Dr. Garber's

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

Bradley G. Garber's Board Case Update: 06/24/2013

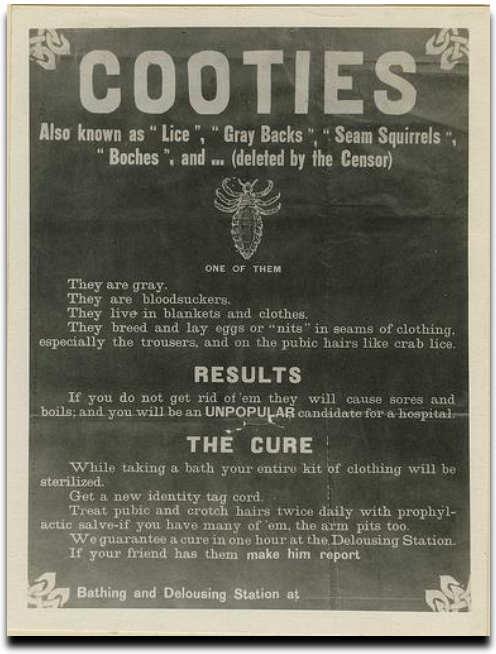
The Oregon Court of Appeals has published a number of written decisions since the first of the year. Here are summaries on a few of them:

SAIF v. Satterfield, A148357; 0900060H (March 27, 2013)

This appeal arose out of a final order of the Director of the Department of Consumer and Business Services. In that order, the director concluded that SAIF had improperly terminated claimant's eligibility for vocational assistance, finding that SAIF had not obtained "new information" indicating that claimant was no longer eligible for such assistance as then required by *former* OAR 436-120-0350. That section provided, in pertinent part, that "[a] worker is ineligible or the eligibility [for vocational assistance] ends when any of the following conditions apply: (1) The worker does not or no longer meets the eligibility requirements as defined in [*former*] OAR 436-120-0320 [(12/1/07)]. *The insurer must have obtained new information which did not exist or which the insurer could not have discovered with reasonable effort at the time the insurer determined eligibility."*

In this case, the worker's claim was closed, on October 29, 2007, with a PPD award, including work disability award, and he was, thus, found eligible for vocational benefits. He requested vocational services, and services were initiated.

Subsequently, claimant inquired about a second opinion due to his asserted level of pain. His attending physician referred him to a Dr. Wilson. Dr. Wilson (rather unexpectedly) made normal physical findings, expressed his opinion that claimant exhibited symptom magnification and no objective findings of wrist impairment, and recommended and IME. SAIF sent claimant to Dr. Swan for an IME. Dr. Swan essentially agreed with Dr. Wilson's assessment. Based on this new information, SAIF found claimant to be no longer eligible for vocational services because he had sustained no permanent impairment. Essentially, there was no longer a basis for a whole person impairment award. Claimant appealed the ineligibility determination. In response, the Director arranged a "Medical Arbiter Panel Examination" (MAE). The independent medical arbiters essentially came to the same conclusions as those of Drs. Wilson and Swan. Upon review of this revocation, however, the Director determined that there was no "new information" supporting SAIF's finding of ineligibility. The Director reasoned, as follows:



"Under the definition of new evidence established as precedent in the decisions discussed above, the facts upon which [SAIF] relied here do not constitute new information. *No new facts were developed in the examinations that occurred after [SAIF] found claimant eligible* [for vocational assistance]. The only additional information that became available was the opinions from different doctors [--namely, Wilson, Swan, and the MAE panel]. *Those opinions were only a re-evaluation of facts, including claimant's physical condition, that [SAIF] possessed before it found claimant eligible.*"

NOTE: There is no such thing as "common sense" in workers' compensation law.

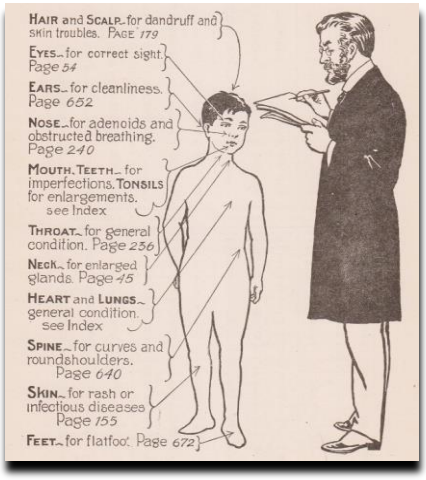
The Court of Appeals asked the astute question, "…[C]ould a reasonable person have concluded that the three reports [from Wilson, Swan and the MAE panel] did not contain new, objective medical findings regarding the current strength and range of motion in claimant's right wrist as compared with the PCE and Tavakolian's 2007 opinions?" The Court answered its own question, "No." **Reversed and remanded.**

NOTE: Over the past year, I've run into a couple of situations in which vocational services have been requested and initiated, based on a NOC. Then, the Order on Reconsideration comes out and finds the worker not impaired. The argument, based on the Department's decision in *Satterfield*, is that a medical arbiter's redetermination of impairment does not constitute "new information." The Court's decision will, hopefully, clear this up.

Hamilton v. SAIF, A148339; 0906605 (April 17, 2013)

Claimant sought review of a Board Order on Review that concluded that her injury, which occurred from and idiopathic fall from a standing position onto the brick floor of her workspace, was not compensable. Claimant tried to argue that the brick floor was something that increased the risk of injury.

Claimant was a cook/cashier and was standing in the kitchen, at work, when she fainted. She didn't hit anything on the way down. She just hit the brick floor. She hurt her teeth and face. SAIF denied the claim. Claimant requested a hearing. She conceded that her fall was idiopathic, but argued that the hardness of the brick floor and the employer's requirement that she stand at work contributed to her facial and dental injuries. In other words, she would not have been as injured if the employer had laid down shag carpet in the kitchen.



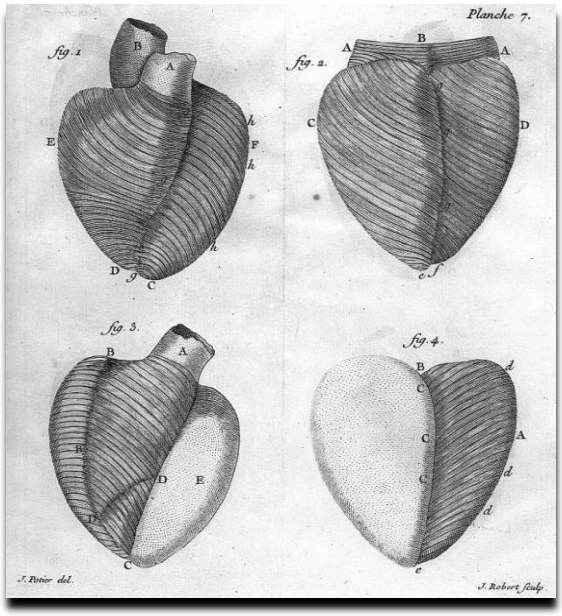
The Court observed, as follows:

"…Claimant's work environment, which required standing on a hard kitchen floor, is unlike situations where the employer has placed the worker in settings that may greatly increase the danger of injury, such as by requiring her to stand on a ladder or an elevated platform or to stand next to a dangerous object that would have caused severe injury had she fallen on it. Instead, she fell on level ground onto the floor. There was nothing special about the floor or the height from which she fell that greatly increased the danger of injury." **Affirmed**

Balcom v. Knowledge Learning Enterprises, A148227; 0901465 (May 15, 2013)

Claimant sought review of a Board Order on Review that upheld employer's denial of her combined condition claim involving L5-S1 foraminal stenosis. Claimant argued, before the Court of Appeals, that the Board committed an error of law in finding a particular doctor's opinion persuasive in support of employer's combined condition denial, in spite of the doctor's belief that claimant's work injury was not even a material cause of her disability and need for treatment. This, of course, is a "substantial evidence" issue. Employer, however, simply pointed out to the Court that this particular and specific argument was not raised before the Board and was not, therefor, preserved for judicial review.

In order for an issue to be considered by the Court of Appeals, it must have been preserved before the Board. See ORAP 5.45(1); *State v. Wyatt*, 331 Or 335 (2000). Claimant attempted to argue that her assignment of error was preserved when she "made the same argument to the Board in her Respondent's Board Brief." Employer responded that there was no evidence of this in the record. During oral argument before the Court, claimant's counsel candidly admitted that the argument first raised before the Court was not raised before the Board. Oops! **Affirmed**



Mendoza v. Liberty Northwest, A149463; 1003257 (June 12, 2013)

Claimant sought review of a Board Order on Review that upheld employer's AOE/COE denial. Claimant was injured while she was driving to employer's office to pick up paychecks to distribute to fellow employees. Employer denied the claim, alleging that claimant was not injured in the course of her employment. The Board agreed, reasoning that claimant was "off work, not being paid, and was free to use her time as she wished" when the accident occurred. Although the Board recognized that "employer permitted team leaders [of which claimant was one] to pick up the paychecks in person," it found that "claimant was neither required nor expected to pick up paychecks as a team leader" but that she did so "because she needed the money right away," and concluded that "claimant's activity provided no benefit to her employer."

The Court found that, while employer did not require claimant to travel to its Tacoma, WA office to pick up checks to distribute to employees, it coordinated that activity by establishing rules governing when and how team leaders could do so. In other words, it allowed and acquiesced in such behavior. The Court observed that it was claimant's responsibility to distribute paychecks to employees under her direction and the fact that she may have wanted her own paycheck on an expedited basis did not make her journey a personal mission. **Reversed and remanded**

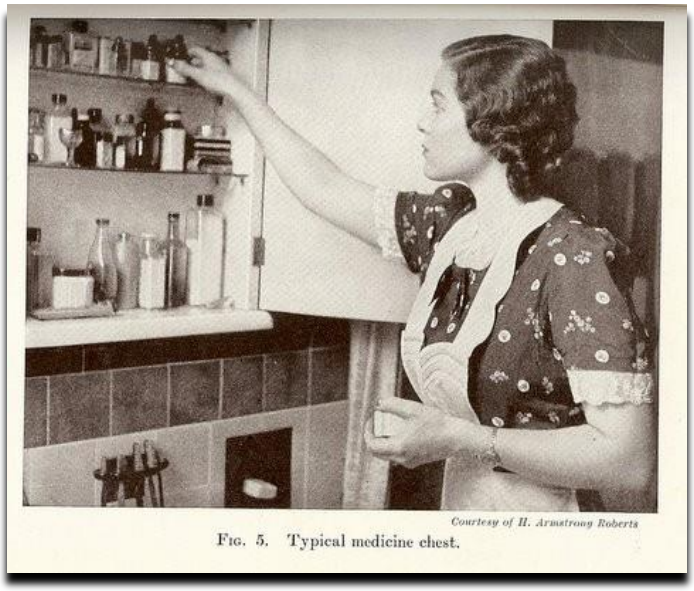
Trimet v. Wilkinson, A149776; 0806396 (June 12, 2013)

This is, simply, a situation in which, in the context of a claim acceptance, the insurer attempted to, also, deny the same condition.

Claimant was injured when her TriMet bus seat "lost air" and "went to the floor." She injured her…wait for it…wait for it…low back! She filed a claim for benefits. She was sent to an IME. After the IME, the insurer sent claimant a letter, stating as follows:

"Dear [claimant]:

"Your injury of August 29, 2007 has been accepted as a disabling lumbar/sacroiliac strains [*sic*] and left trochanteric bursitis.



Courtesy of H. Armstrong Roberts

FIG. 5. Typical medicine chest.

"Medical evidence indicates that you had pre-existing conditions relating to these body parts and that your injury of August 29, 2007 combined with these pre-existing conditions to require treatment and cause disability. The medical evidence also establishes that the original accepted injury has resolved and is no longer the major contributing cause of any claimed need for treatment or disability. The report issued by Dr. John Swanson as the result of the independent medical examination of September 3, 2008 supports this statement and your attending physician Lori Gross, MD has concurred with the report.

"We are therefore denying that compensability of your current conditions involving the left hip and low back as not being compensably related to your accepted injury and not arising out of and in the course of employment with [employer]."

The Board found that, because the employer did not previously accept a combined condition, and because there was no evidence of a change in the condition, it could not deny the combined condition at the same time it accepted it. More specifically, the Board found that the "acceptance" was not a "combined condition" acceptance. More accurately, the language of the acceptance/denial suggests that claimant's lumbar/sacroiliac strains and trochanteric bursitis conditions were not accepted as conditions that were combined with anything else. Because there had, technically, been no combined condition acceptance, there could be no combined condition denial. The Court directed, as follows:

"Specifically, although it acknowledged that existence of a combined condition, the letter did not (1) specify the particular combined condition purportedly being accepted, nor the preexisting conditions being relied upon as the basis for employer's identification of an unspecified combined condition; (2) demarcate the date on which claimant's work injury combined with those unspecified preexisting conditions; or (3) specify when the combined condition became compensable." **Affirmed**

Baker v. Liberty Northwest, A140572; 0701646, 0701564 (June 19, 2013)

Claimant sought review of a Board Order on Review that upheld the employers' denials of his occupational disease claim for a left shoulder condition.

Claimant started having left shoulder pain in 2002. He sought treatment from Dr. Sedgewick. Dr. Sedgewick performed surgery on the shoulder in 2003 and told claimant that his shoulder condition was work-related. Claimant did not, however, file a claim until 2007. In 2003, claimant's employer was insured by SAIF; in 2007, his employer was insured by Liberty Northwest. Both insurers denied claimant's claim, alleging that it had been untimely filed.

At the hearing, the ALJ found that Liberty was not responsible for the claim, but that SAIF was because it had "essentially abandoned the untimeliness defense in written closing arguments." On review, the Board held that claimant's 2007 claim, filed with SAIF, was untimely under ORS 656.807(1), because the claim had not been filed within one year of the date claimant was informed by Dr. Sedgewick, in 2003, that he was suffering from an occupational disease. The Board also upheld Liberty's denial. Claimant appealed to the Court of Appeals.

The Court summarily found that, under ORS 656.807(1), claimant's claim with Liberty Northwest was untimely filed. The question was whether the occupational disease claim was also barred against the subsequent insurer, SAIF. Claimant asserted, essentially, that a new limitation period should begin with each subsequent period of employment. He also argued that, in light of his subsequent exposure at his employment with SAIF's insured, which caused a progressive worsening of his condition, he was not barred from bringing an occupational disease claim for his current shoulder condition. Finally, claimant argued that his documented treatment in 2003 should be considered, in addition to his ongoing exposure, in determining the compensability the condition caused by an occupational disease process.

Claimant attempted to relay on holdings in *Ahlberg v. SAIF*, 199 Or App 271 (2005) and *Kepford v. Weyerhaeuser Co.*, 77 Or App 363 (1986). In *Ahlberg*, claimant suffered some hearing loss. He filed a claim, which was denied. That went unappealed. Several years later, he filed another claim for hearing loss. This was after 17 years of additional exposure. SAIF denied the claim, contending that the second claim was barred by the previously-unappealed denial. The Board upheld the denial. The Court of Appeals reversed, citing *Kepford*, in which it determined that a worsening of a denied condition is a change in condition that will support the relitigation of a previously-denied claim.

In this case, however, there was not denial and, thus, no indication that there had been a worsening of claimant's preexisting condition due to his work activities since denial. Instead, claimant's theory was that he suffered from a "new" occupational disease. The medical evidence did not support that theory, however. It was the same thing, in 2007, that it was in 2003. The Court determined that the claim was untimely filed as to both employer's/insurer's. **Affirmed**