

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



Bradley G. Garber's Board Case Update: 01/22/2013

**Christian R. Lundblad, 65 Van Natta 28 (2013)
(ALJ Sencer)**

Claimant requested review of an Opinion & Order that affirmed an Order on Reconsideration that awarded no work disability. Subsequent to publication of Judge Sencer's order, the Director issued an order setting aside SAIF's termination of claimant's vocational program and reinstating claimant's return-to-work plan and eligibility for vocational assistance. Claimant's counsel asked the Board to take administrative notice of the Director's order in its review. The Board declined to do so.

ORS 656.283(6) provides, in part, "Evidence on an issue regarding a notice of closure that was not submitted at the reconsideration required by ORS 656.268 is not admissible at hearing, and issues that were not raised by a party to the reconsideration may not be raised at hearing unless the issue arises out of the reconsideration order itself."

Obviously, the Director's order could not have been submitted to the Department during the reconsideration process. The Board cited a number of cases in which it refused to take administrative notice of "post-reconsideration" evidence that was not in existence or submitted at the reconsideration proceeding. *See Willie L.*

Frison, 63 Van Natta 1331 (2011); *Richard D. Chick*, 58 Van Natta 91 (2006); *Crecencie Pavon-Valdez*, 56 Van Natta 4020 n 2 (2004); *Salvador Guevara-Morales*, 56 Van Natta 1427 (2000).

Ultimately, the Board found that there would be no harm and no foul by affirming claim closure, because the Director's order had the practical effect of reopening the claim, anyway.

**Dortha Campo, 65 Van Natta 78 (2013)
(ALJ Fisher)**

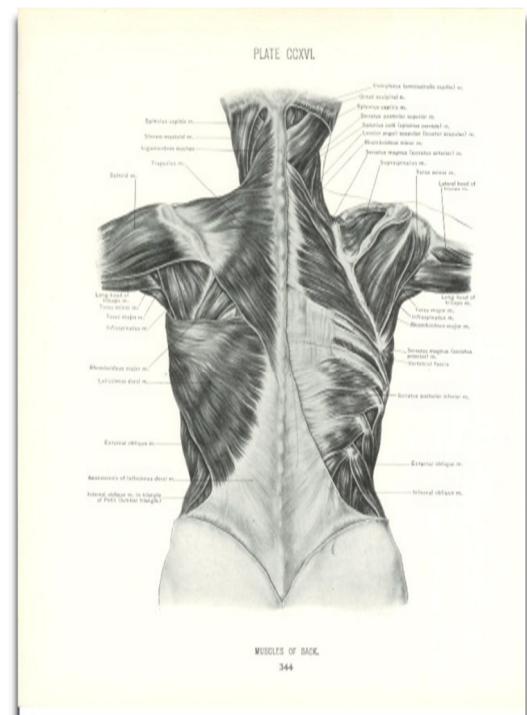
Employer appealed an Opinion & Order that set aside its denial of a new/omitted condition claim for a "combined spondylosis" condition. Because claimant raised a combined condition as a new/omitted condition, it was her burden, initially, to prove the existence of a combined condition.

Claimant had made a claim for a "lumbar strain combined with spondylosis at L4-5 and L5-S1" and "spondylosis as a combined condition." The ALJ found that the medical evidence was not sufficient to prove the existence of a strain combined with spondylosis. The medical evidence established that claimant suffered from a preexisting spondylosis and that it did not combine with her strain. The ALJ, however, relied on an opinion by the attending physician in finding that "spondylosis as a combined condition" was something separate and distinct from the combined condition of strain and spondylosis. The Board felt that the combined condition of stain and spondylosis was the same thing as "spondylosis as a combined condition." Duh! **Reversed**

Note — Claimant never did clarify what her spondylosis combined with.

**Craig A. Elmore, 65 Van Natta 81 (2013)
(ALJ Smith)**

The ALJ awarded a penalty-related attorney fee of \$3,000, pursuant to ORS 656.262(11)(a), for alleged unreasonable and untimely acceptance of claimant's occupational disease claim. Employer appealed, arguing that the ALJ exceeded the scope of his authority because the penalty issue was not raised as an issue at hearing.



The Board noted, “Issues other than those that the parties agreed to litigate are beyond the scope of issues to be decided by an ALJ.” See *Eleazar Andrade*, 60 Van Natta 3156 (2008); *Robin A. Rohrbacker*, 53 Van Natta 51 (2001). In this case, claimant’s attorney asserted that claimant was entitled to a penalty and assessed fee because of “unreasonable claims processing associated with [a] November 15th denial.” It turns out that the employer issued a denial of a claim that had not been filed, so it was null and void. The ALJ did not award a penalty and fee for that issue, but decided to award a penalty and fee for an alleged unreasonable delay in accepting a claim that had been made. This issue, however, was never raised by claimant. **Attorney fee vacated**

