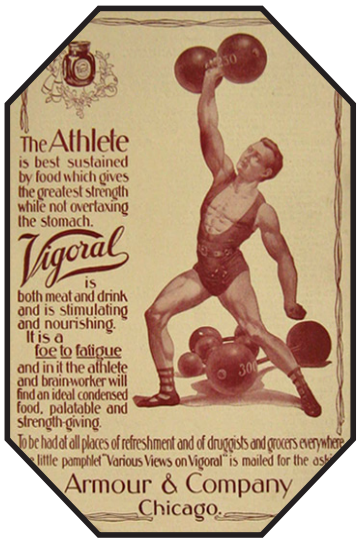
DR. GARBER'S

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

Bradley G. Garber's Board Case Update: 12/27/11

Noah J. Bedwell, 63 Van Natta 2494 (2011)
(ALJ Smith)

Claimant requested review of an Opinion & Order that affirmed an Order on Reconsideration that did not award any value for work disability.



Claimant was injured on February 8, 2008, and SAIF accepted a lumbosacral strain. In July, claimant started treating with a Dr. Goodwin. Dr. Goodwin diagnosed a lumbar strain, combined with DDD at L5-S1. On April 8, 2009, Dr. Goodwin released claimant with a 20-pound lifting restriction, which he attributed to the preexisting DDD.

SAIF closed the claim on April 9, 2009 and awarded claimant no PPD. An Order on Reconsideration affirmed the Notice of Closure and claimant requested a hearing. In affirming the reconsideration order's determination that claimant was not entitled to an award for work disability, the ALJ found that, while Dr. Goodwin had imposed a 20-pound lifting restriction on claimant that resulted in his inability to return to his regular work, the restriction was attributed, entirely, to preexisting

DDD.

Claimant appealed the matter to the Board and argued that, because he had not been released to return to his regular work, and because a medical arbiter had found him entitled to 3% PPD due to his accepted lumbosacral strain, he was entitled to a work disability award.

The Board found that it was "indisputed" that claimant did not return to his job-at-injury. They had to determine whether Dr. Goodwin released his patient to return to regular work. He did not. They, then, had to determine whether Dr. Goodwin's work restrictions were due to a compensable injury. See ORS 656.214(1)(c)(B). Dr. Goodwin had concluded that, with regard to his accepted lumbosacral strain, claimant was able to return to his job-at-injury. It was the preexisting DDD that stood in the way. Affirmed

Dissent: The dissent argued that, because the medical arbiter found all of claimant's restrictions to be due to his accepted lumbosacral strain, the arbiter should be relied upon in deciding whether claimant was entitled to a work disability award. The dissenting Board member overlooked the statute, however, which delegates authority to the attending physician (not a medical arbiter) to decide whether the patient can return to work because of impairment arising out of an accepted condition.

Ashley A. Rehfeld, 63 Van Natta 2515 (2011)
(ALJ Rissberger)

Sedgwick CMS was the designated claim processor for the noncompliant employer in this case. It appealed an Opinion & Order that found claimant's wrist injury claim to have been filed timely, and that her claim was compensable.

The alleged noncompliant employer publishes a magazine to outdoor activity enthusiasts. Claimant worked as an intern for the publisher. She did some graphic design and advertising.

On August 17, 2008, the employer directed a "photo shoot," and asked claimant to be one of the

models. She was a skateboarder, and was asked to perform some stunts on her skateboard. She agreed (DUH!) and fell off her skateboard, injuring her wrist. (Probably never did that before). She filed a claim.

The Department found the employer to be a non-complying employer, and assigned defense of the claim to Sedgwick. Sedgwick alleged that claimant's injury did not arise out of and in the course of her employment. Claimant requested a hearing.

The ALJ found an employment relationship, reasoning that the employer had the right to direct and control claimant's work and that she received remuneration for her work. Therefore, the ALJ found that claimant's injury arose out of and in the course of her employment.

Sedgwick argued, on appeal, that there was no employment relationship between the employer and claimant, because claimant was not paid and did not expect to be paid. Here are the facts:

"Claimant worked for the employer largely as an unpaid intern before her injury. However, the record establishes that she had begun selling advertisements for the employer before her injury (although she did not complete those sales). The record also establishes that claimant expected to be remunerated for completed sales work. Sedgwick does not challenge that expectation. Instead, Sedgwick argues that claimant was not entitled to the promised commission for advertising sales, because she did not complete any such sales. However, we are not persuaded that completed work activities are a necessary prerequisite for finding an existing employment contract."

The Board found that there was an employment contract between claimant and the employer, and that she was a "worker" when she was injured during the August 17, 2008 photo shoot. **Affirmed**

NOTICE: What is missing in this analysis is whether claimant's voluntary agreement to engage in an activity (a fun photo shoot), that had absolutely NOTHING to do with her internship, was something that was contemplated by her "contract" of employment with the employer.