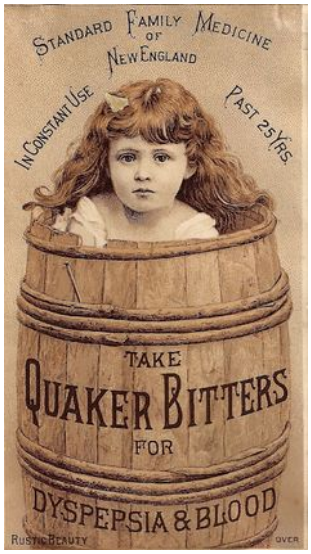
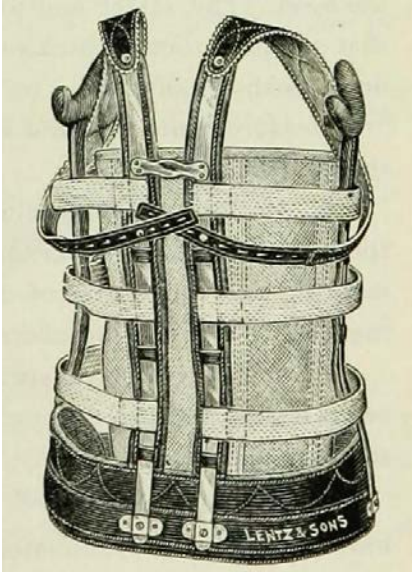
Dr. Garber's
DISPENSARY OF COUGH SYRUP, BUFFALO LOTION, PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE & WORKERS' COMPENSATION CASES



Bradley G. Garber's Board Case Update: 06/15/2015

Claudia S. Stryker, 67 Van Natta 1003 (2015) (ALJ Crumme')

Claimant requested review of an Order that affirmed an Order on Reconsideration that awarded her 6% whole person impairment for right shoulder and low back conditions. She argued that, under *Schleiss v.* SAIF, 354 Or 637 (2013), her impairment should not have been apportioned. She took the position that, for apportionment to be conducted the employer, first, had to accept a combined condition and, then, deny it prior to claim closure.



Dr. Kitchel examined claimant on behalf of SAIF. He opined that claimant's work injury combined with preexisting arthritis in, both, her shoulder and her thoracolumbar spine to cause and prolong disability. He opined, however, that in June of 2013, about six months post-injury, claimant's combined condition no longer constituted the major contributing cause of her disability or need for treatment. He apportioned 60% of claimant's shoulder impairment to her work injury and 40% to preexisting arthritis. Regarding his lumbar spine findings, he attributed 20% of claimant's impairment to her work injury and 80% to preexisting arthritis. A subsequent Notice of Closure apportioned the right shoulder and lumbar spine impairment in accordance with Dr. Kitchel's findings and apportionment. (Claimant's attending physician had concurred with the IME report).

An Order on Reconsideration affirmed the Notice of Closure in all respects, and claimant requested a hearing. ALJ Crumme' concluded that the ARU did not err in apportioning claimant's permanent impairment findings. The ALJ reasoned that claimant's right shoulder acromioclavicular osteoarthritis and thoracolumbar degenerative disc qualified as "preexisting conditions" under ORS 656.005(24)(a)(A) and, therefore, *Schleiss* did not prohibit "apportionment." Claimant appealed the decision to the Board.

Before the Board, claimant's attorney argued that, in order to apply the "apportionment" rule in OAR 436-035-0013(1), SAIF was required to accept and deny a "combined condition" before claim closure. Because SAIF did not do that, claimant contended that the apportionment rule did not apply.

NOTE: Just because your IME physician finds evidence of a combined condition, does not mean you have to accept one (unless you are explicitly asked to).

The Board observed, as follows:

"A carrier is authorized to accept a "combined condition" before claim closure. *See* ORS 656.005(7)(a)(B); ORS 656.262(6)(b), (7)(a). If a carrier does so, and the accepted injury is no longer the major contributing cause of the combined condition, it must issue a "pre-closure" denial of the accepted combined condition

or the entire combined condition is rated. ORS 656.262(7)(b); *SAIF v. Belden*, 155 Or App 568, 576-77 (1998), *rev den*, 328 Or 330 (1999)."

In this case, SAIF did not accept a combined condition, so it did not need to issue a pre-closure combined condition denial. The Board found that the preexisting arthritis in claimant's shoulder and low back satisfied the statutory definition of "preexisting condition" found at ORS 656.005(24) and that claimant's impairment could, therefore, be apportioned. **Affirmed (Lanning and Weddell, dissenting, so it will probably be appealed to the Court of Appeals)**

Marcelino Camacho, 67 Van Natta 1012 (2015) (On Remand)

The Court of Appeals reversed the Board's Order on Review, *Marcelino Comacho*, 64 Van Natta 1274 (2012) that upheld SAIF's denial of claimant's injury claim for low back and thoracic strains. The Court determined that the Board misapplied ORS 656.310(2) in that it failed to give sufficient probative weight to claimant's statements to his treating physicians about the mechanism of his injury.

On February 15, 2011, claimant sought treatment for back pain. The examining physician recorded that claimant had felt a pop and the onset of low back pain when he lifted a pallet from a manual forklift.

Subsequently, on March 24, 2011, claimant completed an 827 form indicating that he was injured while pulling a pallet jack with a 50-pound load, backwards.

At the hearing, no testimony was offered. The parties relied upon the record. The ALJ, citing *Zurita v. Canby Nursery*, 115 Or App 330 (1992), *rev den*, 315 Or 443 (1993), reasoned that the documentary record alone did not carry claimant's burden of proof. Consequently, the ALJ upheld SAIF's denial.

In *Zurita*, the Court of Appeals differentiated between hearsay statements in medical reports that concern medical matters for purposes of diagnosis or treatment, and hearsay statements in medical reports regarding other circumstances of an injury, which may be considered and evaluated under the circumstances of the case.

In this case, the Court of Appeals explained that claimant's statements to his medical providers about the mechanism of his injury were entitled to *prima facie* weight under ORS 656.310(2), at least to the extent that such statements did not contradict each other. The court glossed over the blatant differences in the mechanism of injury described by claimant and reasoned that claimant presented *prima facie* evidence that his symptoms arose while he was "moving" pallets using a pallet jack. (It made no difference to the Court, that claimant was either "lifting" or "pulling" when he felt something in his back).

Unfortunately, the Board determined, after reassessing the documentary evidence, that it made no difference, whether claimant was lifting or pulling when he was injured. **Reversed (Assessed fee: $13,740)**