# Dr. Garber's

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

## Bradley G. Garber's Board Case Update: 07/14/2014

### Bradley R. Madrid, 66 Van Natta 1080 (2014)
### (ALJ Poland)

Claimant requested review of an Opinion & Order that upheld the employer's *de facto* denial of his new/omitted condition claim for a "lumbar disc at L5-S1."

Claimant injured his low back on November 17, 2012. As is often the case, the claim was accepted for the condition of **lumbar strain**. In December, Claimant asked that the scope of claim acceptance be expanded to include the condition of "lumbar disc @ L5-S1." On March 19, 2013, the employer issued a modified Notice of Acceptance that accepted: **lumbar strain combined with preexisting facet degeneration arthritis at L4-5 and L5-S1 as well as preexisting disc degeneration and mild protrusion at L5-S1."**

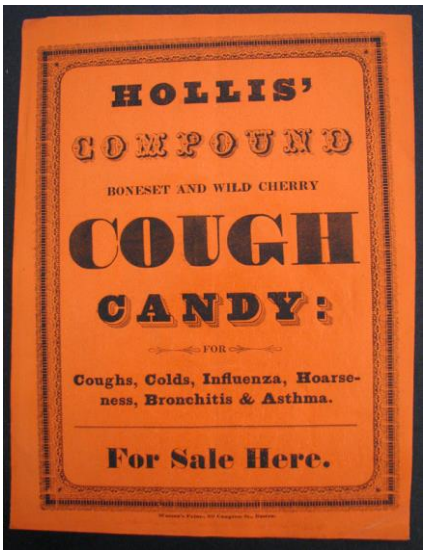
Claimant requested a hearing for a *de facto* of the condition he requested acceptance of, back in December. At hearing, he contended that the employer's modified "combined condition" acceptance did not respond to his claim. The

employer countered that the claim for a "lumbar disc" was not a claim for a "condition" and that it was not obligated to either accept or deny it. The employer further contended that any procedural obligation is had to process the claim was satisfied by its modified acceptance of the combined condition that included an L5-S1 disc protrusion.

After hearing, the ALJ concluded that the medical evidence was insufficient to establish the compensability of the L5-S1 disc protrusion.

On review, the Board held that Claimant perfected a new/omitted condition claim and that the employer had an obligation to either accept or deny the claim. So, the claim was, indeed, in *de facto* denied status. The Board upheld the denial, however.

The Board agreed that Claimant's claim for acceptance of a "lumbar disc @ L5-S1" was not a claim for a "condition." "Lumbar disc" did not refer to any specific pathology or physical status of a body part. When a claimant makes a "new/omitted" condition claim, it is his/her burden of proof to establish the existence of a "medical condition." See *Carl R. Hale,* 65 Van Natta 2316 (2013). In this case, Claimant did not even make a claim for a "condition." **Affirmed**




## Tyrel Albert, 66 Van Natta 1212 (2014) (Order on Remand)

This case ended up, back at the Board, upon remand from the Court of Appeals. Concluding that the Board erred in basing its determination that Claimant was entitled to a work disability award upon a reference to a DOT description of his work duties, the Court remanded the matter to the Board to consider other evidence, such as medical records describing Claimant's work activities, Claimant's own description of his actual work activities, and the employer's "Regular Duty Job Analysis."

Claimant, who worked for the U.S. Forest Service on a trail crew, injured his knee and had to have some surgery. On claim closure, he was awarded a 6% "whole person" award, but no "work disability" award. He requested reconsideration.

After reconsideration, and after the ARU had reviewed Claimant's own description (by affidavit) of his work requirements and activities, in addition to evidence from his attending physician, an Order on Reconsideration granted Claimant a work disability award and penalized the employer, under ORS 656.268(5)(e), for failing to include a work disability award in its Notice of Closure. The work disability award was calculated, in part, on the ARU's reliance on the strength classification found in the DOT description of a "forestry worker." The ARU found that Claimant's BFC was "Heavy" and his RFC was "Medium." Employer requested a hearing.

After hearing, the ALJ concluded that Claimant had not met his burden of establishing entitlement to a work disability award. Accordingly, the penalty against the Employer was also set aside. Claimant, then, requested review. On review, the Board agreed with the ARU with regard to Claimant's entitlement to a work disability award and a penalty. Claimant was, still, not satisfied. He appealed the matter to the Court of Appeals, alleging that his RFC was "Light," not "Medium."


The Court determined that the Board had erred in basing its decision that Claimant had not been released to his regular work, in part, on the ARU's reference to the DOT Forestry Worker job description. The Court reasoned that the ARU's choice of that description, for purposes of calculating the amount of claimant's work disability benefit was not *evidence* of his actual job duties before he was injured. The Court stated, rather, that the DOT description of Claimant's work duties and requirements reflected only a **conclusion** based on the evidence on that issue, a conclusion required by the need to fit Claimant's regular work into one of the nine categories describing the overall level of physical activity associated with the job for purposes of identifying his BFC. The Court found that the Board erred in relying on the DOT description, instead of the actual evidence from Claimant and his treating physician, as to his BFC and RFC. That's why the whole thing was remanded to the Board, for reconsideration.

On reconsideration, the Board affirmed its previous determination that Claimant was entitled to a work disability award and that his BFC was "Heavy" and his RFC was "Light/Medium." Claimant argued that the RFC should be "Light;" the Employer argued that it should be "Medium." The Board rubber-stamped its

previous decision, with regard to the work disability award. It did, however, reverse its decision with regard to the penalty issue.

The Employer argued that it should not be assessed a 25% penalty on amounts due because the Order on Reconsideration's work disability award was based on evidence that was generated after the Notice of Closure, evidence that it did not have at the time of claim closure. The Board agreed.

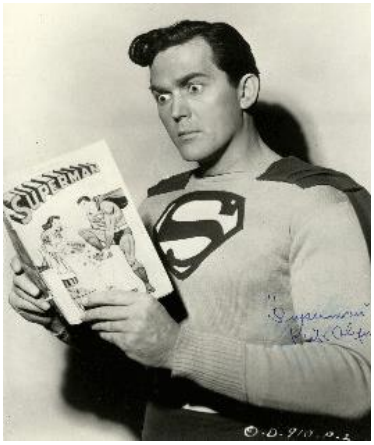
Claimant's attorney was awarded $15,000 because the Employer argued that the work disability award should be eliminated or reduced, and it was not.

**THE TAKEAWAY:** DOT classifications are very limited in their usefulness when determining BFC. Rely on actual employer-generated job descriptions and other evidence of a worker's actual day-to-day work activities/requirements in determining, both BFC and RFC.

## AND FROM THE COURT: (ta-daaa)

## Camacho v. SAIF, (1101741; A152079), June 18, 2014

Claimant appealed a decision by the Board that upheld the denial of his claim for low back and thoracic strains. The Board held that Claimant did not carry his burden of proof. In reaching that conclusion, the Board did not afford probative weight to statements made by Claimant to his medical providers for the purpose of diagnosis and treatment required by ORS 656.310(2).



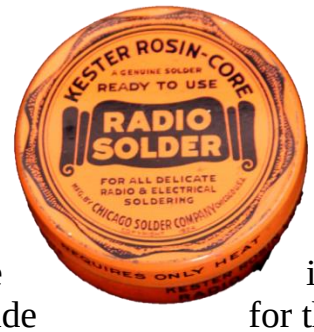
ORS 656.310(2) provides, in part, as follows: "The contents of medical, surgical and hospital reports presented by claimants for compensation shall constitute prima facie evidence as to the matter contained therein…."
According to the medical records, Claimant told his chiropractor that he felt immediate pain, 11 days earlier, while at work. He told the chiropractor that he "was unloading pallets off a manual forklift and putting them on a trailer" when he felt a "pop" in his low back, followed by immediate pain. The mechanism of injury was described as **lifting**. On that date, the chiropractor assisted Claimant in completing and filing a Form 827. He recommended a full medical release from work due to the injury.

Subsequently, Claimant started seeing Dr. Heitsch. He told Dr. Heitsch that he injured his back, at work, while **pulling** on a loaded pallet jack. Dr. Heitsch helped Claimant fill out and file another Form 827.


SAIF denied the compensability of Claimant's claim and Claimant requested a hearing. Claimant, a Hispanic male who could not speak English, however, did not attend the hearing. Claimant's attorney decided to proceed, by presenting argument based on the record. After hearing, the ALJ upheld SAIF's denial, after concluding that Claimant's statements (clearly hearsay, in nature) in the medical reports were not sufficient to prove that his need for treatment resulted from his work injury. Claimant appealed the decision to the Board, and the Board affirmed, concluding that Claimant's statements regarding the circumstances of his injury were not statements to which the Board was required to afford *prima facie* weight under ORS 656.310(2) but, instead, were hearsay statements that the Board was free to give whatever weight it deemed appropriate under the circumstances of the case.

The Board concluded that Claimant statements, as recorded in the medical reports, were insufficient to prove causation. The Board's decision was influenced, in part, by Claimant's inconsistent reports of the mechanism of injury. The Court discussed ORS 656.310(2) and its prior decision in *Zurita v. Canby Nursery*, 115 Or App 330 (1992) and made the following distinction: "Accordingly, a claimant's statements in medical reports constitute *prima facie* evidence under ORS 656.310(2) if those statements were for the purpose of medical diagnosis or treatment.

Otherwise, a claimant's statements in medical reports are hearsay to which the board may afford may whatever weight it deems appropriate under the cirmcumstances." The Court determined that Claimant's statements in the medical records as to how his injury occurred, the nature of the pain that resulted from the injury, and his medical history were all statements that were made for the purpose of medical



diagnosis and treatment. In other words, they were *prima facie* evidence of a work-related injury, regardless of the precise mechanism involved. As summarized by the Court, "When afforded the weight required by ORS 656.310(2), claimant's statements in the medical records establish that, while he was moving pallets using a pallet jack, he experienced a 'pop' in his back and immediate pain in his lower back and thighs." In short, the inconsistent statements as to the mechanics of the injury did not constitute a basis for discrediting Claimant's report of an injury, at work, while moving pallets with a pallet jack. It made no difference, to the Court, whether claimant was injury while "lifting" or "pulling." **Reversed**