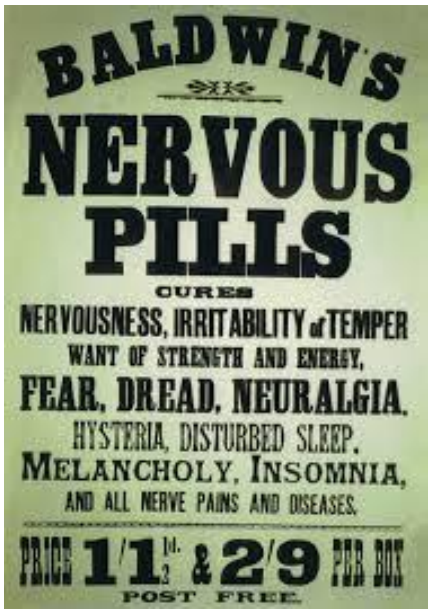
Dr. Garber's

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

by Bradley G. Garber
Wallace, Klor & Mann, P.C.



Board Case Update: 12/05/2016

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

Donald L. Midkiff, 68 Van Natta 1272 (2016)
(ALJ McWilliams)

Claimant requested review of an Opinion and Order that affirmed an Order on Reconsideration's award of 9 percent whole person permanent impairment for a lumbar strain and L4-5 disc protrusion.

On April 22, 2015, a Notice of Closure awarded 9 percent whole person impairment for the accepted conditions based on a lumbar surgery. Claimant requested reconsideration, seeking an increase in his PPD. He requested the appointment of a medical arbiter. A 3-member panel was assigned.

On July 18, 2015, the medical arbiter panel attributed zero percent of its impairment findings to the accepted lumbar strain and L4-5 disc extrusion. Instead, the panel attributed 75 percent of its findings to preexisting lumbar degenerative disc disease and spondylosis because of the "relatively decreased lumbar extension in the setting of normal flexion" and axial mechanical back pain. The panel attributed the remaining 25 percent of its findings to "physical deconditioning" (aka, obesity).

Based on the arbiters' report, the ARU awarded no additional PPD beyond the 9 percent awarded for the surgery at L4-5, under OAR 436-035-0350(2). The ALJ affirmed the Order on Reconsideration.

Claimant argued that no legally cognizable preexisting conditions existed because the record did not establish that his degenerative disc disease and/or spondylosis constitute "arthritis," or that his prior treatment for those conditions contributed to his impairment.

To qualify as a "preexisting condition" in an initial injury claim, a condition must contribute to disability or a need for treatment and, unless the condition is arthritis or an arthritic condition, for the worker must have been diagnosed with, or obtained medical services for, the condition before the initial injury. *See Patty A. Stafford*, 62 Van Natta 2493 (2010).

There was evidence in the record that claimant's degenerative conditions, as well as his obesity, were previously diagnosed/treated. The Board, thus, found that the record supported the existence of preexisting conditions. Because the medical arbiters attributed claimant's preexisting conditions constituted 100 percent of his impairment, the Board determined that claimant was not entitled to any additional PPD, over and above the 9 percent previously awarded. **Affirmed**

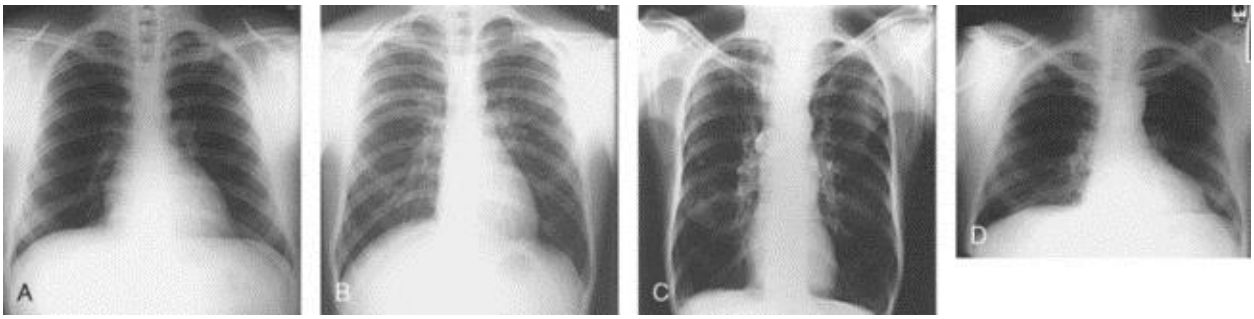
Shane Turley, 68 Van Natta 1810 (2016)
(ALJ Lipton)

Claimant requested review of that portion of an Opinion & Order that increased his PPD award for a low back injury beyond the 15 percent PPD award granted by an Order on Reconsideration, but declined to award permanent impairment attributable to his obesity.

Claimant's claim was accepted for the condition of lumbar strain, and was closed by Notice of Closure, with no PPD award. Then, claimant raised a "new/omitted" condition claim for an L5-S1 disc herniation, which was accepted by Modified Notice of Acceptance. The claim had to be reclosed and claimant received a 9 percent PPD award for surgery at L5-S1. Claimant requested reconsideration and the appointment of a medical arbiter.

Subsequently, claimant was evaluated by a 3-member arbiter panel. The panel attributed 25 percent of claimant's ROM loss to his accepted L5-S1 disc herniation, 20 percent to an unaccepted L1-2 disc herniation, 30 percent to obesity and 25 percent to pain.

By Order on Reconsideration, claimant's PPD award was increased to 15 percent. The reconsideration order apportioned the lumbar spine ROM loss by 50 percent due to claimant's obesity and contribution from the non-compensable L2-1 disc herniation, arriving at 7 percent impairment for ROM loss of the lumbar spine.



Claimant requested a hearing, contending that his ROM impairment value should not have been apportioned based on his obesity. Claimant, like Donald Midkiff (above), contended that his obesity (aka, "body habitus") is not a legally cognizable preexisting condition under ORS 656.005(24)(a). The record, however, established that claimant was diagnosed with obesity in September 2012, prior to his December 2012 compensable injury. The Board wrote, as follows:

"* * * Therefore, because the 'obesity' diagnosis preexisted claimant's work injury incident, and the record (*i.e.*, the arbiters' reports) established that it contributed to claimant's disability, obesity (also described as 'body habitus') is appropriately considered a statutory preexisting condition under ORS 656.005(24)(a). *See, e.g., Donald L. Midkiff*, 68 Van Natta 1272, 1275 (2016)(obesity was a preexisting condition where the record established that is was diagnosed before the compensable injury and it contributed to the claimant's disability)." **Affirmed**

Nickolas Waldon, 68 Van Natta 1944 (2016)
(ALJ Sencer)

SAIF appealed an Opinion & Order that directed it to pay specific medical bills for claimant's bilateral knee condition. Appropriately, it questioned the jurisdiction of the Hearings Division.

On February 17, 2015, claimant completed an 801 Form, asserting an occupational disease claim involving both of his knees. On March 31, 2015, SAIF denied the claim. Claimant did not request a hearing and the denial became final.

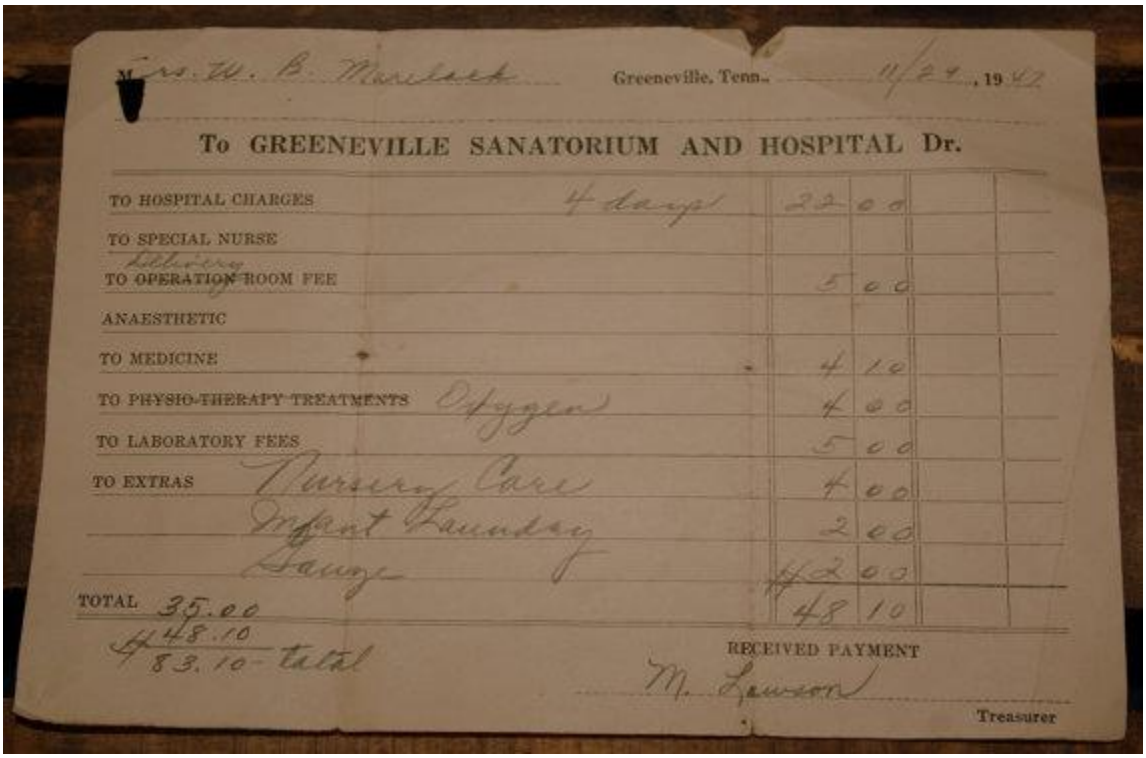
In June 2015, claimant received some medical bills for treatment he had received. After SAIF declined to pay the bills, claimant filed a request for hearing with the Hearings Division. The parties subsequently agreed to dismiss that request without prejudice, to allow claimant to submit the matter to the Workers' Compensation Division (WCD).

Then, instead of allowing the Medical Resolution Team to resolve the issue, claimant requested a hearing before WCD. WCD then transferred the matter back to the Hearings Division for a hearing.

At the hearing, SAIF contested jurisdiction. Claimant contented that the Hearings Division had jurisdiction and that SAIF was equitably estopped from arguing that it was not responsible for payment of the bills. (Apparently, someone must have told claimant that his bills would be covered).

The ALJ agreed with claimant's position and ordered SAIF to pay the bills. SAIF appealed.
The Board reasoned, as follows:

"Jurisdiction over the adjudication of disputes under ORS Chapter 656.704 is divided between the Hearings Division and the Director of the Department of Consumer and Business Services. ORS 656.704. More specifically, the Hearings Division has original jurisdiction over 'matters concerning a claim.' ORS 656.283(1); ORS 656.704(1), (3).



Mrs. W. B. Murdock Greeneville, Tenn. 4/29, 1947

To GREENEVILLE SANATORIUM AND HOSPITAL Dr.

TO HOSPITAL CHARGES	4 days	22	00
TO SPECIAL NURSE			
TO OPERATION ROOM FEE	Delivery	5	00
ANAESTHETIC			
TO MEDICINE		4	10
TO PHYSIO-THERAPY TREATMENTS	Oxygen	4	00
TO LABORATORY FEES		5	00
TO EXTRAS	Nursery Care	4	00
	Infant Laundry	2	00
	Layette	2	00
TOTAL 35.00		48	10
48.10			
83.10 - total			

RECEIVED PAYMENT
M. Lawson
Treasurer

"With respect to disputed medical services, ORS 656.704(3) provides that 'matters concerning a claim' concern disputes that: (1) require a determination of the compensability of the medical condition for which medical services are proposed (ORS 656,704(3)(b)(A)); or (2) require a determination of whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability (ORS 656.704(3)(b)(C))."

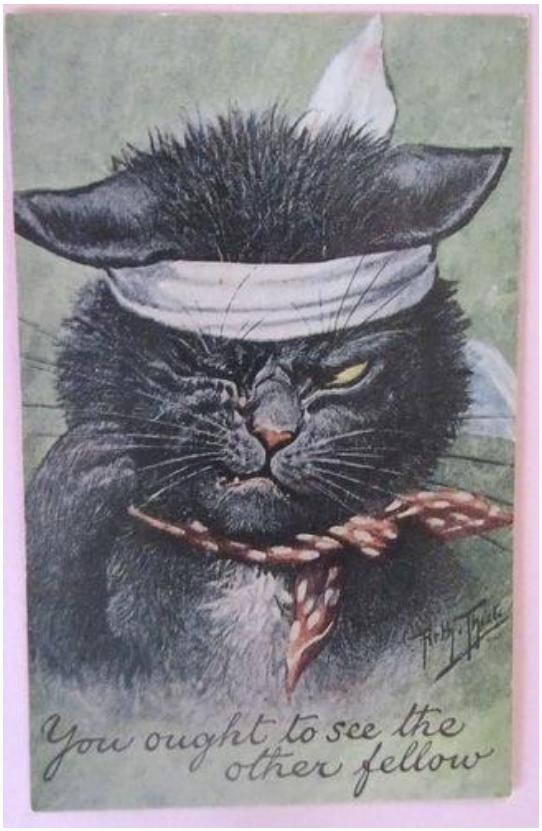
In this case, there was no issue with regard to compensability of the claim, so there was no "matter concerning a claim." On review, claimant had to acknowledge that there was no "matter concerning a claim." Nevertheless, he continued to assert that the Board could reach the merits of the claim and determine that SAIF was equitably estopped from denying payment. The Board disagreed, finding that, without jurisdiction over the issue, it could not reach the merits. **ALJ Order Vacated; Request for Hearing Dismissed**

James R. Cook, 68 Van Natta 1948 (2016)
(ALJ Otto)

Claimant requested review of an Order that upheld SAIF's denial of his low back injury claim. The issue was whether claimant's injury arose out of and in the course of his employment.

Claimant worked for the employer as an in-home caregiver for a "Mr. Nash." Mr. Nash was married to a "Ms. Nash." Claimant had chickens and, sometimes brought some of his eggs over to the Nash home. When his shift ended, on January 1, 2016, he clocked out, grabbed his car keys, grabbed some empty egg cartons and headed out the door. He was to be relieved by another caregiver, Ms. Lavea. Mr. Nash's daughter (Ms. Fehrenbacher) was also home for the holidays. Ms. Lavea, Ms. Nash, and Ms. Fehrenbacher readied Mr. Nash for a walk and, then, they all walked out, with claimant.

As claimant was walking toward his car, he slipped on some ice and fall on his back, also hitting his right elbow and head. As he lay on the ground, looking up at Ms. Nash, Ms. Lavea and Ms. Fehrenbacher, claimant said, "Aren't you glad I'm clocked out?" Then, he got up and walked to his car, telling the women he was alright.



During his drive home, claimant began to experience severe low back pain. He drove to the hospital where he was treated for a back strain. He told hospital personnel that he was injury while assisting a patient. **LIAR!**

The ALJ concluded that claimant's injury did not occur in the course of his employment, under the "going and coming" rule. In addition, the ALJ did not find claimant to be a credible witness.

On review, claimant argued that he was still working when he was injured because he was carrying some empty egg cartons and intended to bring some eggs back to Ms. Nash!

There is an exception to the "going and coming" rule, called the "dual purpose" exception. Under the "going and coming" rule, injuries sustained while an employee is traveling to or from work generally do not occur "in the course of" employment. *Krushwitz v. McDonald's Restaurant*, 323 Or 520 (1996). Injuries suffered when an employee is traveling to or from work generally are noncompensable because, during that time, the worker is rendering no service for the employer.

Under the "dual purpose" exception to the "going and coming" rule, trips to or from the workplace, serving both personal and business purposes, may be compensable. *Hendrickson v. Lewis*, 94 Or App 5 (1988); *Angela M. Chiotakos*, 47 Van Natta 1419 (1995). The "dual purpose" exception applies where, in the absence of the employee's personal motive, a special trip to accomplish the business purpose would have to be made by the employer.

Claimant (creatively) contended that, because he was taking empty egg cartons home with him, to fill them with eggs and give them to Ms. Nash, he was serving a business purpose at the time of his injury. Interestingly, claimant did not testify, at hearing, that he was carrying egg cartons. LOL!! Instead, he testified that he was carrying **food scraps**!!

The Board agreed that claimant was not credible, and that the "dual purpose" exception to the "going and coming" rule did not apply. **Affirmed**