

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



**Bradley G. Garber's Board Case Update: 05/13/2013**

**Justin D. Morris, 65 Van Natta 812 (2013)**  
**(ALJ Spangler)**

Claimant appealed an Order that found “pre-hearing” subpoenas to employees of the self-insured employer were invalidly issued and denied claimant’s motion to continue the hearing for the testimony of an unavailable witness who had not been lawfully subpoenaed.

A subpoena may be issued to compel attendance and testimony at a hearing. OAR 438-007-0020(2). Under OAR 438-007-0020(3), “[s]ubpoenas issued on behalf of a party may be served by the party or the party’s representative. Service may be made in person or by certified mail or other mail that provides for a receipt signed by the recipient.” The rule further provides: “(4) Subpoenas shall be served far enough in advance of an



*“When did we switch from magazines to musical instruments?”*

appearance to allow the witness or party a reasonable time to comply with the subpoena or to file an objection.”

Prior to a hearing scheduled for April 11, 2012, claimant’s counsel sought enforcement of subpoenas issued in April via email. That method of service is, of course, not allowed by OAR 438-007-0020. So, the ALJ ruled that service was invalid. So, the hearing was continued to May 9, 2012. The ALJ gave claimant’s counsel the opportunity to re-subpoena the witnesses, law enforcement officers. The ALJ also told claimant’s counsel to serve the subpoenas at least 10 days before the hearing.

Claimant’s counsel waited until May 8, 2012, the day before hearing, to personally serve the witnesses. Defense counsel objected. Based on his previous ruling, and on OAR 438-007-0020(4), the ALJ found the subpoenas to be invalid and unenforceable.

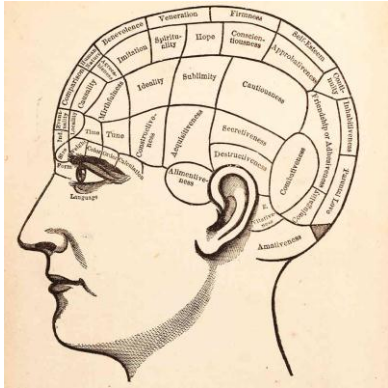
Claimant’s counsel also asked for a further continuance of the hearing to secure the attendance of another witness. The ALJ did not grant a further continuance because claimant did not present evidence of “extraordinary circumstances” under OAR 438-006-0081, and also did not subpoena the witness.

On review, the Board found no abuse of discretion on the part of the ALJ.

**Affirmed**

**Jeffrey A. Schultz, 65 Van Natta 829 (2013)**  
**(ALJ Smith)**

SAIF requested review of an Order that: (1) found that the Hearings Division had jurisdiction to consider claimant’s allegation that SAIF had committed a discovery violation during the reconsideration proceeding before the Appellate Review Unit; and (2) awarded a “penalty-related” attorney fee.



After closure and issuance of an Order on Reconsideration, SAIF requested a hearing to dispute issues arising out of the Order. Subsequently, Claimant filed a request for hearing, alleging a discovery violation, plus entitlement to penalties and fees. Claimant sought consolidation of the issues and the cases were initially consolidated by the Hearings Division. SAIF requested bifurcation of the discovery-related penalty and fee issues from its request for hearing on issues arising out of the

Order on Reconsideration. The motion for bifurcation was appropriately granted by the ALJ and the cases were separately briefed.

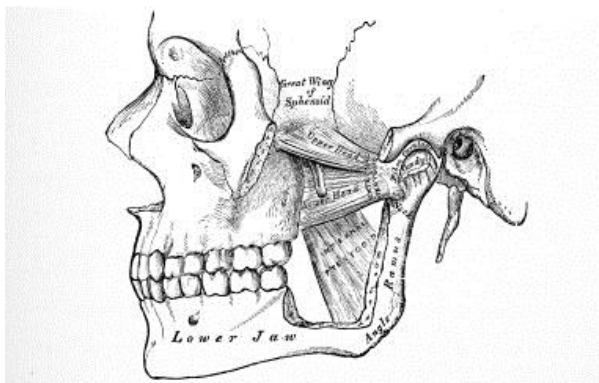
SAIF argued that jurisdiction over the penalty/fee issue was within the sole jurisdiction of the Department, and that it should be dismissed. The ALJ concluded, however, that the subsequent narrowing of the issues to the discovery-related penalty/fee issue did not divest the Board of jurisdiction and went on to find that SAIF unreasonably failed to provide discovery, and that a penalty-related fee of \$750 should be assessed.

The Board found that, because the alleged discovery violation occurred “in the course of” the reconsideration proceeding it presented an “issue arising out of the reconsideration order.” Therefore, under the circumstances, the Board found that the penalty/fee issue was a “matter concerning a claim,” and that the Board and Hearings Division had jurisdiction.

The Board went on to find that SAIF did, in fact, commit a discovery violation. It went on to find, however, that claimant’s attorney was not entitled to a fee because there were no “amounts then due” and because the delay in providing discovery did not involve a delay in acceptance or denial of a claim and did not result in an unreasonable refusal to pay compensation. **Affirmed, in part, reversed as to the \$750 attorney fee**

**James L. Williams, 65 Van Natta 874 (2013)  
(ALJ Fulsher)**

Claimant requested review of an Order that: (1) found that the Hearings Division lacked jurisdiction to consider claimant’s request for penalties and fees arising out of SAIF’s allegedly unreasonable “pre-hearing request” discovery violation; and (2) dismissed claimant’s request for hearing.



Claimant’s counsel (Fontana) characteristically peppered SAIF with discovery requests. One of those concerned an IME report from Dr. Colleti. The discovery request was made on September 24, 2012. SAIF received the report on September 26, 2012. On October 25, 2012, having not received a copy of Dr. Colleti’s report, yet, claimant’s counsel requested a hearing raising

penalty and fee issues arising out of late discovery.

After hearing, the ALJ reasoned that, because Claimant’s hearing request only raised issues of penalties and fees, jurisdiction resided with the Department. She, therefore, dismissed claimant’s request for hearing.

On review, the Board reasoned that, not only did Claimant’s attorney raise a penalty/fee issue, he also raise an issue with regard to the reasonableness of SAIF’s discovery violation. Therefore, it reasoned, the issues were “matters concerning a claim” and that the Board could exercise jurisdiction. As it observed, “A hearing request alleging a discovery violation is not limited to

penalty and attorney fee issues.” **You know why?** Because in *Coman v Corrections Dep’t*, 327 Or 449, 454 (1998) (a case, doubtless, right on point), “an ALJ may also issue an enforceable order for the production of records.” HUH??

In this case, when Claimant’s counsel filed his request for hearing, SAIF had not, yet, disclosed Dr. Colleti’s report. So, when the request for hearing was filed, the Board had jurisdiction to issue an order compelling production. If, on the other hand, SAIF had provided the report late, but before the request for hearing, the Board would, presumably, not have jurisdiction. Is that clear? **Reversed; Hearing Request reinstated**

