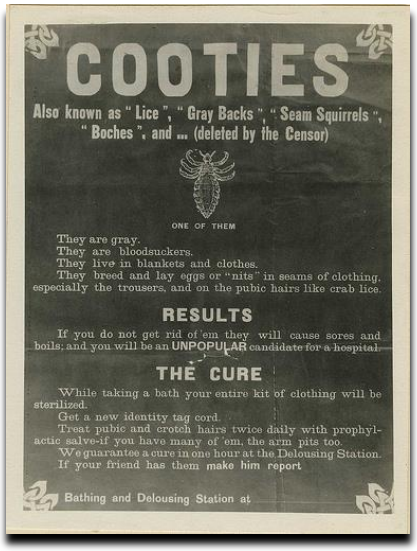
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 08/20/2013

Jose L. Hernandez, DCD, 65 Van Natta 1363 (2013) (ALJ Crumme')

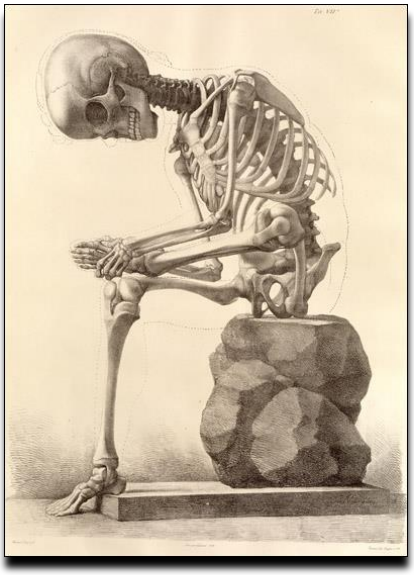
SAIF requested review of an Opinion & Order that set aside its denial of claimant's psychological disorder. The ALJ's decision was based on medical evidence which, he felt, was based on more accurate history. Turns out, claimant was lying.

About one month after the Opinion & Order issued, claimant was involved in a motor vehicle accident. Ultimately, he died from injuries sustained in that accident. The reason for the accident is that claimant was intoxicated. This sort of alcohol abuse was not previously revealed to claimant's examining and treating physicians. SAIF's expert reported that claimant's alleged misrepresentations about his alcohol use had a significant impact on her analysis of claimant's alleged

work-related emotional conditions.

After claimant's MVA, SAIF acquired the emergency room records in which a history was recorded that claimant drank 60-70 cans of beer a week. Prior to this, claimant had told all of his treating and examining physicians that he only had about one or two beers per month.

Based on this critical newly-obtained medical information, the Board determined that the record before the ALJ had been "improperly, incompletely or otherwise insufficiently developed." See ORS 656.295(5). Because of this, the matter was remanded to the ALJ for further development of the record and reconsideration. **Remanded**



Tricia A. Batchler, 65 Van Natta 1460 (2013) (ALJ Rissberger)

Claimant requested review of an O&O that declined to award temporary disability benefits.

Pursuant to ORS 656.313(1)(a)(A), the filing of a carrier's appeal of a Board's order stays the payment of the compensation appealed, except for temporary disability benefits that accrue from the date of the order appealed until claim closure under ORS 656.268, or until the order appealed from is itself reversed, whichever occurs first. Obviously, benefits that accrue after an order are not benefits that are part of the subject matter on appeal. But, the filing of an appeal stays benefits that are subsequently awarded by provisional claim closure. In short, if a provisional Notice of Closure awards time loss for a period in which compensability is disputed by a pending appeal, those time loss benefits are not due and payable until the appeal has run its course and the employer is ultimately found responsible for payment.

The Board summarized, as follows:

*" * * * [T]he issue is whether part of the Notice of Closure's award is presently payable in light of the currently pending employer appeal from the earlier Board*

*decision that concerned the disputed temporary disability benefits. * * * [W]e conclude that the employer is authorized to stay such benefits, subject to its obligation to eventually pay that compensation (along with interest under ORS 656.313(1)(b)) if its appeal is unsuccessful."*

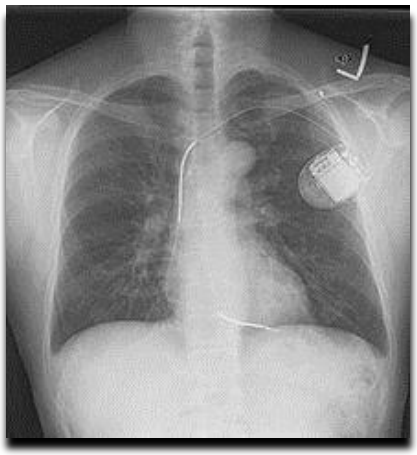
NOTE: Even though you have a compensability issue up on appeal, you still need to process the claim in accordance with the Order that is under appeal. "Provisional" acceptance and "provisional" Notice of Closures will protect you from penalties and fees.

Gregory A. Ray, 65 Van Natta 1492 (2013) (ALJ Poland)

SAIF requested review of an O&O that set aside its denial of claimant's new/omitted condition claim for a post-operative staph infection.

Claimant was injured on February 5, 1979. That's right **1979**! (I was in college). He suffered extensive burns to his left chest and had several reconstructive surgeries. The medical course is interesting, so I will repeat it (omitting references to the exhibits):

"Claimant has significant permanent residuals from his 1979 burn injury and its associated treatment. These residuals include the removal of all subcutaneous fatty tissue over the left chest wall, leaving abnormal skin due to extensive skin grafting and scar tissue. Because of the loss of subcutaneous fat, from which blood vessels would normally supply the grafted skin, blood is instead supplied by the underlying muscles of the chest wall floor. As a result, the normal supply of oxygen and nutrients to the grafted skin is at risk, along with claimant's vascular system and the supply of infection-fighting white blood cells. Claimant's vascular system is further compromised by his 35+ year history of smoking one-half to two packs of cigarettes per day.



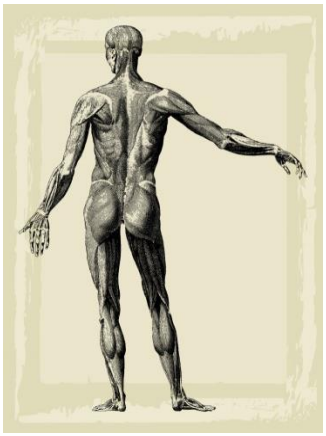
"In May 2011, claimant was diagnosed with severe, idiopathic cardiomyopathy. In September 2011, Dr. Patel implanted a pacemaker with a cardioverter-

defibrillator (ICD) in a subcutaneous pocket over claimant's left chest wall muscle. After the procedure, the blood supply to the skin graft/scar tissue area was cut off, and the blood entered the subcutaneous pocket, forming a hematoma. The tissue over the implant developed necrosis and sloughed off, allowing bacteria under the skin, which became infected, causing sepsis."

Claimant contended that his staph infection was a new condition related to his original, accepted claim, way back in 1979. Nobody disputed the existence of claimant's post-operative staph infection. The issue was whether claimant's accepted burn injury was the major contributing cause of his infection. The ALJ found that claimant has carried his burden of proof.

The Board felt otherwise, noting that "[a]ll the physicians opined that without the intervening event of the ICD surgery, claimant would not have contracted an infection." Ultimately, the Board felt that it was the cardiologist's decision to place the ICD on top of claimant's chest wall muscle, this cutting off the blood supply to his preexisting skin grafts, that was the major cause of the staph infection. **Reversed**

Rosanna L. Jakobson, 65 Van Natta 1513 (2013) (ALJ Dougherty)



Claimant requested review of an O&O that upheld the employer's denial of her injury claim.

Claimant worked as a punch press operator, making chain saw parts. On December 9, 2011, she fell while walking across the floor. There were no witnesses, and she had no memory of the event. A coworker found her lying on the floor, unconscious. She was transported to the ER.

According to the ER initial report, it was undetermined whether claimant lost consciousness before or after her fall. SAIF denied her claim, on an AOE/COE basis.

Whether an injury "arises out of" and occurs "in the course of" employment concerns two prongs of a unitary "work connection" inquiry that asks whether the relationship between the injury and the employment has a sufficient nexus so that the injury should be deemed compensable. To establish the "arising out of"

element of the test, a causal connection must be linked to a risk connected with the nature of the work or a risk to which the work environment exposes the claimant. A truly unexplained fall, a "neutral" risk, is considered to arise out of employment as a matter of law and is compensable, so long as it occurs in the course of employment. So, the task was to classify claimant's fall as the result of idiopathic factors, or as something that was truly unexplained. Whether a fall is truly unexplained is a question of fact, and a fall will be deemed "truly unexplained" only if the claimant "persuasively eliminates all idiopathic factors of causation." In other words, if idiopathic factors can be eliminated, there is an inference that there must have been something at work that caused the injury.

The medical evidence established a synopal event as the possible idiopathic cause of claimant's injury. The parties agreed that this was the issue. It was up to claimant to establish that she did not suffer from such an event on the date of injury. Importantly, she had a documented history of such events. Claimant's long-term attending physician, in addition to claimant's testimony that she hadn't suffered a syncopal (fainting) event since age 12, effectively rebutted SAIF's evidence and established that the fall was "truly unexplained." **Reversed**

Manu R. Kamanda, 65 Van Natta 1571 (2013)
(ALJ Otto)

Claimant requested review from an O&O that upheld the denial of her alleged "new/omitted" conditions claim for a "bite" and a "contusion." (Such idiocy!)

In February 2011, claimant, a mental health technician at a disabled adult care facility, sustained multiple injuries after being assaulted by a patient. The claim was accepted for the following: (1) contusion of the right 4th finger; (2) contusion of the right 5th finger; (3) lumbar strain; (4) cervical strain; and (5) right ankle strain. Claimant then asked that "bite" and "contusion" be added to the scope of claim acceptance.

Importantly, a carrier is only required to accept a "condition," not a mechanism of injury. The distinction between a "condition" and a "mechanism of injury" is an issue of medical fact. In this case, the Board determined that "bite" was a mechanism of injury and that, by accepting the contusions resulting from that bite, the insurer adequately apprised claimant and her doctors of what was covered under the accepted claim. The "contusion" had, of course, already been accepted. **Affirmed**

And from the Court of Appeals:

Vigor Industrial, LLC v. Ayres, 0901523, A149855 (August 7, 2013)

This case is an attempt to define what constitutes a "preexisting condition" to be weighed against an "otherwise compensable injury" in the context of a combined condition acceptance/denial. The Court couched the analysis in mathematical terms: (1) Claimant's position – Combined condition = (OCI) "otherwise compensable injury" + (PEC) "preexisting condition"; (2) Employer's position – Combined condition = (OCI) + (PEC and other conditions). The Court held that only statutorily defined preexisting conditions (those found in ORS 656.005(24)(a) may be used in determining what constitutes the major contributing cause of a claimant's combined condition.

The Court concluded: "Thus, we agree with the board that a 'combined condition' consists of two components: (1) 'an otherwise compensable injury'; and (2) a statutory 'preexisting condition.'" In other words, conditions that do not meet the definition of a preexisting condition don't matter. As the Court observed, "Other conditions that neither are encompassed within the 'otherwise compensable injury' nor are statutory 'preexisting conditions' play no part in the 'major contributing cause' analysis." **Affirmed**