Dr. Garber's

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

Bradley G. Garber's Board Case Update: 05/11/2015

Kayla L. Sjogren, 67 Van Natta 724 (2015) (ALJ Pardington)

The employer requested review of that portion of the ALJ's Opinion & Order that set aside it denial of Claimant's "new/omitted" condition claim for "deconditioning and/or atrophy."

Claimant injured her low back in August 2012 and filed a claim for benefits. Her claim was accepted for the condition of **lumbar strain**. Because she had to take time off work, due to her low back condition, she gained weight. Her attending physician opined that she had become deconditioned and would need to be "reconditioned" before she could return to her regular work. So, she underwent physical therapy and entered into an extensive personal fitness regimen. The ALJ found that claimant's deconditioning was compensable as a consequential condition.

On review, the employer argued that deconditioning is not a medical "condition" within the meaning of ORS 656.267. The Board observed, as follows:

*For purposes of ORS 656.267(1), a "condition" is defined as "the physical status of the body as a whole * * * or of one of its parts." Young v. Hermiston Good Samaritan, 223 Or App 99, 105 (2008). Whether a claim is for a medical "condition" is a question of fact to be decided based on the medical evidence in individual cases. Armenta v. PCC Structural, Inc., 253 Or App 682, 692 n 7 (20120); Young, 223 Or App at 107.*

Claimant's attending physician diagnosed Claimant's deconditioning, describing it as a "physical status of the body as a whole * * * or one of its parts." In contrast, the IME physician commented, "Deconditioning is not a medical illness and I am not even sure if it is a diagnosable medical condition." The Board found the attending physician more persuasive. **Affirmed**

TIP: If your expert says something like "I am not even sure," you're going to lose!

William R. Beaudry, II, 67 Van Natta 743 (2015)
(ALJ Smith)

Claimant requested review of the ALJ's Order that upheld SAIF's denial of his death benefits claim. (I assume someone was acting on Claimant's behalf)

On November 18, 2013, Claimant suffered fatal injuries while riding as a passenger in an employer-owned truck driven by a coworker that was involved in a

motor vehicle accident. The MVA occurred after Claimant's work shift had ended and he and his coworker were returning back to their hotel room, after visiting a gun store, 46 miles away from the jobsite.

SAIF denied compensability of Claimant's claim, alleging that his fatal injury did not arise out of and in the course of his employment. Claimant alleged that his injury arose out of and in the course of his employment under the "traveling employee" doctrine. The ALJ agreed that Claimant was a "traveling employee" but that his travel to the gun shop constituted a "distinct departure" from his work duties.

In *Slaughter v. SAIF*, 60 Or App 610 (1982), the Court held that the claimant's injury was compensable because it occurred during a reasonable activity while he was passing time at a tavern and arose out of the necessity "to kill time" during a forced layover. The court reasoned that the trip was minimal in both time and space, and did not amount to a distinct departure.

In this case, however, the Board observed that Claimant was injured (aka, killed) almost two hours after his work shift had ended and after he had gone to a gun store 46 miles away from his work location. The Board concluded, "We do not

find the decedent's situation similar to 'passing time' during a forced layover between work-related activities. **Affirmed**