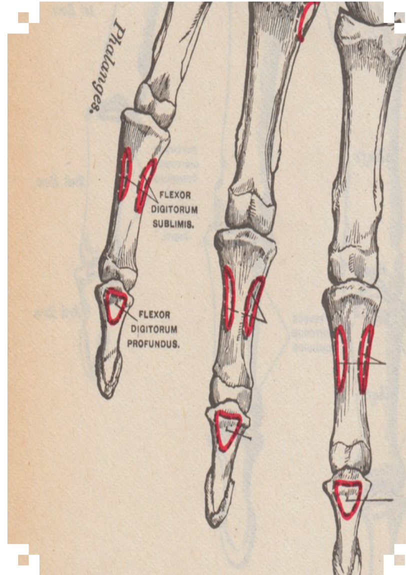
DR. GARBER'S

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



Bradley G. Garber's Board Case Update: 11/08/11

Francisco M. Carlos-Macias, 63 Van Natta 2184 (2011)
(ALJ Donnelly)

Claimant requested review of an Opinion & Order that upheld SAIF's denial of his aggravation claim and found diagnostic medical services not compensable.

Claimant disputed SAIF's aggravation claim denial, alleging that he never filed an aggravation claim and, therefore, SAIF's denial was premature. ORS 656.273(3) provides, in part:

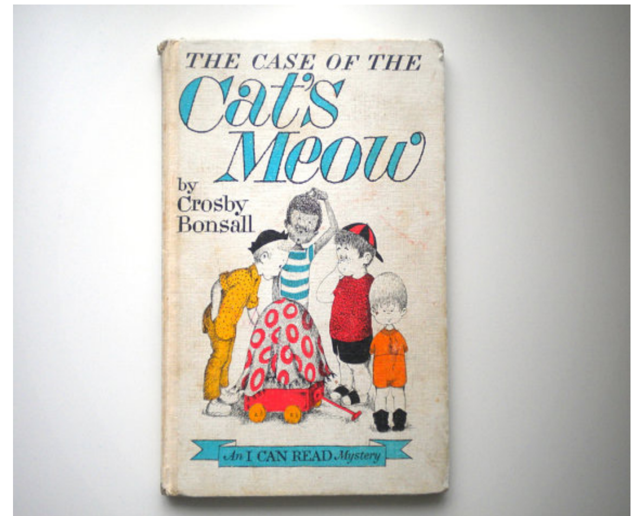
"A claim for aggravation must be in writing in a form and format prescribed by the director and signed by the worker or the worker's representative and the worker's attending physician."

ORS 656.005(6) states that a "claim" means a "written request for compensation from a subject worker * * *." In this case, claimant checked a box on the 827 form, indicating that he was filing an aggravation claim. The Board astutely recognized that this would constitute a claim. Claimant signed it. He attempted to argue, on appeal, that because the attending physician was not the one

to check the box, the 827 form was not a valid aggravation claim. The Board observed, "All the statute requires is that the physician sign the form." In other words, the physician does not need to be the box-checker. The Board found that claimant, in fact, filed an aggravation claim. It, then, went on to address the medical service issue.

Claimant underwent a triple phase bone scan and EMG/nerve conduction testing. He had an accepted claim for a left shoulder condition. The ALJ felt that the diagnostic testing was not related to the accepted condition and, therefore, found SAIF not liable for payment for the services.

The Board observed, "If diagnostic services are necessary to determine the cause or extent of a compensable injury, those services are compensable whether or not the condition that is discovered as a result of them is compensable." In this case, the attending physician asserted that the testing was particularly important when the patient presented in an exaggerated manner that may actually be a culturally related phenomenon. He felt that the bone scan and EMG testing was necessary to determine diagnosis and treatment. Independent examiners felt that the testing was unnecessary, but the Board deferred to the opinions of the attending physician and found the testing compensable. Claimant's attorney was awarded $5,000. **Affirmed in part, reversed in part**



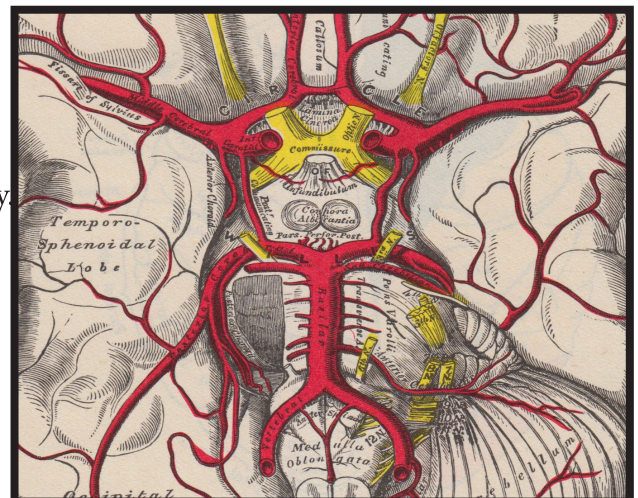
Eric M. Schwartz, 63 Van Natta 2192 (2011) (ALJ Naugle)

SAIF requested review of an Opinion & Order that set aside its denial of Claimant's bilateral arm injury claim.

Claimant was planting trees in May 2010. While using a "digging bar," he hit a rock with the bar, causing a shock sensation in both arms, right greater than left. He switched arms and continued working. But, favoring the right arm, his left arm became more sore. He stopped using the digging bar and switched to some less strenuous work. After a few days, he journeyed out of state and (allegedly) went to a "Dr. Teichman."

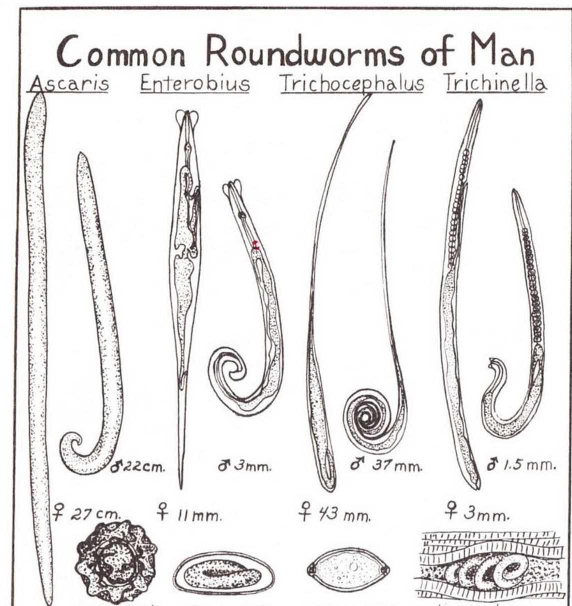
In October 2010, Claimant returned to the state of Oregon and sought treatment from a chiropractor, for bilateral elbow/arm pain. An MRI revealed tendinopathy of the common extensor and flexor tendons of the right elbow, and fluid in the bicipital radial bursa in the left elbow. The chiropractor opined that this was all due to Claimant's work activities in May.

SAIF had Dr. Swan perform a records review. Dr. Swan concluded that, because Claimant did not seek treatment for over five months, it was not medically probably that his condition, in October, was related to his work activities in May. The ALJ, however, found the chiropractor more persuasive than the orthopedic surgeon because the surgeon based his opinions on a faulty understanding that Claimant had sought no treatment between May and October.



Claimant never produced any records of his out-of-state treatment with Dr. Teichman. He simply testified that he went to the doctor, out-of-state, in May. There was really no

way to refute this testimony and the Board believed it. Because it believed Claimant's testimony, it felt that Dr. Swan's opinions were based on a faulty history. **Affirmed**



Moral:

Testimony establishing treatment is equivalent to documentary evidence of treatment. Go out-of-state, come back and lie all you want.

And from the Court of Appeals:

SAIF v. Hanscam, 0900239; CA A144869 (November 2, 2011)

SAIF appealed a Board decision that determined Claimant's "date of injury," in an occupational disease claim, to be October 3, 2005, instead of February 29, 1988.

After litigation, SAIF accepted Claimant's claim for bilateral knee osteoarthritis, with "date of injury" of October 3, 2005. That was the date that Claimant filed his occupational disease claim. When SAIF closed the claim, on October 22, 2008, it calculated Claimant's benefits for PPD based on the rate in effect on February 29, 1988, alleging that that was the date when Claimant first sought treatment, or became disabled, as a result of his knee condition.

Claimant requested reconsideration of the Notice of Closure, and the Appellate Review Unit agreed that October 3, 2005 was the appropriate date to utilize in calculating Claimant's PPD award. SAIF appealed.

There was medical evidence that Claimant received medical treatment for his osteoarthritic knees in 1987 and 1988. The condition of "end stage osteoarthritis" was not made, however, until 2005. SAIF argued that "end stage osteoarthritis" was the same as "osteoarthritis" for purposes of determining when Claimant first sought treatment or became disabled. The focus, on appeal, was when Claimant's osteoarthritis "gave rise" to the right to compensation. See, Reynoldson v. Multnomah County, 189 Or App 327 (2003). Dr. Bowman, Claimant's attending physician concluded that, although Claimant's work activities throughout his lifetime had contributed to the osteoarthritis in Claimant's knees, the pathology did not become "compensable" until his work exposure with SAIF's insured from 2000 to 2005. It was only then that the condition became "end stage" and disabling, thus making Claimant eligible for compensation. Ultimately, the Board and the Court agreed that Claimant's PPD benefits should be based on the rate in effect on October 3, 2005. **Affirmed**