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& Workers' Compensation Cases

Bradley G. Garber's Board Case Update: 01/06/12

Colleen E. Allen-Schublin, 63 Van Natta 2572 (2011)
(ALJ Jacobson)

Claimant appealed an Opinion & Order that upheld the self-insured employer's denial of her medical services claim for her low back condition. The employer had accepted claimant's low back claim "for her low back." (That's how it was done in 1986). In 1987, the employer and claimant entered into a Stipulation, whereby the employer agreed to pay claimant for a 5% PPD award, plus all outstanding chiropractic bills, and for up to three chiropractic treatment per month, forever. (DUH).


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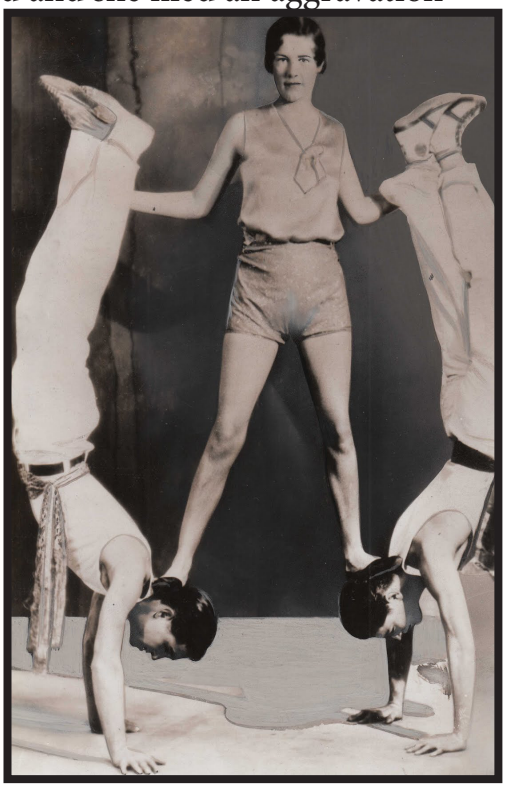
In 1992, a DCS was approved which, by its terms, obligated the employer to "abide by" the 1987 stipulation. Thereafter, the employer authorized and paid for claimant's monthly chiropractic treatments of three or fewer per month through 2010. Finally, in January 2010, Drs Duncan and Duff conducted an IME and determined that continuing chiropractic care was not materially related to her 1986 work injury. Claimant's long-term treating chiropractor disagreed, opining that claimant's chiropractic treatments were materially related to her 1986 work injury.
In March 2010, the employer issued a denial, stating that claimant's August 1986 injury was not a material contributing cause of her current chiropractic treatment. (It is not clear, from the Order on Review, whether the

employer denied claimant's "current condition."). The ALJ upheld the employer's denial, rejecting claimant's argument that the employer was precluded from denying claimant's chiropractic treatments because of the 1987 stipulation and 1992 DCS.
On review, the Board avoided addressing the interesting contractual issues and, instead, found the chiropractor's opinion that claimant's need for ongoing chiropractic treatment was materially related to the accepted "low back." **Reversed**

MORAL: ***A chiropractor who has treated an injured worker for 25 years will be believed before a couple of IME doctors, almost EVERY time.***

Beth Wilson-Atagabe, 63 Van Natta 2621 (2011) (ALJ Mills)

The self-insured employer requested review of portions of an Opinion & Order that: (1) found that claimant's chiropractic treatment was causally related to her accepted right shoulder condition; and (2) set aside the employer's denial of claimant's aggravation claim.
Claimant injured her right shoulder on June 6, 2008. On July 29, 2008, the employer accepted a nondisabling right shoulder sprain. On April 14, 2009, the employer filed a request for dispute resolution regarding the appropriateness of ongoing chiropractic treatment with the Workers' Compensation Division. On the "Specification of Disputed Issues" form, the employer checked boxes stating that the medical services were disputed because: (1) "The service is not causally related to the accepted condition"; and (2) "The service is excessive, inappropriate, ineffectual." Because causation was place at issue, the Department issued a "Defer and Transfer Order" that deferred administrative review of the "propriety" issue until causation was determined by the Hearings Division.
On May 22, 2009, claimant's right shoulder condition worsened and she filed an aggravation claim. This, of course, was within one year of the acceptance of her noncompensable injury, so she was obligated to file a request for reclassification. Instead, she filed an 827 Form on June 3, 2009. The employer did not respond. Then, claimant refiled her 827 Form on August 3, 2009. Employer responded to that one, by denying the aggravation.



The ALJ found that claimant's accepted right shoulder condition had, indeed, actually worsened, and set aside employer's aggravation claim denial. The ALJ also found that the disputed treatment was causally related to the accepted condition. The Board affirmed those aspects of the Opinion & Order. The ALJ went on to find that disputed treatment was appropriate. The Board found that the ALJ did not have jurisdiction to decide that issue. It observed, as follows: "…[W]hen the WCD transfers a causation dispute to the Board's Hearings Division, jurisdiction over the 'propriety' dispute remains with WCD. Diana M. Steinbach, 63 Van

Natta 413 (2011). Therefore, because the WCD here deferred action on the 'propriety' dispute, and transferred only the causation dispute to the Board's Hearing Division, the 'propriety' dispute remains pending before WCD. Nathaniel D. Erdkamp, 63 Van Natta 2125, recons, 63 Van Natta 2325 (2011). Therefore, the 'propriety' dispute must be addressed by WCD."
The Board referred the matter back to the Department for resolution of the medical service dispute. **Affirmed, in part, Vacated, in part.**

Steven M. Boswell, 63 Van Natta 2630 (2011)
(ALJ Sencer)

The self-injured employer requested review of an Opinion & Order that set aside a denial of the compensability of claimant's "lumbosacral spondylosis/lumbar spinal arthritis." This condition allegedly developed as the result of claimant's years of bouncing around in his truck. In affirming the ALJ's order, the Board found an anesthesiologist's opinion on causation more persuasive than the opinions of Board certified experts in neurology and orthopedics. The anesthesiologist found that years of "microtrauma" had resulted in claimant's degenerative arthritis. He admitted that, even a mosquito bite might be considered a microtrauma. Watch out! Affirmed

MORAL: ***Medical qualification has no bearing on the persuasiveness of the opinion expressed.***

Dale E. Van Bibber, Jr., 64 Van Natta 5 (2012)
(ALJ Ogawa)

Claimant requested review of an Opinion & Order that affirmed a Director's order that reduced claimant's permanent disability award under ORS 656.325(4).
Claimant was compensably injured on January 21, 2005. SAIF accepted minimally displaced fractures of the L1, L2, L3, and L4 transverse processes and left flank subcutaneous contusion. In April 2005, claimant started treating with Dr. French, who prescribed physical therapy and progressive rehabilitation. Claimant did not follow up with Dr. French and did not comply with Dr. French's recommendations. On June 15, 2005, SAIF notified claimant that his benefits would be suspended unless he participated and/or cooperated in his medical treatment. He returned to Dr. French on June 30, 2005. Dr. French recommended x-rays, but claimant did not follow through with this recommendation until July 19, 2005.

On September 8, 2005, noting claimant's failure to comply with his recommendation for physical therapy, Dr. French declared claimant medically stationary and, due to his deconditioning, released him to regular work, on a graduated basis. Eventually, on February 2, 2006, claimant's claim was closed and he received a 19% whole person award. An Order on Reconsideration affirmed the PPD award. Claimant requested a hearing.

An ALJ affirmed the Order on Reconsideration. The claimant requested review, and the Board reversed the ALJ's Opinion & Order. SAIF petitioned for judicial review. While things were pending before the court, claimant's claim was closed, again, after he had gone through an authorized training program. This time, he was awarded work disability, in addition to his 19% whole person award. The Court affirmed the Board's earlier Order on Review.

At that point, SAIF petitioned the Director for an order reducing claimant's PPD award, pursuant to ORS 656.325(4); OAR 436-060-0105(14). This was on March 31, 2010. The petition was based on claimant's continued noncompliance with Dr. French's treatment recommendations. Claimant had 10 days from the date of mailing of SAIF's petition to respond. In an April 13, 2010 letter, claimant briefly informed the Director and SAIF that he "objected" to SAIF's reduction request. SAIF responded that claimant's response was untimely and provided no substantive or procedural basis for his objection.

On June 9, 2010, the Director concluded that claimant unreasonably failed to follow Dr. French's medical advice and reduced claimant's work disability award to zero. Claimant requested a hearing.

The ALJ affirmed the Director's reduction of claimant's work disability award. So did the Board. The Board noted that, in reviewing the Director's reduction of benefits decision, the standard of review was for "abuse of discretion." This is a very difficult standard to overcome, and the claimant did not do it. Affirmed

Note: ORS 656.325(4) allows for a reduction of PPD if the injured worker does nothing to improve his/her condition pursuant to physician recommendation.