DR. GARBER'S

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

Bradley G. Garber's Board Case Update: 06/07/2012

CASE 1:

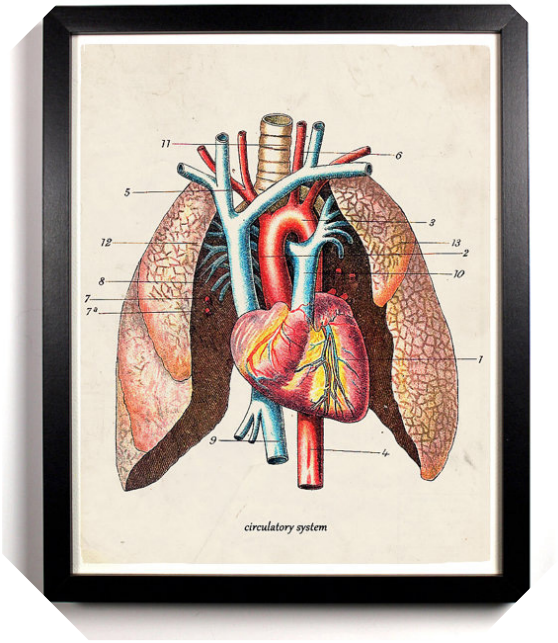
Joseph C. Ashworth, DCD, 64 Van Natta 972 (2012)
(ALJ Fisher)

The surviving spouse of Joseph Ashworth (Claimant) requested review of that portion of an Opinion & Order that affirmed SAIF's denial of claimant's occupational disease claim for mesothelioma. There were five employer's involved in this compensability/responsibility case.

Claimant served in the Navy in 1945 & 1946. When he came back from the service, he went to work as a millwright and worked in that capacity until 1978. Beginning in 1977, he owned and operated a motel. SAIF was the workers' compensation carrier for the motel business, but claimant and his wife elected not to purchase workers' compensation coverage for themselves.

Claimant stopped working in 1989. In 2007, he was diagnosed with, and died of,

mesothelioma. His wife applied for survivor's benefits. She filed claims with all prior employers. They all denied responsibility; none denied compensability.



The ALJ assigned responsibility to the last employment in line, under the "last injurious exposure" rule. That was the motel, SAIF was the insurer, but Claimant was not covered. On appeal, Claimant argued that the ALJ erred in assigning responsibility to his self-employment. The Board did not agree.

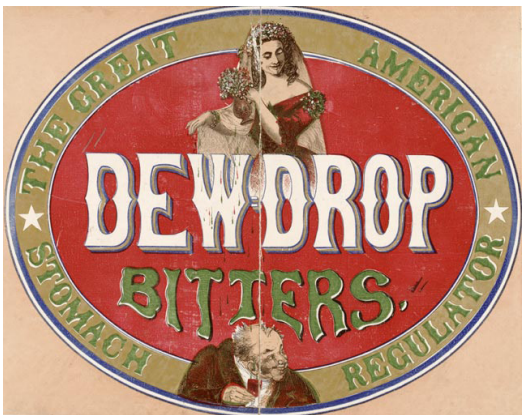
The Board explained, in a footnote, as follows:

"…[A]s we explained in Lewis D. Vanover, 64 Van Natta 206, 210 n 4 (2012), because claimant, as a self-employed property owner/manager, is presumptively responsible under the LIER, he (as the presumptively responsible employer) has the affirmative burden of showing that responsibility should be shifted to a different carrier (either by showing that is was impossible for claimant's self-employment to have caused his disease or that a previous employment exposure was the sole cause of his condition)."

Because Claimant could not show that it was impossible for his self-employment to have contributed to his condition, he did not carry his burden of proof. Even if he had, he would not have been entitled to benefits because he elected to not be covered. **Affirmed**

CASE 2:

Donny Pine, 64 Van Natta 1043 (2012)
(ALJ Pardington)



Claimant requested review from an Opinion & Order that: (1) excluded a medical report and chart notes from the attending physician; and (2) upheld the insurer's denial of his occupational disease claim for a low back condition. The Board focused its Order on the evidentiary issue.

Claimant's attending physician was a Dr. Gilmore. The employer submitted exhibits that included chart notes

from Dr. Gilmore. Prior to hearing, claimant submitted a report from Dr. Gilmore as an exhibit. The employer's attorney demanded a deposition of Dr. Gilmore. By the date of hearing, Dr. Gilmore's deposition had not been scheduled. At the hearing, the employer's counsel requested that, unless a deposition was scheduled within a reasonable time, Dr. Gilmore's report be excluded because of unavailability for cross-examination. Claimant's counsel reported that Dr. Gilmore had moved out of state and could not be located. The hearing was on June 22, 2011; the ALJ gave the parties until August 15, 2011 to locate Dr. Gilmore and schedule her deposition.

On August 17, the employer's attorney moved to exclude Dr. Gilmore's report from the record. Claimant's counsel did not reply so, on September 14, 2011, the ALJ granted the employer's motion and excluded all of Dr. Gilmore's chart notes and reports.

Subsequently, on September 26, 2011, Claimant's counsel provided employer's attorney with Dr. Gilmore's contact information and asked the ALJ to reconsider his evidentiary ruling. The ALJ did not change his ruling. Claimant argued, on appeal, that this constituted an abuse of discretion. Under the circumstances, the Board found no abuse of discretion. **Affirmed**

CASE 3:

Rhonda Braatz, 64, Van Natta 1051 (2012)
(ALJ Fulsher)

The self-insured employer requested review of an Opinion & Order that set aside its denial of Claimant's bilateral carpal tunnel syndrome (CTS) condition.

The employer presented expert evidence from orthopedist Dr. Button, occupational medicine specialist Dr. Ackerman, and hand specialist Dr. Tavakolian. Claimant presented an opinion from a Dr. Pomranky who saw Claimant, once, then referred her on to Dr. Tavakolian. The Board found Dr. Pomranky more persuasive, even though her opinion was based on an incorrect understanding of the course of Claimant's symptoms. In his dissenting opinion, Board Member Lowell observed, as follows:

"Moreover, the record establishes that Dr. Tavakolian is an orthopedic surgeon, with training in hand and microvascular surgery. The record also establishes that Drs. Button and Ackerman, who support Dr. Tavakolian's opinion, specialize in hands and upper extremities and occupational medicine, respectively. * * * However, the record does not establish that Dr. Pomranky has similar relevant specialized expertise. [citation omitted]. In addition, Dr. Pomranky specifically referred claimant to Dr. Tavakolian, thus acknowledging his specialized expertise."

Board Member Lowell concluded that Dr. Tavakolian was the most persuasive expert in the record. He would have upheld the employer's denial. **Affirmed**

MORAL: The Board doesn't pay much attention to credentials. Don't rest your case on expertise; save money and go for a plumber (or chiropractor).

CASE 4:

James G. Gilliland, 64 Van Natta 1062 (2012)
(ALJ Fulsher)

Claimant requested review of an Opinion & Order that upheld the employer's denial of his medical services claim for his current mental condition. Claimant was injured in 1984 when (get this)… a forklift fell on his head! The employer accepted his claim, of course, but "back in the day," the scope of claim acceptance was not expressly identified. In 1997, Claimant started treating for post-traumatic stress disorder (PTSD). In 1998, the employer accepted that condition.

In February 2011, Dr. Goranson examined Claimant at the employer's request. Dr. Goranson concluded that Claimant no longer suffered from PTSD, or other psychiatric condition, related to his 1984 injury. He opined that the 1984 injury and Claimant's accepted conditions "were not even a de minimis contributor" to his "current

condition or need for treatment."

After receiving Dr. Goranson's report, the employer informed Claimant that it would no longer pay for medical treatment. Claimant appealed employer's "current condition" denial. The ALJ upheld employer's denial.

On review, the Board concluded that Claimant's attending physician, Dr. Gold (who first started treating Claimant 13 year after his injury) persuasively opined that there was a material relationship between his accepted PTSD condition and his current need for treatment. Under ORS 656.245(1)(a), it was Claimant's burden to prove that his previously accepted PTSD constituted a material cause of his current need for treatment, 27 years later. Because Dr. Gold had been treating Claimant for 13 years, his opinion regarding causation was determined to be most persuasive, even though he had not been involved in Claimant's care for 13 years after the industrial injury.

Board Member Langer wrote a dissenting opinion, in which she expressed her reservation about the persuasiveness of Dr. Gold's opinions, as follows:

"Dr. Gold, however, did not provide a persuasive explanation as to why claimant's current need for treatment was caused in material part by his accepted PTSD. I find this omission particularly significant given the absence of a PTSD diagnosis in claimant's chart notes for approximately 10 years." **Reversed**

MORAL: Don't let a forklift fall on your head.