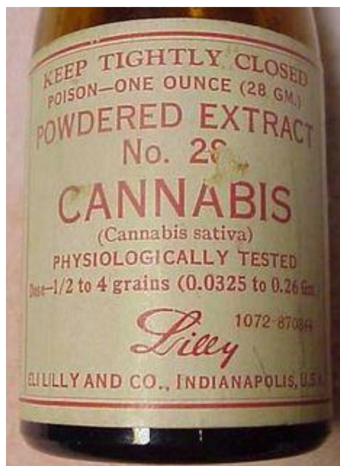
Dr. Garber's

DISPENSARY OF COUGH SYRUP, BUFFALO LOTION, PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE & WORKERS' COMPENSATION CASES

11/10/16

by Brad G. Garber
Wallace, Klor, Mann, Capener & Bishop



Robert McCutchen, 68 Van Natta 1591 (2016) (ALJ Brown)

Claimant requested review of an Opinion & Order that upheld employer's denial of a medical services claim for a spinal cord stimulator.

Claimant sustained a low back injury in June 2007. He reported intense low back and left leg pain. In July 2007, the employer accepted a low back strain. Claimant returned to work, but subsequently fell and reported a worsening of his low back pain. A lumbar spine MRI scan revealed a herniated disc at L4-5.

By December 2007, claimant's leg pain was bilateral. A second MRI scan, however, revealed no herniated disc at L4-5. Claimant was subsequently examined by Dr. Rosenbaum, Dr. O'Neill, Dr. Cummings, Dr. Sandell, Dr. Yoo, Dr. Fiks, Dr. Lorber and Dr. Wong. Dr. Fiks requested authorization to perform a spinal

cord stimulator trial. This was in January 2015, eight years after the initial injury. Authorization was denied.

Employer indicated to the Medical Resolution Team of the Workers' Compensation Division that there was a causation issue, so a Defer and Transfer Order transferred the matter to the Hearings Division.

In January 2016, Dr. Fiks opined that claimant's June and July 2007 injury events, in combination, constituted the major contributing cause, and separately were each, at least, a material contributing cause of claimant's chronic bilateral radiculitis/radiculopathy conditions and need for treatment.

In upholding the medical services denial, the ALJ found that Dr. Fiks' opinion was insufficient to sustain claimant's burden of proof.

The Board went through the litany:

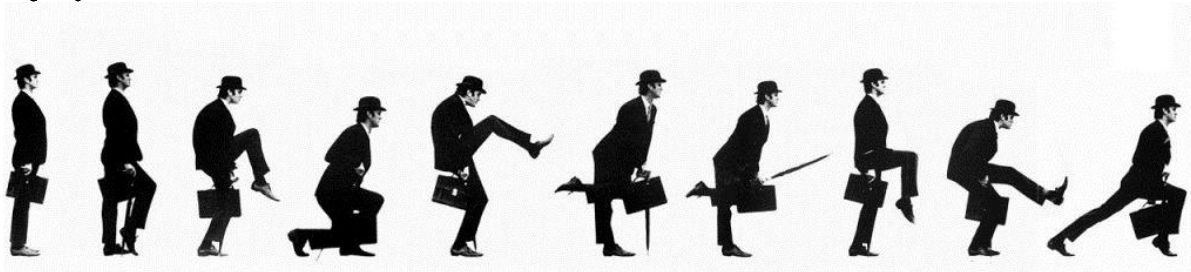
"A carrier must generally cause to be provided medical services for conditions 'caused in material part' by a compensable injury. ORS 656.245(1)(a). The phrase 'in material part' means a 'fact of consequence.' *SAIF v. Swartz*, 247 Or App 515, 525 (2011); *Mize v. Comcast Corp-AT&T Broadband*, 208 Or App 563, 569-71 (2006). However, for combined or consequential conditions, the carrier is responsible for only those medical services that are 'directed to medical conditions caused in major part by the injury.' ORS 656.245(1)(a); *SAIF v. Sprague*, 346 Or 661, 673 (2009).

"The 'compensable injury' is the 'work-related injury incident,' not the accepted condition. *See Brown v. SAIF,* 262 Or App 640, 652 (2014); *SAIF v. Carlos-Macias*, 262 Or App 629, 637 (2014). Thus, the medical services need not relate to an accepted condition, but the requisite causal relationship must be shown between the work-related injury incident and the condition that the disputed medical service is 'for' or 'directed to.' *Fernando Javier-Flores*, 67 Van Natta 2245, 2248 (2015); *Barbara A. Easton*, 67 Van Natta 526, 529 (2015)."

The employer tried to argue that the radiculitis/radiculopathy condition, to which the spinal cord stimulator would be directed, was a "consequential" condition, and that claimant had to show that the original injury incident was the major contributing cause of need for treatment. The Board addressed this argument, as follows:

"The distinguishing feature of a 'consequential condition' is that it is not directly caused by the 'work-related injury incident,' but instead is a separate condition that arises as a consequence of an injury or condition caused directly by the 'work-related injury incident.' *Allen v. SAIF*, 279 Or App 135, 138 (2016); *English v. Liberty Northwest Ins. Corp.*, 271 Or App 211, 215 (2015). An illustrative example would be a back strain caused by an altered gait resulting from a compensable foot injury. *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1997); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 n2 (1992). In the alternative, if the proposed spinal cord stimulator is 'for' an 'ordinary condition,' medical services 'for' that condition would be compensable if the condition were caused in material part by the compensable injury. ORS 656.245(1)(a)."

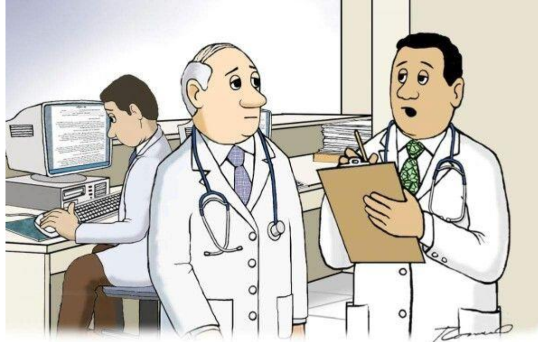
Ultimately, the Board determined that claimant's radiculitis/radiculopathy condition was not a consequence of his injury, but was a direct result of claimant's injury incident, in 2007. **Reversed**



Joann M. Jones, 68 Van Natta 1774 (2016)
(ALJ Kekauoha)

The self-insured employer requested review of the ALJ's Opinion & Order that set aside its denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome and awarded claimant's attorney an assessed fee of $40,000.

Ok….if nothing more jumped out at you, it should be the assessed attorney fee. **$40,000** for a carpal tunnel claim!



I report on this claim to illustrate the pitfall in stacking too many experts. In this case, five expert depositions were taken, and a rebuttal report from Darrell Brett, M.D. was submitted into evidence. After all was said and done, claimant overcame the denial of her bilateral CTS condition and her attorney was awarded $40,000 (presumably because of the time involved in depositions, conferences and reports), plus reasonable costs. Because the employer requested review of the decision and was unsuccessful in reversing the ALJ's decision, an additional attorney fee of $7,500 was awarded claimant's counsel. In other words, close to $50,000 on a carpal tunnel claim. **Affirmed**

John V. Rocks, Jr., 68 Van Natta 1799 (2016) (ALJ Kekauoha)

The self-insured employer requested review of an Opinion & Order that awarded a $10,000 employer-paid attorney fee under ORS 656.386(1). Claimant's counsel cross-appealed, wanting more money.

At the hearing level, claimant's counsel requested a fee of $12,500 for his efforts which resulted in a pre-hearing rescission of the employer's denial. Employer objected to the requested amount, contending (among other things) that claimant's counsel's efforts related to two unsuccessful mediations should not be considered in determining the amount of the assessed fee.

The Board went through its analysis, as follows:

"In determining a reasonable attorney fee award under OAR 438-015-0010(4), the following factors are considered: (1) the time devoted to the case; (2) the

complexity of the issues involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; and (8) the assertion of frivolous issues of defenses. Application of the 'rule-based' factors does not involve a strict mathematical calculation. *Robert L. Lininger*, 67 Van Natta 1712, 1718 (2015)."

In this particular case, the hearing lasted 66 minutes, including closing arguments. The hearing transcript was 35 pages long. There were 79 exhibits. There was one deposition. The Board also considered the time that claimant's counsel spent in participating in two unsuccessful mediations. The Board observed, "These circumstances indicate that claimant's attorney's services extended well beyond the time spent at the hearing level."

Considering the factors in OAR 438-015-0010(4), the Board affirmed the $10,000 fee awarded by the ALJ. It increased the award by an additional $3,500, however, for claimant's counsel's efforts in defending against a decrease in his fee. This happens, now, under OAR 438-015-0070(2). Claimants' attorneys are entitled to a fee for defending a fee. **Affirmed**