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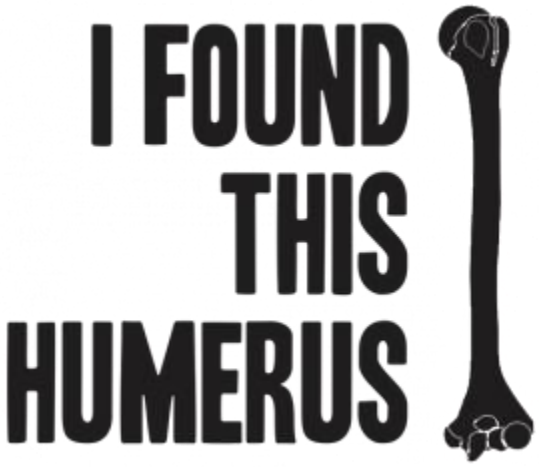
DISPENSARY OF COUGH SYRUP, BUFFALO LOTION, PLEASANT PELLETS, PURGATIVE PECTORAL, SALVE & WORKERS' COMPENSATION CASES

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



Board Case Update: 01/27/2017

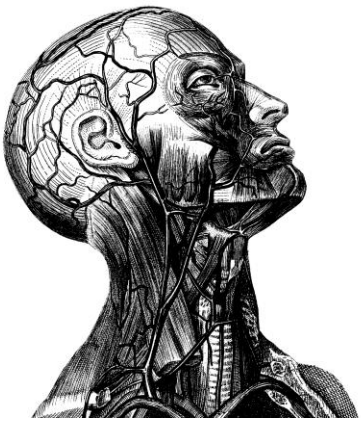
by Brad G. Garber
Wallace, Klor, Mann, Capener & Bishop

Juan Estrada, 69 Van Natta 71 (2016)
(Order on Remand)

The Court of Appeals reversed the Board's Order on Review that found: (1) Claimant had established "good cause," under ORS 656.265(4)(c), for failing to give notice of his injury to the employer within 90 days of its occurrence; and (2) set aside the employer's denial of the injury claim.

Claimant worked as a delivery truck driver, loading and unloading merchandise. On April 27, 2011, he felt a "weird pull" in his groin while lifting a heavy item into his truck. He did not report the injury because he thought it was "just soreness * * * from extra work."

Thereafter, he continued to feel continuing symptoms that proceeded to worsen, over time. Finally, in September 2011, he sought treatment and was diagnosed with a hernia. He filed a workers' compensation claim which was denied as untimely claimed. He filed a request for hearing.



After hearing, the ALJ concluded that claimant did not have "good cause" for waiting so long to file a claim, because he knew, all along, that his symptoms started on April 27, 2011. Employer's denial was upheld. Claimant sought Board review, and the Board reversed the ALJ's Opinion & Order and set aside the employer's denial. The employer appealed the decision to the Court of Appeals. In *Federal Express Corp. v. Estrada*, 275 Or App 400 (2015), the Court reversed the Board's decision, noting that the Board's decision was predicated on the determination that claimant did not know he had been injured. The Court concluded that the Board had not articulated a rational connection between its factual findings and the ultimate conclusion that claimant lacked knowledge that he had been injured.

The Court astutely noted that the Board's findings that claimant was aware of the moment that he felt a distinct painful sensation in his body while lifting a heavy object at work, had soreness in the same area that made work more difficult for him over the next few months, was previously free of such symptoms, and consistently and exclusively attributed his symptoms to the work incident upon receiving his hernia diagnosis. The Court felt that these findings by the Board were inconsistent with its ultimate conclusion that claimant had not realized that he was injured. The Court felt that the Board's ultimate conclusion was inconsistent with its findings, and remanded the matter for reconsideration and explanation.

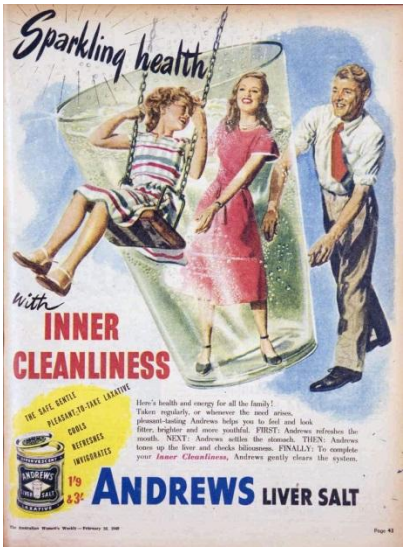
The Board reviewed past decisions and decided that, in the future, it will apply a "reasonable worker" standard when determining whether "good cause" has been shown, on a case-by-case basis. In other words, would a hypothetical "reasonable worker" realize that he or she had been injured at work. The Board stated,

"Specifically, we will examine whether the worker knew of enough facts to lead a reasonable worker to conclude that workers' compensation liability was a reasonable possibility and that notice to the employer was appropriate."

The Board clarified, further, as follows:

"With respect to those prior cases that addressed the 'significance' of an injury, we clarify that in evaluating whether the nature of the accident or symptoms gave the claimant knowledge of the 'accident resulting in an injury of death,' we may consider the significance of the accident or symptoms. However, if a worker is aware of such an accident, untimely notice has not been excused by the worker's belief that the accident or the injury was or was not 'significant.'" *See Michael D. Chilcote*, 64 Van Natta 766 (2012)

On remand, the Board found that claimant knew, all along, when he sustained an injury. He just did not feel that it was significant. Under the circumstances, his report of injury, about 6 months later, was untimely and claimant had not shown "good cause" for not reporting the injury, timely. **Denial, affirmed**



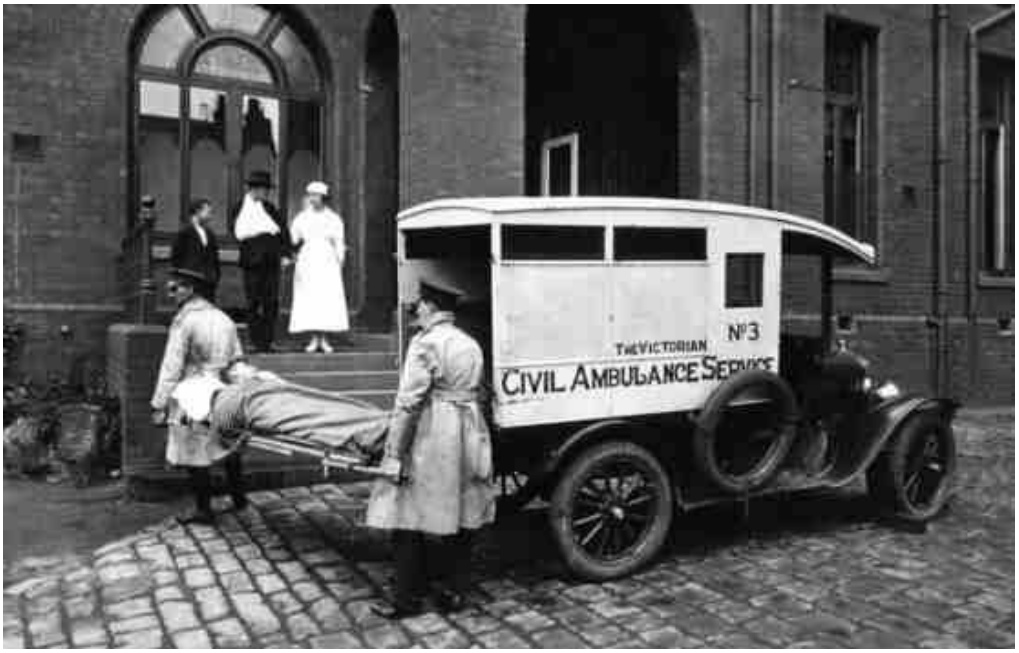
Octavio Negrete, 69 Van Natta 87 (2017) (Order on Reconsideration)

On December 20, 2016, the Board reversed an Opinion & Order that declined to award temporary disability benefits, penalties and attorney fees. The Board found that claimant's attending physician had authorized temporary disability for an undiagnosed right knee condition, eventually diagnosed as a vertical lateral meniscus tear. SAIF sought reconsideration, contending that the Board's reasoning conflicted with the Court of Appeals decision in *Halton Co. v. Nacoste*, 282 Or App 420 (2016)

In *Nacoste*, the carrier accepted a medial meniscus tear and subsequently closed the claim. Two years after closure, the claimant sought an evaluation due to ongoing knee pain, at which time his physician recommended surgery for the meniscus tear. Claimant was diabetic (uncontrolled) and surgery was postponed to allow him to get thing under control. He filed an aggravation claim which was denied, contingent on getting the diabetes under control. The carrier told claimant

that it would voluntarily reopen the claim once the recommended surgery was performed. The aggravation claim was upheld on Board and judicial review.

Finally, surgery was performed and the claim was, as promised, reopened. During surgery, the surgeon found chondromalacia. That condition was added to the scope of claim acceptance. The Court of Appeals determined (in an appeal separate from the appeal from the aggravation claim denial) that the carrier's claim acceptance, as of the date of surgery, did not support an award of temporary disability benefits before the surgery, allegedly due to the chondromalacia first discovered during surgery. That condition was not even known at the time of time loss authorization.



In *Negrete*, the dispute was over whether SAIF was liable for temporary disability benefits resulting from its re-opening of the claim for a new/omitted medical condition. The new condition was a vertical meniscus tear, which was not known about at the time of time loss authorization but was, in fact, part of the reason for the authorization. The medical evidence indicated that claimant's attending physician attributed claimant's inability to return to work on, "possibly," chondromalacia. He recommended and MRI, however, to find out the purpose for claimant's disability. He also clarified his position that, if surgery revealed other pathology, the scope of acceptance might need to be expanded to include those conditions. The Board, under the circumstances, felt that the attending physician's work restrictions were related, at least in part, to the ultimately-accepted meniscal tear. **Affirmed, again**

Kevin J. Siegrist, 69 Van Natta 92 (2017)
(Order on Reconsideration)

I reported on this little spat in my 09/13/16 case law update. *See Kevin J. Siegrist*, 68 Van Natta 1283 (2016). The issue was whether claimant had shown "extraordinary circumstances," entitling him to full reimbursement of his $1,550 cost bill. Under ORS 656.283(2)(d), costs are limited to $1,500, unless there are "extraordinary circumstances" justifying full reimbursement. So…the fight was over $50. The Board gave the claimant the $50.

But, there were other issues, so the claimant requested reconsideration. SAIF decided to, also, raised the reimbursement issue again. This time around, the Board awarded claimant's attorney $5,500, for services on review and reconsideration under ORS 656.382(2). **Affirmed, supplemented, modified**