Dr. Garber's

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

Bradley G. Garber's Board Case Update: 12/28/2012

Stefan R. Cammann, 64 Van Natta 2401 (2012)
(Order on Reconsideration Approving Claim Disposition Agreement)

SAIF submitted an executed Claim Disposition Agreement for approval and the agreement was approved. But, relying on *Berta K. McClintock*, 64 Van Natta 1350 (2012), the Board did not consider SAIF's waiver of an overpayment to constitute valid consideration for the agreement. SAIF requested reconsideration.

The CDA provided that the total amount of the disposition was $3,500: $714 payable to claimant, $238 to his attorney, and $2,548 to SAIF for partial recovery of its $5,000 overpayment lien. The remainder of the overpayment was waived. In the past, relying on *Karen L. Beagal*, 49 Van Natta 231 (1997), the Board has refused to recognize an insurer's waiver of its right to recover an overpayment as consideration for settlement.

In this case, revisiting the holding in *Beagal*, the Board reviewed the issue *En Banc*. The posed three questions:

1. Does the carrier's waiver of an overpayment constitute "consideration?"
2. Is the consideration sufficient to avoid a finding that the agreement is unreasonable as a matter of law?"

3. Is the proposed attorney fee award under the Board's rules?"

In revisiting the *Beagal* rationale, the Board decided to look up the dictionary definition of "consideration." Consideration is defined as "some right, interest, profit, or benefit to the promisor * * * or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the promise * * *." The pivotal question, for the Board, was whether the waiver of an overpayment was a "benefit" to a claimant, or was a "forbearance" or "detriment" to SAIF. The Board answered this question, as follows:

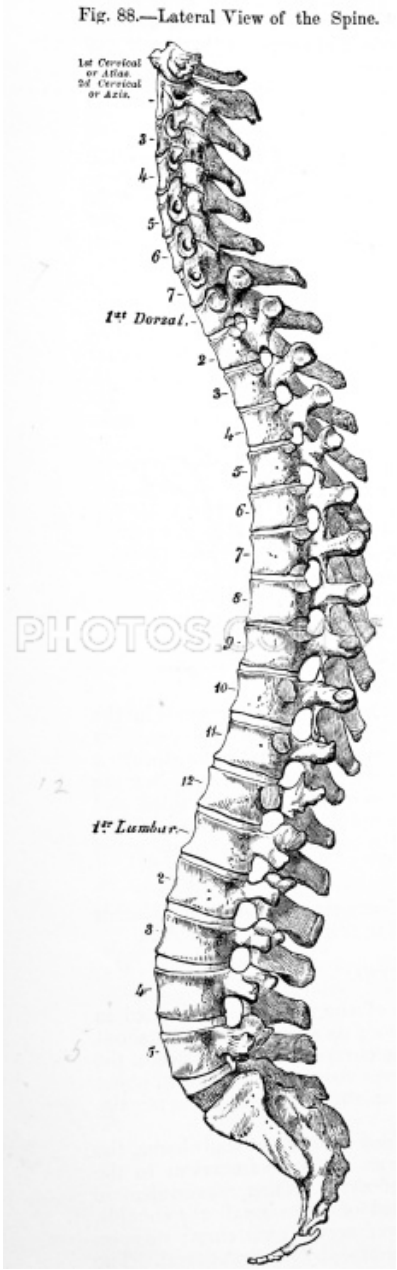
"As applied here, in return for a release of rights to future workers' compensation benefits, claimant has acquired the legal right of having a purported overpayment waived. In other words, should he become entitled to the payment of temporary/permanent disability compensation resulting from a future claim (which would otherwise become subject to offset pursuant to ORS 656.268(14)(a) due to the overpayment), he will receive that future compensation without an offset because the overpayment no longer exists. As such, this waived overpayment qualifies as a 'benefit' to claimant."

The Board also considered SAIF's waiver of its right to collect future benefits in satisfaction of its lien to constitute a forbearance. Consequently, the Board concluded that waiver of an overpayment can be consideration in support of a CDA. While a waiver can be consideration, however, the Board stated, "A carrier's waiver of an overpayment does not qualify as 'proceeds' of a CDA." There must be some "proceeds" so that claimant's attorney can get a fee under OAR 438-015-0052(1). In this particular case, the claimant received some money "proceeds" in addition to the benefit of a waiver of SAIF's remaining overpayment. The $238 awarded to his attorney, was deemed to be reasonable. The Board observed that, because CDA proceeds are "compensation," SAIF was authorized to recover the "unwaived" portion of its overpayment ($2,548) from the total settlement amount.

Walter S. Wiese, 64 Van Natta 2438 (2012)

(ALJ Smith)

Claimant, a chiropractor, filed a claim for bilateral shoulder, neck, and upper back conditions. While the ALJ found claimant to be a subject worker, he found that claimant's injuries did not arise out of and in the course of his employment because there was no "employment" for the injury to arise out of. Claimant was the sole proprietor of a business registered as "Lighthouse Chiropractic." When he was injured, he was moving a table out of a building in which he had been conducting business. He was moving the table to another location. The ALJ found that claimant had not opened his business, had no patients, and did not receive any income for chiropractic-related services during the policy period of his coverage.



On review, claimant argued that the ALJ interpreted his work too narrowly and did not consider the entire scope of his activities as a sole proprietor chiropractor running his own business. He contended that moving the "adjustment table" bore a sufficient relationship to his employment as a sole proprietor chiropractor to be compensable and that, in any event, his activity at the time of the injury was at least sufficiently incidental to his employment to be compensable. The Board agreed.

While the facts are somewhat convoluted, it turns out that the owner of the building in which claimant conducted his business had to sell the property, so claimant had to get his office equipment out of the building. It was in the process of moving that claimant injured himself. The Board found that claimant's injury occurred "in the course of" his employment because it took place within the period of his employment as a sole proprietor of a chiropractic business, at a place where he was reasonably expected to be, and while he was reasonably fulfilling the duties of his employment. Claimant did not cease being a chiropractor simply because he had to move his business. **Reversed**

Moral: Even chiropractors get injured

Francien Murillo, 64 Van Natta 2458 (2012) (ALJ Otto)

The employer appealed an Order on Reconsideration and Opinion & Order that did not apportion claimant's chronic condition award of 5%, per accepted condition. Employer accepted a thoracolumbar strain. Because the condition involved both the thoracic spine and the lumbar spine, both sections of the back were addressed, separately, by medical arbiter, on reconsideration. The range of motion measurements were apportioned by the arbiter, with 75% due to preexisting and noncompensable degenerative processes and 25% due to the industrial injury. The arbiter also found that claimant suffers from a chronic condition significantly limiting the repetitive use of his mid and low back. The ARU apportioned the range of motion findings and, then, added 5% to each back section. Claimant ended up with a total of 13% PPD

On appeal, employer argued that OAR 436-035-0019(2) expressly states that impairment findings need to be combined with chronic condition findings, and not simply added. The Board did not address the argument and found, instead, that because the medical arbiter did not apportion the chronic condition findings, as well as the other impairment findings, it had to simply add the chronic condition award without apportionment.

Query-- *If the chronic condition is necessarily associated with the same pathology that results in other scheduled impairment, why would it not be apportioned to the same degree as any other impairment finding.*