

Fall 2008

Highlights:

- Control of premises is key in determining compensability for injuries
- ADA Amendments Act adds new "major life activities" to list

General Index:

Oregon Claims	2
Washington Claims	3
Employment Update	4
SBH Notable Events	5
For More Information	5

111 SW Fifth Ave.
Suite 1200
Portland, OR 97204
503-225-5858

Sather, Byerly & Holloway in Action!

WCCA Golf Tournament at Langdon Farms



Nike team spirit team—Larry Holt (Nike); Lance Johnson (SBH); Gene Rappe (Travelers); and Brian Perko (SBH).



Rebecca Watkins (SBH); Joe & Debbie Fincham (ESIS); and Krishna Balasubramani (SBH).

Aboard the Crystal Dolphin



Krishna Balasubramani, Deborah Sather & Lance Johnson.



Deb Newstrand (Fred Meyer) & Deborah Sather enjoying the Crystal Dolphin cruise.

Oregon Workers' Compensation

Oregon Workers' Compensation Board Decisions

Control of premises is key in determining compensability for injuries that occur while going to or coming from work.

Generally, injuries that occur going to or coming from work, including during lunch breaks, are not compensable. Recently, the Board has been examining the employer's control of the premises to determine whether the injury that occurred "going to or coming from work" is compensable. In **Theresa Noble, 60 Van Natta 880 (2008)**, the Board found a worker's injury, which occurred during a personal errand on a paid break, was compensable because the record established the area in which the worker was injured was controlled by her employer. In accordance with the employer control of premises test (**Naomi R. Pierce, 60 Van Natta 2420 (September 15, 2008)**), the Board found the worker's injury sustained during her lunch break did not occur in an area controlled by her employer. Consequently, the Board concluded the worker's injury did not arise out of and in the course of her employment.

Only stay compensation you have contested.

The Board awarded penalties and attorney fees for unreasonable withholding of compensation for a carrier's stay of payment of PPD award while on appeal. The Board found the carrier was entitled to stay the payment of the increased PPD granted by the Order on Reconsideration pending its appeal of that order. Nevertheless, the Board concluded that, because the carrier had not requested reconsideration of the Notice of Closure (NOC), it was not authorized to stay the payment of the uncontested PPD granted by the NOC. Even if a NOC is on appeal, you will need to determine if payment is proper. **Ricky S. Beckerman, 60 Van Natta 2460 (September 19, 2008)**.

Need to meet all requirements for TTD in Own Motion claim for new/omitted condition.

The saying "the devil is in the details" certainly applies to Own Motion claims. Recently, the Board held the worker was not entitled to TTD despite authorization from her attending physician because of a missing "detail." The Board held that, although she was prescribed curative treatment, it was not prescribed in lieu of hospitalization necessary to enable her to return to work, and she was not entitled to TTD benefits based on her previously reopened Own Motion claim. The Board agreed the statutory requirement for the payment of TTD benefits had not been satisfied. **Belinda A. Butcher, 60 Van Natta 2173 (August 21, 2008)**.

Strict compliance with the rules is mandatory when administratively closing claims.

We have all felt the frustration when a worker fails to seek treatment and prolongs a workers' compensation claim. To have these claims closed, strict compliance with the rules governing closure is required. The Board has held a closure was premature because a carrier had not sent a copy of its "failure to seek treatment" warning letter to the worker's attending physician before closing the claim. The



Another Successful WCCA Fall Conference (10/14/08) thanks to the hard work of these ladies (left to right): Erin Nielsen—WCCA Vice President/Empire Pacific; Shandin Jones—WCCA Professional Member/One Call Medical; Katherine Taylor—WCCA Secretary/OMAC; and Viki Bisby—WCCA President/City of Portland.

The Board recently concluded carrier was not authorized to stay payment of uncontested PPD granted by NOC because carrier had not requested reconsideration.

When issuing warning letters, be certain to copy the attending physician of record.

warning letter was sent to the neurosurgeon, but not the attending physician who recently took on the role of attending physician. Therefore, when issuing warning letters, be certain you copy the attending physician of record. **Mark Miller, 60 Van Natta 2157 (August 21, 2008); OAR 436-030-0034(6).**

Washington Workers' Compensation

Washington Court Decisions

Department's right to reimbursement for workers' compensation benefits paid to claimant does not extend to third-party recovery for pain and suffering.

This case came before the appellate court on the Department's appeal of the lower court's finding that it cannot seek reimbursement from a worker's third party recovery compensating him for pain and suffering. The Department argued the statutory reimbursement term "recovery" includes "all damages except loss of consortium." The Court rejected that argument, holding that, because the Department did not—and will not—pay pain and suffering damages, the pain and suffering portion of the worker's third party damages is not a "recovery" under RCW 51.24.030(5). **Tobin v. Department of Labor & Industries, 187 P3d 780 (Wash. App. Div. 2 July 1, 2008).**

Two year limitations period for widow to file a claim for surviving spouse benefits began to run from the date of worker's death where worker and widow received notice and made a claim for benefits during worker's lifetime. RCW 51.28.055 (2003).

The worker's surviving spouse appealed the Superior Court dismissal of her claim for benefits filed four years after the death of her husband. The trial court found the two year statute of limitations lapsed because she had knowledge of her husband's prior industrial insurance benefits and of the cause of his death. The surviving spouse argued the statute requires written notice that the death was job-related. The Court disagreed.

The Department allowed Mr. Purdy's asbestos exposure claim. After claim closure, Mr. Purdy was advised he could seek reopening if his condition worsened. The parties stipulated Mr. Purdy told his surviving spouse he had been exposed to asbestos, she believed the successful claim for benefits during his life was for asbestosis, and she filed a claim for spousal benefits based on the same exposure. The parties further stipulated the surviving spouse never received written notice regarding her right to file a claim within two years of Mr. Purdy's death. Former RCW 51.28.055 (2003) provided:

Claims for occupational disease or infection to be valid and compensable must be filed within two years following the date the worker had written notice from a physician: (1) Of the existence of his or her occupational disease, and (2) that a claim for disability benefits may be filed. * * *

The Court concluded, by stepping into Mr. Purdy's shoes, his surviving spouse had the same notice already given to her late husband. **In re Purdy, 189 P3d 826 (Wash. App. Div. 3 July 31, 2008).**



Steve Verotsky & his daughter Ava enjoying the MCN Happy Hour SBH co-sponsored at The Ram in Lake Oswego.

Employment Law Update

Oregon Courts

Hays Group, Inc. v. Biege --- P3d ---- (D Or 2008).

A contractual agreement to arbitrate is not an unconstitutional denial of the right to a jury trial, even in absence of notice that the agreement waives such right. Under Oregon law, agreement to binding arbitration is a voluntary waiver of right to jury trial.

Lee v. Employment Dept, 221 Or App 449 (2008).

Pre-tax dollars paid into a Section 125 cafeteria plan are properly excluded from wages when determining unemployment benefits.

Necanicum Inv. Co. v. Employment Dept, 345 Or 138 (2008).

The Oregon Supreme Court reversed a decision of the Court of Appeals and found payments to corporate directors were not wages. The Court of Appeals found the directors to be employees of the corporation and their payment for services the equivalent of wages. Thus, the lower court concluded the directors earned wages for purposes of unemployment taxes. The Supreme Court pointed out that the definitions of "employer," "employee," and "employment" set out in ORS Chapter 657 all began with the preamble, "unless the context requires otherwise." This language recognized that although an individual might otherwise meet the definition of an employee, he or she may not be an employee if circumstances suggest otherwise. The court then referenced statutes setting out incorporation requirements, and noted that those statutes specifically note a director could be—but may not be—also an employee. Similarly, other statutes indicate corporate officers may not be considered employees. Examining the circumstances of the directors at issue, the court held they acted in a corporate role and not as employees.

Federal Legislation

New ADA Amendments.

On September 28, 2008, the President signed into law the ADA Amendments Act, an amendment to the Americans with Disabilities Act of 1990. Although retaining the basic definition of a disability as "substantially limited in one or more major life activities," the amendment refines components of the definition. The new law instructs the EEOC to redefine "substantially limits." It adds to the existing list several new "major life activities" including, among others, reading, bending, communicating, functions of the immune system, digestive, bowel, and reproductive functions. It also eliminates the consideration of mitigating measures in determining if a person has a disability. Contact lenses and eye glasses are the exceptions to the rule. Finally, the amendments shape the protections for persons "regarded as disabled" by affording protection from retaliation and discrimination, but not entitling them to reasonable accommodation. **The new law goes into effect January 1, 2009.**

**SBH Annual
Claims
Professional
Workshop**

November 7, 2008

ADA Amendments Act adds new "major life activities" to list, including reading, bending, communicating, functions of immune system, digestive, bowel & reproductive functions.

For More Information

**Oregon and Washington
Workers' Compensation**

Lance Johnson
503-595-2137
ljohnson@sbhlegal.com

**Oregon
Workers' Compensation**

Jennifer Roumell
503-412-3116
jroumell@sbhlegal.com

**Employment Law and Oregon
Workers' Compensation**

Rebecca Watkins
503-595-2134
rwatkins@sbhlegal.com

General Newsletter Comments

Natasha Denyer
503-412-3113
ndenyer@sbhlegal.com

Deborah Flowerday
dflowerday@sbhlegal.com

www.sbhlegal.com

SBH HAPPENINGS

At the 2008 WCCA Golf Tournament, two SBH attorneys captured the men's long-drive competition. **Steve Verotsky** captured the title for Hole 5 with a 325 yard drive, and **Lance Johnson** captured Hole 12 with a 285 yard drive. Both invite challengers for next year!



**Krishna Balasubramani
has turned the big 4-0!**

It's a girl!



Deborah Flowerday
welcomed Lucy Elizabeth on
September 26, 2008
(7 lbs., 14 oz., 19 ½ inches)

About our Newsletter ...

The information contained within this newsletter is not legal advice, but a resource to help you stay informed about legal developments affecting your job. If you have a specific issue or concern, please contact your attorney for advice. SBH is a specialized firm offering comprehensive litigation and consultation services to employers, insurers, and adjusters in the Pacific Northwest. SBH assists with workers' compensation, employee policies & records, return to work programs, leave administration, osha compliance, discrimination, longshore, claims processing, hiring & firing, wage & hour, and more.