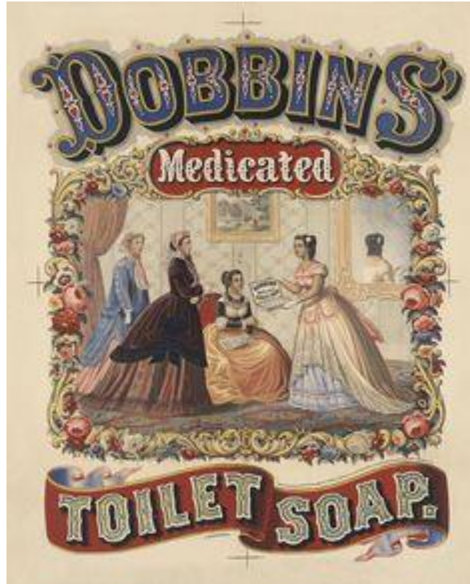
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 11/6/2015

Jorge O. Benites, 67 Van Natta 1886 (2015)
(ALJ McWilliams)

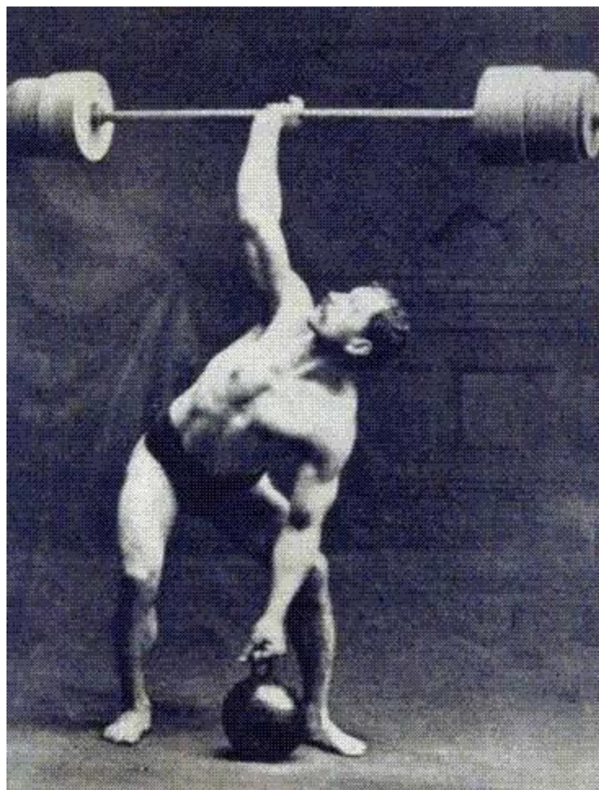
The employer requested review of an Opinion & Order that awarded Claimant 37% work disability, when the Order on Reconsideration had awarded nothing for work disability.

Claimant, a truck driver, compensably injured his left shoulder. His claim for benefits was accepted for the conditions of left shoulder rotator cuff strain, rotator cuff tear and partial biceps tear.

On April 14, 2014, Dr. Butters, attending surgeon, released Claimant to return to work with a 20-pound overhead lifting restriction. Subsequently, Dr. Butters signed the employer's job analysis, indicating that Claimant could perform the

physical activities listed. Those activities included loading and unloading cargo weighing up to 50 pounds.

The claim was closed by Notice of Closure dated August 1, 2014. Claimant was awarded 10% whole person impairment, but no work disability award.



Claimant's attorney, then, got in touch with Dr. Butters and asked him to assume that "unloading" cargo entailed occasional lifting of more than 50 pounds and more than 20 pounds, overhead. Dr. Butters decided that Claimant could not, under those circumstances, return to his normal job.

Subsequently, the employer's workers' compensation coordinator submitted an affidavit stating that loading and unloading did not exceed the 20-pound overhead lifting restriction imposed by Dr. Butters.

The ARU, relying on Dr. Butters' previous release to regular work, affirmed the Notice of Closure and declined to grant Claimant a work disability award. Claimant requested a hearing.

The ALJ, relying on the post-closure attorney-drafted report from Dr. Butters, along with an affidavit submitted by Claimant, concluded that Claimant had not been released to "regular work." She believed that lifting in excess of 20-pounds, overhead, was determinative.

On review, the employer argued that claimant was release to his job-at-injury and, therefore, was not entitled to a work disability award. The Board agreed, observing, as follows:

"Whether claimant is entitled to work disability depends on whether he returned to regular work or was released to regular work by his attending physician. If either of these event occurred, claimant is not entitled to work disability. ORS 656.214(2)(a); ORS 656.726(4)(f)(E). 'Regular work' means 'the job the worker

held at injury.' ORS 656.214(1)(d); OAR 436-035-0005(14). It includes tasks that are performed on a steady or customary basis, even if those tasks are not part of the worker's job description or otherwise explicitly required. *Thrifty Payless, Inc. v. Cole*, 247 Or App 232, 239 (2011). As the party challenging the Order on Reconsideration, claimant has the burden establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000)."

In April, 2014, Dr. Butters gave Claimant a "Full Release" to return to driving, except for a 20-pound restriction on overhead lifting. In soliciting Dr. Butter's opinion that Claimant's work injury precluded "unloading," Claimant's attorney asked him to **assume** that "unloading" would, on some occasions, require that Claimant lift more than 20 pounds, over his head. The Board found that the record did not support that assumption. The job analysis, signed by Dr. Butters, only mentioned "lifting" and "carrying" up to 50 pounds. Nothing was said about overhead lifting. Because Dr. Butters release Claimant to the job described in the JA, the Board reversed the work disability award. **Reversed**

Chris E. Pardue, 67 Van Natta 1960 (2015)
(ALJ Mills)

SAIF appealed an Opinion & Order that set aside its denial of Claimant's medical services claim, upheld its denial of Claimant's "new injury" claim, and awarded Claimant's attorney a $6,000 fee.

This was a responsibility case involving two car dealerships, both covered by SAIF. The only reason I report this case is because of the attorney fee issue.

The ALJ awarded an attorney fee of $6,000, pursuant to ORS 656.307(5). The ALJ determined that the attorney fee was available under ORS 656.307(5) because a ".307" Order did not issue due to a "technicality." On review, SAIF, on behalf of one of its clients, contended that the attorney fee assessment was governed by ORS 656.308(2)(d) because a ".307" order, from WCD, was never issued. The Board agreed, observing, as follows:

"It is undisputed that WCD did not issue an order designating a paying agent under ORS 656.307. In the absence of a WCD '.307' order, the attorney fee provision of ORS 656.307(5) does not apply. *See Kevin D. Cierniak*, 58 Van Natta 2991, 2996 (2006)(because the carrier was not a party to the '.307' order, it was not subject to the '.307' order and therefore, ORS 656.307(5) did not govern the attorney fee award in regard to that carrier); *David W. Denton*, 43 Van Natta 1033, 1035, *recons*, 43 Van Natta 1221 (1991)(Board cannot 'deem' any insurer/employer joined under and subject to a '.307' order, absent the Director's designation)."

The Board, instead, applied ORS 656.308(2)(d), which provides that, absent a showing of extraordinary circumstances, a reasonable fee awarded for an attorney's appearance and active and meaningful participation in finally prevailing against a responsibility denial shall not exceed the "soft cap" of $2,500. *See Liberty Northwest Ins. Corp. v. Gordineeer*, 150 Or App 136 (1997)(maximum award under former ORS 656.308(2)(d) for prevailing over a responsibility denial was $1,000 for all levels of review, absent a showing of extraordinary circumstances). There was no showing of "extraordinary circumstances" in this case. **Attorney fee reduced to $2,885**

"Reasonable" attorney fees are at issue in several proposed amendments to the Board's attorney fee rules. The rules are being formulated in response to HB 2764. The Board is seeking written comment or testimony.

Natalia Gonzalez-Perez, 67 Van Natta 1981 (2015) (ALJ Crumme')

Claimant requested review of that portion of the ALJ's Order that upheld SAIF's denial of her occupational disease claim for an abdominal incisional hernia condition.

In January 2012, Claimant had a non-work-related intra-abdominal gall bladder surgery. She ultimately returned to her regular work, lifting heavy items. Over time, however, she began having discomfort and intermittent pain. By October 2012, she noticed a small "ball" in her abdomen. She believed it was due to her surgery.

In June 2013, Claimant reported to her supervisor that she may have been injured at work. She sought medical care and, in July 2013, a "Dr. Polidore," diagnosed a large abdominal incisional hernia. Claimant filed a claim. SAIF denied compensability in December 2013.

Claimant relied on opinions from Dr. Polidore; SAIF relied on opinions from a "Dr. Bernardo," to support its denial. Dr. Bernardo opined that Claimant's previous surgery, rather than her employment activities, was the major contributing cause of her condition. He observed that Claimant's work activities were "not sufficiently strenuous to have caused a hernia without her weakened abdominal wall due to the 2012 surgical incision." In other words, Claimant was "predisposed" to develop her hernia.

The Board discussed the predisposition issue, as follows:

"For occupational disease cases, predispositions and susceptibilities do not constitute 'causes' contributing to the disease, condition or need for treatment/disability. *See Murdoch v. SAIF*, 223 Or App 144, 146 (2008)(applying the injury susceptibility standard of ORS 656.005(24)(c) to occupational diseases); *Multnomah County v. Obie*, 207 Or App 482, 487-89 (2006); *Liberty Northwest Ins. Corp. v. Spurgeon*, 109 Or App 566, 569 (1992)(all *causes* of a disease, as opposed to mere susceptibilities or predispositions, must be considered in determining which, if any, was the major contributing cause). Whether a factual sequence of events fits within the statutory exception to contributory causation in ORS 656.005(24)(c) is a legal question. *Murdoch*, 223 Or App at 148."

The Board went on to analyze whether Claimant's previous surgical incision was a "cause" to be included in an occupational disease analysis or excluded as a mere susceptibility. The Board relied upon the Oregon Court of Appeals decision, in *Corkum v. Bi-Mart Corp.*, 271 Or App 411 (2015) in finding that Claimant's 2012

surgical incision was just a condition that made Claimant "susceptible" to the development of her hernia, but that it did not independently contribute to disability or need for treatment. They concluded, "Therefore, we do not consider the previous surgical incision to be a 'cause' in the evaluation of claimant's occupational disease, or a statutory preexisting condition." **Reversed**