Dr. Garber's

DISPENSARY OF COUGH SYRUP, BUFFALO LOTION, PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE & WORKERS' COMPENSATION CASES

by Brad G. Garber
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Board Case Update: 02/17/2017

Wendy L. Mohr, 69 Van Natta 236 (2017)
(ALJ Fisher)

Claimant requested review of an Order that declined to award additional temporary total disability benefits.

After her injury, SAIF accepted her claim for benefits. She suffered a right foot lisfranc fracture that required surgery. After surgery, on August 19, 2015, SAIF paid TTD benefits. On November 9, 2015, claimant's attending physician approved a modified job offer presented to claimant by SAIF. In doing so, the attending physician agreed that claimant could commute from her home in

Estacada, to the jobsite in Portland. The job offer defined "commute" to mean that claimant could "tolerate either 1) driving a car, OR 2) being a passenger in a car, OR 3) utilizing public transportation (to and from work)." (emphasis original). In approving the job offer, the attending physician noted that claimant was not able to drive a car because she was in a cast.

On November 15, 2015, the employer offered claimant modified duty work. SAIF began payment of TPD benefits based on assumed earnings beginning on that date. Claimant began the modified work six days later, when the cast was removed and she was able to drive her car. She requested a hearing, seeking TTD benefits from November 15 to November 21.

The ALJ, relying on the prior Board decision of *James P. Andrews*, 55 Van Natta 3499 (2003), reasoned that the modified job offer did not require a commute that was beyond claimant's physical capacity. Therefore, he concluded that ORS 656.268(4)(c)(A) did not allow claimant to refuse the modified job offer.

On review, claimant contended that the statute allowed her to refuse the job offer because the offer required a commute that was beyond her physical capacity. Remember…her attending physician said she could not drive. So, that limited her options to taking public transportation (she could not find a ride in a private vehicle). She could not walk to the bus, which stopped four blocks away. So, the job offer required a commute that was beyond her physical capacity.

SAIF argued that a "commute" is defined, simply, as the distance between a claimant's home and the work site. *See* OAR 436-060-0030(4)(a). SAIF argued that ORS 656.268(4)(c)(A) allowed claimant to refuse a modified job offer only if she lacked the physical capacity to travel that distance by **any** method, regardless of whether the particular methods of commuting available to her were within her physical capacity. So, for example, if she had a horse that she could ride to the bus stop, she would be able to "commute."

The Board didn't buy it. **Reversed. Attorney fee -- $14,000**

Casual Observation: Because of six days of TTD??

Ruben Morales-Benito, DCD, 69 Van Natta 251 (2017)
(ALJ Donnelly)

Claimant (Ruben's girlfriend) requested review of an Order that denied her survivor's benefits. Claimant and the decedent cohabited, in Mexico, for about two years. They had a child together. Decedent moved to Oregon in November 2013, with the intent to work there and buy a home. He called claimant every day and sent her money every pay period. He intended to return to Mexico, in 2015, to marry claimant.

On December 2, 2014, the decedent was killed in a work-related motor vehicle accident. Thereafter, claimant sought death benefits under ORS 656.226.

The ALJ concluded that claimant did not qualify as a surviving cohabitant entitled to benefits under ORS 656.226 because she and the decedent: (1) were not living together in the state of Oregon for over one year prior to the date of injury; and (2) did not hold themselves out to be married.

ORS 656.226 provides, as follows:

"In case an unmarried man and unmarried woman have **cohabited in this state** as husband and wife for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation, the surviving cohabitant and the children are entitled to compensation under this chapter the same as if the man and woman had been married." (emphasis added).

Claimant's rather creative position was that the phrase "cohabited in this state" did not refer to the state of Oregon but, instead, to "the state of being unmarried individuals that are cohabiting."

The original wording of the statutory section, enacted in 1927, included the phrase "cohabited in the state of Oregon." Secondly, in *Thomas v. SAIF*, 8 Or App 414 (1972), the court concluded that ORS 656.226 was "narrowly drawn and purports to give death benefits only to those women who have cohabited in Oregon for at least one year prior to the worker's death." (Assuming, of course, that the "worker" is a man).

The Board held, "Accordingly, based on the context of ORS 656.226, we conclude that to receive death benefits under that statute, claimant and the decedent must cohabit in the state of Oregon for over a year prior to the date of injury."
Affirmed

Brooke A. Woodward, 69 Van Natta 266 (2017)
(ALJ Fisher)

Sedgwick CMS, as statutory assigned claims agent under ORS 656.054(1), requested review of an Order that: (1) found that claimant was a subject worker; and (2) set aside its denial of claimant's injury claim for a left ankle condition.

The facts are precious.

Claimant was hired as a receptionist for a medical marijuana dispensary that was scheduled to open on April 20, 2015. The manager of the dispensary told her to come to work on April 17 and 18, for training. After a meeting on April 18, everyone toked up, including claimant. After they were blasted, claimant was asked by several coworkers to assist them in buying office supplies.

"On the way to the store, claimant suffered a panic attack as a result of her marijuana intoxication. [citation to record omitted]. Her coworkers returned her to the parking lot of the dispensary, and claimant exited the car. [citation to record omitted]. Feeling unsafe, claimant ran/somersaulted across the parking lot to a retaining wall topped by a chain-link fence. [citation to record omitted]. She

climbed the fence and dropped about 15 feet to the ground below, fracturing her left ankle."

Claimant filed a claim for benefits which was denied by Sedgwick on the basis that her injury was not caused by her "work exposure."

After hearing, the ALJ concluded that: (1) claimant was a subject worker; (2) her injury did not result from engaging in a recreational or social activity primarily for her personal pleasure under ORS 656.005(7)(b)(B); and (3) her injury arose out of and in the course of her employment.

Sedgwick's creative defense was that claimant was not a subject worker, based on a 1985 Court of Appeals case that held that someone engaging in an activity for and illegal business when injured is not a subject worker. *See DePew v. SAIF*, 74 Or App 557 (1985). Trouble is…a medical marijuana dispensary was, at the time of claimant's injury, was a legal business! (Personal, recreational, use had not yet been made legal). The Board observed, "We decline to extend the *DePew* rationale to a legal business enterprise merely because its employees have engaged in an illegal activity on the premises." So, claimant was a subject worker.

The Board went on to find that claimant was under a contract for hire when she was injured (she hadn't gotten paid, yet), so she was a subject worker who was expected to engage in services for remuneration.

Then, the Board turned to the personal pleasure doctrine. In *Roberts v.* SAIF, 341 Or 48 (2006), the Oregon Supreme Court explained that this statutory exclusion raises three questions: (1) whether the worker was engaged in or performing a "recreational or social activity"; (2) whether the worker incurred the injury "while engaged in or performing, or as the result of engaging in or performing" that activity; and (3) whether the worker engaged in or performed the activity "primarily for the worker's personal pleasure."

The Board found that claimant's activity of smoking pot was "incidental" to her employment because the owner/manager of the dispensary invited and encourage her to engage in the activity and provided the marijuana that was consumed. Claimant was expected to remain at work, after the recreational activity, to continue getting the dispensary in shape for the opening day. **Affirmed**

Observation: The Board cited *U.S. Bank v. Pohrman*, 272 Or App 31 (2015), in passing, in which a 15-minute walk, on a paid break, was found to be "incidental" to work. *See Laura Brown*, 68 Van Natta 774 (2016)(concluding that the claimant who had injured herself participating in a break time walking program arranged and encouraged by the employer had not engaged in a social or recreational activity primarily for her personal pleasure due to the close nexus between the walking activity and the claimant's work).

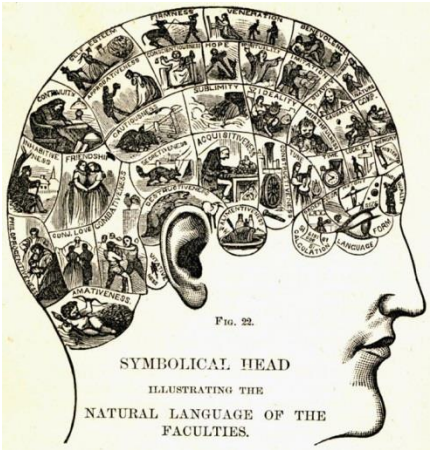

FIG. 22.

SYMBOLICAL HEAD
ILLUSTRATING THE
NATURAL LANGUAGE OF THE
FACULTIES.