

August 2006

**Highlights:**

- 11/03/06  
Advanced  
Oregon Claim  
Adjuster  
Workshop
- New SBH  
website
- Recent SBH  
victory in  
reducing  
deposition fees

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## Can You do More to Protect Your Third Party Lien?

*by Linda Conratt*

The initial stages of a workers' compensation claim significantly impact the likelihood of recovering a third party lien. Are you doing everything possible? Can more be done? Often times the worker is unaware of the potential third party cause of action. As the clock ticks, memories lapse, investigative materials disappear, and questions go unanswered.

With every claim, you should ask who, what, when, where, and how. These questions can lead to the determination of whether there is a viable third party claim. There are several common types of third party claims: motor vehicle/pedestrian accident, defective machinery/product, failure to maintain premises, animal bite, and injury caused by visitor/subcontractor at worksite.

Find out early if there are witnesses and obtain their names, addresses, and phone numbers. Question the circumstances of the accident. What time of day was it? What were the weather conditions? Was the injured worker at fault in any way? It is also a good idea to obtain internal investigative reports generated by the employer and its agents, police reports, and statements of witnesses as soon as you learn of their existence. Contact other involved insurance companies for more information about the party at fault, insurance information, and facts it uncovered pertaining to the injury.

If the case is a product liability case, inquire whether there have been prior injuries and whether the product was modified or changed in any way. You will also need to find out whether the employer or another party was responsible for maintenance.

Once you believe there is a potential third party claim, provide the worker with the election letter by certified mail. You should diary your file regularly to monitor the status of third party recovery. Maintain good communication with the worker's attorney to ensure a Complaint and Notice of a Claim, if applicable, are timely filed.

After the initial injury, a worker may be further injured by a negligent medical provider. Often times, the worker is unaware of the potential medical malpractice claim. Examiners may be the first to identify the potential medical malpractice claim based on their experience. You should advise the worker or attorney regarding the potential claim and send a third party election letter.

The more fact-finding done during the initial stages of a claim, the stronger your likelihood of recovering your third party lien. The information will also help you evaluate whether recovery is probable, the amount of expected recovery, and whether compromising your lien is reasonable.

*(See sidebar on page 2.)*

## Claims Processing Change: Even if Worker has Voluntarily Returned to Modified Duty, get Physician Approval of the Modified Job *by Norm Cole*

When processing potential third party claims, be sure and ask:

- Who, what, when, where, and how?
- Time of day?
- Weather conditions?
- Was the injured worker at fault in any way?

Older case law from the Board and the Court of Appeals held that workers are not entitled to reinstatement of TTD when they leave work for reasons unrelated to the injury. However, in a recent decision, **Fidel Vivanco, 58 Van Natta 1677 (2006)**, the Board concluded TTD had to be reinstated unless the attending physician had approved a job description of the modified job the worker voluntarily performed.

Following a work injury, Vivanco voluntarily returned to modified work. His attending physician was not notified of the specific duties the modified work entailed and thus had not agreed claimant was capable of performing them. Several months later, while still working the modified job, Vivanco was terminated. SAIF stopped paying TTD. The Board relied on ORS 656.325(1) to find the cessation of TTD was wrong and approval of a modified job by the attending physician was a prerequisite to ending TTD payments.

The *Vivanco* decision is a significant change in the law. SAIF has filed an appeal to the Court of Appeals and we will monitor the outcome. **Employers, insurers, and administrators can continue payment of TPD and thereby avoid reinstatement of TTD only if the worker's physician has reviewed and approved a description of the modified job.** Although *Vivanco* did not clarify if an employer/carrier must make a bona fide job offer to an employee who is voluntarily performing modified work, making such an offer protects your ability to continue payment of TPD if the worker leaves the job for reasons unrelated to the injury.

Continuing payment of TPD (and avoiding reinstatement of TTD ) is allowed if the worker's physician has reviewed and approved a description of the modified job.

## SBH Obtains Rulings Reducing Deposition Charges *by Ron Pomeroy*

It is common practice to depose medical providers. Many years ago, the OAR's contained fee schedules with designated provider fees for preparation, travel and the deposition itself. Those provisions were repealed and now providers are allowed to charge "reasonable" fees for those services and expenses.

Occasionally, a provider will attempt to charge excessive fees for depositions and deposition preparation compared to other providers within their field of specialty. Such was the case with neurosurgeon V. James Makker, M.D.

In two recent MRU cases, SBH successfully reduced Dr. Makker's bills by arguing he constructively refused to be deposed since his pre-deposition advance billing requests were more than twice usual neurosurgeon deposition-related fees in his local area. A survey of neurosurgeon billings for similar services was conducted by Natasha Denyer of our office and was vital in obtaining the MRU Order granting a sizeable fee reduction. With this type of investigation, the carrier can successfully dispute excessive providers fees.

Interested in receiving alerts of significant changes affecting your job? Sign up for e-alerts at [www.sbhlegal.com](http://www.sbhlegal.com).

*(Ron Pomeroy has been an active member of the Oregon bar since 1973 and is also an inactive member of the Guam bar. He formerly practiced business law and was a former criminal prosecutor prior to defending employers in workers' compensation matters in 1987.)*

## Oregon WC Claims: Court

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### Riding a motorcycle deemed to be a recreational activity.

The Oregon Supreme Court recently affirmed the Court of Appeals decision in **Roberts v. SAIF, 341 Or 48 (June 15, 2006)**. The court agreed riding a motorcycle at a car dealership is a recreational activity primarily for the purpose of personal pleasure and removes the worker from the course of employment. The court defined primarily as principally or fundamentally and concluded the fundamental or principal reason the car salesman was riding the motorcycle was personal. Had the worker not stipulated to the finding the activity served no business purpose, the case may have been decided differently.

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*Recent court ruling found subjective complaints are objective if symptoms are verifiable, measurable, or observable.*

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### Medical opinion based on worker's report of subjective complaints constitutes objective worsening for an aggravation claim.

The court recently found the worker's complaints of pain, numbness, and loss of grip strength constituted evidence of a worsening and was sufficient for the worker to prevail on an aggravation claim. Reasoning that a worker's subjective complaints are objective if the symptoms are verifiable, measurable, or observable, the court found a doctor may properly rely on the worker's report of such symptoms in forming a medical opinion. In **Merle West Medical Center v. Parker, 207 Or App 24 (July 19, 2006)**, the physician relied on the worker's subjective report of decreased grip strength but never performed grip strength testing. The worker also complained of increased pain and numbness. The court held the physician's reliance on the worker's subjective complaints despite the absence of testing was adequate to prove an actual worsening of the compensable carpal tunnel syndrome.

## Washington WC Claims: Court

### Changes made in the schedule of benefits for hearing loss cases.

Determining which schedule of benefits applies to a particular claim is often confusing, especially when a worker has a long history of injurious noise exposure. In **Harry v. Buse Timber & Sales, Inc., 132 P.3d 1112 (Wash. App. Div. I May 1, 2006)**, the court remanded the case for application of a tiered rating system for PPD associated with the worker's long history of occupational hearing loss. The court found it was unjust to use the schedule of benefits based on when the hearing loss initially became disabling. It also noted hearing loss can be disabling before it becomes noticeable to the worker.

Based on the courts recommendations, the hearing loss impairment will be apportioned over time and based on reliable audiograms. The hearing loss is considered partially disabling on the date it is documented by audiogram, as verified by medical testimony. Workers will then be paid for that percentage of hearing loss according to the schedule in effect on the date of each such audiogram.



Rebecca Watkins, Deborah Sather, and Jennifer Roumell at SBH's June 7<sup>th</sup> Employer Workshop.

## Washington WC Claims: Board of Industrial Insurance

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*There were no tentative significant decisions designated this quarter.*

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## Oregon WC Claims: Workers' Compensation Board

### Diabetic's injury due to skipped meal found compensable.

Claimant worked as a caregiver for a residential care home. She usually ate at three specific times during her work day. On the date of injury, she testified she was unusually busy taking residents to the park and did not arrive back at the residence until 8:00 p.m., missing her usual 5:00 p.m. meal. The Board found her injury arose out of employment because she skipped her normal meal due to work duties.

This case illustrates the importance of obtaining witness testimony regarding course and scope cases. The employer contested the period of time claimant alleged she was at the park and asked the Board to assume she had taken cigarette breaks on the day of her injury. However, because no witnesses testified to the assertions, the Board had to disregard these potential defenses. **Kendra S. Easton, 58 Van Natta 934 (2006).**

### Injury sustained during arrest not compensable.

In contrast to *Kendra Easton* discussed above, the following case demonstrates how credible witnesses can assist in winning a course and scope case for an employer. Claimant, a tow-driver, was pulled over for speeding. He contacted his dispatcher and was told to cooperate. However, the police officer testified that claimant refused to provide identification and would not exit his vehicle. A stun gun was eventually used, injuring claimant's neck. The Administrative Law Judge found the police officer credible, and the Board deferred to those findings.

The Board noted violations of employer's policies, rules or directives are not automatically noncompensable if the violations related to the method of accomplishing ultimate work duties. Here, however, the injury did not occur in the course of employment because claimant exceeded the bounds of his ultimate job duties by defying his employer's instructions to cooperate with the police officer. His injury did not arise out of employment because his risk of injury was due to a personal decision not to cooperate with the police. This action was not based on activities inherent in his job. This case likely turned on the credible testimony of the police officer. **David W. Sisco, 58 Van Natta 1114 (2006).**

### Injury incurred at friend's house found compensable.

In a case undoubtedly frustrating for the employer, claimant worked as an in-home caregiver for the employer's client. She cooked, cleaned, grocery shopped and drove the client to appointments. On the day of injury, claimant drove the client to the grocery store, dropped him off, and proceeded to drive to a friend's house. Claimant testified that she went to her friend's house to discuss the date of the client's next brain trauma class because the friend was considering taking over the client's care. After visiting with her friend, claimant walked towards her car, tripped and fell on a tree root, and was injured.

The Board found claimant was a traveling employee because her work included travel away from the client's home on a regular basis. Thus, her injury while traveling occurred in the course and scope of employment unless she engaged in a distinct departure on a personal errand. The Board found the injury was reasonably related to claimant's travel status because claimant visited her friend while waiting for her client to shop and they met to discuss the location of the client's next brain trauma class. Her departure from working was brief in time and short in distance. The departure was transitory and slight. Board Member Langer wrote a lengthy dissent. **Barbara R. Scardi, 58 Van Natta 1611 (2006).**

*Reminder:  
credible  
witnesses can  
assist in  
course and  
scope cases.*

## Employment Law

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### Focus on Disability discrimination.

Federal and state laws provide protections for disabled individuals, including protections in the realm of employment. The federal law, the **Americans with Disabilities Act (ADA)**, 42 USC 11201 et seq. applies to most employers, with a minimum requirement of 15 or more employees. State laws in Oregon and Washington apply to an even broader category of employers. The ADA and state laws require employers to make reasonable accommodations for employees with disabilities. Litigation often involves a dispute over the threshold question of whether an employee is disabled and thus entitled to the protections of the law. Oregon and Washington laws have not always agreed with the ADA on what "disability" means. The highest courts of both states have issued recent decisions addressing this aspect of disability laws.

### Who is disabled in Washington? State court adopts federal definition.

In *McClarty v. Totem, Electric*, 137 P.3d 844 (Wash. 2006), the Washington Supreme Court held that the WLAD definition of disability should be interpreted consistent with the ADA. Likely, this holding will aid employers by clarifying that there is one definition for disability. The nagging question this decision raised is what impact this will have on temporary disabilities.

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*Washington Supreme Court recently held WLAD definition of disability should be consistent with the ADA.*

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The federal ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities," a record of impairment, or being regarded as having such an impairment. Regulations further define impairment and substantial limitations by weighing the duration and permanence of impairment. Under Washington Law against Discrimination (WLAD), "the presence of sensory, mental, or physical disability" is defined as abnormal conditions. Historically, a temporary disability--such as the disability while healing from a broken hip--also receive protection under the WLAD.

The treatment of temporary disabilities has been one of the key differences between Washington law and the ADA. The permanence of impairment is a component of the definition of disability in the ADA. Although the court has not yet weighed in on the issue, Washington's adoption of the federal definition could very well mean that temporary disabilities will lose their protection under Washington law.

### Who is disabled in Oregon? Medical marijuana decision.

The Oregon Supreme Court recently issued its decision in *Washburn v. Columbia Products, Inc.*, 340 Or 469 (2006) addressing whether an employer had to reasonably accommodate an employee's use of medical marijuana. The employee (a millwright) used the marijuana off-the-job for leg spasms that impaired his ability to sleep. When he tested positive for marijuana during a drug test, he was terminated under the employer's zero-tolerance drug policy. The Court of Appeals held the employer had to accommodate off work medical marijuana use under Oregon disability laws.

The Oregon Supreme Court reversed, holding the employee was not disabled under Oregon's disability laws. With the use of mitigating measures (medication), the employee was not substantially limited in a major life activity. Because the employee was not disabled, the employer had no duty to accommodate him. Thus, the Oregon court held that under Oregon law, like under the ADA, successful use of mitigating measures may take an employee out of the category of disabled.

*Because the state is unable to affirmatively require employers to accommodate what federal law prohibits, employers do not have to accommodate medical marijuana use.*

The court largely side-stepped the question the Court of Appeals raised: Does an employer have to accommodate medical marijuana use under state disability law? The US Supreme Court has ruled that marijuana is an illegal substance under the Controlled Substances Act and an employer need not accommodate its use. Oregon's Medical Marijuana Act, however, makes the medical use of marijuana legal under state law. In his non-binding concurrence, Judge Kistler explained that the federal law and Oregon's law conflict when an employer is asked to accommodate marijuana. He concluded that because the state cannot affirmatively require employers to accommodate what federal law prohibits, employers do not have to accommodate medical marijuana use. Although this discussion occurred in concurrence and is not precedent, the Washburn Court of Appeals decision has been overruled, suggesting that when asked to address the issue, the Oregon Supreme Court will follow many other states in finding employers do not have to accommodate medical marijuana.

## Other Significant Federal Cases.

### High court sides with workers in retaliation case.

Retaliation encompasses a broad scope of actions, not only the substantial employer actions prohibited under discrimination laws.



Enjoying refreshments after SBH's May 4<sup>th</sup> Washington Workshop, Lisa Kinsley, Zoe Wylychenko, Angela Grace and Bruce Byerly.

The United States Supreme Court, in what is being called a decision with far-reaching implications, held an employee need not show a significant employer action to establish retaliation under Title VII of the Civil Rights Act. In ***Burlington Northern v. White*, 126 S. St. 2405 (2006)**, a rail yard employee, who usually operated the forklifts, reported sexual harassment by her supervisor. The supervisor was disciplined but the employee was also shifted to a job position that did not include driving forklifts, which were under the supervision of the accused supervisor. The new position, while in the same job class, required more general labor than the position in which she primarily drove a fork lift. The employer argued that the employee did not face an adverse employment action because her wages and classification remained the same. The Court refused to require evidence of a significant action and found the job change, which was more physically demanding, could be considered retaliation. The Court drew a distinction between anti-discrimination provisions that refer to hiring, firing and the terms and conditions of employment, and anti-retaliation provisions that broadly prohibit "discrimination" because of a report of harassment. To effectuate the wording and intent of the retaliation provisions, the Court held any change could be found sufficient to plead retaliation claims. This decision is anticipated to allow employees to establish more readily a retaliation case against the employer.

**Disability and direct threat.**

Employers operating heavy equipment or commercial vehicles are faced with tough decisions when an employee reveals a chronic condition such as diabetes, seizure disorder, or hypertension. Safety risks to others and the employee must be measured against protections for those with disabilities. In ***Dark v. Curry County*, 451 F.3d 1078 (9<sup>th</sup> Cir. 2006)**, the Ninth Circuit held an employee had presented a factual claim under the ADA concerning whether his termination was motivated by his disability.

Dark had epilepsy and one to two hours before a seizure usually experienced an aura or nervous jerk. He worked as a maintenance and construction worker and drove heavy equipment. One morning he experienced an aura but decided to go to work. While driving a county truck, he experienced a seizure. Injury was prevented by the slow speed of the vehicle and the actions of his passenger who took control of the vehicle. After a medical examination and Dark's admission to having had an aura, he was terminated. Both administrative and trial court forums dismissed his claim of disability discrimination. The Ninth Circuit reversed, finding the county's reason for termination based on misconduct (driving with known safety risk) was not legitimate because the conduct directly arose from the disability. Dark offered evidence that the reason was pretextual, including evidence that other maintenance workers had not been terminated in similar situations.

*Interested in registering for upcoming SBH seminars?*

Contact Laurel Hough at 503-595-2123 or [lough@sbhlegal.com](mailto:lough@sbhlegal.com)

For employers, it is key to act *before* an accident or incident arises. Jobs that could pose hazards should be analyzed and the essential skills for those jobs should be outlined in job descriptions. Be able to articulate each job requirement and why it is a necessary part of the job. This basic step will assist in determining qualifications for the job, deciding whether a disability prevents an employee from performing essential functions, and providing an informational source for physicians performing fitness-for-duty examinations.

**Make the women wear makeup and the men shave.**

A former employee at Harrah's casino in Las Vegas brought a claim of sex discrimination under federal law. Harrah's required her to wear makeup to keep her job. The Ninth Circuit in ***Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9<sup>th</sup> Cir. 2006)**, upheld the dismissal of the lawsuit, finding the "appearance standards" imposed burdens on both men and women and thus were not discriminatory.

Employers should be cautious in adopting new gender-specific appearance standards in their workplaces based on this decision. Much of the employee's failure to prevail appears to be due to lack of evidence. The court stated there was no evidence that the standards put any significant burden on women over men, which might ignore the costs of cosmetics. In addition, the employee did not allege sex stereotyping, which may have impacted the decision. Under Oregon law, it is illegal to discriminate against employees because of "sexual identity" and thus making a man wear pants or a woman wear earrings might be found discriminatory under state law without reasonable business justification for the requirement.

## For More Information

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## SBH Notables

Sather, Byerly & Holloway is pleased to announce Paralegal **Hollie Felisiano** has joined our team. Hollie was a claims examiner in the workers' compensation industry for five years with Educational Service District 112 and Sedgwick CMS/Lake Oswego. Hollie now assists Bruce Byerly with his Oregon and Washington claims and Deborah Sather with her Washington claims.



Robb Schotthoefer, Jennifer Roumell, Laurel Hough and Jim Shikany enjoy the annual SBH Bowling Tournament.

WCCA's Annual Golf Tournament takes place on September 12th at Langdon Farms. Come see us at our table on the first hole and support the WCCA. For more information, see <http://www.sbhlegal.com/pdf/2006-golf-flyer.pdf>

## Upcoming Seminar

### Advanced Claims Adjuster Workshop

When: Friday, November 3, 2006;  
9:00 a.m. – 4:00 p.m.

Where: Multnomah Athletic Club

*Social gathering to follow*

Topics:

- Performing IME's Under Current Rules—Appropriate IME letters, Ethics and Standards of Conduct;
- Everything you Ever Wanted to Know About Responsibility But Were Afraid to Ask;
- Return to Work, JA's, ADA and Vocational Considerations;
- Current Claim Management Issues;
- Latest Appellate Cases and How They Affect Your Claim Decisions.

*Expecting 2 IME credits for adjuster renewal certification; 5 ½ total credits for entire program.*

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