

Spring 2010

## Highlights:

- Exclusive Remedy
- Processing Tips
- Case law Updates
- New SBH Hires

## General Index:

Oregon Claims	3
SBH Notable Events	9
For More Information	9

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

## Restrictions to Exclusive Remedy Provision of ORS 656.018

By Steve Verotsky

Recently, the Oregon Court of Appeals issued a decision that further restricts the protections of the exclusive remedy provision of ORS 656.018. In *Merten v. Portland General Electric* (March 24, 2010), the Court reversed the trial court's grant of summary judgment in favor of the employer and held that an injured worker is not barred by the exclusive remedy provision from bringing a civil claim for fraudulent processing of his workers' compensation claim.

### FACTS

*\*\*Please note when a court reviews a motion for summary judgment, it construes the facts in a light favorable to the nonmoving party. In other words, the court presumed all of Merten's allegations were true.\*\**

In April 2003, Merten fell from a power pole. He immediately reported the injury to his employer but did not file a claim until August 2003. He alleged injuries to his shoulder and low back and indicated he had received medical treatment from Dr. Krier. The employer contacted Dr. Krier for records but his office did not disclose the records.

In September 2003, the employer contacted Merten and informed him it had not received any medical records related to his claim and if the records were not received by October 3, 2003, his claim would be denied. Claimant was also informed the employer had the right to "reverse the denial and accept the claim at any time." By October 6, 2003, the employer had not received any medical records and, therefore, a denial was issued with the 60-day appeal notice. However, the denial noted "[w]e will review your claim again for possible approval, once we receive medical documentation from your physician."

Instead of requesting a hearing, Merten continued to communicate with the employer regarding his injuries. Merten claimed the employer repeatedly told him that, if he submitted medical records documenting his injuries from the fall, the employer would accept his claim. These communications persisted after the 60-day appeal deadline had lapsed.

In May 2006, more than 200 days after the denial was issued, Merten contacted the employer to obtain a claim number to facilitate payment of his upcoming shoulder surgery. He also inquired about compensation for his low back. At this point, the employer told him that his back injury was no longer an issue because he was time barred from appealing the October 6, 2003 denial. However, the employer eventually accepted the shoulder injury.

*Continued*

*Court found that fraud is not the type of injury, which can be established by medical evidence supported by objective findings; therefore, the claim falls outside of the Workers' Compensation Act.*

SBH was well represented at the WCCA Golf Tournament.



Ron Holloway, Debbie Fincham, Joe Fincham, & Krishna Balasubramani



Steve Verotsky, Brian Koerber, Jamie Carlton, & Laura Cromwell



Ted Stark, Lucia Mantilla, Aaron Bass, & Craig Stone

In December 2005, Merten filed a civil claim for fraud alleging the employer never intended to open his injury claim and told him that it would do so only to prevent him from making a timely request for a hearing on the denial. A trial court granted the employer's request for summary judgment and agreed that a civil fraud claim was barred because the Workers' Compensation Act provided his exclusive remedy.

On appeal, the Oregon Court of Appeals disagreed with the trial court and reasoned that Merten's fraud allegations arose from "non-work-related" communications and the Oregon Workers' Compensation Act did not provide the exclusive remedy. The case was remanded back to the trial court to determine whether the communications were fraudulent.

### ANALYSIS

Generally, when a worker sustains an injury that arises out of and occurs in the course of employment, the worker can only seek remedies provided for under the Oregon Workers' Compensation Act. 656.018(1)(a). There are some notable exceptions. For example, an injured worker is permitted to bring a civil negligence claim when benefits are denied on a major contributing cause basis. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001).

In Merten's case, the Court of Appeals evaluated whether representations made during the processing of his workers' compensation claim were sufficiently connected to his employment such that the representations occurred "in the course and scope" of his employment. The Court reasoned the employer's discussions with Merten about his claim were "non-work-related" communications and, therefore, any harm resulting from those communications did not arise out of and occur in the course of his employment. This reasoning appears to be inconsistent with the Supreme Court's decision in *Robinson v. Nabisco*, 331 Or 178 (2000), which held that an injury sustained during an independent medical examination evaluation occurred in the course and scope of employment. Neither an IME nor communications about a claim for benefits have any direct relationship to a worker's employment, but there is an argument they both share an indirect relationship to employment.

The Court also explained that Merten's fraud claim "is not the sort that can be compensated by the Workers' Compensation Act. It cannot be treated by 'medical services or result in disability or death,' as required by ORS 656.005(7)(a)." Ultimately, the Court found that fraud is not the type injury that can be established by medical evidence supported by objective findings and, therefore, the claim falls outside of the Workers' Compensation Act. With this analysis, the Court likely reached the correct decision. The issue of whether the employer's communications with Merten were fraudulent remains to be determined by the trial Court.

### RECOMMENDATIONS

From a practical perspective, the Merten decision has less to do about what types of harm can be remedied by the Workers' Compensation Act and more to do with reasonable processing obligations and how best to communicate with claimants. In terms of processing obligations, it is important to

*Continued*

Even with denied claims, the processing agent must continue to evaluate factual and medical evidence to determine if there is a legitimate basis to deny the claim for benefits.

remember that even when a claim has been denied, the processing agent must continue to evaluate factual and medical evidence to determine whether there is a legitimate basis to deny the claim for benefits. *Brown v. Argonaut Insurance Company*, 93 Or App 588, 592 (1988) (a denial becomes unreasonable if new evidence eliminates any legitimate doubt about liability). However, the obligation to evaluate evidence ends when the 60-day appeal deadline passes.

The *Merten* case also reminds us that verbal communications with claimants can be perilous. Although there may be no bright line rules about what you can and cannot say to claimants, there are two guiding principles. First, when the subject turns to whether a claim will be accepted or denied, do not offer predications. Claimants may rely on those representations to their detriment and, potentially, to your detriment as well. Second, steer clear of offering advice to claimants. If claimants have questions about their rights and responsibilities, refer them to the Oregon Ombudsman for injured workers.

## Processing Tips

### Electronic Payment of Compensation

You are not limited to issuing live checks to claimants. Workers' Compensation rules allow for electronic payment of compensation, such as direct deposit and automated teller machines. This might be helpful in claims involving PTD payments. Requirements are listed in OAR 436-060-0153 and include:

- (1) Worker agrees to electronic payment in writing;
- (2) Worker can discontinue service by notifying insurer in writing;
- (3) Format must be negotiable and payable to the worker for the full amount of the benefit paid without cost to the worker; and
- (4) Worker must be able to make an initial withdrawal of the entire amount of the benefit paid without delay or cost to the worker.

### CDA Alert

As of March 1, 2010, WCB's website allows on-line access to information concerning approved Claim Disposition Agreements (CDAs).

Specifically, WCB is posting on its website a list of approved CDAs, either by order or postcard, which are compiled on a daily basis. The list is updated each day to include the date of approval, claimant name and CDA number. A link to the CDA web page can be accessed at: <http://www.cbs.state.or.us/wcb/contents/cda.htm>.

## OREGON WORKERS' COMPENSATION

by Jennifer Roumell

### Oregon Supreme Court Cases

---

**CDA does not extinguish attorney fees associated with medical services disputes.** *Liberty Northwest Ins. Corp. v. John L. Watkins*, \_\_\_P3d \_\_\_, 347 Or 687, 2010, WL569652Cor.) <http://www.publications.ojd.state.or.us/S057190.htm>

**Facts:** Claimant suffered a compensable back injury and subsequently entered into a CDA whereby he released "all rights to workers' compensation benefits except for medical services." Years later, he requested medical services as part of the claim and the insurer denied the services. The matter was litigated before the MRU.

**Decision:** A CDA does not extinguish the worker's right to attorney fees for a subsequent medical services dispute. Given that the CDA could not resolve medical services and that the right to attorney fees in a medical services case are "derivative of medical services claims," the court held that "a successful medical services claim carries with it the right to attorney fees under ORS 656.386(1)" that cannot be extinguished by a CDA.

**Lesson:** A CDA will not extinguish further processing of medical services, medical disputes or related attorney fees.

### Oregon Court of Appeals Cases

---

**PPD cannot be reduced in a Notice of Closure due to failure to follow physician's advice.** *SAIF v. Vanbibber*, 234 Or App 68 (2010). <http://www.publications.ojd.state.or.us/A136922.htm>

**Facts:** The claim was closed following a work-related back injury with an award of impairment but did not award work disability on the grounds his physician opined claimant would have been able to do his regular work if he had complied with the PT program.

**Decision:** The Court held an insurer was wrong by not awarding work disability despite the statement by the doctor.

**Lesson:** Insurer must award the work disability but then may appeal their closure and ask for reduction in benefits if a claimant's failure to follow physician's advice would have reduced his PPD award.

**A worker can file successive hearing loss claims against his employer even after an initial accepted claim for the same condition.** *Pilgrim v. Delta Airlines*, 234 Or App 80 (2010). <http://www.publications.ojd.state.or.us/A137246.htm>



Recent visit from Debbie Schiller and Donna Fuller of Arrowpoint, accompanied by Jack (companion dog in training). Visit [CCI.org](http://CCI.org) for more information on Canine Companions for Independence.

**Facts:** Claimant filed a hearing loss claim and was awarded 16% in 1996. He continued to work at the employer and filed another hearing loss claim for hearing loss incurred after 1996. The employer treated the claim as an Own Motion worsening claim. The ALJ and Board upheld the denial because claimant had not proven that hearing loss since 1996 was the major cause of his condition or of the worsening of the previous hearing loss before 1996. Claimant's hearing loss was proven to be 16% since 1996.

**Decision:** The Court reversed and remanded the claim for acceptance. They reasoned that ORS 656.802(2)(a) applied and claimant need only show a series of work exposures caused the disease. There was no proof of a combined condition with the pre-1996 hearing loss or that the pre-1996 hearing loss itself was a worsened pre-existing condition. The Court stated ORS 656.802(2)(b) did not apply when the pre-existing disease and the worsening are both employment related. The only proof required by claimant is to show employment conditions are the major cause of the disease.

**Lesson:** Claimant has the burden of proving employment conditions are the major cause, regardless of prior accepted claim. Of interest, the OAR will allow apportionment/offset of the prior PPD award.

**Worker not authorized to work in the USA not entitled to vocational assistance.** *Carreon v. Commerce & Industry Ins. and DCBS*, 233 Or App 440 (2010), 226 P.3d 73 (2010). <http://www.publications.ojd.state.or.us/A137651.htm>

**Facts:** Claimant was compensably injured and her claim was closed with an award for permanent impairment. After the claim was closed, claimant was notified that she was ineligible for vocational assistance because she was not authorized to work in the United States.

**Decision:** A worker who is not authorized to work in the United States is not entitled to vocational assistance benefits. The worker argued OAR 436-120-0320(10)(a), a department rule stating a requirement that workers be "authorized to work in the United States" as a condition for vocational assistance, was contrary to statute and invalid. The court disagreed, noting that ORS 656.340(7) authorized the department to place "other conditions" on vocational assistance eligibility than those expressly stated in the statute.

**Lesson:** It is important to review all facts, including citizenship and green cards in determining eligibility for vocational services.

**No penalty or fee if refusal to close or failure to respond timely to request to close was reasonable.** *Fitzsimonds v. MJ Hughes Construction, Inc.*, 233 Or App 447 (2010). <http://www.publications.ojd.state.or.us/A138173.htm>



Jamie Carlton, Lance Johnson, and Jeana Wines enjoying themselves on the Crystal Dolphin (August 2009).





Tracie Boyd & Norm Cole enjoying Karaoke at Happy Hour co-sponsored with MCN, Black Diamond and Express Dental at Lola's Room at the Crystal Ballroom.

**Facts:** Attending physician determined the compensable condition was medically stationary and asked employer to schedule a physical capacities evaluation (PCE) for claimant, which took place April 19, 2006. On April 24, 2006, claimant requested that a Notice of Closure be issued closing the claim. On May 1, 2006, employer's representative informed claimant that the claim would not close until claimant's attending physician had the opportunity to examine the evaluation. A Notice of Closure issued on May 25, 2006 after insurer discussed attending physician's response to PCE exam.

**Decision:** The employer's response that it was waiting for the attending physician's review and concurrence with a PCE was reasonable. Accordingly, there was no award of penalties or attorney fees.

**Lesson:** Insurer's action will be reviewed to determine if refusal to close was reasonable. Here, there was no written communication, but verbal response was deemed reasonable.

## Oregon Workers' Compensation Board Cases

---

**End stage osteoarthritis viewed as new condition. Date of injury based on treatment for this new condition.** *Timothy R. Hanscam*, 62 Van Natta 228 (2010). <http://www.cbs.state.or.us/external/wcb/2010/review/jan/0900239c.pdf>

**Facts:** In 1987 and 1988, claimant had arthroscopic knee surgery (each knee). In 2005, he again sought treatment for both knees and was deemed a candidate for total knee replacement. Dr. Bowman said the 1987-1988 treatment was for idiopathic arthritis, but he now had end stage osteoarthritis caused, in major part, by a lifetime of work activities, including work for SAIF's insured from 2000 to 2005. SAIF was found responsible for an occupational disease per the last injurious exposure rule and closed the claim based on a date of injury in 1988.

**Decision:** The Board concluded the date of injury was in 2005 because, per *Reynoldson v. Multnomah County*, 189 Or App 327, *rev den*, 336 Or 192 (2003), the first treatment for end stage osteoarthritis was in 2005, rather than in 1988. An Order on Reconsideration used 2005 as the date of injury, which resulted in an increase of more than 25% of the value due to the change in the PPD rate and a penalty.

**Lesson:** The date of an occupational disease claim is determined by the date of initial treatment of the compensable condition.



Bruce Byerly & Penny Francis at SBH Annual Workshop, November 2009.

**Time loss awarded in spite of combined condition denial; Awarded for remaining compensable condition.** *Sheryl J. Otwell*, 62 Van Natta 234 (2010). <http://www.cbs.state.or.us/external/wcb/2010/review/jan/0901009a.pdf>

**Facts:** Following a July 30, 2007 injury, SAIF accepted left L4-5 disc herniation combined with pre-existing DDD at L4-5 and L5 radiculopathy combined with preexisting DDD at L4-5. On December 4, 2008, SAIF denied the current combined

condition as of July 5, 2008. Claimant appealed. On December 18, 2008, SAIF issued a NOC awarding temporary disability for various periods through July 5, 2008. An Order on Reconsideration awarded temporary disability for various periods through October 15, 2008, when claimant was deemed stationary. ALJ affirmed. SAIF contested entitlement to temporary disability as of July 5, 2008.

**Decision:** The Board awarded temporary disability through August 1, 2008. The additional disability was attributable to the accepted portion of the claim, *i.e.* the L4-5 disc herniation and L5 radiculopathy, which was responsible for causing temporary disability until these conditions resolved on August 1, 2008.

**Lesson:** Review file as to all conditions in determining rights to temporary disability.



Longtime legal secretary, Beverly Reams, retired from SBH in February 2010. She will be missed!

### **No third party lien for recovery under underinsured motorist coverage.**

*Lorraine I. McKinnon*, 62 Van Natta 274 (2010).

<http://www.cbs.state.or.us/external/wcb/2010/tpo/0900006tpb.pdf>

**Facts:** Liberty's insured was injured in a work-related MVA. Claimant filed a suit against the third party allegedly responsible for her injury. The third party insurer tendered policy limits of \$25K. Liberty had paid nearly \$49K but approved the settlement and collected a \$10,500 share. Claimant then pursued a claim against the insurer of the automobile she was driving for underinsured motorist benefits (UIM). This was settled for \$60K. Liberty petitioned the Board for a share.

**Decision:** The Board held Liberty was not entitled to a share. ORS 742.504(4)(c) states UIM coverage does not apply so as to insure directly or indirectly to the benefit of any workers' compensation carrier or self insurer under any workers' compensation law.

**Lesson:** There is no third party recovery for workers' compensation claim under underinsured motorist coverage.

### **Attorney Fee awarded when claim withdrawn and denial rescinded.**

**Facts:** Claimant's supervisor informed claimant he had filed a workers' compensation claim on her behalf for job stress. Claimant informed her supervisor and employer's workers' compensation department she did not wish to file a claim. The employer, nevertheless, issued a denial which claimant appealed. Shortly before the hearing, employer's counsel stipulated the denial was null and void and the parties agreed to limit the hearing to whether claimant's attorney was entitled to a fee. The ALJ awarded \$2,400.

**Decision:** The Board upheld the attorney fee.

**Lesson:** Once claimant is represented by an attorney, the issue of attorney fees is present even when a claim is withdrawn.



## Upcoming SBH Events

- 04/29/10 – WSAJ Legal Educational Seminars
- 05/05/10 – DMEC Quarterly Conference
- 05/05/10 – WSIA Annual Conference in Kennewick
- 05/12/10 – WCCA Luncheon
- 05/20/10 – Managing Your Workforce Effectively – Presented by SBH Attorneys  
(Noon-5pm – MAC Club – for details, contact [lhensley@sbhlegal.com](mailto:lhensley@sbhlegal.com))

## Client Happenings



Ron Pomeroy & LaGayla Berg  
aboard the Crystal Dolphin—  
August 2009.



WCCA Holiday Party—  
Sandra Shefman, Brian  
Perko, Debbie Fincham,  
Jennifer Roumell, Laurel  
Hensley, & Debbie  
Hopkins.



Debbie Hopkins & Ron  
Holloway cruising on the  
Crystal Dolphin—August 2009.



Terry Chinn, Jeana Wines,  
JoAnn Piehl, & Jennifer  
Roumell at WCCA Golf  
Tournament at Langdon  
Farms—September 2009.



Larry Holt, Linda Barno, Brian  
Perko & Lance Johnson at  
WCCA Golf Tournament at  
Langdon Farms.

## For More Information

### Oregon Workers' Compensation

Jennifer Roumell  
503-412-3116  
[jroumell@sbhlegal.com](mailto:jroumell@sbhlegal.com)

### General Newsletter Comments

Natasha Denyer  
503-412-3113  
[ndenyer@sbhlegal.com](mailto:ndenyer@sbhlegal.com)

[www.sbhlegal.com](http://www.sbhlegal.com)

## SBH HAPPENINGS

### CD Release: *Sons of Good Fathers*

Not to toot our own horn (or more like it, strum our own guitar), but Bruce Byerly and the band *Sons of Good Fathers* have released a CD. Bruce plays the Dobro. The genesis of the CD was the desire to help Minds Matter, Inc., a 100% volunteer academy mentoring organization serving high-achieving, low-income high school students. All proceeds from the sale of this CD go to Minds Matter, Inc. To learn more about Minds Matter, Inc. check out their website: [http://www.mindsmatter.org/chapter\\_portland.asp](http://www.mindsmatter.org/chapter_portland.asp).

### New SBH Hires

#### Jamie McCall



Jamie started with SBH on March 1<sup>st</sup> and primarily assists Steve Verotsky and Aaron Bass. She has worked in the legal field since obtaining her paralegal certificate from Pioneer Pacific College in 1997. She lives in Newberg with her two daughters (Noelle & Emma) and enjoys long-distance horse racing in her free time.

#### Molly Vida



Molly joined SBH on March 22<sup>nd</sup> and primarily assists Ron Holloway and Lance Johnson. Molly attended California State University and has been a legal assistant since 1989. Molly recently moved to Portland from Sacramento with her husband James and teenage daughter Haley.

### ***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.