

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



Bradley G. Garber's Board Case Update: 05/27/2014

And... in the "Good Use of Resources" category:

Ronald Dean, 66 Van Natta 961 (2014)
(ALJ Fisher)

Claimant requested review of and Order that declined to direct SAIF to fully reimburse him for the cost of his lay witness fee. This fight was over...wait for it.....wait for it.....\$25.75!

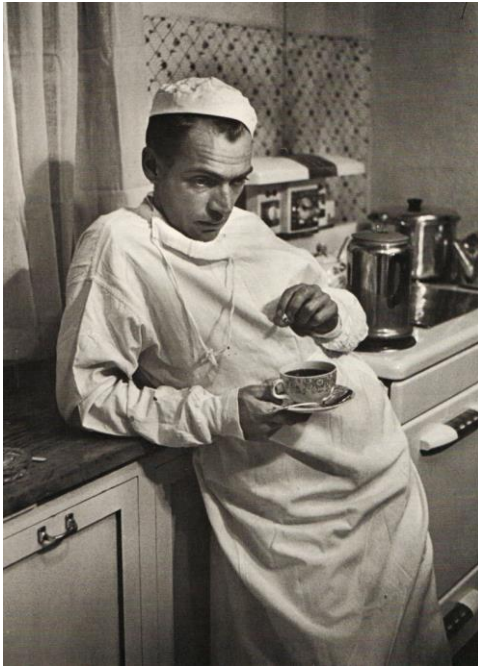
A prior Opinion & Order had set aside SAIF's compensability denial and awarded an attorney fee and costs. Claimant had subpoenaed a witness to the hearing, and had paid the witness a fee of \$31.44. When SAIF paid the costs, it reimbursed claimant in the



amount of \$5.69, pursuant to ORS 44.415(2).

ORS 44.415(1) provides, in part, as follows:

“Except as provided in subsection (2) of this section, a person is entitled to receive \$30 for each day’s attendance as a witness and mileage reimbursement at the rate of 25 cents a mile in the person is required to travel from a place within or outside this state in order to perform duties as a witness.”



ORS 44.415(2) provides, in part, as follows:

“In any ... proceeding where a public body is a party, a person is entitled to receive \$5.00 for each day’s attendance as a witness and mileage reimbursement at the rate of eight cents a mile if the person is required to travel from a place within or outside this state in order to perform duties as a witness.”

SAIF claimed that it is a “public body” and that, therefore, subsection (2) applied; Claimant argued that subsection (1) applied.

The Board found that, based on prior case law, SAIF is, indeed, a “public body.” But, the Board went on to find that ORS 44.415(2) does not prevent it from awarding a prevailing claimant his or her “reasonable” expenses and costs, pursuant to ORS 656.386(2). The Board felt that \$31.44 was a reasonable witness fee and instructed SAIF to pay up. **Reversed**

And...from the “William Thomas Frank” category:

**Brown, Sr. v. SAIF, 1102146; A151889 (May 7, 2014)
(Oregon Court of Appeals)**

This one will make your blood boil, your skin crawl and your hair fall out. SAIF accepted a **lumbar strain**. There was evidence generated that supported the acceptance of a combined condition. Claimant requested acceptance of a

combined condition and, after litigation, SAIF was ordered to accept it. So, it accepted a **lumbar strain combined with preexisting lumbar disc disease and preexisting spondylolisthesis**.

Subsequently, after generating medical evidence that the lumbar strain component of the combined condition had reached medically stationary status, SAIF issued a current combined condition denial. Claimant requested a hearing.

In upholding SAIF's denial of the combined condition, the ALJ reasoned that it was SAIF's burden to prove "that the 'lumbar strain' component" of the accepted combined condition was no longer the major contributing cause of claimant's disability or need for treatment. The ALJ accepted SAIF's argument that it was the claimant's obligation to demand acceptance of a worsening of the underlying degenerative changes. Absent an acceptance of those specific degenerative conditions, the ALJ reasoned that resolution of the accepted strain amounted to resolution of the work-related injury. On review, the Board affirmed the ALJ's Order. Claimant took it up to the Court of Appeals.

After reviewing the definition of "compensable injury," in ORS 656.005(7)(a), the basis for a "combined condition" denial, in ORS 656.262(6)(c), the insurer's burden of proof under ORS 656.266(2)(a), and the legislative history underlying the current statutory definition of what constitutes a "compensable injury," the Court held: "To satisfy the burden of proof described in ORS 656.266(2)(a) to deny a combined condition, the insurer must establish that the 'otherwise compensable injury,' *i.e.*, the accidental work injury, is no longer the major contributing cause of the disability or need for treatment of the combined condition."

PROBLEM: What is the "otherwise compensable injury?"

The Court determined that SAIF could not deny the "combined condition," unless and until the entire combined condition was no longer related to disability or treatment arising out of the "compensable injury." In other words, it's not what you have **accepted** as the "other compensable injury," it's the entire injury that you end up accepting that matters. So, if you accept a combined condition, that is the "otherwise compensable injury."

Query: What does the "combined" condition combine with, so that you can issue a denial when the "otherwise compensable injury" no longer constitutes the major contributing cause of disability or need for treatment?

This decision, of course, needs to be appealed to the Oregon Supreme Court, and if the Court does not reverse the decision, the legislature needs to get involved. In the meantime, any case in which you have issued a current/combined condition denial will be affected. Already, the Board has issued an Order of Abatement, in *Michael, F. Jones*, 66 Van Natta 936 (2014), to review the Opinion & Order, in light of this decision. Appeal, appeal, appeal!

