Dr. Garber's

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

Bradley G. Garber's Board Case Update: 12/10/2012

Glenn D. Kramer, 64 Van Natta 2245 (2012)
(ALJ Fulsher)

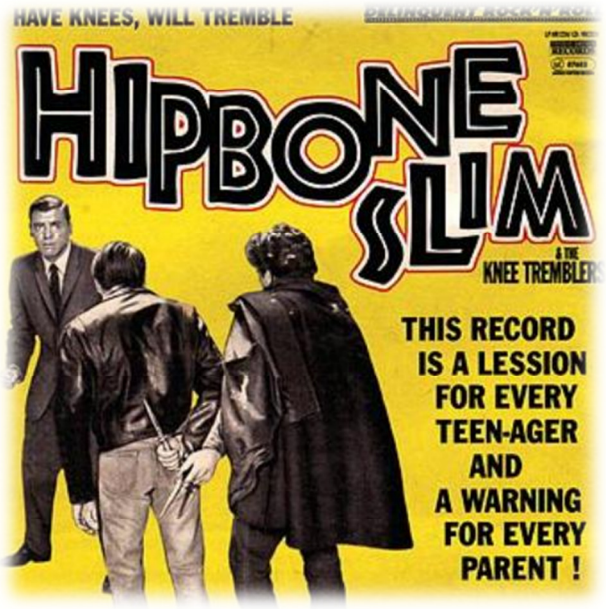
Claimant requested review of an Opinion & Order that upheld the insurer's denial of his "new" left hip condition.

Claimant had an accepted right knee condition. He tried to argue that his left hip condition was the result of a "combination" of conditions. This, of course, was so the employer would have the burden of proof. The employer, on the other hand, argued that the hip condition was, if compensable, a "consequence" of his accepted condition. Under that legal theory, claimant would have the burden of proof. The Board framed the issue as follows:

"First, claimant's 'claim' was for a left hip condition. 'Combined' and 'consequential' conditions are *theories* that are applied to determine whether the claimed condition is compensable. Although a claimant's theory of compensability is the starting point, we must review the entire record to determine the appropriate standard of review. *Daniel Suing*, 56 Van Natta 2600, 2601

(2004)(citing *Dibrito v. SAIF*, 319 Or 224, 248 (1994)); *Daniel S. Field*, 47 Van Natta 1457, 1458 (1995)(it is our obligation as a fact finder to apply the appropriate legal standards to determine the compensability of a worker's claim.") Here, despite claimant's chosen theory of compensability (combined condition), the medical evidence persuasively establishes that claimant's left hip condition is, in fact, a consequential condition. *See Fred Meyer, Inc. v. Compton*, 150 Or App 531, 536 (1997)(a consequential condition is "a separate condition that arises from the compensable injury, for example, when a worker suffers a compensable foot injury that results in an altered gait that, in turn results in back strain."); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992)(a consequential condition is a condition caused by a compensable injury rather than by the industrial accident itself)." (emphasis added)

Note: Determining which legal theory to apply is not the same as applying a particular "standard of review." Example: the Board's standard of review is *de novo*; the Court of Appeals standard of review is for substantial evidence. Neither has anything to do with what legal theory of recovery is applied.



In this case, the attending physician assessed "left hip pain from transfer stress secondary to right knee condition." This, of course, clearly suggests that the left hip condition was a consequence of the right knee condition. You would think that claimant would run with that and try to carry his burden of proof under ORS 656.005(7)(a)(A). But, no…he sought to prove that his right knee was connected to his left hip. This, apparently, was because while the attending physician explained that claimant's left hip condition was partly caused by "transfer stress" from the right to the left side because of the work injury, he went on to opine that the "major contributing cause" of claimant's left hip diagnosis was his age, weight, deconditioning and preexisting underlying arthritis. **Affirmed**

Kuana L. Blackmon, 64 Van Natta 2336 (2012)
(ALJ Fisher)

The insurer appealed an Opinion & Order that set aside its denial of claimant's right ankle condition. The insurer/employer argued that claimant's injury did not arise out of and in the course of employment.

Claimant rode the bus to work. She fractured her ankle while disembarking in front of the driveway to her employer's place of business. Her claim was denied on an AOE/COE basis. At hearing, the parties stipulated that claimant was injured "in the course of" her employment and that compensability of her claim depended on whether the injury "arose out of" employment.

Note: Oddly, insurer/employer did not raise the "going and coming" rule as a defense. As the Board observed, in a footnote, "Ordinarily an injury that occurs while going to or coming from work is not compensable because it does not occur within the course of employment. *See Enterprise Rent-A-Car of Oregon v. Frazer*, ___ Or App ___, ___ (October 17, 2012). Here, however, the insurer concedes that the injury occurred in the course of claimant' s employment."

A worker's injury is deemed to "arise out of" employment "if the risk of injury results from the nature of his or her work or when it originates from some risk to which the work environment exposes the worker. In this case, claimant had not begun working when she was injured and the record did not establish that the risk of injury stepping down from a bus while holding a handrail was a risk connected with the nature of

her work in customer service. In short, the record did not establish that claimant's work environment exposed her to a risk of injury in the manner that it occurred. **Reversed**

Armenta v. PCC Structural, Inc., 0701193; A141790 (December 5, 2012)

Claimant appealed a decision from the Board that affirmed the employer's denial of his occupational disease claim for cervical and lumbar radiculopathy. Specifically, claimant asserted that, although a medical expert addressed claimant's alleged lumbar radiculopathy and its cause, in a rebuttal report, the Board unreasonably found otherwise and thereby erred in misinterpreting the expert's opinion and disregarding it as rebuttal evidence. This sounds like a classic "war of experts" scenario, something which the Court of Appeals does not ordinarily examine on appeal, due to its substantial evidence standard of review.

After all medical evidence had been presented, calling into question the work-related cause of claimant's alleged occupational disease, claimant requested that the hearing be continued to allow for the submission of a rebuttal report from Dr. Gritzka. The request was granted pursuant to OAR 438-007-0023 (party bearing the burden of proof on an issue is entitled to the "last presentation of evidence and argument on the issue"). We all know what Gritzka's opinions were.

The ALJ found that Gritzka did not expressly diagnose "radiculopathy" and, so, found that there was "no persuasive expert medical evidence supporting claimant's contention that his work activities were the major contributing cause of his cervical and lumbar radiculopathies." He affirmed the employer's denials. The Board adopted and affirmed the ALJ's order, further stating, "Based on the ALJ's express language that the rebuttal report was limited to addressing claimant's cervical and lumbar radiculopathies, we conclude that it was within the ALJ's discretion to exclude evidence that did not fall within the limited purpose for the which the record remained open." On appeal, claimant

argued that Gritzka did, in fact, diagnose lumbar radiculopathy given his "finding of nerve root compression in the lumbar spine."

After looking up the word "radiculopathy," in *Stedman's Medical Dictionary*, the Court decided that, while Gritzka did not use the word in his diagnosis, the language he used in describing the condition mirrored language used by another expert in assessing it. The Court, therefore, found that the Board erred in not considering Gritzka's opinions. It found that Gritzka's opinion, at minimum, addressed claimant's alleged lumbar radiculopathy and its cause, and remanded the matter to the Board to reconsider its decision, after giving proper treatment to Gritzka's rebuttal. **Reverse & remanded**

Note: The Court did not "weigh" the medical evidence; it merely decided that the Board should have considered evidence, instead of deciding that the evidence fell outside of the scope of what was allowed by the ALJ's continuance.