DR. GARBER'S

Dispensary of Cough syrup, Buffalo Lotion,
Pleasant Pellets, Purgative Pectoral, Salve
& Workers' Compensation Cases
The "My Dog Ate The File" Edition

Bradley G. Garber's Board Case Update: 05/25/2012

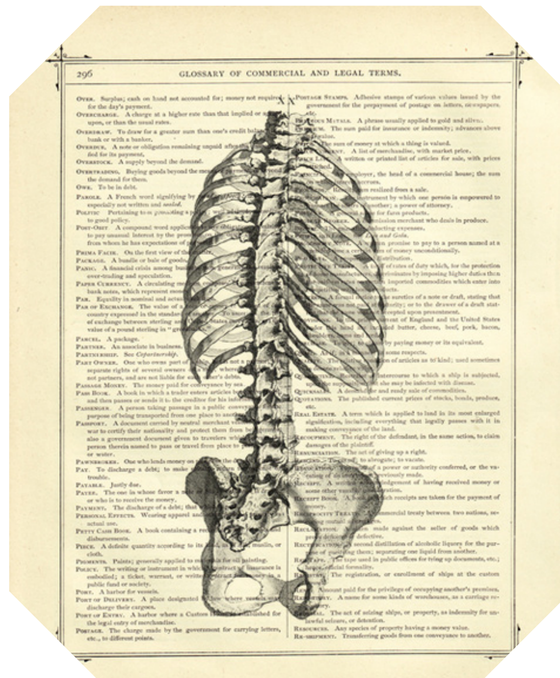
CASE 1:

Theron E. Hutchings, 64 Van Natta 948 (2012)(ALJ Pardington)

Claimant requested review of that portion of an Opinion & Order that upheld the employer's denial of his combined C5-6 and C6-7 spondylosis condition. The employer cross-requested review of other portions of the Order that: (1) declined to admit an additional "rebuttal" report submitted by the employer; (2) set aside its denial of the compensability of diagnostic medical services; (3) awarded a penalty and fee for unreasonable claim processing; and (4) awarded claimant's attorney a $4,000 fee.

The Board affirmed the decision to affirm employer's denial. Because of that, the Board never reached the evidentiary issue. With regard to the medical service issue, however, the Board reversed, finding that the medical services were not causally related to the accepted condition

of cervical strain combined with preexisting spondylosis at C5-6 and C6-7.



ORS 656.245(1)(a) provides, as follows:

"For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury."

If the medical services are directed at an "ordinary" condition, the first sentence of ORS 656.245(1)(a) governs. See Cameron J. Horner, 62 Van Natta 2904 (2010). If the claimed medical service is "directed to" a consequential or combined condition, the second sentence of the section applies.

In this case, claimant's attending physician referred claimant to a neurosurgeon to assess possible surgical intervention to address spondylosis-related symptoms. Employer denied authorization for the referral, alleging that the proposed medical services would be directed at a noncompensable condition. The Board pointed out that the "compensable injury" to which ORS 656.245(1)(a) refers is the condition previously accepted. See SAIF v. Martinez, 219 Or App 182 (2008). Therefore, necessitated in material part by the previously accepted condition. See SAIF v. Swartz, 247 Or App 515 (2011). Because the Board found that the accepted cervical strain portion of employer's combined condition acceptance had resolved, and that the C5-6 and C6-7 spondylosis condition was not compensable, it concluded that the proposed referral of claimant to a neurosurgeon was noncompensable.

Because everything was found to be noncompensable, the penalty and fees awarded by the ALJ were eliminated. **Reversed in part, affirmed in part**

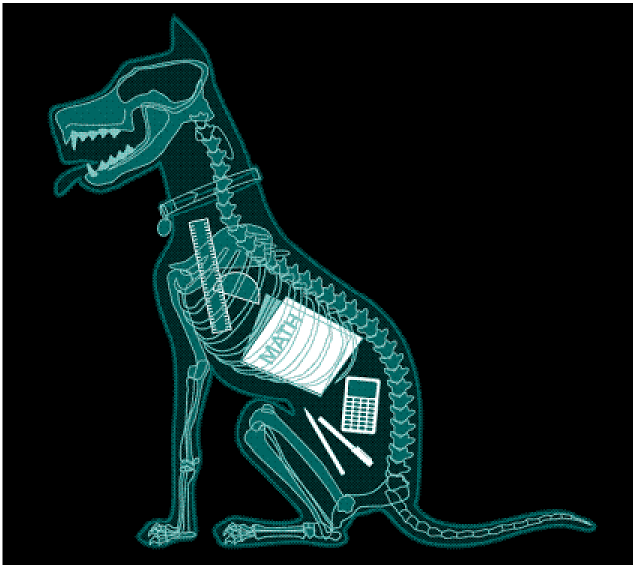
CASE 2:

Patricia Faris, 64 Van Natta 957 (2012)
(ALJ Dougherty)

The self-insured employer requested review of those portions of the ALJ's Order that: (1) assessed a penalty based on its allegedly unreasonable claim processing; and (2) awarded attorney fees under ORS 656.262(11)(a) and ORS 656.386(1).

Claimant filed a claim for bilateral carpal tunnel syndrome in early March 2011. On June 24, 2011 (over 60 days after the filing of the claim), claimant requested a hearing from a de facto denial and sought penalties and fees. After hearing, the ALJ found claimant's claim to be compensable, and assessed penalties and fees.

On review, the employer did not dispute that it had not complied with the statutory requirement, under ORS 656.262(6)(a), that it accept or deny claimant's claim within 60 days. Instead, it argued that no penalty was warranted because it had a legitimate doubt about its liability for the claim and, therefore, its inaction was not unreasonable. It argued that an asserted legitimate doubt about compensability can constitute a legitimate doubt about its claim processing obligations. (We know where this is going….)



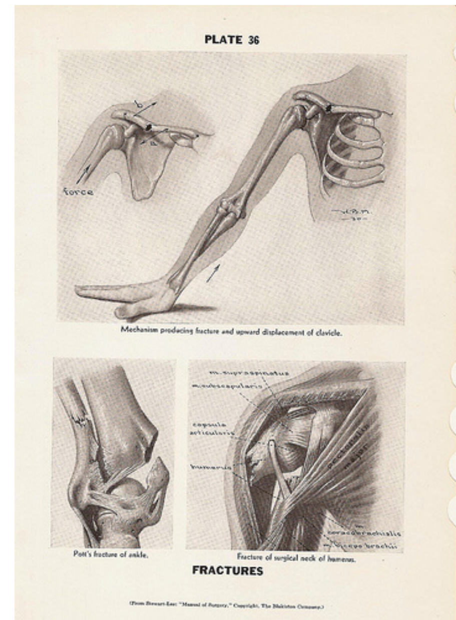
The Board observed, as follows:

"However, ORS 656.262(11)(a) authorizes a penalty based on a failure to timely accept or deny a claim, without regard for any doubts an employer may have about the merits of the claim. Moreover, the record does not establish that doubt about liability for the claim supported the employer's failure to process the claim." See Charles M. Lydall, 62 Van Natta 806 (2010). Affirmed

PRACTICE TIP: If you have an excuse for not processing a claim that is not dependent on interpretation of medical (or other) evidence, you might (MIGHT) avoid a penalty

and penalty-related fee. But, the excuse has to be something like this: "My dog ate the file, and I didn't see the 801 form for over 60 days." It can't be something like this: "The attending physician doesn't answer the question." (You had 60 days to get an IME, in that case). In other words, even if the supervisor on the job site says that accident never happened, but the emergency room physician says that it did, you need to make a decision and do something within 60 days. Sitting on your thumbs will get you a penalty AND fee assessment.

CASE 3:



Clara A. Zehrt-Shay, 64 Van Natta 961 (2012) (ALJ Bloom)

The self-insured employer requested review of an Opinion & Order that set aside its denial of claimant's new/omitted condition claim for right knee chondromalacia.

This is a case in which the employer asserted that claimant's claim was for a "consequential" condition and that it was up to claimant to prove that her accepted right knee medial meniscal tear, lateral meniscus tear and ACL tear constituted the major contributing cause of her chondromalacia. The medical evidence, however, established that the accepted conditions combined with preexisting chondromalacia. So, the Board determined that the burden shifted to the employer to prove, under ORS 656.266(2)(a), that the "otherwise compensable condition" was not the major contributing cause of claimant's disability/need for treatment of the combined condition. The Board determined that the employer did not carry its burden of proof. **Affirmed**

NOTE: In this case, claimant's claim was for an "accidental injury, combined condition or consequential condition." All have differing levels of proof and burdens of proof. While it is not clear, from the Order on Review, it appears that the employer simply denied the claim. So, it is not clear whether compensability of an injury (material contributing cause, claimant's burden), a consequential condition (major contributing cause, claimant's burden), or a combined condition (not the major contributing cause, employer's burden) was denied, or what was litigated. If you get a "kitchen sink" claim, it may be prudent to request clarification of the claim from the worker's attorney.