claimant's attorney's travel to hearing and deposition was not a reimbursable expense or cost under ORS 656.386(2). **Reversed, in part.**

Jackie A. Scott, 63 Van Natta 2375 (2011)
(ALJ Crumme)

The insurer requested review of the Judge's order that: (1) awarded temporary total disability (TTD) benefits; and (2) assessed penalties and fees for alleged unreasonable claim processing.



Claimant injured her low back in 2007. The insurer accepted an L4-5 disc condition. The claim was closed on October 16, 2008. Then , claimant requested acceptance of "arachnoiditis." The insurer denied that condition.

The insurer's expert did not think that claimant had arachnoiditis but, instead, post-surgical scarring. Claimant's attending physician diagnosed chronic low back pain and concluded that claimant would not "ever go back to work and was probably unable to work due to chronic pain and her use of pain medication."

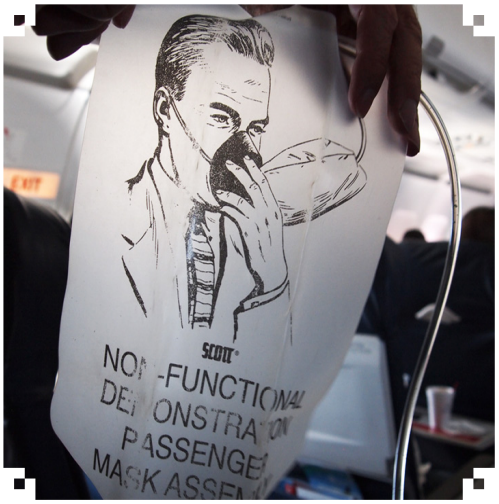
On October 13, 2009, an ALJ approved a "Stipulation" that upheld the denial of arachnoiditis, but provided that the insurer would accept "surgical scarring." In December 2009, claimant's attending physician opined that the surgical scarring condition was medically stationary on September 18, 2008. On March 24, 2010, claimant requested a hearing, seeking TTD under new/omitted medical condition claim for surgical scarring.

The ALJ awarded claimant TTD from September 18, 2008 through April 12, 2011, the date of the hearing. The ALJ also assessed a penalty and attorney fee for unreasonable claim processing.

While the October 13, 2009 Stipulation established "surgical scarring" as a compensable condition, the attending physician never "authorized" time loss for that condition. It was in June 2009 that claimant's attending physician opined that his patient had significant permanent partial disability due to her post-operative scarring. On October 7, 2009, six days before the Stipulation was approved by the ALJ, the attending physician opined that claimant was "never going back to work." Subsequently, the attending physician opined that claimant's scarring condition had been medically stationary since September 2008.

The Board observed, "Having reviewed the medical reports from Dr. McNabb, which indicated that claimant's condition had reached maximum improvement in September 2008 and that any subsequent disability was permanent, we conclude that the record does not establish that claimant's disability was temporary when the insurer accepted the scarring condition in October 2009." Reversed

Moral: Permanent disability is NOT temporary disability



Lisa R. Davis-Warren, 63 Van Natta 2396 (2011)
(ALJ Pardington)

Claimant requested review of an order that upheld the employer's denial of her injury claim for the effects of an "air pressurization" event.

Claimant is a flight attendant. On June 7, 2010, she had difficulty taking a deep breath, approximately five ten minutes after flight takeoff. A co-worker experienced the same effect. Claimant's symptoms worsened over the course of the flight, and the pilot completed an incident report stating that the aircraft failed to pressurize on "climb out." On the following day, claimant sought treatment for symptoms of nausea, disorientation, dizziness and a migraine headache.

Claimant's expert, board certified in hyperbaric medicine, treated claimant with hyperbaric oxygen. He opined that claimant's exposure to the "incomplete cabin pressurization" and her subsequent symptoms warranted such treatment.

Employer's expert opined that claimant's "reported symptoms" from the , workplace event. He did not believe that claimant required medical treatment.

The ALJ upheld the employer's denial, relying on employer's expert's analysis and opinions. The Board's analysis is instructive:

"An injury is compensable if the work incident required medical services. [citing K-Mart v. Evenson, 167 Or App 46 (2000)]. Under ORS 656.005(7)(a), the harm, damage or hurt that is sufficient to amount to an 'injury' is one 'requiring medical services or resulting in disability or death.' Id. Medical services need not be directed toward the cure of an existing identifiable disease; rather, diagnostic or other medical services will suffice. Id. (citing Finch v. Stayton Canning Co., 92 Or App 168, 173 (1988))"

In short, claimant's attending physician found objective evidence of injury requiring hyperbaric oxygen treatment. Compensable. **Reversed**

House Bill 2093, effective January 1, 2012:

The new law prohibits an employer, insurer, service company, or any of its agents from engaging in any of the following activities, specifying that only a certified MCO may:
(1) Restrict a worker's choice of health care or medical service provider;
(2) Restrict a worker's access to any category of medical service provider;
(3) Restrict a medical service provider's ability to refer a worker to another provider;
(4) Require pre-authorization or pre-certification to determine the necessity or medical services or treatment; and
(5) Restrict treatment provided to a worker by a medical service provider to specific treatment guidelines, protocols, or standards.

Query: What if the proposed treatment is one that is restricted, as experimental or unapproved, under OAR 436?