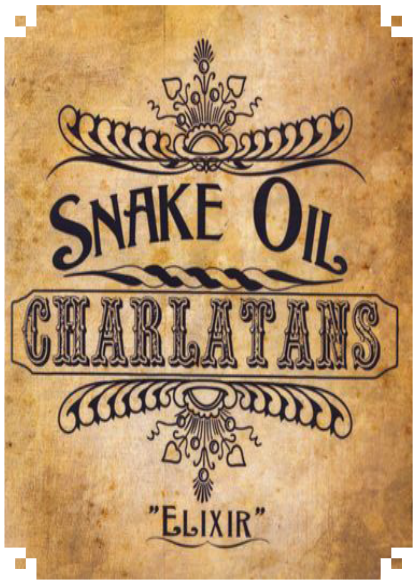
DR. GARBER'S

Dispensary of Cough syrup, Buffalo Lotion,
Pleasant Pellets, Purgative Pectoral, Salve
& Workers' Compensation Cases



Bradley G. Garber's Board Case Update: 10/27/11

Nathaniel D. Erdkamp, 63 Van Natta 2125 (2011) (ALJ Sencer)

The self-insured employer requested review of an Order that found it had disputed the causal relationship between claimant's accepted right knee condition and proposed medical services. Employer argued that it did not dispute the compensability of claimant's condition but, instead, the compensability of proposed treatment and that, therefore, the Hearings Division did not have jurisdiction over the issue.

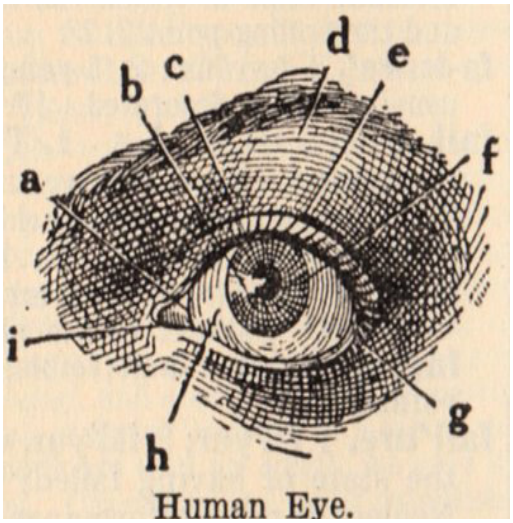
Claimant sustained a compensable right knee medial meniscus tear in 2007. On April 2, 2010, his attending physician requested authorization from the employer for pain management services. The employer did not respond, so claimant requested Medical Director review.

WCD acknowledged claimant's request and asked the employer to submit a "Specification of Disputed Medical Issues" form and certify that there was "no issue of causation or compensability of the underlying claim or condition." Employer submitted the

form, but did not check "Yes" or "No" on the form. In a cover letter, accompanying the submission of the form and pertinent claim documents, Employer raised "proprietary-based" reasons for its disapproval of medical services and concluded, "There is consequently serious doubt if the requested service is even causally related to the accepted condition." (Whoops).

WCD issued a "Defer and Transfer Order" and sent the issue to the Hearings Division. At the hearing, Employer contended that the Department's order was erroneous because it had never disputed causation. Employer contended it was only disputed compensability of medical services. The ALJ found that Employer had, in fact, disputed causation and that, because Employer conceded the causal relationship at hearing, claimant's attorney was entitled to an attorney fee for overcoming a denial.

A dispute regarding whether a sufficient causal relationship exists between medical services and an accepted claim is within the Board's subject matter jurisdiction because it is a "matter concerning a claim." ORS 656.704(3)(b)(C); AIG Claim Services, Inc. v. Cole, 205 Or App 170 (2006). A dispute regarding whether medical services are "excessive, inappropriate, ineffectual, or in violation of the rules regarding the performance of medical services" is within the subject matter jurisdiction of the Department because it is not a "matter concerning a claim." ORS 656.704(3)(b)(B); ORS 656.327.



Human Eye.

In this case, because Employer did not expressly "certify" that causation was NOT at issue and, in fact, raised a causation issue in its narrative to the MRU and, furthermore, did not check the appropriate box on the "Specification of Disputed Medical Issues" form. The Board found that Employer raised a causation issue and, therefore, that the Hearings Division had subject matter jurisdiction over the matter.

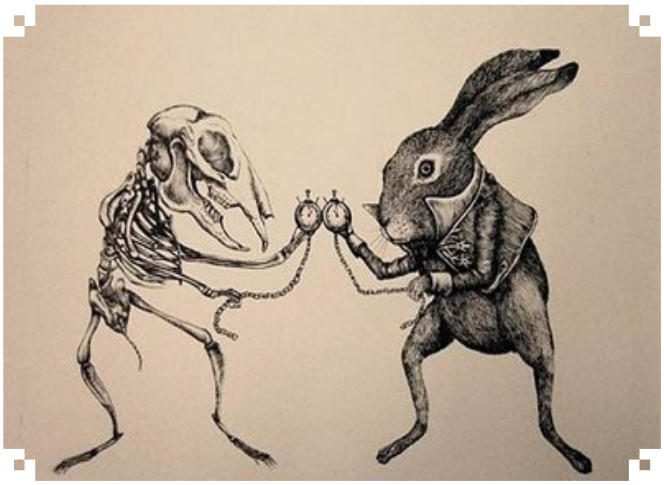
The Hearings Division did not address the issue of "propriety" raised by Employer. It left that issue to the Department, after finding that the cause of proposed treatment was claimant's accepted claim. The Board agreed with this disposition and Judge Sencer's attorney fee award. It awarded claimant's attorney a "contingent" fee of $5,500, payable only if the Department ultimately found the proposed palliative medical care to be proper. **Affirmed**

Moral:

Check the right box and do not say "causation" if you do not want to dispute "causation."

Michael L. Long, 63 Van Natta 2134 (2011) (ALJ Dougherty)

Claimant requested review of an order that upheld SAIF's denial of his new/omitted medical conditions claim.



Claimant, who had a history of low back complaints, was injured when he fell at work, on May 21, 2006. SAIF ended up accepting a lumbar strain, a right shoulder strain, and a sacroiliac strain. It had denied new/omitted condition claims for the conditions of L5-S1 disc protrusion, fractured osteophyte at L5, and nerve root impingement at L4, L5 and S1. Pursuant to a prior Opinion & Order, SAIF was ordered to accept the fractured osteophyte and nerve root impingement at L5. The rest of SAIF's denial was upheld. Then, not quite ready to stop the idiocy, claimant requested that SAIF accept "low back condition resulting in radiculopathy and mechanical back pain" and "low back condition resulting in left sided pain, incontinence and groin pain." On July 26, 2010, SAIF issued a denial, contending that the request sought "acceptance of unspecified conditions which are not new or omitted medical conditions pursuant to ORS 656.267." Claimant requested a hearing.

The ALJ found that claimant's request was insufficient and that the evidence regarding the compensability of the claim was insufficient. On appeal, claimant contended that his request was sufficient to identify new/omitted medical conditions and that the evidence supported compensability of the claimed conditions. The Board concluded "that the claim was not for a new/omitted medical condition."

The Board wrote as follows [citations omitted]:

"A new/omitted medical condition claim for a symptom of a previously accepted condition may be denied because the symptom is not a new/omitted medical condition. Similarly, a new/omitted medical condition may be denied, even if the claimed condition is compensable, if the claimed condition is not 'new' or 'omitted.'"

In this case, SAIF had already accepted all of the pathology that caused the symptoms claimed as "new" or "omitted" conditions. Based on the medical evidence, the Board found that the claimed conditions were not "new" or "omitted." **Affirmed**

Compare: *Nichole M. Robinson, 63 Van Natta 1475 (2011)(even though only medical evidence in record equated "lumbosacral strain" with "lumbar strain," Board found a new/omitted condition compensable)*

Scott W. Weeks, 63 Van Natta 2142 (2011)
(ALJ Lipton)

In this case, Claimant requested review, in part, to dispute an order that did not award an attorney fee for alleged unreasonable claim processing. Claimant made a "new/omitted" condition claim on October 19, 2010. Employer conceded that it did not accept or deny the claim within 60 days. It offered no explanation for its failure to timely respond to the claim. It argued, however, that no penalty-related fee could be assessed because there were no "amounts then due." This, of course, is a dead argument after Nancy Ochs, 59 Van Natta 1785 (2007).

The value of this decision is that, after considering the factors set out in OAR 438-015-0010(4), the Board awarded a fee of $500 to claimant's attorney, as a penalty-related fee.

Moral:

Use this case as a "lodestar" when arguing about assessed fees for not responding to a new/omitted condition claim, timely. Also, good fodder for settlement negotiations.