Dr. Garber's

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

by Brad G. Garber
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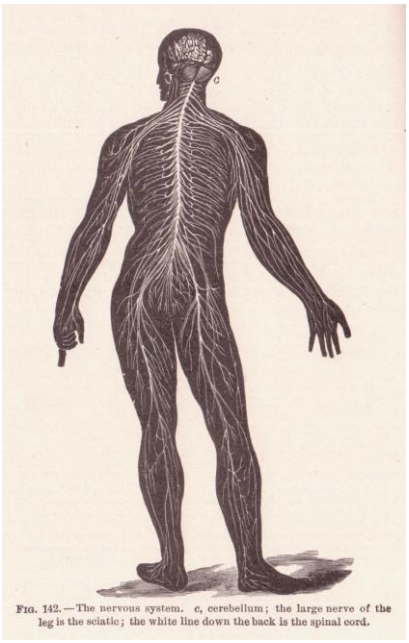


FIG. 142.—The nervous system. *c*, cerebellum; the large nerve of the leg is the sciatic; the white line down the back is the spinal cord.

Board Case Update: 04/21/2017

Ernest R. Lyons, 69 Van Natta 688 (2017)
(ALJ McWilliams)

Claimant requested review of an Order that: (1) declined to award an attorney fee under ORS 656.386(1); and (2) declined to award penalties and fees for alleged unreasonable claim processing.

Claimant injured his right arm on May 15, 2015. He was seen by an emergency room physician on that date and was assessed with a right bicep strain. Subsequently, he went to Dr. Stowell, who ordered and MRI scan of claimant's right shoulder. The scan, performed on May 26, 2015, revealed a biceps tendon tear and partial tear of the supraspinatus.

On June 2, 2015, Dr. Stowell signed and dated an 827 Form, requesting acceptance of a "SLAP lesion-bicep tendon tear right" as a new or omitted condition.

On June 25, 2015, SAIF issued a Notice of Acceptance which identified the accepted condition as a **right shoulder strain**.

On August 14, 2015, claimant requested a hearing, alleging a "*de facto*" denial and seeking penalties, fees and costs. Three days later, he initiated a new/omitted condition claim for a "right tear of the long head biceps tendon at the anchor, a SLAP tear, and a partial tear of the supraspinatus." SAIF accepted the new conditions on September 29, 2015.

At the hearing, claimant's attorney argued that SAIF should have included the requested conditions in its initial acceptance, and that its failure to accept them at the outset constituted an unreasonable *de facto* denial. He sought an attorney fee under ORS 656.386(1), and a penalty and penalty-related fee under ORS 656.262(11)(a).

Unfortunately, there is a statutory section, ORS 656.262(6)(d) that provides, "[a]n injured worker who believes that a condition has been incorrectly omitted from a notice of acceptance, or that the notice is otherwise deficient, first *must*

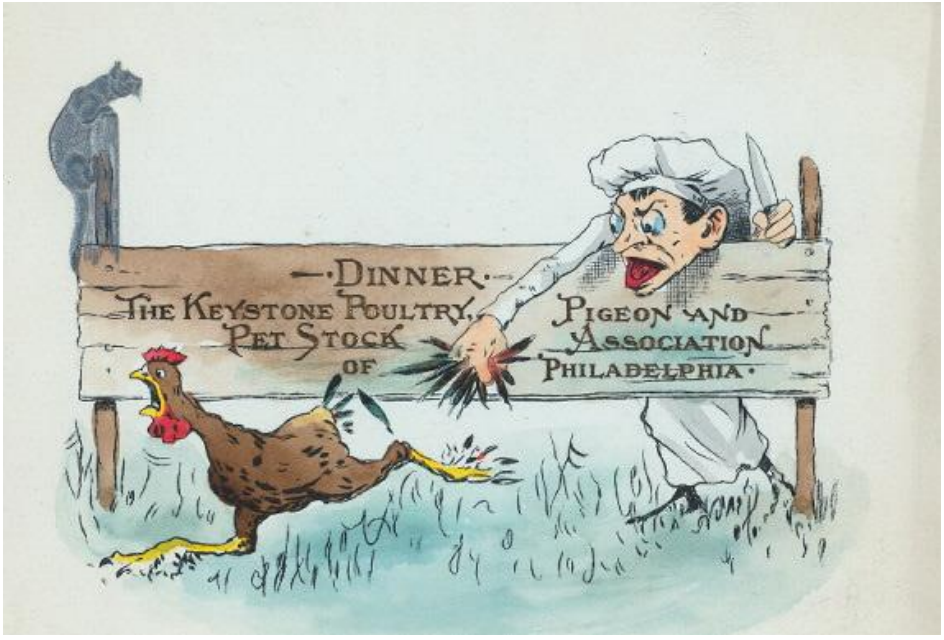
communicate in writing to the insurer or self-insured employer the worker's objections to the notice pursuant to ORS 656.267." (Emphasis added).

As the Court of Appeals explained, in *Johansen v. SAIF*, 158 Or App 672 (1999), "An initial claim is filed and ultimately accepted within the time prescribed by ORS 656.262(6)(a) * * * *Once the claim is accepted*, the claimant can object to the notice of acceptance and seek to have any conditions included. ORS 656.262(6)(d)." (Emphasis added). In *Kenneth Hawes*, 54 Van Natta 1915 (2002), the Board held that a "carrier's failure to respond to the claimant's request for acceptance of conditions before the carrier had accepted any conditions was not a 'denied claim' under ORS 656.386(1)(b)." **Affirmed. No penalties or fees.**

Cheryl A. McCarty, 69 Van Natta 769 (2017)
(ALJ Sencer)

The insurer requested a hearing of an Opinion & Order that set aside its denial of claimant's injury claim for a left ankle condition.

That ALJ found that claimant was a "subject worker" when she fell while taking a rest break on the alleged employer's premises. Employer maintained, on review, that claimant was not a subject worker. The ALJ made his finding based on claimant's testimony. Employer argued that claimant was not a credible witness and that her uncorroborated testimony was insufficient to carry her burden of proof.



Pursuant to ORD 656.005(30), a "worker" is a person "who engages to furnish services for remuneration, subject to the direction and control of an employer * * *." Claimant testified that a guy by the name of "Dave," who worked for the alleged employer, hired her as a cook.

She communicated with Dave by text messages and phone calls. Claimant also testified that Dave agreed to pay her $15 per hour, plus travel expenses. Before the hearing, in a recorded statement, claimant stated that Dave agreed to pay her $12 per hour. Claimant also testified that she text messaged Dave, while on her way to work, to tell him that she was on her way to work, and that Dave responded, "ok." Claimant never called Dave as a witness, to corroborate her testimony.

Claimant further testified that, when she arrived at the restaurant, she met the alleged employer and that he agreed to take care of the employment paperwork after her shift. But, during her prior recorded statement, claimant did not mention meeting the employer or that she made "paperwork" arrangements with him before starting her shift. Claimant never called the alleged employer as a witness.

Finally, claimant testified that, at about 7:15 a.m., while she was working, a waitress arrived at the restaurant. You guessed it…she did not call the waitress as a witness, to corroborate her testimony.

The Board did not find claimant to be a credible witness and concluded, "Therefore, claimant's testimony does not persuasively establish that there was an express or implied agreement between her and the alleged employer to provide remuneration for services, subject to the alleged employer's right to direct and control those services." **Reversed**

Jesus Pena, 69 Van Natta 772 (2017)
(ALJ Fulsher)

Claimant requested review of an Opinion and Order that affirmed an Order on Reconsideration that awarded no PPD for his accepted conditions.

The employer had obtained video surveillance of claimant that revealed no impairment. It did not send the video evidence to claimant's attending physician, Dr. Heitsch, but it did supply it to the Appellate Review Unit and the ARU gave it to the medical arbiter panel, on reconsideration of the Notice of Closure. Claimant argued that the medical arbiter panel's finding should be excluded from consideration because it was based on the surveillance video that had not been reviewed by a physician involved in his evaluation or treatment, as required by OAR 436-030-0155(4)(a). That rule provides, as follows: "Surveillance video provided for arbiter review must have been viewed prior to

claim closure by a physician involved in the evaluation or treatment of the worker."

The Board recognized that the rule was not complied with, but concluded, "Nevertheless, for the following reasons, the medical arbiter panel's report is not excluded from consideration 'as a matter of law' on this basis."

The Board wrote:

"Here, claimant does not cite, and we do not find, any statutory authority, administrative rule, or case precedent to support the proposition that the medical arbiter panel's report should be 'excluded from consideration' because the panel reviewed a surveillance video that did not comply with OAR 436-030-0155(4)(a). Instead, an insurer that does not provide information complying with the requirements set forth in OAR 436-030-0135, 436-030-0145, 436-030-0155, and 436-030-0165 may be assessed civil penalties, and such failure may also be grounds for extending the reconsideration proceeding. OAR 436-030-0175(1). Thus, the rules do not outright preclude the consideration of the medical arbiter panel's report in rating claimant's permanent disability under these particular circumstances."

Finally, while the medical arbiter panel was influenced by its viewing of the surveillance DVD, that evidence was not the sole evidence for the panel's finding of "invalidity," with regard to its range of motion and other impairment findings. The Board relied on the arbiter panel's findings in affirming the Order on Reconsideration. **Affirmed**

Nancy E. Eggert, 69 Van Natta 791 (2017)
(ALJ Brown)

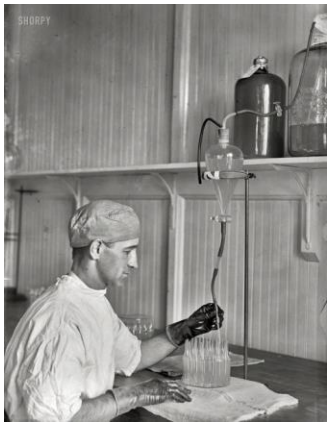
Claimant requested review of an Opinion & Order that: (1) found that SAIF's "contingent" Notice of Acceptance did not constitute a *de facto* denial of a claim; and (2) declined to award penalties and fees for alleged unreasonable claim processing.

Claimant injured her left knee at work. Her claim was denied. After litigation, SAIF's denial was set aside. It appealed the Opinion and Order and, then, issued a Notice of Acceptance, contingent on the outcome of its appeal.

The condition accepted was a left medial meniscus tear as the "contingent accepted medical condition."

The Board affirmed the Opinion and Order that set aside SAIF's denial. SAIF appealed the matter to the Court of Appeals, but subsequently withdrew its appeal.

On October 8, 2015, after all the litigation and appeals were done, claimant asked SAIF to issue a "clarified Notice of Acceptance that does not state it is conditional or contingent upon any outcome of litigation, since all litigation regarding initial compensability has been concluded." SAIF ignored the request.



On January 14, 2016, claimant requested a hearing, asserting "*de facto* denial/challenge to Notice of Acceptance/medical services" and seeking (of course) penalties and fees.

After hearing, the ALJ concluded that SAIF was not required, by statute or case precedent, to amend its acceptance after the dismissal of its request for judicial review. She declined to assess a penalty or penalty-related fee.

The Board observed that claimant had not made a claim for a new or omitted condition; she merely sought "clarification" of the Notice of Acceptance. Because claimant did not make a new/omitted condition claim, there was no *de facto* denial. SAIF, after-all, had accepted the medial meniscus tear. But, the Board continued, as follows:

"Nonetheless, ORS 656.262(6)(d) directed SAIF to revise the notice or to make other written clarification in response to claimant's written communication within 60 days of its receipt. [citation omitted]. Because SAIF did not make any response to claimant's request for clarification and expense reimbursement (which had been stayed pending the outcome of SAIF's appeal), and offered no persuasive explanation for its failure to do so, we conclude that it unreasonably delayed or refused to pay compensation under ORS 656.262(11)(a)."

Because there were some amounts due (related to a request for reimbursement for claim-related mileage and pharmacy expenses) at the time SAIF failed to revise its Notice of Acceptance, a 25% penalty was assessed, as well as a penalty-related fee of $3,000. **Affirmed, in part. Reversed, in part.**