Dr. Garber's

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

Bradley G. Garber's Board Case Update: 02/07/2013

Roger D. Curtis, 65 Van Natta 171 (2013)
(ALJ Kekauoha)

Claimant appealed an Order that declined to award him temporary disability benefits and declined to award penalties and fees for alleged unreasonable claim processing.

Claimant, a carpenter, was assigned by a temporary staffing agency to work at a cabinet shop. While working for the cabinet shop, he developed and infection in some of his right fingers. He reported the problem to his employer on October 26, 2011. On the following day, he underwent surgery for the infection and was taken off work through November 10, 2011. On November 3, 2011, he went through drug testing and his urine sample turned up positive for cocaine. When he found out about the test results he called up his employer and assured the employer that he had never used cocaine. He attributed the positive test results to his ingestion of a "coca leaf-related" tea. (Yeah, sure!) His employment was terminated in comformance with the employer's "zero tolerance" drug policy. Claimant was not officially informed of the termination of his employment.

Claimant's doctor released him to modified duty work on November 7, 2011. The employer stuff the work release into claimant's personnel file and did not inform him that the modified duty work would have been available "but for" his November 3 termination.

On December 19, 2011, SAIF accepted claimant's claim for "right hand cellulitis and MRSA felon of the second right finger." Claimant received temporary total disability benefits from October 29, 2011 through November 8, 2011. He filed a request for hearing, alleging that he was entitled to time loss benefits from November 9, 2011 through December 5, 2011 (the date he was released to regular duty work). The ALJ found that, but for his termination for violation of work rules, claimant would have been able to return to modified work and that he was not, therefore, entitled to time loss benefits from November 9, 2011 through December 5, 2011. Claimant tried to argue that, because he was not notified of the termination of his employment, he was never "terminated."

The Board agreed with claimant's argument as follows:

"It is undisputed that claimant received no notice from the employer concerning a termination. In addition, he testified that 'Chad' (who was apparently the employer's recruiter) told him that he was 'laid off.' (Tr. 9). Admittedly, Mr. Ely's November 9 'memo to file,' states that light duty work would have been available to claimant 'had he not been terminated for violation of work place rules or other disciplinary reasons as of 11/03/11.' (Ex. 12). However, Mr. Ely clarified that he was 'under the impression' that claimant 'was considered terminated.' (Tr. 21-22). Finally, Mr. Ely did not state that he talked to 'Chad' or any other employee, abut whether claimant was actually terminated.

"Under such circumstances, we are not persuaded that claimant's employment was 'terminated.' Because he was not terminated, ORS 656.325(5)(b) is not applicable. Thus, the employer was not authorized to convert claimant's TTD benefits to TPD benefits."

Similarly, claimant's TTD benefits could not be converted into TPD benefits under ORS 656.268(4)(c), because the modified job approved by claimant's attending physician was never offered to claimant. **Reversed, in part, and claimant awarded time loss from November 9 through December 5**

MORAL - If you fire someone, let them know about it.

Howard E. Benjamin, 65 Van Natta 215 (2013) (ALJ Reichers)

Claimant requested review of an Order that dismissed his request for hearing due to untimely filing. Claimant challenged the insurer's calculation of the TTD rate, going back to November 6, 2006. He filed a request for hearing on February 3, 2011. ORS 656.319(6) provides, "A hearing for failure to process or an allegation that the claim was processed incorrectly shall not be granted unless the request for hearing is filed within two years after the alleged action or inaction occurred." The ALJ found that the statute precluded litigation over processing actions or inactions that occurred over two years before the request for hearing. The Board agreed, but reinstated the hearing request to allow claimant to put on evidence of claim processing within the two year period prior to the request for hearing (February 3, 2009 through February 3, 2011). **Affirmed, in part; vacated, in part**

Kimberly A. Summerhays-Morgan, 65 Van Natta 223 (2013) (ALJ Donnelly)

The self-insured employer appealed an Order that set aside its occupational disease claim denial. In setting aside the denial, the ALJ relied, in part, on a "post-hearing" report from Dr. Puziss. The employer argued that Dr. Puziss's report should not have been admitted as evidence because it exceeded the scope of continuance.

Hearing was on November 17, 2011. The ALJ continued the hearing (as very often happens) to allow claimant to obtain a rebuttal report in response to medical reports submitted by the employer. On March 1, 2012, claimant submitted a January 30, 2012 medical report from Dr. Puziss based on his examination of

claimant. Dr. Puziss had not previously submitted any medical evidence. In other words, he was a hired gun.

The employer objected to the admission of Dr. Puziss's medical report, claiming that the report exceeded the scope of the continuance. The ALJ allowed the report in, but granted the employer the right to cross-examine Dr. Puziss. The employer decided to not do that.

On review, the employer argued that it was an abuse of discretion for the ALJ to admit Dr. Puziss's report because it was not a "rebuttal" report. In admitting the report, the ALJ noted that no restriction was place upon claimant as to what physician could provide a rebuttal report, or on the form such a rebuttal might take. Portions of Dr. Puziss's report directly responded to employer's medical evidence. The Board found no abuse of discretion. **Affirmed**

Note: This type of tactic is used quite often by claimants' counsel and Dr. Puziss is very often the hidden weapon. There is seldom any limitation on where a claimant may go to obtain a rebuttal report. There is really no requirement that the rebuttal come from a medical expert who has already offered evidence in the case.