DR. GARBER'S

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

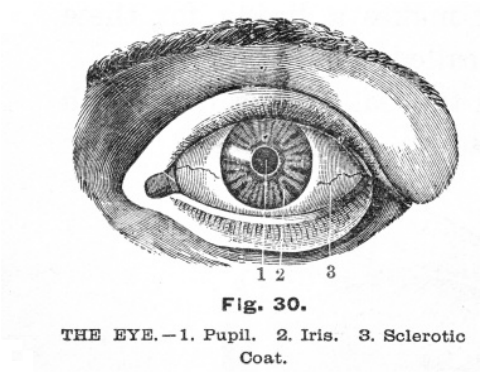


Fig. 30.

THE EYE.—1. Pupil. 2. Iris. 3. Sclerotic Coat.

Bradley G. Garber's Board Case Update: 04/12/2012

CASE 1:

Larry E. Horner, 64 Van Natta 663 (2012)
(ALJ Ogawa)

The self-insured employer requested review of portions of an Opinion & Order that awarded a penalty under ORS 656.268(5)(d) for an unreasonable refusal to close the claim, and handed claimant's attorney a $6,000 fee under ORS 656.382(1).

The claimant suffered a compensable left knee injury in November 1998. Originally, an anterior cruciate ligament tear was accepted, along with meniscal tears. Post-traumatic arthritis was subsequently accepted in 2005, and left medial collateral instability was accepted in 2006.

On May 14, 2010, after reviewing surveillance of the claimant that showed him functioning quite well and, after reviewing a PCE report, the attending physician declared his patient medically stationary and released him to return to modified duty work. On June 17, 2010, claimant requested claim closure. The employer issued a notice of refusal to close, on June 24, 2010, alleging that it did not have sufficient information upon which to base claim closure.

On July 22, 2010, the employer asked the attending physician to provide impairment ratings. Instead, the attending physician recommended another PCE. After the PCE, on

August 24, 2010, claimant again requested claim closure. Again, on September 1, 2010, the employer issued a notice of refusal to close, again alleging that it did not have sufficient information upon which to base claim closure. It arranged for a closing IME with Dr. Matteri. Claimant did not object to the IME and attended. After claimant's attending physician was presented with Dr. Matteri's impairment findings, he concurred and claimant's claim was closed.

Claimant filed a request for hearing from the employer's refusal to close of September 1, 2010, alleging that the employer's refusal to close was unreasonable. In Cayton v. Safelite Glass Corp., 232 Or App 454 (2009), the court explained that there are three predicates to the assessment of a penalty under ORS 656.268(5)(d): (1) there must be a closure of a claim or refusal to close a claim; (2) the "correctness" of that action must be at issue in a hearing on the claim; and (3) there must be a finding that the notice of closure or the refusal to close was not reasonable. In Horner, the "correctness" of the employer's refusal to close was at issue, and the Board found that it did not act correctly.
Noting that the employer requested information from the attending physician in July, 2010, and after being informed by the physician that he recommended another PCE, did nothing until November, the Board found that the employer had September. HUH?

There are two issues here: (1) whether the employer was dilatory in its processing responsibilities; and (2) whether it had sufficient information upon which to base claim closure. While it may have been guilty of (1), it certainly was not guilty of (2). What is telling is that, after the employer decided to arrange for a closing IME, claimant attended! This, of course, is an implicit acquiescence in the employer's assertion that it did not have sufficient information upon which to base claim closure. It needed impairment findings, concurred in by the attending physician. It did not have those until after the IME. **Affirmed, but should be appealed**

CASE 2:

David W. Ronk, 64 Van Natta 669 (2012) (ALJ Fulsher)

Claimant requested review of an Opinion & Order that upheld the employer's de facto denial of his medical services claim for a left hip condition. The issue was "medical services." HEY! Isn't jurisdiction with the Department?

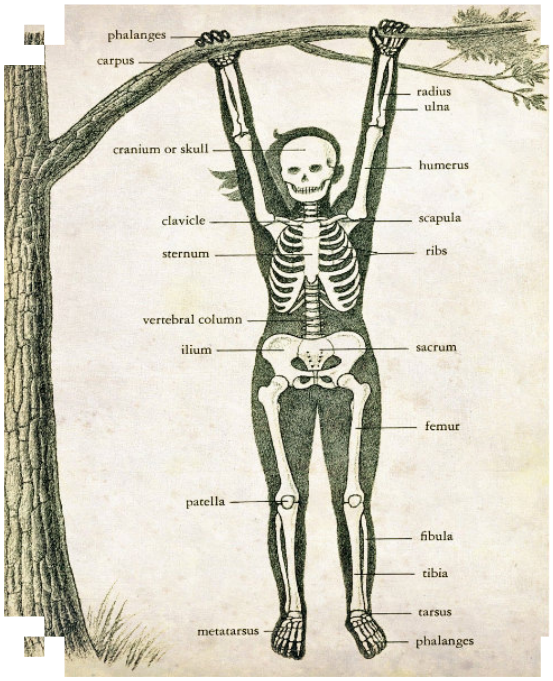
In December 2005, the employer accepted a closed head injury. The claim was closed in March 2008. Claimant entered into an assisted living facility as a result of his accepted head injury. Then, on April 28, 2010, claimant was diagnosed with a left hip fracture. When the employer refused to pay for hip fracture treatment, claimant requested review by the Medical Review Unit of the Workers' Compensation Division (WCD). The employer rightfully disputed the compensable connection between claimant's head injury and his hip condition, so the Department shagged it off to the Hearings Division.

After hearing, the ALJ decided that claimant had not established the causal connection between his accepted head injury and his hip condition. The Board decided otherwise. It found, in a footnote, that claimant's hip fracture was caused, either, by a

seizure that came about as a result of claimant's head injury, or a fall related to "other symptoms" of the accepted head injury. Thus, it determined, the hip fracture was a separate condition that arose from the compensable closed head injury. This, in spite of the fact that no physician expressly opined that claimant's accepted closed head injury was the major contributing cause of his hip fracture. Reversed

MORAL: The foot bone's connected to the knee bone, the knee bones connected to the hip bone, the hip bone's connected to the head bone….

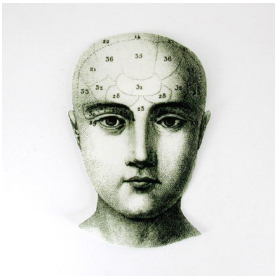
CASE 3:



And from the Court of Appeals:

Cortez v. Swanson Group, Inc., CA A144045 (February 29, 2012)

This is a case that arises out of the exclusivity provision of the Workers' Compensation Act, ORS 656.018. The issue is whether a "member" of a Limited Liability Corporation (LLC) is protected from civil litigation for negligence. The decision affects business arrangements that attempt to limit liability under the umbrella of a corporate organization.



While the factual/business facts are somewhat convoluted, the main issue is that claimant was injured by a forklift while working for Sun Studs. Sun Studs used to be an "Inc." After it was purchased by Swanson Group, Inc., it was renamed as Sun Studs, LLC. Sun Studs was a "member" of the Swanson Group. After his injury, claimant alleged that he could sue his employer for negligence. His employer asserted that the "exclusive remedy" provisions of the Workers' Compensation Act limited him to benefits under the Act. In Circuit Court, Sun Studs was successful and obtained a summary judgment.

On appeal, claimant argued that the exclusivity provision only applies to shield "officers and director" of an employer from personal liability; it does not extend to "members" of an employer. After examining the language of the statute, the Court agreed, stating, "We conclude that the exclusive remedy provision of the workers' compensation law does not apply to 'members' of an LLC." That is because there is no mention of "members" in the exclusivity provision. There is a certain logic to this. Under ordinary circumstances, a co-worker who causes another worker's injury at work is not immune from civil suit for negligence; it is only the employer that enjoys that protection. If an employer has set up a legal arrangement whereby it, by analogy, is an "employee" (or member) of another corporation, it may expose itself to civil negligence suits.

This case, understandably, has the business community quite alarmed. It is quite likely that it will be appealed to the Oregon Supreme Court.