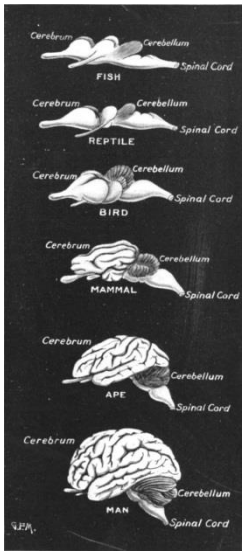
Dr. Garber's
DISPENSARY OF COUGH SYRUP, BUFFALO LOTION, PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE & WORKERS' COMPENSATION CASES



Bradley G. Garber's Board Case Update: 07/22/2015

Charles L. Chase, 67 Van Natta 11205 (2015)
(ALJ Fulsher)

Claimant requested review of an Order that affirmed an Order on Reconsideration that awarded him 11% whole person impairment and 27% work disability for a left ankle condition. The main issue was whether claimant's base functional capacity (BFC) should be classified as "Very Heavy."

The ALJ affirmed the Order on Reconsideration's work disability award, in which the Appellate Review Unit (ARU) determined claimant's BFC to be "Medium." The ALJ noted that the ARU had considered claimant's sworn affidavit, but that it

relied on a regular job description submitted by the employer and the strength categories found in the Dictionary of Occupational Titles (DOT). Claimant was a cook.

On review, claimant argued, of course, that his affidavit trumped the employer's job description and the DOT codes.

OAR 436-035-0012(9) provides, in pertinent part, as follows:

"(9) Base functional capacity (BFC) is established by using the following classifications: sedentary (S), light (L), medium (M), heavy (H), and very heavy (VH) as defined in section (8) of this rule. *The strength classifications are found in the Dictionary of Occupational Titles (DOT).* Apply the subsection in this section that most accurately describes the worker's base functional capacity.

* * * * *

"(C) A job description that *the parties agree* is an accurate representation of the physical requirements, as well as the tasks and duties, of the worker's regular job-at-injury." (emphasis added).

In the five years before his December 17, 2011 compensable injury, claimant worked as a "Line Cook." Claimant submitted a job description for a Line Cook that was generated by his employer. The description, however, did not include any lifting/strength requirements. In an attached affidavit, claimant attested that the job description did not mention some particular job duties such as lifting full kegs of beer weighing over 100 pounds, and tubs of dirty dishes/fries/pickles weighing over 50 pounds.

The Board observed, "The definitive issue is what role claimant's affidavit has in establishing his BFC." The Board continued, "Contrary to claimant's contention, while we consider the record as a whole (including the job duties and physical demands of the relevant job), OAR 436-035-0012(9) requires that the strength category for the at-injury job be determine by the category assigned in the DOT, a specific job analysis, *or a job description agreed upon by the parties.*" (emphasis

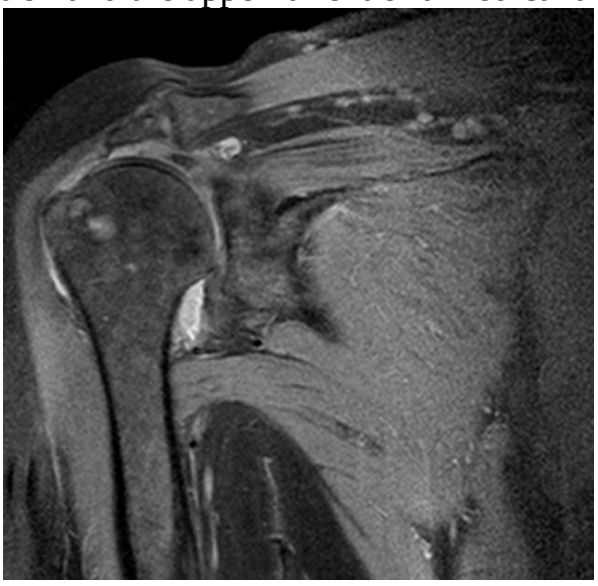
added). The Board noted that, while claimant's affidavit was probative of which DOT code most accurately described his at-injury job, his affidavit could not be relied upon to determine that no DOT description was accurate and that, therefore, his description must be relied upon. **Affirmed**

NOTE: So, while a claimant can introduce an affidavit that provides a dramatically different description of his/her work activities than those in the closest DOT description, if there is no agreement between the parties that the claimant's description is accurate, the closest DOT description will rule.

Stuart C. Yekel, 67 Van Natta 1279 (2015)
(ALJ Otto)

SAIF requested review of an Opinion & Order that awarded claimant 15 percent whole person impairment for his left shoulder condition, whereas the Order on Reconsideration awarded no permanent impairment.

Claimant's claim was initially accepted for the condition of **left shoulder strain**. It was later modified to include a **high grade long head biceps tear**. SAIF issued a Notice of Closure that did not award any permanent impairment. Claimant requested reconsideration and the appointment of a medical arbiter.



In the midst of the reconsideration process, claimant's attending physician, Dr. Bollom opined that his patient had developed an impingement syndrome as a direct consequence of his industrial injury which resulted in a need for surgery to perform a distal clavicle and acromion resection. Dr. Bollom (presumably at the urging of

claimant's attorney) concluded that claimant had a chronic condition that significantly limited his ability to repetitively use his left shoulder.

The medical arbiter, Dr. Brenneke, opined that claimant was not significantly limited in the repetitive use of his left shoulder due to the accepted conditions or medical sequelae, and that the need for surgery was due to unrelated subacromial impingement and degenerative joint disease. Subsequently, an Order on Reconsideration affirmed the Notice of Closure. Claimant requested a hearing.

In awarding permanent impairment, the ALJ appled *Brown v. SAIF*, 262 Or App 640 (2014), *rev allowed*, 356 Or 397 (2014), to the rating of claimant's permanent disability attributable to his compensable left shoulder injury. Noting that the medical arbiter opined that claimant was not "significantly limited" in the repetitive use of his shoulder "due to the accepted condition or direct medical sequelae," the ALJ reasoned that the arbiter had not applied the proper legal analysis. Because Dr. Bollom eventually opined that claimant's "accepted injury" significantly limited claimant's ability to repetitively use his left shoulder, the ALJ relied on that finding and awarded 5% impairment for a chronic condition impairment.

Furthermore, because Dr. Bollom had opined that claimant had developed an impingement syndrome as a result of his injury and that the impingement resulted in the need for surgery, the ALJ awarded claimant impairment for the impingement and the surgery, even though impingement was not an accepted condition.

On review, SAIF contended that the Court's holding, in *Brown*, is limited to the phrase of "otherwise compensable injury" as used in ORS 656.262(6)(c), ORS 656.266(2)(a), and ORS 656.005(7)(a)(B). Because the present dispute involved an evaluation of permanent disability, n ot compensability, SAIF asserted that impairment should be based on finding caused by the "accepted compensable

condition and direct medical sequelae." See OAR 436-035-0007(1). Consequently, SAIF argued that *Brown* does not apply in the context of determining impairment. The Board agreed. After examining the rules and statutes specifically related to the assessment of impairment, the Board had the following to say:

"The above statutory and administrative authority make clear that impairment is awarded based on the accepted conditions and the direct medical sequelae of the accepted conditions and provides a process for addressing disputes over the scope of the accepted conditions when the claim is closed. Were we to apply the *Brown* rationale, with its emphasis on the "work-related injury incident," in the context of rating permanent disability, it would require us to disregard the "accepted condition-based" focus of the preceding statutes. Moreover, it would be inconsistent with the aforementioned statutes that require application of the disability standards. Under these circumstances, we decline to extend the *Brown* holding outside its context of compensability disputes arising under ORS 656.262(6)(c), ORS 656.266(2)(a), and ORS 656.005(7)(a)(B)." Reversed

COMMENT: This, of course, is a very good decision that prevents conditions being rated when they are not part of the accepted claim. This was a backdoor attempt to have non-claimed conditions to be found, essentially, compensable without the need for a claim.

If you have received recent Orders on Reconsideration that have declared your Notice of Closure to be premature because the attending physician only addressed "conditions" instead of the "work-related injury incident" (I just received one of these), file a Motion to Abate and Reconsider with the ARU, if you are within your appeal window. See OAR 436-030-0007