Dr. Garber's

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

Bradley G. Garber's Board Case Update: 05/5/2014

Vernon L. Bowman, 66 Van Natta 681 (2014) (ALJ Marshall)

SAIF issued a "pre-hearing" rescission of its compensability denial. Claimant's attorney (Rob Guarrasi) wanted a $25,000 fee. After SAIF's rescission, the parties could not agree on a proper attorney fee, so the attorney fee issue went to hearing. Judge Marshall awarded claimant's attorney a fee of $6,000. So, Mr. Guarrasi requested review.

In reviewing an attorney fee, the Board considers factors set out in OAR 438-015-0010(4). Those factors are: (1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorney(s); (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; and (8) the assertion of frivolous issues or defenses.

The Board focused on the “time devoted to the case” factor. Claimant’s attorney presented the ALJ with a “Statement of Services” in which he itemized 36 hours spent on the case. Fourteen of those hours were spent preparing for hearing on the attorney fee issue, after SAIF had rescinded its denial.

A claimant’s attorney is entitle to a reasonable fee for being “instrumental in obtaining a rescission of the denial prior to a decision.” ORS 656.386(1). But, in determining the value of the attorney’s services, only those services rendered **before** the rescission are considered. *Amador Mendez*, 44 Van Natta 736 (1992); *Steven P. Stewart*, 52 Van Natta 1326 (2000), *aff’d*, 178 Or App 145 (2001).

After considering other factors set out in OAR 438-015-0010(4), the Board affirmed the $6,000 attorney fee. **Affirmed**

John S. McKean, 66 Van Natta 711 (2014)
(ALJ Donnelly)

At issue, on review was whether the employer had met its burden of establishing that the “otherwise compensable condition” (a lumbar strain) had ceased to be the major contributing cause of the disability/need for treatment for the previously-accepted condition of low back strain combined with preexisting noncompensable lumbar spondylosis. On review, claimant asserted that the “otherwise compensable injury” should, first, be analyzed as the “work event,” followed by a determination as to whether that “event” had ceased to be the major contributing cause of the disability/need for treatment of the combined condition. In other words, claimant attempted to change the focus from the medically assessed **injury** to the non-medical injury **event**.

Claimant’s counsel conceded that this interpretation did not comport with established court and Board precedent. The Board agreed. **Affirmed**

Rebecca L. Nehring, 66 Van Natta 734 (2014)
(ALJ Fulsher)

Another dog-related injury case:

Claimant filed a claim for a head injury. The employer denied it on the ground that it did not arise out of and in the course of employment. The Judge upheld the employer's denial.

Here are the operative facts: Claimant, who is an on-site property manager in a mobile home park, took her dog out for a pee. While the dog was peeing, a gust of wind came along and blew claimant over. She hit her head on a railroad tie that the employer used as part of the landscaping of the trailer park.

The ALJ found claimant's head injury to be non-compensable. On review, claimant alleged that she was engaged in a work-related activity (watching her dog pee, apparently), and that her head injury was, therefore, employment related. The Board agreed with her.

On review, the employer argued that claimant's activity, at the time of her injury, was a "recreational" or "social" activity, engaged in or performed *primarily* for her personal pleasure**. [THINK ABOUT THIS --- wasn't it the dog that was getting some pleasure?]** Not surprisingly, the Board did not think ORS 656.005(7)(b)(B) applied to the facts. Instead, it addressed the AOE/COE issue.

Here's the crux of the Board's analysis:

"Here, we find that claimant's injury resulted from a risk of her work environment because she was outside during her regular work hours for the purpose of inspecting storm damage [she was going to do that after her dog was done peeing], which fulfilled her obligations as property manager to report emergency maintenance, make

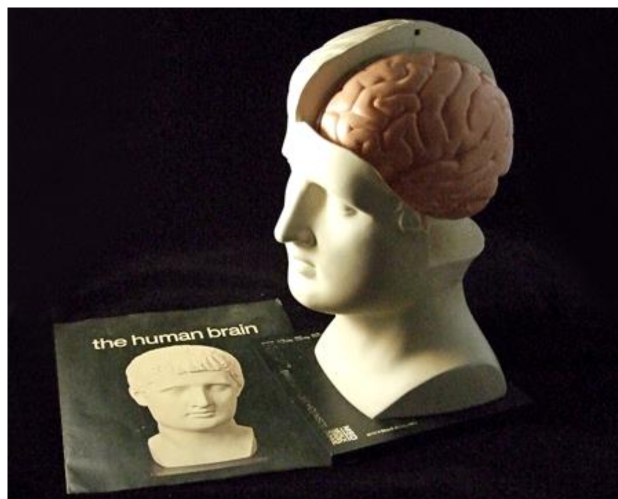
recommendations or physical repairs, replacements, and/or improvements, and to perform routine inspections of the grounds. Although the employer may not have had control over claimant's dog or the wind, it had control over whether she worked away from her home or outside in the elements, and '[i]f as a condition of employment, the employer exposes workers to risks outside of the employer's control, injuries resulting from the risks can be compensable." Because claimant testified that she was going to call her employer to report storm damage on the premises, after her dog peed, the Board determined that she was outside, at that particular time, in order to "prepare" for her upcoming phone call with her supervisor. In other words, her dog's potty stop was preparing claimant for a phone call. **Reversed**

[CAVEAT: Don't allow your off-premises workers to own dogs]

Kevinia L. Frazier, 66 Van Natta 761 (2014) (On Remand)

This one came back to the Board, on remand from the Court of Appeals. The ALJ had set aside the employer's AOE/COE denial, and the Board had affirmed. The Court of Appeals, however, determined that the "going and coming" rule applied to the compensability analysis, and remanded the matter to the Board for application of the rule to the facts.

As with most of these "going and coming" rule cases, the facts are critical. Claimant was employed at a call center and regularly worked an 8-hour shift, with paid morning and afternoon breaks, as well as a lunch break. She was not allowed to stay in the work area during breaks. She could leave the call center to run errands or smoke cigarettes or get coffee or whatever…. The employer provided two on-site break rooms, complete with junk food dispensers.



The call center was located in a "strip mall" with multiple other businesses. When exiting the center, there was a public sidewalk and a drive-through area for

vehicles. On the other side of the drive-through, there was a parking lot that was owned and operated by another company. Claimant's employer leased some spaces in the parking lot for customers and employees. In the parking area was a covered break area or "smoking hut."

In March 2009, claimant visited with co-workers at the "smoking hut." As she returned to work, while crossing the parking lot, her shoe got caught in a crack in the pavement and she fell, injuring her knee and ankle. She suffered a torn lateral meniscus.

In setting aside the employer's denial, the ALJ found that claimant's injury arose out of and in the course of her employment. The employer appealed, arguing that the "parking lot exception" to the "coming and going" rule did not apply. The Board didn't buy it and affirmed the Opinion & Order.

The Court of Appeals agreed with the employer and remanded the matter to the Board to analyze the case under the "coming and going rule," without application of the exception. Here's the boiler plate analysis:

"Injuries sustained while the employee is going to or coming from the place of employment generally do not occur 'in the course of' employment. *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994). The 'parking lot' rule, however, provides and exception: when an employee traveling to or from work sustains an injury 'on or near' the employer's premises, the 'in the course of' portion of the work-connection test may be satisfied if the employer exercises some 'control' over the place where the injury is sustained. *Id.* At 367; *Beverly M. Helmken*, 55 Van Natta 3174, 3175 (2003), *aff'd without opinion*, 196 Or App 787 (2004)."

In this case, the employer exercised no control over the parking lot where claimant was injured. It did not own, lease, or otherwise control or maintain the area of the parking lot where claimant was injured. On remand, the Board found that the "parking lot exception" to the "going and coming rule" did not apply. **Reversed**

Marcos Ruiz, III, 66 Van Natta 777 (2014)
(ALJ Fulsher)

Claimant requested review of an Order that denied him a work disability award for his left index finger injury.

Claimant sustained a compensability injury while working as a machinist. He ended up having a partial amputation of the left index finger. According to a "Regular Job Description," claimant's regular work involved, in pertinent part, being outdoors 5 percent of the time and wearing personal protective equipment; i.e., gloves, glasses, and hearing protection. Claimant agreed that this job description was accurate.

On February 13, 2013, claimant's attending physician released him to full duty work. The physician also indicated that claimant was medically stationary without permanent impairment. A Notice of Closure, on February 28, 2013, awarded 6 percent whole person impairment due to the partial amputation. Because claimant had been returned to regular work, he received no work disability award.

Claimant's attorney then had the attending physician agree that, when the temperature dipped below 50 degrees, claimant's left finger became painful due to cold sensitivity. Claimant requested reconsideration of the Notice of Closure, alleging that he had not returned to his regular work because of his cold sensitivity issue. He argued that his attending physician's work releases were based on an incomplete understanding that his "regular work" involved working in temperatures below 50 degrees. Claimant contended that, based on new information that he had cold intolerance at temperatures below 50 degrees, his attending physician's restriction from performing in temperatures below 50

degrees meant that he had not really been release to his regular work. The Board disagreed.

The Board observed, as follows:

"Despite his comment that claimant 'can try warm fitted gloves or hand heater' when working in temperatures below 50 degrees, the record establishes that claimant's 'pre-injury' work already required him to wear gloves. Because claimant's 'regular work' included wearing gloves, we are not persuaded that Dr. Ackerman ultimately restricted him from returning to regular work. *See Darryl L. Jones*, 64 Van Natta 2448, 2451-52 (2012) (no entitlement to work disability where the attending physician released the claimant to regular work with certain limitations because the claimant's 'pre-injury' work ('regular work') already involved such limitations)."

In an affidavit, claimant asserted that he was unable to perform his "regular work" due to his cold intolerance. He did not, however, indicate that he had, in fact, tried working with "warm fitted gloves or hand heater" and that the gloves or heater did not work. The Board wrote, "Although claimant relies on his affidavit to establish that he was unable to perform his regular work as a consequence of his cold intolerance, our decision must be based on the attending physician's release, and not claimant's personal assessment of his physical capabilities." **Affirmed**