DR. GARBER'S

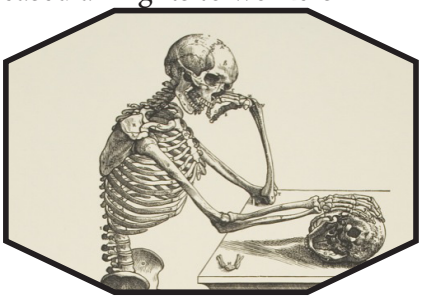
Dispensary of Cough syrup, Buffalo Lotion,
Pleasant Pellets, Purgative Pectoral, Salve
& Workers' Compensation Cases

Bradley G. Garber's Board Case Update: 11/29/11

Daniel R. Minyard, 63 Van Natta 2244 (2011)
(Order on Remand)

The Court of Appeals sent this one back to the Board, reversing an Order on Review that affirmed the ALJ's order that set aside the insurer's denial of medical services. The insurer had denied surgery at L4-5, alleging that the proposed surgery was not causally related to the accepted injury, an L4-5 disc herniation.

After claim acceptance and processing, the insurer closed claimant's claim with a 37% PPD award. Then, claimant and the insurer entered into a CDA in which claimant released all rights to workers' compensation benefits, except for medical services under ORS 656.245.



Claimant continued to have problems with his low back, and underwent additional surgery, in March 2006. Then, even more surgery was recommended and the insurer, rightfully so, decided that enough was enough. Dr. Keiper wanted to conduct a repeat surgery for a recurrent L4-5 disc herniation. It turns out, however, that after March 2006, claimant slipped and fell on ice and reinjured his back. He tried to tie his need for repeat surgery to his work-related injury of 2003. After a supportive report from Dr. Yodlowski, the insurer denied compensability of proposed surgery.

The ALJ set aside the insurer's denial and the Board affirmed the ALJ. The insurer appealed the matter to the Court of Appeals. The Court, citing ORS 656.245(1)(c)(F) and (G) determined that, because the proposed medical services were for a condition that had worsened after claim closure, the proposed

medical service was available only through an accepted aggravation claim under ORS 656.273(1). The Court determined that the CDA, approved in 2004, did not release claimant's right to receive medical services, including the proposed surgery at L4-5, but that, in order to exercise that right, claimant needed to prove an aggravation.

Ultimately, claimant was unable to prove an aggravation of his low back condition. The major contributing cause of any worsening of his combined condition was determined to be his fall on the ice in March 2006 and other non-work related factors. **Reversed**

Barbara J. Ferguson, 63 Van Natta 2253 (2011) (ALJ Lipton)

The self-insured employer requested review of the ALJ's order that set aside its denial of claimant's current low back condition. Claimant cross-requested review, seeking penalties and fees.

Claimant was injured in November 2009, and the employer accepted a low back strain. Subsequently, claimant underwent a CT scan that revealed a disc bulge at L4-5 and a bulge at L5-S1. In June 2010, Dr. Woodward examined claimant at employer's request. He diagnosed a resolved lumbar strain, lumbar spondylosis and "chronic low back pain."

On July 19, 2010, the employer issued the following denial:

"Your claim is accepted for the condition of a lumbar strain. Based on medical evidence it appears that the accepted condition is no longer a material contributing cause of your ongoing symptoms, or need for treatment. It also appears that your current condition is severable from the lumbar strain in that your accepted condition is medically stationary with no permanent impairment. Therefore, we are issuing this denial of your current condition."

(Note the problems: (1) no combined condition acceptance; and (2) no claim for new/omitted conditions)

The Board determined that a denial, in the absence of a claim, is a legal nullity. See, Altamirano v. Woodburn Nursery, Inc., 133 Or App 16 (1995). After reviewing ORS 656.005(6), the Board determined that claimant had never filed a claim for a "current condition," so a current condition denial was premature and a legal nullity. The Board pointed out that the employer's denial contained the following statements: "(1) claimant's accepted lumbar strain 'is no longer a material contributing cause of [her] ongoing symptoms, or need for treatment'; (2) the accepted lumbar strain 'is medically stationary with no permanent impairment'; and (3) '[t]herefore, [the employer denied claimant's] current condition." Affirmed

Moral: If you want to deny medical services, deny medical services; don't issue a denial

Jeremy C. Snethen, 63 Van Natta 2281 (2011)
(ALJ Otto)

Another Dr. Puziss special.

Claimant allegedly injured his low back, at work, on December 10, 2009. Claimant did not experience immediate symptoms. It was not until March 8, 2010, that claimant tried to tie his testicular pain to lifting tires eight months earlier. Employer denied compensability of the claim. The ALJ upheld the denial.

Claimant was sent to Dr. Puziss, by claimant's attorney. Dr. Puziss reviewed MRI films and decided that claimant had sustained a "classical" injury to his spine, after lifting tires. The films revealed degenerative disc disease and Schmorl's nodes at L1. Dr. Puziss acknowledged that claimant did not have the "typical" symptoms of a low back injury. He concluded, however, that there was "no other rational explanation" for claimant's right inguinal/testicular pain except for the December 10, 2009 injury. The Board did not find his opinions persuasive. (Parenthetically, claimant seemed to remember that his groin pain started after he quit a work-out program)
Affirmed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