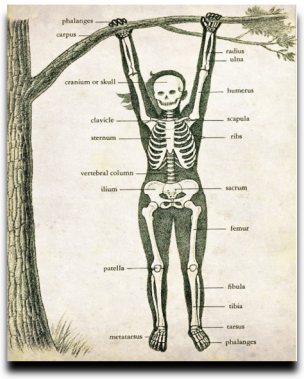
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 03/12/2013

Robert Majors, 65 Van Natta 391 (2013)
(ALJ Mills)

The self-insured employer requested review of an Opinion & Order that set aside its denial of Claimant's left shoulder injury claim. The claim was denied because of late filing.

Claimant is a delivery driver. On about September 16, 2011, he injured his left shoulder while pulling a stuck trailer pin on his delivery truck. He did not report the injury.

On January 5, 2012, Claimant slipped on some ice and grabbed the truck door to catch his fall. He reinjured his shoulder. On that day, he told the office manager about his injury. He did not tell his direct supervisor, however, about his injury.

On February 27 or 28, Claimant completed a work injury report and told his direct supervisor that he injured his left shoulder on September 16, 2011. He did not tell her about the January 5 injury.

Claimant filed a claim for his September 16 injury. Compensability of that claim was denied on timeliness grounds. At the hearing, Claimant raised a *de facto* denial issue with regard to his second injury in January.

After hearing, the ALJ upheld the timeliness denial on the September injury, but set aside the *de facto* denial of the January injury, finding that Claimant's reporting of his injury to the office manager was sufficient to apprise the employer of that injury in a timely manner.

In reversing the ALJ's Opinion & Order, the Board observed, as follows:

"As a preliminary matter, we note that the secretary/office manager's knowledge of the 2012 injury (on the day of the injury) is not imputed to the employer, because the record establishes that this person did not have supervisory authority over claimant and claimant knew that he was supposed to report an injury to the warehouse manager or his 'boss.' *See Safeway Stores, Inc. v. Angus,* 200 Or App 94 (2005)(a supervisor's knowledge of an injury may be imputed to the employer); *David J. Stout, Jr.,* 63 Van Natta 620 (2011)(employee's knowledge of injury not imputed to employer when that person was neither the claimant's supervisor, nor acting as such)."

The Board found that the office manager's knowledge of Claimant's January 5 injury could not be imputed to the employer because she did not have any supervisory authority over Claimant. **Reversed, with regard to the de facto denial; otherwise affirmed.**

Juan P. Saavedra-Hernandez, 65 Van Natta 469 (2013)
(ALJ Ogawa)

In this case, Claimant requested review of an Opinion & Order that upheld the employer's compensability denial and declined to award penalties and fees for an alleged discovery violation. The main issue, on appeal, was whether the employer should be penalized for failing to disclose information (a surveillance video) which it believed could be used for

impeachment. The Board found that the judge did not err in declining to assess a penalty and penalty-related fee. It observed, as follows:

"Evidence need not be relevant solely for impeachment purposes. *Marylin L. Hunt,* 49 Van Natta 1456 (1997). But if it is withheld, it may be used only for impeachment purposes. Also, the determination of whether evidence has impeachment value comes not at the hearing, but rather at the time to duty to provide discovery arises. *Herbert L. Lockett,* 50 Van Natta 154, 156 (1998)."

The Board reviewed the surveillance video and determined that it really did not reveal much of evidentiary value. Nevertheless, it concluded that it was not unreasonable for the employer to consider the evidence as impeaching, at the time of its duty to provide discovery. **Affirmed**

Beware: Even though, at the time the duty to provide discovery arises, you might think something can be used as impeachment, the duty to provide discovery is ongoing and there may come a time when it is no longer reasonable to think that the withheld evidence constitutes impeachment.

Michael D. Razavi, 65 Van Natta 506 (2013) (ALJ Crumme')

SAIF appealed an Opinion & Order that set aside its denial of Claimant's injury claim. Claimant injured himself while walking down a public sidewalk, on the way to his car, to retrieve his personal computer that had some work-related information on it. SAIF alleged that he was not on a "personal errand" at the direction of his employer or in furtherance of his employer's business (the "personal errand" exception is part of the "going and coming" rule). Instead, SAIF argued that Claimant was engaged in a personal mission beyond the scope of his employment.

Claimant responded that the "going and coming" rule (or, as I like to call it, the

"coming and going" rule) did not apply because he was neither going to work, or coming from work, and was at all relevant times acting within the course and scope of his employment.

Claimant, a graduate student at the employer's Student Health Services department, worked in the substance abuse prevention program. His duties included teaching classes and running a diversion program for people charged with being a minor in possession or possession of a controlled substance. Because his work was done in locations other than in an office on the employer's premises, he could come and go as needed, without clocking in or out. With his supervisor's knowledge, he took his work home to complete his duties. He used both his office computer and his personal laptop.

On the date of injury, Claimant left his office to walk down the street to his apartment, to retrieve his laptop out of his car. He was injured when he slipped on wet leaves and fell on a public sidewalk. The Board found, as follows:

"Under these circumstances, we find that claimant was injured while on duty and walking to get work-related items out of his car. The injury occurred during his work hours. He was not on an unpaid break. Although claimant was not on the employer's premises when the injury occurred, he was in a place where the employer could have reasonable expected him to be." **Affirmed**

Query: Does the "in the course of" element of the definition of a work-related injury boil down to a question as to whether the employer is deemed to be reasonably apprised of the location of the injury? If an employee is injured at home and the employer knows that the employee is working at home, the burden will be on the employer to prove that the injury was **not** incurred in the course of a business-related activity. This is an impossible burden. Maybe Yahoo's CEO is on to something.