Dr. Garber's

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

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

Board Case Update: 03/24/2017

Johanna L. Southard, 69 Van Natta 345 (2017)
(ALJ Fisher)

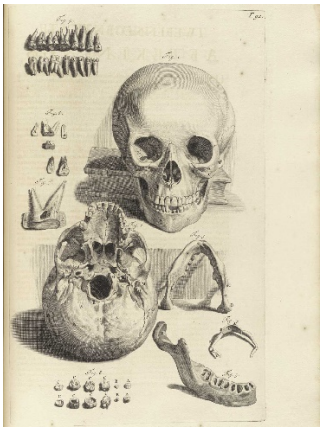
Claimant requested review of an Order that upheld SAIF's denial of her new/omitted condition claim for concussion.

Claimant was involved in a work-related motor vehicle accident on September 22, 2014. She went to an emergency room where she was diagnosed with "multiple contusions and muscle strain." She exhibited no evidence of head trauma, loss of

consciousness, or neurological damage. Later, that same day, a chiropractor evaluated claimant and recorded her complaints of headache, dizziness and vision problems.

Two days later, on September 24, claimant went to Dr. Nelson, who became her attending physician. Dr. Nelson noted neurological complaints of confusion, feelings of weakness, difficulty walking, and headache. He diagnosed neck pain, cervical radiculopathy, thoracic strain, and neck strain.

By October 1, 2014, claimant's musculoskeletal complaints had improved, but she still suffered from symptoms which Dr. Nelson felt were consistent with a "mild, possibly moderate" concussion, attributable to the MVA.



Claimant continued to suffer from symptoms suggestive of concussion. She was sent to Dr. Reimer, for an IME on June 29, 2015. Based on his review of records, Dr. Reimer noted a lack of clinical history of a head injury and no alteration of neurologic function at the time of the incident, or shortly thereafter. In his opinion, claimant never had "a head injury, a brain injury, a closed-head injury, or a concussion."

In July 2015, claimant's injury claim was accepted for a **right knee contusion** and a **cervical strain**." Claimant requested the acceptance of a concussion, which SAIF denied.
Claimant's counsel drafted a concurrence letter to Dr. Nelson which he signed on September 8, 2015. In that letter, Dr. Nelson explained that concussions or traumatic brain injuries (TBI) are not typically diagnosed by radiographic studies or scans. He explained that a "blow to the head" is not necessary for a concussion and that a "violent shaking" or "whiplash" type activity where the head moves back and forth is a very typical mechanism for creating a concussion.

As explained by Dr. Spatrisano, another expert consulted by claimant's counsel, "A concussion occurs when the brain hits the <u>interior</u> skull as a result of a rapid head movement, such as a whiplash injury occurring from a sudden stopping movement as with a motor vehicle accident." (emphasis, original).

The employer then sent claimant to an IME with Drs. Ireland (neurologist) and Kitchel (orthopedic surgeon). They defined a concussion as an "immediate and transient impairment of neurologic function following a biomechanical trauma to the head." They reasoned that, because claimant did not have any complaint of impairment of neurologic function, when she went to the emergency room, following the MVA, she did not sustain a concussion.

Ultimately, in this case, six experts were involved: Reimer, Ireland and Kitchel on the employer's side; Spatrisano, Nelson and Dimmig on claimant's side. The Board, on review, found the opinions of claimant's experts more persuasive. **Reversed. Attorney fee - $11,000**

NOTE: It is good to keep in mind, as Dr. Nelson explained, ER records may not detect evidence of a TBI, which is an internal injury that may only be determined by clinical presentation. Also, a stacking of experts may increase the amount of the assessed attorney fee.

Troy L. Berry, 69 Van Natta 381 (2017)
(ALJ Fisher)

Claimant requested review of an Opinion & Order that upheld the employer's denial of claimant's occupational disease claim for a mental disorder.

What might have caused claimant's alleged mental disorder, you might ask. As summarized by the Board, he was accused of embezzlement and was the subject of an investigation, then he was involved in an investigation regarding sex tapes made by students, then he was accused of "inappropriate touching" of students.

The ALJ, and the Board, found that the employer's investigation into the various accusations brought against him (resulting in administrative leave and discipline)

was properly considered a job performance evaluation or disciplinary action under ORS 656.802(3)(b). The Board went on to find the employer's actions (investigation and reprimand) to be "reasonable." **Affirmed**

Dawn Turner, 69 Van Natta 444 (2017)(Turner I)
(ALJ Jacobson)

The employer requested review of that portion of an Order that awarded claimant's attorney an assessed fee of $2,500, under ORS 656.262(11), for a discovery violation.

Claimant was compensably injured on November 7, 2014. On April 6, 2015, the claims adjuster received a request for discovery from claimant's counsel. Discovery was timely provided through November 6, 2015. Thereafter, further discovery was not provided until February 19, 2016, after claimant's attorney filed a request for hearing on February 10, 2016, alleging late discovery and entitlement to penalties and fees under ORS 656.262(11)(a).

At hearing, it was stipulated that discovery was late and that there were no "amounts due." So, there was no basis for a penalty. Claimant's attorney argued that he was still entitled to an assessed fee, based on the Court of Appeals decision in *SAIF v. Traner*, 273 Or App 310 (2015).

ORS 656.262(11)(a) allows for the assessment of a penalty-related fee, even if there are no amounts due upon which to base a penalty, if the carrier/employer unreasonably fails to issue an acceptance or denial of a claim or otherwise unreasonably fails to pay compensation. The statute says nothing about a failure to provide discovery in a timely manner.

The Court, in *Traner*, awarded a fee under circumstances in which the employer unreasonably failed to issue an acceptance or denial of a claim. Such was not the case, in *Turner*. The Board, in an *en banc* decision, agreed with my position that the holding, in *Traner*, did not change the clear language of the statute and that late discovery did not serve as the basis of a penalty-related assessed fee. **Reversed**

NOTE: This is an important decision. Imagine how many requests for hearing employers would see, for minor discovery infractions, if this decision had not been reversed. The Board, in active litigation situations, may impose penalties and fees for late discovery under OAR 438-006-0091. The footnote on the last page of the decision is something to pay attention to: " * * * [T]he current statutory scheme simply does not allow the remedy that claimant urges us to apply, and *Traner* did not hold otherwise. To the extent there is a 'gap' in the attorney fee statutes related to unreasonable discovery violations when no compensation is delayed, resisted or refused, the remedy rests with the legislature." Do not be surprised to see legislation introduced by the Claimants' Bar. See, *Dawn Turner*, 69 Van Natta 569 (2017)(*Turner* II); *Leah M. Recor*, 69 Van Natta 575 (2017)

Jolene M. Brill, 69 Van Natta 461 (2017)
(ALJ Fulsher)

Claimant requested review of an Order that affirmed an Order on Reconsideration that did not award a work disability award.

Claimant injured her left foot. SAIF accepted a non-displaced fracture of the fifth metatarsal, and a left ankle sprain. Prior to claim closure, claimant agreed to a job description that indicated her job required OCCASIONAL standing and FREQUENT walking. Her attending physician, when declaring her medically

stationary, opined that she would not be capable of performing her job at injury. He restricted her job activities, however, due to non-work related factors.

A Notice of Closure dated April 29, 2015 awarded claimant an 11% whole person award, and a 19% work disability award. SAIF requested reconsideration of its own Notice of Closure. The only thing SAIF could dispute was impairment findings. But, on June 17, 2015, SAIF's attorney discussed claimant's work restrictions with her attending physician, a "Dr. Johansen," and got him to agree that, in terms of reasonable medical probability, any of claimant's work restriction were not due to her compensable injury. SAIF submitted this post-closure evidence to the Appellate Review Unit.

On September 15, 2015, the ARU issued an Order on Reconsideration in which it increased claimant's whole person impairment award but, based on Dr. Johansen's post-closure report, reduced claimant's work disability to zero. Claimant requested a hearing.

Relying on a Board case from 2009, SAIF argued that the ARU could address the work disability issue, even though its request for reconsideration raised, only, the issue of impairment. Unfortunately, the statute that was relied upon by the Board, in its 2009 decision, was amended in 2011. The statute, ORS 656.268(5)(c), now provides, "A request for reconsideration by an insurer or self-insured employer may be based only on disagreement with the findings used to rate impairment." (emphasis added).

The Board observed, "Here . . ., while SAIF requested reconsideration regarding the impairment issue, it subsequently solicited Dr. Johansen's opinion regarding work disability (which was not at issue) and submitted that opinion to the ARU for consideration in the reconsideration proceeding." **Reversed. Work disability award of 19% reinstated.**

THE CLAIMANT WHO WON'T GO AWAY:

Joy M. Walker, 58 Van Natta 11 (2006)
Joy M. Walker, 61 Van Natta 739 (2009)
Joy M. Walker, 61 Van Natta 2017 (2009)
Joy M. Walker, 63 Van Natta 517 (2011)
Joy M. Walker, 63 Van Natta 564 (2011)
Joy M. Walker, 66 Van Natta 325 (2014)
Joy M. Walker, 67 Van Natta 1597 (2015)
Joy M. Walker, 68 Van Natta 371 (2016)
Providence Health System Oregon v. Walker, 254 Or App 676 (2013)
Walker v. Providence Health System Oregon, 267 Or App 87 (2014)

AND NOW!

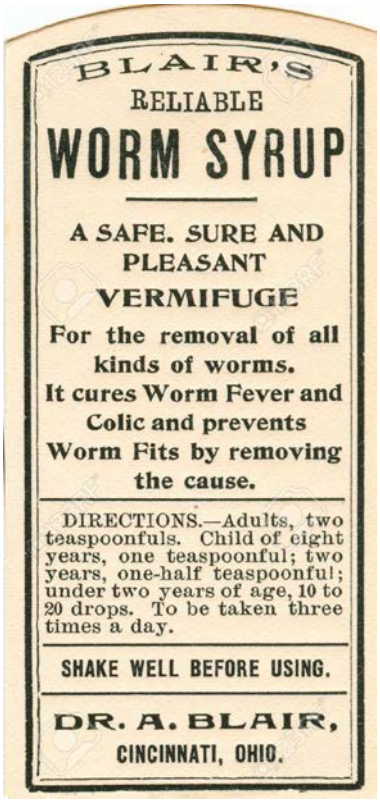
Providence Health System Oregon v. Walker, 0906234; A156440 (March 8, 2017)

Claimant, again, asked the Court of Appeals (which really does not enjoy the world of Workers' Compensation) to review another Board Order that denied a penalty and penalty-related fee for employer's failure to close her claim within 10 days of her September 30, 2009 request for closure.

In the first go-around the Board denied the penalty and penalty-related fee because there were no "amounts due" upon which to base a penalty. The Court disagreed with that decision in *Providence Health System Oregon*, 254 Or App 676 (2013) and remanded the matter back to the Board. The Court held that any potential penalty that might be due claimant under *former* ORS 656.268(5)(d), as a result of employer's *de facto* refusal to close the claim within 10 days of claimant's September 30, 2009 request for closure, must be based on the amount of compensation that claimant "would have been entitled to be paid if the employer had closed the claim on [October 10, 2009]."

The Court went on to hold, however, "that whether employer's *de facto* failure to close the claim entitled claimant to any penalty at all also depended on whether employer had a 'legitimate doubt' as to its obligation to close the claim." Claimant argued that the employer had "sufficient information" upon which to base claim closure, on October 10.

Back story: Claimant had no-showed for an IME and the Department had suspended benefits. On remand, before the Board, employer argued that, in light of claimant's failure to comply with the requested IME, the record lacked sufficient information, on October 10, to determine the extent of her impairment due to a newly-accepted condition of depression and panic disorder. The Board disagreed, reasoning that the medical record, as of November 5, 2009 (the date of claim closure), was the same as it was on October 10, 2009.



On judicial review, employer argued that the Board erred. The Court agreed, observing, "[I]n light of claimant's continued refusal on October 10, 2009, to attend employer's lawfully requested independent medical examination (IME), employer did have a legitimate doubt as to its legal obligation to close the claim under ORS 656.268." **Reversed**

I wonder when we'll hear from "Joy" again…

Vantassel v. SAIF, 1301453; A156798 (March 15, 2017)

Claimant sought review of an Order on Review in which the Board upheld SAIF's denial of an injury claim for a disc herniation at L5-S1 that occurred when he stepped out of a truck at work. Claimant contended, on appeal, that the Board erred in determining that the claim was not compensable because claimant's two previous disc herniations and resulting surgeries at L5-S1 were preexisting conditions that combined with the work incident and were the major contributing cause of his need for treatment.

Claimant tried to argue that the prior herniations and surgeries merely "predisposed" him to further injury. For injury claims, ORS 656.005(24)(a) defines a preexisting condition as "any injury, disease, congenital abnormality,

personality disorder or similar condition that contributes to disability or need for treatment." ORS 656.005(24)(c) excluded from the definition of a preexisting condition a condition that "merely renders the worker more susceptible to the injuruy." Claimant argued that his prior herniations and surgeries merely made him more susceptible to injury.

SAIF responded by arguing that, while the prior insults to L5-S1 may have made claimant more susceptible to further injury, that preexisting condition also contributed, in major part, to claimant's disability and need for treatment.

In *Corkum v. Bi-Mart Corp.*, 271 Or App 411 (2015), the Court of Appeals tried to discern the meaning of a "mere susceptibility." The Court concluded, "[A] condition merely renders a worker more susceptible to injury if the condition increases the likelihood that the affected body part will be injured by some other action or process but does not actively contribute to damaging the body part." In other words, a mere susceptibility makes a person more vulnerable or susceptible to injury but does not contribute to the damage itself.

In this case, the medical established that, while the prior condition of claimant's L5-S1 disc rendered claimant more susceptible to injury at that level, that condition "actively" caused the resulting condition in claimant's low back, after his injury incident. **Affirmed**

Harry L. Rumer, 69 Van Natta 536 (2017)
(ALJ Donnelly)

Claimant requested review of an Order that did not award penalties and fees against SAIF for unreasonable claim processing.

On March 19, 2015, claimant, a volunteer firefighter, fell off a fire truck and injured his right knee. He filed a claim on the following day. The claim was accepted on April 22, 2015 for the condition of **right knee sprain**. Included in the language of the Notice of Acceptance was the following language: "If you believe a medical condition was omitted from the notice of acceptance, or the notice is otherwise incomplete or incorrect, you must notify the insurer in writing" and "[e]xplain why you believe the notice of acceptance is wrong."

Subsequently, claimant was diagnosed with an acute ACL rupture, medial and lateral meniscus tears and mild, preexisting, arthritic changes. Claimant's attending physician performed surgery on June 1, 2015.

On July 15, 2015, claimant filed a Request for Hearing in which the issues were identified as "failure to properly process claim, failure to modify the Notice of Acceptance pursuant to ORS 656.262(6)(d)(F), penalties and fees. On the same date, claimant initiated a new/omitted condition claim for a complete ACL tear, a medial meniscus tear, a full thickness vertical tear of the posterior horn [of the medial meniscus], and a lateral meniscus tear.

On August 16, 2015, the attending physician confirmed, to SAIF that the conditions of ACL tear, medial meniscus tear and lateral meniscus tear were related to claimant's work injury. So, on August 19, 2015, SAIF modified the scope of its acceptance to include these new conditions.

Because there was no issue with regard to compensability, the parties proceeded by written arguments on the issue of penalties and fees. In his written closing argument, claimant contended that ORS 656.262(6)(b)(F) required SAIF to initiate an investigation and reevaluation of its Notice of Acceptance when it received an MRI and other medical reports, and authorized surgery. Because SAIF did not take the initiative to do this, until after the Request for Hearing was filed, claimant asked the ALJ to assess a 25% penalty and award a penalty-related fee under ORS 656.262(11)(a).

The ALJ determined that SAIF had timely accepted claimant's new/omitted condition claim. Accordingly, the ALJ concluded that SAIF's processing was reasonable and declined to award a penalty or penalty-related attorney fee. In

doing so, she noted that, consistent with the statutory scheme enacted by the legislature in ORS 656.262(6)(d) and ORS 656.267, claimant was advised in the Notice of Acceptance that he must notify SAIF, in writing, if he believed that a medical condition was omitted from the acceptance notice.

The issue, on review, was who has the responsibility to raise an issue with regard to the scope of acceptance. BUT…the only issue raise by Claimant's Request for Hearing were penalty/fee issues. *Sua sponte* (aka, on its own), the Board had to address whether it even had jurisdiction to address claimant's claims. The Board observed, as follows:

"Here, claimant requested a hearing regarding SAIF's alleged 'failure to properly process [the] claim, failure to modify the Notice of Acceptance pursuant to ORS 656.262(6)(b)(F),' and seeking penalties and attorney fees. (Hearing File). On the "hearing request" form, he checked the issue boxes for "other," "penalty," and " attorney fee." He did not check the "compensability," "partial denial after claim acceptance," or "challenge to notice of acceptance" boxes."

Because the only issues raised were, penalty and fee issues, and because the Department has exclusive jurisdiction over those issues, the Board did not have jurisdiction to address the issues raised for hearing. **Opinion & Order Vacated, Request for Hearing Dismissed**

WARNING: Careful, what boxes you check!