DR. GARBER'S

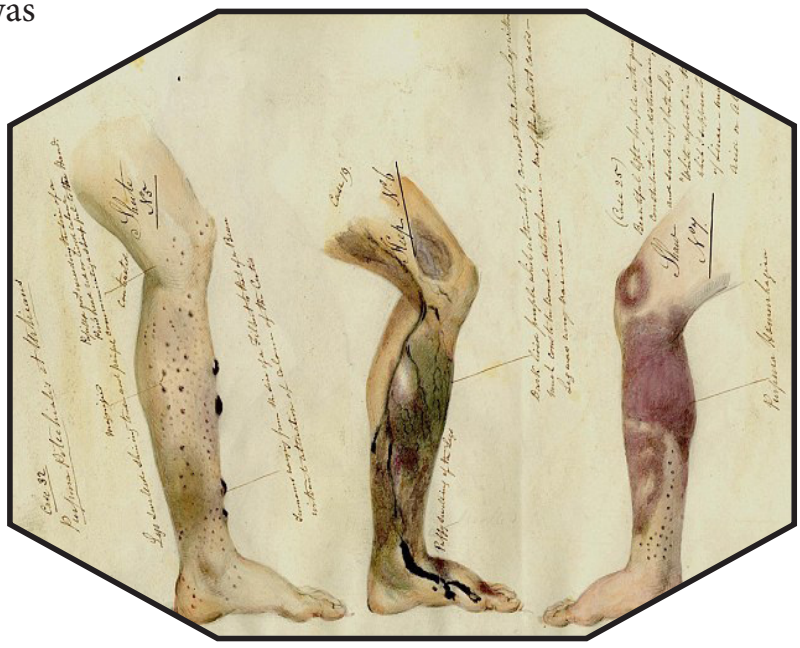
Dispensary of Cough syrup, Buffalo Lotion,
Pleasant Pellets, Purgative Pectoral, Salve
& Workers' Compensation Cases

Bradley G. Garber's Board Case Update: 01/23/12

David L. Hetrick, 64 Van Natta 43 (2012)
(Order on Reconsideration)

Claimant requested reconsideration of a Board Order on Review that upheld SAIF's back-up denial of claimant's right knee injury claim and found the knee injury not compensable. The board upheld it's previous decision regarding SAIF's back-up denial. I went on to discuss the compensability issue in greater depth, as follows:

"To prove the compensability of an injury, claimant must establish that the work incident was a material contributing cause of his disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1); Albany Gen. Hosp. v. Gasperino, 113 Or App 411, 415 (1992). He must prove both legal and medical causation by a preponderance of the evidence. Harris v. Farmer's Co-op Creamery, 53 Or App 618 (1981); Carolyn F. Weigel, 53 Van Natta 1200 (2001), aff'd without opinion, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially



causative work activities; whether those work activities caused claimant's condition is a question of medical causation. Darla Litten, 55 Van Natta 925, 926 (2003)."

The Board went on to note that, in this particular case, whether claimant was able to establish legal causation hinged on his credibility and reliability. The Board did not find claimant credible.

After claimant filed his claim, he repeatedly reported that he injured his knee when he stepped in a pothole. Unfortunately, for claimant, there was surveillance video of his work site that showed a pothole, but never showed claimant stepping in it on the date in question. After watching the video, at the hearing, claimant changed his story and reported that, after falling, he looked around and saw the pothole and just assumed that he had stepped into it. Then he "recalled" that he really fell behind a truck, outside of the view of the surveillance camera. He really did not know what caused him to fall.

Even though he was found to have lied, claimant proceeded to argue that the Board should, nevertheless, find his claim compensable because he had proven compensability based on the medical record. The Board found, however, that the opinions of claimant's attending physician were based on an incorrect history. So, claimant could not establish either legal causation or medical causation. **Affirmed**

Steven R. Lowell, 64 Van Natta 68 (2012)
(ALJ Dougherty)

Claimant requested review of the portions of an Opinion & Order that did not assess penalties against the employer for alleged unreasonable claim processing and alleged discovery violation (failure to provide a copy of claimant's personnel file).

At the hearing, claimant's attorney sought a penalty and, of course, penalty-related fees for employer's failure to provide a copy of the Notice of Closure to him at the same time it sent it off to claimant. OAR 436-030-0020(8) provides that a copy of a Notice of Closure must be mailed to the worker, the employer, the director and the worker's attorney, if the worker is represented. On the date of claim closure, claimant was represented. The Notice of Closure was sent to claimant on March 8, 2011. Claimant was awarded a sizable PPD award, and the employer initiated payment. Claimant's attorney requested reconsideration and the Department set aside the Notice of Closure based on the fact that claimant's attorney was not provided a copy of the notice as required by OAR 436-030-0020(8). In short, claimant's attorney cut off the full

payment of claimant's PPD award by requesting reconsideration.

The Board appropriately framed the issue, stating, "…[T]he question is whether that failure resulted in an unreasonable delay or refusal to pay compensation." Seeing as how the employer had awarded claimant over $10,000 and had begun making payments, there certainly was no unreasonable action, on the part of the employer, that resulted in non-payment of benefits. Claimant argued that closure affected his right to TTD/TPD benefits. Claimant failed to point out, however, that he had returned to work and his time loss benefits were cut off in December of 2010. So, the employer denied him nothing. His attorney did, due to a technical glitch.

The Board went on to address whether a failure to provide claimant's attorney with a copy of his personnel file resulted in an unreasonable delay or refusal to pay compensation. It noted, as follows:

"Under WCD's discovery rule, claimant may request that the carrier furnish 'legible copies of documents in its possession relating to a claim.' OAR 436-060-0017(4). If the carrier has such documents in its possession, which are not archived, it must mail them within 14, days of receipt of claimant's request. OAR 436-060-0017)7)(a)."

The Board agreed with the ALJ that there was no evidence in the record that the claim processor had claimant's personnel file in its possession at the time Claimant's attorney demanded discovery. It was important that the discovery demand was made before claimant requested a hearing. Because of that the Department's discovery rules applied, instead of the Board's discovery rules in OAR 438. Because there was no evidence that the personnel file was in the claim processor's possession at the time of the demand, the Board found that the employer did not unreasonably delay or refuse the payment of compensation. **Affirmed**

Joseph N. Crawford, 64 Van Natta 105 (2012)
(ALJ Smith)

Claimant requested review of an Opinion & Order that found his aggravation claim to be invalid.

Claimant injured his shoulder, at work, in January 2007. On February 25, 2010, the employer accepted a nondisabling right shoulder supraspinatus tendinopathy and impingement. In October 2010, claimant underwent shoulder surgery. On December 6, 2010, an 827 form was filed, reporting an aggravation. Employer denied the claim.

After hearing, the ALJ found that, both, the aggravation claim and the denial were procedurally invalid. Under ORS 656.277(2), if a claim has been classified as "nondisabling," a request for reclassification is the way to go; only after the expiration of one year after claim acceptance may an aggravation claim be filed. At the hearing, the parties agreed that the issue was compensability of an aggravation claim. On review, claimant argued that, even though the aggravation claim was filed within one year of the acceptance of the nondisabling compensable injury, the REAL issue was a "medical services" issue. Claimant wanted payment for his surgery. The Board determined that this was an ORS 656.245 issue, properly addressed by the medical director. **Affirmed**