Dr. Garber's

**DISPENSARY OF COUGH SYRUP, BUFFALO LOTION,
PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE
& WORKERS' COMPENSATION CASES
by Bradley G. Garber
Wallace, Klor & Mann, P.C.**

Board Case Update: 01/13/2017

**by Brad G. Garber
Wallace, Klor, Mann, Capener & Bishop**

David Dunn, 69 Van Natta 14 (2017)
(ALJ Naugle)

SAIF requested review of an Order that set aside its denial of claimant's occupational disease claim for a right foot condition.

In February 2015, claimant sought treatment for right foot pain. He was diagnosed with a right fifth metatarsal "apophysitis" condition. He filed a claim for benefits and SAIF denied compensability. Claimant requested a hearing.

The ALJ noted that claimant had a congenital unfused right fifth metatarsal "apophysis." Citing *Corkum v. Bi-Mart Corp.,* 271 Or App 411 (2015), the ALJ

concluded that because the apophysis merely rendered claimant more susceptible to the apophysitis, it was not a "preexisting condition" or a "cause" to be weighed in determining the major contributing cause of the occupational disease. The ALJ found claimant's work activities to constitute the major contributing cause of his apophysitis.

The Board went on to differentiate a "predisposition" from a "preexisting condition." The Board relied, in part, on the Court of Appeals decision in *Murdoch v. SAIF*, 223 Or App 144 (2008), *rev den*, 346 Or 361 (2009). In that case, the Court address an occupational disease claim for a toe amputation that resulted from a work-related infection. Claimant had been diagnosed with diabetes and diabetic polyneuropathy and SAIF argued that those medical conditions should be taken into consideration in determining the major contributing cause of claimant's occupational disease. The Court felt otherwise, observing that the diabetes and diabetic polyneuropathy merely rendered the claimant "more susceptible to the infection" and could not be considered a "cause."

In this case, claimant's attending podiatrist explained that the condition at issue, "apophysitis," is an inflammatory condition that results when the peroneus brevis tendon repetitively pulls on the fibrous tissue of the "apophysis." He opined that the apophysis was "merely a passive contributor" that "merely made claimant susceptible to apophysitis." The Board found the podiatrist's opinions most persuasive and agreed with the ALJ's analysis and conclusions. **Affirmed**

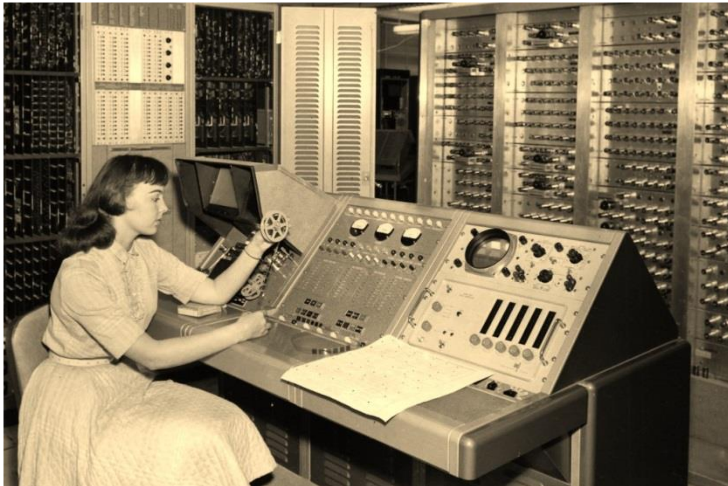
NOTE: One way to look at the "predisposition" issue is to consider whether the predisposing condition <u>actively</u> contributes to the outcome. Does the fact that you have an arm bone predispose you to a broken arm bone? In this case, if claimant's diabetes could be shown to have been an active causative factor in the development of his apophysitis, the outcome may have been different.

Kimberly M. Farrin, 69 Van Natta 26 (2017) (ALJ Smith)

Claimant requested review of an Order that upheld employer's motion to dismiss due to untimely filing of a request for review.

On October 18, 2016, the ALJ issued an Order that affirmed an Order on Reconsideration. The ALJ's Order included a notice that the parties had 30 days within which to file a Request for Review.

On December 19, 2016, the Board received faxed correspondence from claimant's attorney that included a copy of a request for Board review of the ALJ's order. The request for review was dated November 14, 2016, and stated that it was "sent via email" to requestwcb@state.or.us and was copied to SAIF.



The Board's email address for accepting requests for review is: request.wcb@oregon.gov. See OAR 438-005-0046(1)(f)(A). So…the request for review went into the ether. It has passed out of the solar system, as we know it.

The 30th day after the ALJ's October 18, 2016 order was November 17, 2016. Claimant's request for Board review was "dated" November 14, 2016, but it was sent to the wrong place. So, the Board did not receive the request for review until December 19, 2016, when claimant's counsel faxed the Board a copy of the request for review. Thus, the Request for Review was not "filed" until December 19, 2016. Too late. **Affirmed**

Moral: Be careful when filing something important, by computer.

Michael Dewey, 69 Van Natta 29 (2017) (ALJ Crumme')

SAIF appealed an Order that set aside its denial of claimant's new/omitted condition claim for Lyme disease.

Claimant, a forester, noticed an embedded tick on his right shin after a day of field work at a tree farm. He filed a claim for benefits which SAIF accepted. The condition accepted was a "tick bite."

"It's Eden. You don't have to keep checking for ticks."

Subsequently, claimant developed symptoms that were consistent (or inconsistent, depending on the medical expert) with Lyme disease. A "Dr. Leggett" performed a record review and concluded that claimant's history of exposure, his "post-tick bite" symptoms, and serologic testing were inconsistent with the development of Lyme disease. SAIF denied the condition.

Claimant had three doctors who concluded that his symptoms were consistent with Lyme disease. SAIF had three doctors who concluded that claimant's symptoms were not consistent with the disease. Unfortunately, two of SAIF's experts based their opinions, in part, on medical records of another person named "Michael Dewey" (different middle initial and different date of birth). Oops! **Affirmed**

NOTE: The main reason I report this decision is that it is the first and only decision addressing compensability of Lyme disease since 1997 (condition not medically proven). Makes one think about the compensability of insect transmitted diseases. How about the Zika virus, or avian flu?

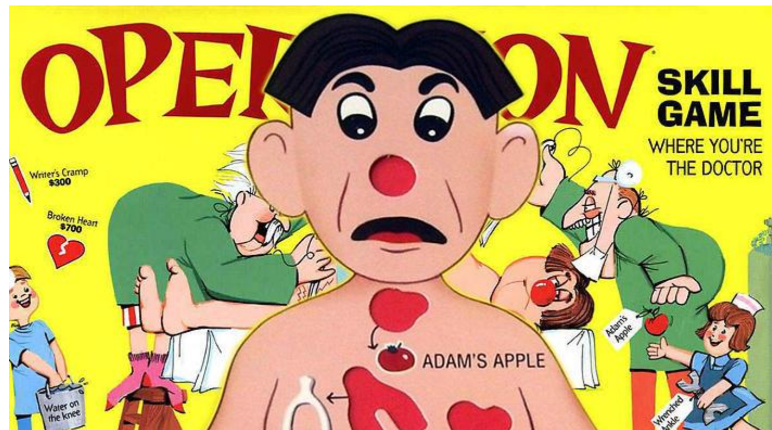
Angela M. Freemont, 69 Van Natta 57 (2017) (ALJ Fulsher)

Claimant requested review of an Order that upheld the employer's denial of her new/omitted condition claim for a left upper extremity "burn" condition.

Claimant had an accepted claim for a left wrist sprain. Six months after her injury, her attending physician, Dr. Puziss, prescribed DMSO (remember that stuff?) and hydrocortisone. The idea was to put some hydrocortisone on the skin and follow it up with DMSO, so it would get absorbed into the affected area. (This, in lieu of an injection, I surmise).

Claimant allegedly put about two drops of the hydrocortisone on her skin. After about one minute, she experienced "intense pain and a burning sensation" at the site. She went to the emergency room where she was diagnosed, by Ms. Watson (a nurse) with a first degree chemical burn.

Claimant filed a new/omitted condition claim for "medication reaction/first degree burn, left upper extremity." The employer accepted "medication reaction as the left forearm," but denied claimant's claim for a "first degree burn." Significantly, the denial was not based on the theory that the burn was the same condition as the medication reaction. (Spitting chemical hairs….)



So, the issue was whether claimant's medication reaction was the same thing as a "burn." Nurse Watson explained that, while she did not witness blistering at the site, blistering was not necessary for a diagnosis of "burn."

Dr. Dickerman, who reviewed claimant's medical records at the employer's request, noted that DMSO is "known to cause burning and irritation of the skin as a common side effect." He opined that Nurse Watson's examination findings were "consistent with a first degree burn," which does not usually form a blister. He opined that "first degree burn" was the best diagnosis for claimant's condition, and that her application of DMSO had caused the burn.

The employer had to concede that claimant sustained a "burn." It disputed causation, however, because the prescription for use of DMSO was not a "reasonable and necessary" treatment. Unfortunately, however, it did not request Medical Director review of the prescription on that basis. So, the issue for the Board was a consequential condition compensability issue, not a medical service issue. It determined that the "burn" was a consequential condition related to the treatment of claimant's accepted injury. **Affirmed**

(TIP: If Dr. Puziss, or any other physician, mentions DMSO, run to the Department!)