

Spring 2009

Highlights:

- Proposed Legislation Requires Your Response
- COBRA Changes
- It's a Girl!

General Index:

Oregon Claims	1
Washington Claims	3
Employment Law	5
SBH Happenings	6
For More Information	6

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

OREGON WORKERS' COMPENSATION

by Jennifer Roumell

Occupational Disease or Accidental Injury?

The burden of proof seems simple enough for workers' compensation claims. If you have an occupational disease claim, then claimant has to prove that the exposure is the major contributing cause of the diagnosed condition. ORS 656.802. This is a high standard to meet. Alternatively, for an accidental injury, claimant need only prove that the work injury was a material cause of disability or need for treatment. ORS 656.005. This is a much lower standard and one that does not require an actual diagnosable condition. Therefore, the different standards cause parties to dispute what qualifies as an injury claim and what is an occupational disease. Over the last few months, the Board has addressed this question in a number of decisions.

Gradual Versus Sudden Onset Is a Factor to Consider

In two recent cases, the Board held that a month-long onset qualified as an occupational disease and a week-long onset was determined to be an accidental injury claim. In *Aerin L. Gloor*, 61 Van Natta 280 (2009), claimant worked as a registered nurse and filed a claim for gradual onset of neck pain due to being short staffed for the prior month and lifting patients by herself. She was diagnosed with a C6-7 herniation. Claimant filed the claim as an OD claim, but the employer wanted it analyzed as an injury claim. The Board held it was properly analyzed as an occupational disease claim, relying on the fact that it was of gradual onset.

Conversely, in *Robert Lekberg*, 61 Van Natta 647 (2009), the Board held a one-week period qualified as an accidental injury. Here, claimant had a history of low back complaints. In 2000, he had pain into his left buttocks. In 2004, a DCS resolved the current condition and specific claims for L2-3 and L4-5 degenerative disc disease (DDD). In 2006, claimant sought treatment for left side pain and cramping in his leg. In 2007, he developed low back and left leg pain after a 70-hour week driving truck. An L3-4 disc condition (and multilevel DDD) was found. SAIF denied compensability. The ALJ upheld the denial, finding the condition to be an occupational disease. On review, the Board reversed, evaluating the claim instead as an injury. The Board relied on two *(continued)*

points to make this determination: it found the heavy work week a discrete period of time and found the new diagnoses different from all of claimant's prior complaints. The Board relied on the treating doctor under the material cause standard to find the claim compensable.

In Infectious Disease Claims, the Exposure Period Is Crucial

In infectious disease claims, the Board looks at exposure periods to determine if it is an occupational disease or injury claim. In *Tony L. Fairbanks*, 61 Van Natta 74 (2009), the Board held there was un rebutted medical evidence that established claimant's injurious exposure and the onset of his infection occurred suddenly, during a discrete period of time. It was analyzed as an injury claim and found to be compensable. Claimant, a millwright/mechanic, received a boot allowance for his work boots. Two and a half months after using the boots, he noticed shin discomfort. When he removed his boots at the end of the workday, he noticed a red spot on his left shin two inches below the top of the boot level. One week later, he sought treatment and was diagnosed with a MRSA infection. Medical testimony indicated he probably had prior MRSA colonization, but it had not been diagnosed or treated prior to the diagnosis of the MRSA infection. Thus, ORS 656.005(24)(a) was held not to apply. Since there was a discrete, sudden onset of the MRSA infection "condition," an accidental injury, rather than an occupational disease, theory was appropriate.

The Board reached the opposite conclusion in *Martha K. Seeley*, 54 Van Natta 2279 (2002). There, the Board held it was impossible to determine the exact exposure period and analyzed the claim as an occupational disease. Claimant, an operating room technician, sustained numerous "needle stick" injuries at work. After suffering a penetrating wound from a contaminated suture needle in 1999, claimant tested positive for the Hepatitis C virus (HCV) for the first time. *Seeley*, at 2280. The medical evidence revealed the source of claimant's HCV was unknown, it could not be determined, and it was impossible to ascertain how long claimant had been HCV positive. *Id.* at 2281.

The employer in *Seeley* argued that because claimant's condition was not the product of multiple incremental injuries or exposures, but instead resulted from a single accidental exposure, it must be analyzed as an injury rather than an occupational disease. *Id.* at 2282. Based on the doctor's references to claimant's 25 years in a health profession with a statistically higher incidence of HCV and her history of numerous "needle stick" episodes, the Board concluded claimant's HCV condition was gradual in onset and was properly analyzed as an occupational disease. *Id.* at 2283.



Debbie Hopkins (ESIS),
Jeana Wines (SBH) &
Shandin Jones (One Call
Medical) at WCCA
Spring Conference.

WASHINGTON WORKERS' COMPENSATION

by Bruce Byerly

New Legislation Will Restrict Employer Contact with Attending Physicians

Dave Kaplan, Executive Director of the Washington Self-Insurers Association, reports that SHB 1402 was passed by the legislature. The bill prohibits ex parte contact with medical providers after a Notice of Appeal is filed. The bill will soon be on the Governor's desk for her signature.

WSIA believes there is still a chance Governor Gregoire may veto SHB 1402. WSIA has asked that those who oppose the bill send their objections to the Governor. You can send requests to veto the bill through the WSIA website, <http://www.wsiassn.org/index.html>, or by letter to The Honorable Chris Gregoire, Governor, State of Washington, PO Box 40002, Olympia, WA 98504-0002. Please describe your own objections to the bill.

The arguments against the bill include:

- The bill fundamentally changes the state workers' compensation system;
- Ex parte contacts have been approved by the Supreme Court;
- Medical providers already can refuse to participate in ex parte contact with the employer's attorneys;
- The bill will increase deposition and attorney costs for employers;
- The bill will complicate medical providers' information release decision making, particularly in complex claims where appeals run simultaneously with ongoing claim management; and
- The bill could increase potential liability for health care workers for unauthorized releases.

WSIA warns the bill will:

- Add over \$1.5 million per year in cost to the Washington's workers' compensation system;
- Increase claim management impediments and delays;
- Confuse medical providers; and
- Will not result in better outcomes for workers.

If you object, you must register your objections quickly—before the bill is signed.

Log on to <http://www.wsiassn.org/index.html> to let Governor Gregoire know your objections to SHB 1402.

Hearing Loss Schedule of Benefits Determined by Last Injurious Exposure

The Washington Supreme Court has determined in an occupational disease hearing loss case with no medical treatment that the appropriate benefit schedule is the schedule in effect on the date of the last injurious exposure. *Harry v. Buse Timber & Sales, Inc.*, ___ WA ___, 201 P3d 1011 (2009).

In *Harry*, the worker was hired by the employer in 1968. He worked until he retired in 2001. During his employment, he was exposed to high noise levels capable of producing hearing loss. The employer administered annual audiograms, as required by WISHA. The 1974 audiogram established compensable left ear hearing loss. The hearing loss progressed. By 1986, the right ear was also affected. The worker waited until he retired in 2001 to consult a physician. His physician informed him he had a 38.13 binaural hearing loss.

The Court observed RCW 51.32.180(b) controls the applicable schedule of benefits. This statute provides in section (b):

“... The rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of contraction of the disease or the date of filing the claim.” (Emphasis added.)

The Supreme Court framed the issue as: When does occupational hearing loss become “partially disabling” for purposes of determining the applicable benefit schedule for permanent partial disability awards?

The Court held:

“Considering the purpose of the IIA, the liberal construal mandate, the definition of occupational disease, and the nature of occupational hearing loss, we interpret ‘the date the disease ... becomes totally or partially disabling,’ as referring to the date the aggregate compensable disability occurred, not the date a compensable loss first occurred. Accordingly, we hold the date of the last injurious exposure is the date occupational hearing loss is ‘partially disabling’ within the meaning of RCW 51.32.180(b).” (Emphasis added.)

The Court suggested that employers could limit their exposure by providing workers with physician-certified notices of compensable hearing loss with the first audiogram that demonstrates a compensable hearing loss.



Ron Holloway enjoying a surprise visit from his granddaughter, Morgan.

EMPLOYMENT LAW UPDATE

By Jamie Carlton

How COBRA Changes Impact Your Workplace

As a result of the American Recovery and Reinvestment Act of 2009 signed into law by President Obama, a new provision for COBRA benefits has emerged. Certain employees are now entitled to receive a 65% subsidy for premiums for a period of up to 9 months.

These changes impact COBRA benefits for employees who are involuntarily terminated from employment between September 1, 2008 and December 31, 2009 and have an annual income less than \$125,000 (single) or \$250,000 (joint filing). Individuals who were involuntarily terminated on or after September 1, 2008 and declined COBRA coverage must also be given a new opportunity to enroll.

The employees will pay 35% of the full premium. The employer (or health plan or insurer—whoever would typically receive premium payments) must cover the remaining 65%. The employer then applies to the government for a payroll tax credit equal to the 65% subsidy. If the employer does not have payroll taxes equal to the full amount of the subsidy, it can apply for a direct reimbursement.

The new law creates a host of new obligations for employers. The primary obligation will be to notify employees about the subsidy and maintain supporting documentation for the claimed credit. Employers must maintain documentation pertaining to an employee's election of COBRA continuation, the involuntary termination and payment of their 35% premium share. The employer must submit documentation with its request for payroll tax credit/reimbursement.

Employers may ask how this subsidy will impact other laws and obligations in the employment context. The new provision states the entire premium should be treated as if the employee still pays 100% and the 65% subsidy should not be considered additional compensation to the employee. But does the subsidy impact obligations such as workers' compensation benefits, for example calculations of time loss benefits for Washington claims? Many such questions are expected to be encountered by employers and SBH will continue to monitor and provide legal updates regarding this evolving area of law.

The new law creates a host of new obligations for employers. The primary obligation will be to notify employees about the subsidy and maintain supporting documentation for the claimed credit.

Model notices and further information about the changes can be found at www.dol.gov/ebsa/cobra.html.

SBH HAPPENINGS

For More Information

Washington Workers' Compensation

Bruce Byerly
503-412-3102
bbyerly@sbhlegal.com

Oregon Workers' Compensation

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

Employment

Jamie Carlton
503-595-2127
jcarlton@sbhlegal.com

General Newsletter Comments

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

www.sbhlegal.com



It's a Girl!

**Congratulations to
Lance and Erica Johnson.
Zoe was born on
February 17, 2009.
She weighed 7 lbs., 11oz.
and was 20 ½ inches.**

Upcoming Events

[April 28, 2009](#)

ADA and FMLA Workshop in Hermiston

9:30 a.m. – Noon at the
Hermiston Community Center

Contact Laurel Hensley at
lhensley@sbhlegal.com for
details and registration.

[May 6, 2009](#)

DMEC Quarterly Conference <https://m360.dmec.org/ViewEvent.aspx?id=5838&instance=0> *Meeting the Challenges of Mental Health*

Krishna is on the panel for this
discussion.

[May 7 & 8, 2009](#)

WSIA Annual Conference – Sea Tac

<http://www.wsiassn.org/>

[May 13, 2009](#)

WCCA Luncheon <http://www.wccaonline.org/>

[July 9, 2009](#)

Sterling Seminar – Fundamentals of WC

Norm & Jamie are speakers.

[July 10, 2009](#)

OSIA Summer Meeting <http://www.osia.com/Conferences.html>

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.