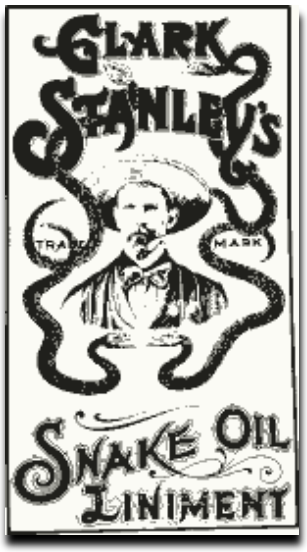
Dr. Garber's

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



Bradley G. Garber's Board Case Update: 09/16/2013

Steven C. Yielding, 65 Van Natta 1585 (2013)
(ALJ Naugle)

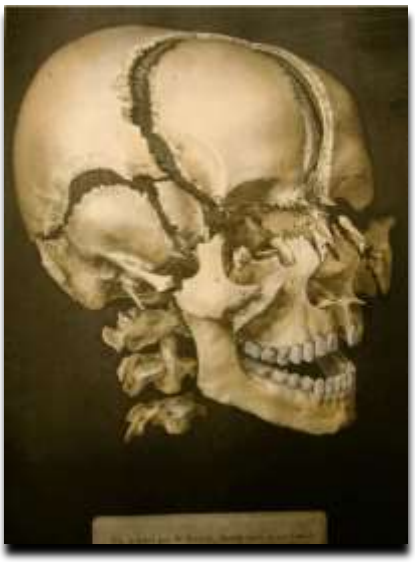
The self-insured employer requested review of an Opinion & Order that set aside its denial of claimant's left knee injury claim. This was one of those "combined condition" situations and the ALJ found that employer did not establish the existence of a preexisting condition as defined by ORS 656.005(7)(a)(B). On review, employer argued that Dr. Fuller's analysis and opinions established the existence of a preexisting condition.

Dr. Fuller reviewed claimant's x-rays, MRI films and operative report and opined that there was no evidence of left knee arthritis. Nevertheless, he found claimant's degenerative meniscus changes to constitute an "arthritic condition" that resulted in structural change in claimant's knee. According to Dr. Fuller, the meniscus acts as a "shock absorber." He explained that damage to the

shock absorber results in "extra compensatory force applied to the adjacent bony articular cartilage, leading to arthritic breakdown of the articular cartilage, along with additional structural change, such as joint space narrowing and bone spur formation."

The Board did not find Dr. Fuller's opinion sufficient to establish the existence of "arthritis or an arthritic condition." It wrote, "To begin, Dr. Fuller's opinion regarding 'structural changes' is general in nature, rather than addressed to claimant's particular situation." The Board went on to note that no physician, including Dr. Fuller, identified breakdown of articular cartilage, joint space narrowing, or bone spur formation in the MRI films of claimant's knee. **Affirmed**

NOTE: Make sure the hypothetical structural changes are confirmed by diagnostics and make sure to tie the findings, specifically, to the claimant. In other words, something to the following effect: "Mr. X's meniscus acts as a shock absorber. When part of Mr. X's knee meniscus was removed it caused extra compensatory force to be applied to adjacent structures in Mr. X's knee, thus leading to a breakdown of the articular cartilage in Mr. X's knee."



Ronald L. Lucas, 65 Van Natta 1692 (2013) (ALJ Dougherty)

The insurer appealed an Opinion & Order that set aside its denial of ….(wait for it)….**transient unresponsiveness**! Hey, we've all been there!

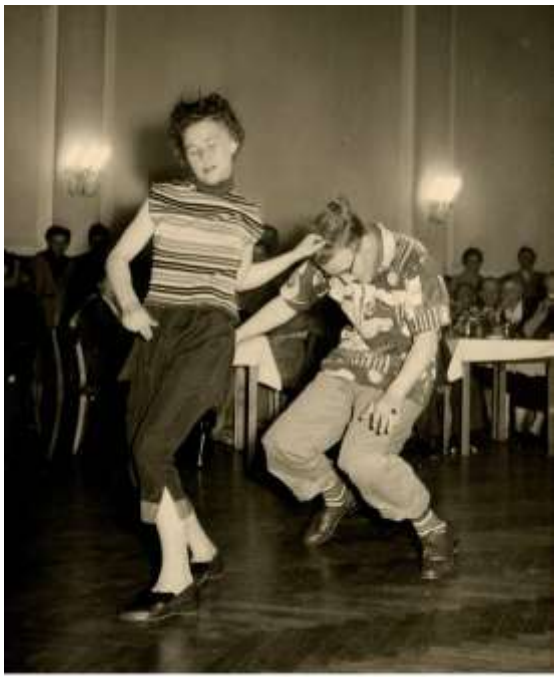
Claimant had an accepted right shoulder claim. In April 2010, the parties entered into a CDA. In February 2011, claimant found Dr. Seymour, who approve Lyrica, Cymbalta, Trazadone and Flexeril. Claimant had a medical marijuana card, but Dr. Seymour decided to stay away from that one.

On August 12, 2011, claimant had a little party. In addition to his medications, he downed some "Long Island" iced teas and had a bit of his medical marijuana. After about 30-45 minutes after going to bed, his wife noticed that his snoring did not sound normal, but she could not wake him. She started CPR and called 911.

In the ER, claimant was about to be intubated when he suddenly woke up. He was assessed with "transient unresponsiveness," and was admitted to the hospital for observation. He was discharged the following day.

After hearing, the ALJ determined that the medical evidence established that the treatment for claimant's compensable shoulder condition (i.e., drugs) was a material contributing cause of his transient unresponsiveness and, therefore, the medical services in the ER and hospital were compensable.

On review, the employer argued that claimant's transient unresponsiveness was a consequential condition, that the "major contributing cause" standard applied, and that claimant did not carry that burden of proof.



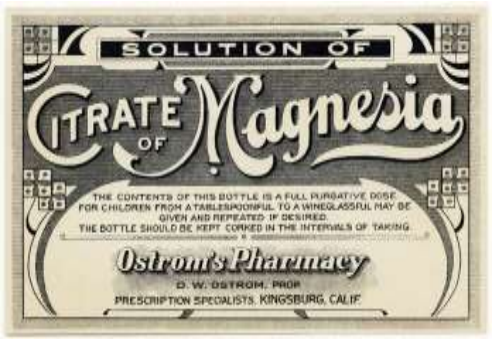
On review, the Board agreed with employer's position that claimant's transient unresponsiveness was a consequential, rather than ordinary, condition related to claimant's accepted shoulder claim. It wrote, "Here, the record does not establish that claimant's 'transient unresponsiveness' was the direct result of reasonable and necessary treatment for his accepted shoulder conditions." Because claimant had taken his medications, without problem, for over a year, and only reacted how he did after adding alcohol and marijuana to the mix, the Board concluded that claimant's transient unresponsiveness was not due to his claim-related treatment. Claimant did not carry his burden of proof. **Reversed**

NOTE: Is "transient unresponsiveness" an ICD-9 diagnosis, or a description of state? How about "momentary idiocy," "temporary dancing fool," "Frank Sinatra wannabe?"

Robert M. Coleman, Jr., 65 Van Natta 1748 (2013) (ALJ Brown)

Claimant requested review of an Opinion & Order that affirmed employer's injury claim denial.

Claimant is a correctional officer. His job duties include escorting inmates to and from the hospital and staying with them at the hospital when they need treatment. On October 12, 2012, claimant was scheduled to work from 9:30 P.M. to 5:30 A.M. The employer called claimant, at home, around 5:00 P.M. and directed him to report for hospital watch at a local hospital. He could have reported to work and driven to the hospital in an employer-owned vehicle. Instead, he decided to drive his own car to the hospital. When he arrived at the hospital, around 9:10 P.M., he got out of his car and tried to run to the front door of the hospital. He slipped and fell on wet ground/leaves.



SAIF denied claimant's claim, asserting that his injury did not arise out of and in the course of his employment because the "going and coming" rule applied. As pointed out by the Board, "Generally, injuries sustained by employees when going to and coming from their regular places of work are not compensable." See, *Jenkins v. Tandy Corp.*, 86 Or App 133 (1987). The observed that claimant's job involved routine assignments to local hospitals. In fact, claimant testified that he spent 8 out of the 10 days before his injury performing hospital watches.

Claimant argued that the "special conveyance" exception, the "special errand" exception or the "traveling employee" rule removed him from the "going and coming" rule. The Board did not buy any of it. **Affirmed**

NOTE: This is simply a good case to review in your AOE/COE claims

Joshua McCuen, 65 Van Natta 1762 (2013) (ALJ Poland)

Claimant appealed an Opinion & Order that upheld WCD's suspension order and affirmed employer's noncooperation denial.

Claimant filed an injury claim on October 24, 2012. He provided a mailing address, which was his sister's residence. He had no phone.

On October 30, 2012, employer's claim administrator mailed a letter to claimant at the address he had provided. The letter informed claimant that he was required to

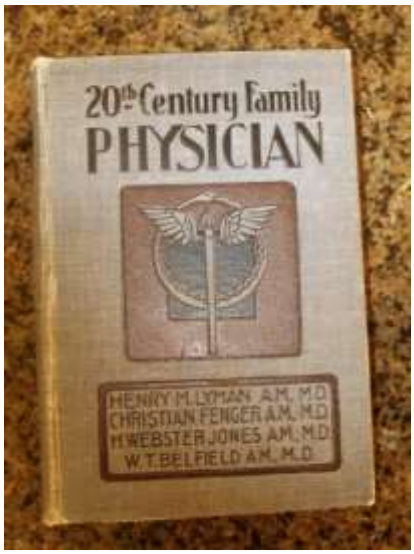
call the claims examiner to schedule a recorded statement. The letter was sent by certified and regular mail. Claimant did not respond to the letter.

On November 14, 2012, the claim administrator asked WCD to suspend claimant's benefits. A copy of the request was sent to claimant.

On November 16, WCD notified claimant in writing, by regular mail, that his benefits would be suspended in five working days unless he contacted the claim administrator and cooperated with the investigation of his claim. Claimant did not contact WCD, or the claim administrator, as directed. Accordingly, WCD issued an Order Suspending Compensation on November 28.

On December 17, the claim administrator denied claimant's injury claim, based on his noncooperation. Claimant appealed the denial. (At least, THAT got his attention)

After hearing, the ALJ found that the claim administrator's investigative request was reasonable and that claimant had not diligently monitored his mail, which was within his control. The ALJ concluded that claimant failed to fully cooperate with the investigation of his claim, as required by ORS 656.262(14). She upheld the WCD suspension order, and employer's denial.



On review, claimant argued that the investigative demand was unreasonable and that he failed to cooperate for reasons beyond his control. The Board didn't buy it.

If an injured worker fails to cooperate after the carrier notifies him in writing of his obligation to cooperate, the carrier may ask WCD to suspend compensation benefits. OAR 436-060-0135(3). If WCD finds that the worker failed to reasonably cooperate, WCD "shall" suspend all or part of the payment of compensation after notice to the worker. If the worker does not cooperate for an additional 30 days after the notice, the insurer may deny the claim because of the worker's failure to cooperate. ORS 656.262(15).

To set aside a "noncooperation" denial, the worker must prove one of the following: (1) that he fully and completely cooperated with the claim

administrator's investigation; (2) that he failed to cooperate for reasons beyond his control; or (3) that the administrator's investigative demands were unreasonable. See, *Naomi R. Hopper*, 64 Van Natta 1899 (2012).
Claimant argued that the administrator's demand that he call to schedule a recorded statement was unreasonable. That went over like a lead balloon.
Affirmed