Dr. Garber's

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

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Board Case Update: 12/27/2016

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Chong Kim, 68 Van Natta 2041 (2016)
(ALJ Lipton)

Claimant requested review of an Opinion & Order that upheld employer's denial of his occupational disease claim for a right arm overuse condition.

On June 10, 2015, claimant sought treatment for right forearm and shoulder pain that worsened when using a computer mouse for work. A "Dr. Melvin" diagnosed right lateral epicondylitis, explaining that claimant had an "overuse injury" related to habitual posture and the ergonomics of his work station.

Claimant started treating with Dr. Buncke on June 17, 2015. Dr. Buncke opined that claimant had a right upper extremity overuse nerve compression disorder "seen commonly in high computer use individuals" with the wrist extended on a mouse. He also observed that claimant had a less severe left upper extremity condition, which he did not document due to time constraints.

On July 24, 2015, Dr. Wilson examined claimant at the employer's request. Claimant reported that his symptoms improved since he stopped working, that he had pain only in his right lateral elbow and forearm, and that driving made his symptoms worse. Dr. Wilson examined claimant's arms and diagnosed nonwork-related right thoracic outlet syndrome and possible right C5-6 cervical radiculopathy, as well as bilateral (right greater than left) lateral epicondylitis, cubital tunnel syndrome, and carpal tunnel syndrome.

According to Dr. Wilson, claimant's bilateral lateral epicondylitis was difficult to explain by his mouse use because, while repetitive, that activity was not of the force required to cause lateral epicondylitis. He also observed that claimant had lateral epicondylitis on the left side, yet did not use the mouse with his left hand. Dr. Wilson felt that claimant's work-related mouse use was a material contributing cause of his right lateral epicondylitis condition, but not the major contributing cause of that condition. (**Think about this: Use of a "mouse" causes tendonitis in the elbow?)**

Anyway…the Board did not find Dr. Buncke's opinions persuasive because he never could explain claimant's bilateral symptoms. **Affirmed**

Stephen G. Flint, 68 Van Natta 2047 (2016)
(ALJ Brown)

The insurer requested review of an Order that set aside its denial of claimant's new/omitted condition claim for L5-S1 stenosis and foraminal narrowing. The insurer contended that ORS 656.225(1) applied to a compensability dispute and that claimant needed to prove that his work injury was the "major contributing cause of a pathological worsening of the preexisting condition."

The Board disagreed, observing as follows:

"ORS 656.225 addresses the compensability of a 'disability solely caused by or medical services solely directed to a worker's preexisting condition.' *See Arms v. SAIF*, 268 Or App 761, 768 (2015)(ORS 656.225 creates limitations on compensation rather than entitlement to it). In *Eric S. Sofich*, 67 Van Natta 1700 (2015), we evaluated the applicability of ORS 656.225 to the compensability of new/omitted condition claims. Citing *Charles I. Sullenger*, 59 Van Natta 1146 (2007), we noted that ORS 656.225 is limited by its terms to disability caused by, or medical services solely directed to, a worker's preexisting condition. *Soflich*, 67 Van Natta at 1704. Accordingly, we concluded that where an "otherwise compensable injury" combines with a "preexisting condition," to cause disability/need for treatment, the compensability of the resulting "combined condition" is properly analyzed under ORS 656.005(7)(a)(B) and ORS 656.266(2)(a), not ORS 656.225." (emphasis added).

In short, ORS 656.225 only addresses disability; it does not address compensability. The Board agreed that claimant proved the compensability of his claim, under ORS 656.005(7). **Affirmed**

Octavio Negrete, 68 Van Natta 2051 (2016) (ALJ Fisher)

Claimant requested review of an Order that declined to award temporary disability benefits and associated penalties/fees.

Claimant was compensably injured in a work-related motor vehicle accident (MVA) on February 19, 2013. SAIF accepted a his claim for a right knee strain, among other conditions.

In May 2013, an MRI scan showed a "questionable" tear of the posterior horn of the medial meniscus. Claimant's attending physician looked at the MRI films and concluded that they did not confirm a meniscus tear.

In July, claimant's attending physician, Dr. Lorber, recommended an evaluation by Dr. Bowman, an orthopedic surgeon, and suggested that a diagnostic arthroscopy might be necessary.

Dr. Bowman saw claimant in August 2013. Dr. Bowman observed that claimant had "some patellofemoral chondromalacia" that was traumatic and was worsening. He recommended diagnostic arthroscopy.

In September, Dr. Lorber opined that claimant's right knee strain was medically stationary. On September 27, 2013, he stated that claimant had no work restrictions for the accepted conditions, but that his post-traumatic chondromalacia was not medically stationary, "as this is contingent on an arthroscopic evaluation." On the same date, claimant initiated an new/omitted medical condition claim for a "post-traumatic" right knee chondromalacia.

On November 25, 2013, SAIF issued a denial or claimant's post-traumatic chondromalacia. On January 22, 2014, SAIF issued a Notice of Closure concerning the right knee strain, awarding no permanent impairment. In May 2014, an Order on Reconsideration affirmed the January 2014 NOC.

On July 24, 2014, SAIF's denial of November 25, 2013 was upheld. The ALJ determined that claimant did not establish the existence of the post-traumatic chondromalacia condition. (**Spoiler Alert: This is because the diagnostic procedure was never authorized, or performed**)

In February 2015, Dr. Bowman performed a diagnostic arthroscopy of the right knee. He found a lateral meniscus tear and a partial anterior cruciate ligament (ACL) injury. So…in April 2015, claimant requested acceptance of a "vertical lateral meniscal tear" and a "partial ACL tear" and new/omitted medical conditions.

In June 2015, SAIF accepted a right knee vertical lateral meniscal tear. It denied the ACL injury. Following its acceptance, SAIF did not pay any temporary disability benefits for the period November 26, 2013 through May 16, 2014. Claimant requested a hearing, seeking those benefits.

Reasoning that claimant had been released to work for his accepted right knee strain, the ALJ concluded that no temporary disability benefits were due from November 26, 2013 through May 16, 2014. On review, claimant contended that he was entitled to temporary disability benefits for the time he was off work because of his accepted lateral meniscus tear (accepted in **June 2015**).

Here is what the Board had to say:

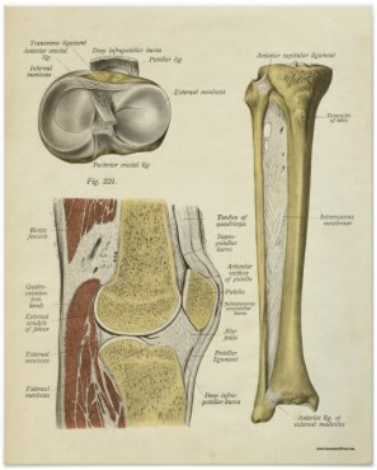
"When an objectively reasonable carrier would understand contemporaneous medical reports to excuse an injured worker from work, a carrier is obligated to pay temporary disability benefits. *Lederer v. Viking Freight, Inc.*, 193 Or App 226, 237, *recons*, 195 Or App 94 (2004). The authorization must relate to the compensable condition. ORS 656.262(4)(d); *Corey J. McEldowney*,62 Van Natta 1718, 1720 (2010); *James E. Harper*, 54 Van Natta 852 (2002), *aff'd without opinion*, 191 Or App 148 (2003)(temporary disability not awarded where time loss authorization was not related to the compensable condition). Temporary disability is payable if the authorization is due in part to the compensable condition, even if the authorization is also directed at unaccepted, or non-compensable conditions. *See Vincent O. Robison*, 67 Van Natta 938, 939 (2015)."

(Remember that the lateral meniscus tear was not discovered until February 2015)

SAIF contended that Dr. Lorber's chart notes established that his time loss authorizations were specifically directed at the denied chondromalacia condition, and that claimant's ongoing knee symptoms were unrelated to the lateral meniscus tear diagnosed by Dr. Bowman. The Board, however, decided that the time loss authorizations by Dr. Lorber were due, in part, to the lateral meniscus tear. This is because, during the entire period, Dr. Lorber and Dr. Bowman were seeking authorization for diagnostic arthroscopy, to determine the cause of claimant's ongoing knee pain.

The Board rationalized its decision, that claimant was entitled to time loss payments for the period in question, as follows:

"Here, we are persuaded that SAIF should have understood that claimant's work restrictions during the disputed period were due, at least in part, to the later accepted right knee lateral meniscal tear. *See Lederer*, 93 Or App at 237; *Robison*, 67 Van Natta at 939. During that period, Drs. Lorber and Bowman were both uncertain of the correct diagnosis regarding claimant's right knee and continued to recommend further diagnostic procedures including a repeat MRI and a diagnostic arthroscopy. [citation omitted]. During the course of the diagnostic arthroscopy, Dr. Bowman diagnosed and surgically addressed a clinically significant lateral meniscus tear."



The Board went on to find that Dr. Lorber's work restrictions, when analyzed [in retrospect] within the context of Dr. Bowman's diagnostic and surgical treatment, "and the continued development of the actual diagnosis," were related in part to the subsequently accepted lateral meniscus tear. Therefore, the Board held that claimant was entitled to temporary disability benefits between November 25, 2013 and May 16, 2014.

(**In other words…because the lateral meniscus tear could have been responsible, in part, for claimant's disability (even though it was not a proven, or compensable, condition in November 2013), temporary disability benefits were due**).

Not only that, but SAIF was found to have acted unreasonably, in failing to pay time loss for the period in question. **Reversed**

Jose G. Dias, 68 Van Natta 2066 (2016)
(ALJ Jacobson)

Claimant requested review of an Order that upheld the employer's denial of his left knee injury. The main issue, on review, was whether claimant's injury arose out of and in the course of his employment.

On June 15, 2015, claimant was walking quickly toward a stairway, carrying new water knives used to repair equipment. He turned to step onto the stairs and twisted his left knee and felt a pop. He experienced immediate pain and sought medical treatment on the same day.

Claimant began treating with Dr. Bell. Dr. Bell diagnosed an acute left knee medial meniscus tear and attributed the condition to claimant's work activity. She ordered an MRI scan which revealed severe chondromalacia of the patella, a partial tear of the ACL, and a complex tear of the medial meniscus. Dr. Bell recommended surgery.

Dr. Brenneke performed an independent file review on behalf of the employer. He concluded that the medial meniscus tear was chronic and degenerative. Plus, he considered claimant's obesity to be a significant risk factor for a meniscus tear.

Based on Dr. Brenneke's report, employer denied claimant's left knee injury claim.

At hearing, the employer argued that claimant's injury should be analyzed as an "unexplained injury," and that claimant was required to persuasively eliminate all idiopathic factors of causation. This argument did not go far with the Board which observed, as follows:

". . . [B]ased on our review of this particular record, we conclude that his injury was not unexplained. Rather, the record establishes that the immediate cause of claimant's injury is known. Specifically, claimant testified, without rebuttal, that he was walking briskly and turning to walk up the stairs when he twisted his knee

and it popped. The injury was therefore explained; it occurred when claimant twisted his knee while walking and turning. *See, e.g., Janet G. Cavalliere*, 66 Van Natta 228 (2014)(fall was not unexplained when the claimant testified that while she was walking at work, her foot caught or her shoe gripped the floor causing her to fall); *Arthur E. Fredrickson*, 52 Van Natta 897 (2000)(fall caused when the claimant 'hooked' his toes on 'something' in or near a parking lot was not 'unexplained,' although the claimant could not identify what specific hazard or impediment 'hooked' his toes)."

After finding that claimant's injury was not unexplained, the Board went on to discuss whether claimant's regular job duties put him in a position to be injured while walking and turning to step onto the stairs. It found that, indeed, walking and stepping onto the stairway was part of claimant's regular job duties and, therefore, that claimant's injury "arose out of" his employment.

Contrary to employer's position, the Board found Dr. Bell's analysis and conclusions (as claimant's attending physician) to be more persuasive than Dr. Brenneke's. **Reversed**

And, from the Court of Appeals

The Halton Company – Halton Co., v. Nacoste, 1301056, 1300653; A155960 (November 30, 2016)

In this case, briefed and argued by yours truly, claimant alleged he was entitled to time loss benefits for the period June 21, 2011 through September 28, 2011. This matter was appealed by the employer to keep issues alive related to another appeal, by claimant, concerning an aggravation claim during the same period of time. The aggravation claim had been denied, and the denial had been affirmed by the Board. *See Nacoste v. The Halton Company*, 275 Or App 600 (2015).

Claimant suffered a compensable knee injury in 2008, and the claim was accepted for the condition of right knee medial meniscus tear. He opted to forego surgical treatment at the time and was, instead, treated conservatively. His claim was closed in 2009, with a 2% whole person impairment award.

Claimant continued to suffer knee pain. He returned to his doctor, who recommended surgery to repair the meniscus and, in March 2011, authorized time loss. Claimant filed an aggravation claim which employer denied on June 21,

2011, reasoning that claimant's condition had not changed since claim closure. In its denial, however, employer wrote, "Please note that once you have undergone repair of the meniscus tear in your right knee, we will voluntarily reopen your claim for aggravation at that time." (Claimant could not undergo surgery until he got his diabetes under control)

Claimant filed a request for hearing from the aggravation claim denial. An ALJ upheld the denial, however, but awarded claimant interim time loss from March 2011 until the date of the denial on June 21, 2011. The Board affirmed the judge's Opinion & Order, and the Court of Appeals affirmed the Board.

In the meantime, on September 28, 2011, claimant underwent surgery to repair the medial meniscus tear. During surgery, the surgeon found Grade 3 chondromalacia, in addition to the medial meniscus tear. Claimant subsequently filed a new/omitted condition claim for the chondromalacia. Employer, true to its word, opened up the claim and started paying time loss benefits, beginning on the date of surgery. It also accepted the chondromalacia condition in June 2012.

Upon claim reclosure, employer awarded claimant TTD benefits from September 28, 2011 through September 12, 2012, in addition to PPD. Claimant requested reconsideration of the NOC and, by Order on Reconsideration, the Appellate Review Unit modified claimant's TTD award by awarding TTD from March 2011 through May 2012.

Employer disputed the time loss benefits ordered for the period June 21, 2011 through September 28, 2011. An ALJ and the Board, however, upheld the award. Unlike the ARU and ALJ, however, the Board did not connect claimant's entitlement to time loss benefits to the discovery of chondromalacia. The board found that, although employer had initially denied an aggravation claim for that

condition, employer's voluntary reopening of the claim, as of the date of surgery, constituted a retroactive acceptance of the aggravation claim.

The fate of the aggravation claim, however, had already been sealed. So, claimant tried to argue that the time loss authorization, for the June – September period, was for the effect of the Grade 3 chondromalacia. In disposing of that argument, the Board observed, as follows:

" * * * Although the ARU based its award of time loss on the chondromalacia, the board did not, with good reason. There is no evidence of an authorization of time loss for that claim before the date of the surgery. It is true, as claimant contends, that the statutes do not require that a physician's authorization of temporary disability benefits relate to a specific diagnosis. But the authorization must relate to a compensable condition. ORS 656.212; *see Scott v. Liberty Northwest Ins. Corp.*, 268 Or App 325, 330, 341 P3d 220 (2014)(describing two periods during which an entitlement to temporary disability benefits may arise, in addition to any interim compensation period, both of which relate to accepted claims that have not yet been closed); *Webb v. Glenbrook Nickel Co.*, 189 Or App 251, 256, 75 P3d 459 (2003)(duty to pay benefits was not triggered by authorization of time loss for a condition that was not compensable). As the board correctly stated, an authorization of time loss is not effective as to a denied condition. *See* ORS 656.262(4)(g). The presurgery authorizations provided by claimant's attending physician were directed to the medial meniscus tear, which had been denied and for which no compensation was due before September 28, 2011." **Reversed and Remanded.**

QUERY: How does this case differ from the Board's decision in Octavio Negrete, discussed above? SAIF is considering appeal of Negrete.

Reynolds v. USF Reddaway, Inc. – YRC, Inc., 1204682; A157147 (December 21, 2016)

Claimant sought review of a Board order that found his new/omitted condition claim for an L5-S1 disc herniation barred by claim preclusion or the "law of the case."

Claimant injured his low back on January 28, 2011. An MRI of February 14, 2011 revealed possible "discogenic material in close apposition to the proximal S1 nerve root."

Claimant's claim was accepted for a disabling **lumbar strain**. The claim was processed to closure in March 2011.

On April 1, 2011, claimant requested acceptance of a new/omitted condition identified as a "herniated disc of my L5/S1." An MRI scan, performed on April 8, 2011, however, revealed "no evidence for disk herniation." Employer denied the new/omitted condition claim. Claimant did not request a hearing from the denial.

By October 2011, claimant's low back symptoms were worse. He sought treatment for pain in his back and down into his leg and foot. Another MRI scan found evidence of a "focal left lateral disk protrusion" that had increased in size since the April MRI scan.

Claimant was treated conservatively. When he continued to worsen, another MRI scan was order. The third MRI scan, performed on May 15, 2012 revealed a "large" left central disc herniation at L5-S1. Claimant's attending surgeon performed surgery. On July, 31, 2012, he signed an 827 Form, making a new/omitted condition claim for the L5-S1 disc herniation. That claim was denied by the employer.

In a letter to claimant's counsel, in January 2013, claimant's attending surgeon opined that claimant's disc was originally compromised on the date of injury and that it gradually worsened, over time, to the point claimant needed surgery.

The employer argued that the claim was barred by claim preclusion because the asserted condition had already been claimed and denied, back in 2011. An ALJ rejected this defense, reasoning that claimant's L5-S1 disc condition had worsened since the June 3, 2011 denial, and that the worsening was related to the original injury.

The Board, on review, adopted the ALJ's findings but determined that the claim was barred because it was based on the same "operative facts" as those underlying the June 3, 2011, denial of the initial new/omitted condition claim. In the

alternative, the board held that the June 3, 2011 denial established the "law of the case" that there was no causal relationship between the L5-S1 disc herniation and the compensable injury.

The Court did not like the "law of the case" thing. (**The Board uses "law of the case" to discount opinions of medical experts who observe, in their reports, that a claimant, for example, never really did suffer from what was accepted, administratively**). The Court stated, "As we recently said in *ILWU, Local 8 v. Port of Portland*, 279 Or App 157, 164, 379 P3d 1167, *rev den*, 360 Or 422 (2016), the law-of-the-case doctrine is preclusive only with respect to a prior ruling or decision of an appellate court as opposed to a trial court or administrative body."

The Court also rejected the claim preclusion basis of barring claimant's new/omitted condition claim. Basically, it determined (rightfully so, in IMHO) that claimant's disc condition, in 2012, was different than the condition that was denied in 2011. Therefore, claim preclusion (based on a situation in which there are identical facts) did not apply to preclude claimant's new/omitted condition claim. **Reversed and Remanded**