

## Summer 2008

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## Late Notice of Closure Triggers Penalties/Fees

by Ron Pomeroy

*Oath Boun*, 60 Van Natta 411 (2008) has opened the door wide for claimants to obtain *significant* penalties and assessed attorney fees when a Notice of Closure is not issued within 10 days of request under ORS 656.268(5)(d).

In *Boun*, the original claims professional responsible for this claim left for another job on August 1, 2006 and a new individual took over the file. Claimant's attorney faxed the *former* adjuster on August 16, 2006 requesting closure of the claim. The new adjuster was not aware of the request and issued neither a Notice of Closure nor a Notice of Refusal to Close. Claimant requested a hearing.

A Notice of Closure issued November 17, 2006 after it was determined that an expansion request would be accepted by an MNOA. The ALJ found the delay *unreasonable* and assessed a \$4,000 attorney fee under ORS 656.268(5)(d). The Board upheld the assessed fee and also the 25% penalty on *amounts then due* at the time of the closure. The Board found the delay unreasonable even though the employer argued they were attempting to determine work restrictions in order to validly close the claim.

Four lessons from this and earlier cases involving claim closure requests can be taken: (1) close the claim within 10 days of the administrator's receipt of the request; (2) if not possible, issue a Notice of Refusal to Close within 10 days; (3) document *any* delay beyond 10 days in detail; and (4) failure to strictly comply with the statute will result in a 25% penalty on *amounts then due* at closure and a large assessed attorney fee.

It is apparent excuses for delay will be deemed insufficient and "unreasonable" in the absence of very well documented and persuasive reasons for inaction. Obtaining necessary information from the attending physician within the context of tight deadlines and repeated follow up, coupled with inaction by the attending physician, is probably the sole acceptable reason for claim closure delay and will, nonetheless, still be looked upon with suspicion based upon recent Board and Court decisions.

## No Wage Action for Failure to Provide Paid Breaks

by Rebecca Watkins

In *Gafur v. Legacy Good Samaritan Hospital & Medical Center*, 344 Or 525 (2008), the Oregon Supreme Court held a failure to receive paid breaks does not give rise to a private wage action.

A class of hospital employees brought suit against their employer for wage violations. Among these claims, the class asserted claims for failure to provide lunch breaks and paid breaks. The Court of Appeals dismissed the lunch break claim but held the class could pursue a wage action for not receiving their paid breaks.

At issue was OAR 839-020-0050, enacted by the Oregon Bureau of Labor & Industries under the statutory authority of ORS 653.261, the statute pertaining to the establishment of minimum employment conditions. The Court of Appeals had noted that the administrative rule entitled employees to uninterrupted paid breaks of ten minutes in duration for every four hours worked. In terms of compensation, this meant employees were entitled to four hours of pay for working only three hours and fifty minutes. Employees deprived of their breaks thus worked ten minutes more without additional compensation. The court held the employees were entitled to a cause of action to recover that unpaid compensation of ten minutes.

The Supreme Court of Oregon, en banc, reversed the Court of Appeals. The Court considered the wage violation statute, which provides a cause of action for employees for violations of ORS 653.010 - 653.261. The Court found it did not need to consider whether the paid break rule exceeded BOLI's statutory authority because nothing in the rule established entitlement to a wage claim for failure to receive paid breaks.

The Court explained that for purposes of wage and hour law, the paid break is still considered a work period. The rule did not create entitlement to an additional ten minutes of pay when a break is missed. Whether or not the break occurs, the employee is entitled to only four hours of pay for the four-hour work period. Moreover, the Court pointed to the fact that BOLI has always assessed civil penalties against employers that failed to provide breaks but not wage penalties.

The Oregon Supreme Court reversed the Court of Appeals and held no individual wage action could be maintained for failure to provide paid breaks.

**For purposes of wage and hour law, the paid break is still considered a work period. There is no entitlement to an additional ten minutes of pay when a break is missed.**

## Oregon Workers' Compensation

### Oregon Workers' Compensation Board Decisions

#### Family nurse practitioners cannot perfect an aggravation claim.

Just a reminder to consider the provider when an aggravation claim is filed. An aggravation claim must be in the form and format prescribed by the Director and signed by the worker or the worker's representative and by the worker's attending physician. ORS 656.273(2) and OAR 436-010-0240(14). The Oregon workers' compensation system does not regard family nurse practitioners as attending physicians. Therefore, if a family nurse practitioner signs the aggravation claim, it is not a perfected claim and no time loss is due and owing. **Toby Hersha, 60 Van Natta 1250 (2008).**



Bruce Byerly & Jill Dulich at WSIA Conference in Kennewick, WA

**Expansion requests must identify a specific condition.**

A request to expand an acceptance to include a combined condition not specifically named is not enough under ORS 656.262(6)(d) and ORS 656.267(1) to perfect a new or omitted condition claim. In *Rafael L. Ortiz-Lopez*, claimant requested expansion of acceptance to include a combined condition based upon a concurrence report from the attending physician. No specific combined condition was evident from the letter itself. The Board held the expansion request was insufficient because it did not list the specific condition sought to be added to the scope of acceptance. ***Rafael L. Ortiz-Lopez, 60 Van Natta 1341 (2008).***

**Unfulfilled requests for personnel file can lead to penalties and attorney fees.**

OAR 436-060-017 requires disclosure of copies of documents relating to a claim within 14 days. Be sure to look at the laundry list of requested documents in opposing counsel's letter of representation. In *Reman*, claimant requested a complete copy of his personnel file after his shoulder claim was denied but before his request for hearing was filed. The personnel records were not supplied and claimant again requested them at hearing. The records were supplied three days after hearing. As there was no proof of the original record request at hearing, no penalty or attorney fee was awarded; however, had that evidence been submitted, a penalty could have been awarded. ***Mike Reman, 60 Van Natta 1298 (2008).***

***ORS 652.750 also allows the assessment of civil penalties against an employer that fails to provide a certified copy of the personnel file within 45 days of a request by the employee.***

**Employment Law Update**

*by Aaron Bass*

This past year, several U.S. Supreme Court, Ninth Circuit and Oregon State cases were decided that impact the employer/employee relationship. Although most of the significant cases were primarily procedural in nature, all have a direct or indirect effect on the way employers conduct business in Oregon and Washington.

**Discrimination**

***Lanier v. City of Woodburn, 518 F.3d 1147 (9<sup>th</sup> Cir 2008).***

Plaintiff applied for a job as a library page with the City of Woodburn. The City then rescinded the offer because Plaintiff refused to comply with the City's policy requiring pre-employment drug testing for all applicants. The trial court dismissed the claim on the employer's motion. The Ninth Circuit reversed the grant of summary judgment for the City and found that although the policy was not facially unconstitutional, it was unconstitutional as applied to Plaintiff because it was a "suspicionless search" in violation of the Fourth Amendment of the U.S. Constitution.

Note: The City did not provide a specific need or substantial justification for the testing. Theoretically, had it done so, the employer may have prevailed. It is important for both public and private employers to identify specific and significant reasons for requiring drug testing.



Aaron Bass being presented with the coveted Green Jacket by Brian Perko at the annual SBH Bowling Tournament.

***Emerald Steel Fabricators v. BOLI, 200 Or App 423 (2008).***

Plaintiff, who was discharged for use of medical marijuana, brought suit for disability discrimination. He asserted that the employer failed to reasonably accommodate his disability. The employer hired temporary employees who, at the end of a 30-day trial period, would be subjected to a drug test should the employer decide to hire the worker full time. Plaintiff informed the employer of his medical marijuana card and the employer ultimately decided not to hire him. BOLI found the employer engaged in disability discrimination. In affirming BOLI's findings, the Court of Appeals side-stepped the issue of whether an employer must provide reasonable accommodation for a medical marijuana user and determined the employer failed to preserve the issue for judicial review.

Note: Consistent with *Washburn*, the Oregon courts have yet to shed light on (1) whether employers have to provide reasonable accommodations for medical marijuana users and (2) whether the federal Drug-Free Workplace Act preempts the Oregon Medical Marijuana Act.

**Disability Discrimination*****Walton v. US Marshals Service, 476 F.3d 723, amended, 492 F.3d 998 (9<sup>th</sup> Cir. 2007).***

In the Ninth Circuit, claims for disability discrimination "regarded as disabled" now have a subjective and objective test. Under the subjective test, a plaintiff must establish the employer believed the plaintiff had an impairment and provide evidence the employer believed the plaintiff was substantially limited in a major life activity. The objective test requires a plaintiff to establish that an impairment imputed to the plaintiff was, objectively, a substantially limiting impairment. The objective test allows a plaintiff to prove he was regarded as disabled when the plaintiff does not have direct evidence surrounding the employer's subjective belief.

Note: This case serves as a reminder that even individuals without disabilities can bring suit if the employer treats them as disabled, such as not assigning the individual the same responsibilities and privileges as co-workers based on a perception that the individual cannot handle them.

**Harassment*****Parker v. Gen. Extrusions, Inc., 491 F.3d 596 (6<sup>th</sup> Cir. 2007).***

Plaintiff submitted a complaint to her human resources manager, who investigated the claim. However, the HR manager "chuckled" at the harasser's responses to the questions and the harasser was only reprimanded with a verbal warning for "horseplay." In addition, the HR manager conducted the investigation in an open area where co-workers could hear. The plaintiff complained to the chairman of the company and the HR manager was forced to conduct further investigations. The HR manager did not conduct such investigations and Plaintiff became so distraught, she took sick leave and then quit. The Sixth Circuit concluded a reasonable jury could find the HR manager's comments and actions showed "reckless disregard" for Plaintiff's Title VII rights sufficient to support a claim for punitive damages.

Note: No matter how facially trivial, it is important to take all complaints seriously. Although the employer has the discretion to determine the appropriate reprimand and punishments for employee violations, this claim may not have reached litigation had the HR manager simply addressed the problem in confidence, establishing an appropriate mechanism for investigating and dealing with employment violations. The same caution should be taken in e-mails or text messages about a complaint.

**SBH Annual  
Claims  
Professional  
Workshop**

**November 7, 2008**

**Details to come!**

*No matter how facially trivial, it is important to take all complaints seriously.*

## For More Information

### Oregon and Washington Workers' Compensation

Aaron Bass  
503-412-3119  
[abass@sbhlegal.com](mailto:abass@sbhlegal.com)

### Oregon Workers' Compensation

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

### Employment Law and Oregon Workers' Compensation

Rebecca Watkins  
503-595-2134  
[rwatkins@sbhlegal.com](mailto:rwatkins@sbhlegal.com)

### General Newsletter Comments

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

Deborah Flowerday  
[dflowerday@sbhlegal.com](mailto:dflowerday@sbhlegal.com)

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

## SBH HAPPENINGS

Paralegal **Donée Allen** has left Sather, Byerly & Holloway to raise her daughter, Larkin. We will miss her.

**Deborah Sather** has joined the Ambassador Board of Dove Lewis, a nonprofit animal hospital in Portland, Oregon. Dove Lewis provides 24-hour emergency care, as well as education and community outreach.

Attorney **Linda Conratt** has left SBH to explore new opportunities. Many thanks to Linda and we wish her good luck in her new venture.

### SBH is pleased to welcome Megan Cieslinski!



**Megan Cieslinski** recently joined the firm as a paralegal. She will be working primarily with Deborah Sather on Oregon and Washington workers' compensation claims. Before joining SBH, Megan worked for six years at the Terrall and Terrall law firm and Touchstone Elementary School. Megan's interests include writing, literature, theater and dance.

## 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.