

Fall 2007

Highlights:

- Alert! New Law Regarding Credit Checks for Washington Employers (see page 5)
- New faces at SBH
- Upcoming SBH events

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Summer Fun with SBH Clients!

Our SBH Open House in July was a big success and proved to be a great way to escape the summer heat.



And the winners are . . .

The following clients/friends of the firm won door prizes:

William Baumgartner, Marc Anderson, Jackie Hagel, Rondeeda Magby, Jerilyn McGilchrist, Keith Sullivan, Leanne Sneath, Phyllis Brinkerhoff, Amber McMurry, Penny Francis, Nina Kolafa, and Nancy Beall.

The SBH Crystal Dolphin Cruise in August drew a large crowd!



The SBH Crew: (front) Donée Allen, Lacey Jones, Hollie Felisiano, Deborah Sather; (back) Brian Perko, Ron Holloway, Krishna Balasubramani, Aaron Bass.



Brian Perko, JoAnn Piehl, and Larry Holt enjoying a beautiful evening on the Crystal Dolphin.

Oregon Workers' Compensation

Oregon Court Decisions

Prior compensable out-of-state injuries may be considered as preexisting conditions.

The Court of Appeals rejected a worker's argument that a prior out-of-state compensable injury should not be considered a preexisting condition. The court reasoned that under the plain language of ORS 656.005(7), a worker's out-of-state injury qualifies as an injury and is not one of the conditions excluded under the definition. ***Kirby v. SAIF, 214 Or App 123 (July 11, 2007)***. It is important to check ISO Claims Index History to identify all potential prior claims.

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Audiogram that did not meet regulation standards was deficient to offset hearing loss PPD award.

Liberty Northwest attempted to use an undated baseline audiogram that did not have information on how the audiogram was calibrated or whether the worker was away from noise for 14 hours prior to the audiogram to offset hearing loss sustained prior to occupational exposure. The court found the audiogram did not comply with OAR 436-035-0250. ***Liberty v. Norton, 213 Or App 530 (June 27, 2007)***.

Worker awarded a chronic condition PPD award despite absence of any objective physical findings by arbiter.

A medical arbiter found the worker was significantly limited in his ability to repetitively use the cervical and lumbar spine regions. The court held the conclusion by the medical arbiter was an objective finding supporting the chronic award despite the absence of any documented objective physical findings. ***SAIF v. Ramirez, 213 Or App 321 (June 13, 2007)***.

Oregon Workers' Compensation Board Decisions

Request clarification from attending physicians regarding time loss authorizations when there is any ambiguity.

In ***Steven R. Holmes, 59 Van Natta 1989 (2007)***, the Board found claimant's attending physician had noted claimant's "severe depression" was interfering with his ability to work and recommended follow-up with his primary care physician in three to four weeks to obtain a refill of his prescribed medications. Applying the ***Lederer*** standard, the Board determined an objectively reasonable carrier would interpret claimant's attending physician's report as a time loss authorization. Moreover, the Board did not consider the attending physician's reference to a three to four week "follow-up" period with a new primary care physician to be a cessation of the attending physician's time loss authorization. Considering the attending physician's description of a "severe depression" interfering with claimant's ability to work with the hope the prescribed medications would enable claimant to "hold down a useful job" in the future, the Board reasoned the attending physician's comments were more supportive of an "open-ended" time loss authorization. Finally, even if the attending physician had subsequently ceased providing care to claimant, the Board determined claimant remained entitled to TTD benefits pursuant to the attending physician's "open-ended" time loss authorization.

It is best to clarify with attending physician when there is any ambiguity in chart notes.

For treatment noncompliance resulting in an increased permanent impairment award, you need to know where to go to seek a reduction.

If you have a claim where claimant is noncompliant with treatment recommendations that results in increased permanent impairment, you can seek a reduction of the PPD award. If the noncompliance is for the compensable condition, only the Director has authority to lower an award. See ORS 656.325 (2); OAR 436-060-0150(14). If the noncompliance is for treatment of a preexisting condition, a reduction can be sought through the WCB. **Dale E. VanBibber, Jr., 59 Van Natta 2174 (2007).**

Notice of a work accident but not filing a claim is all that is needed for a timely claim.

The Board held claimant was not time barred from obtaining his workers' compensation benefits when he filed his claim 17 months after the incident. The Board held that timely notice of the work accident is all that is required and claimant was not required to file a claim within the one-year timeframe. **Jose Amador, 59 Van Natta 2115 (2007).**

Compensability of idiopathic falls continues to be difficult to assess.

After experiencing an idiopathic syncopal episode, claimant fell off her high, barstool-like chair, landed on a hard linoleum surface, and sustained a facial fracture and closed head injury. An engineer testified that the force generated on claimant's head at impact was 1.5 to 2.1 times greater for her office chair vs. a standard office chair. The parties agreed the fracture was in the course of employment but disputed whether it arose out of employment. The Board held it did because the risk of injury arose from a risk to which the work environment exposed the worker. This was a "mixed risk," involving a personal cause and an employment cause combining to produce harm, and employment was a contributing cause. Because the "course of" prong was strongly satisfied, the "arising out of" prong need only be minimally satisfied. The dissent argued that a lower chair and padded surface could have reduced the severity of the injuries, but a higher chair and hard surface did not increase the risk of injury beyond what claimant would have encountered walking in the office or walking outside. **Violet Colhour, 59 Van Natta 1116 (2007).**

Washington Workers' Compensation

Washington Court Decisions

Closing order not final unless communicated to both attending physician and worker.

The Court of Appeals bypassed evidence proving a worker's injury had not objectively worsened by finding the closing order never became final because it was never communicated to the attending physician. It reasoned that when a final order, decision, or award is based upon a medical determination, the legislature considers the treating physician to be an interested party. Consequently, the order does not become final until 60 days after the doctor has received it. **Shafer v. Dep't of Labor & Indus., 159 P3d 473 (June 11, 2007).**

Visit our website at www.sbhlegal.com for a complete schedule of valuable upcoming events, including workshops.

Interested in registering for our November 2, 2007 workshop? Contact Laurel Hough at lough@sbhlegal.com

When seeking a departmental closing order, copy the attending physician on all closing orders and provide the Department with accurate information on the identity of the attending physician.

Washington Board of Industrial Insurance Decisions

Subjective complaints, alone, are not a valid basis for PPD rating.

The Board refused to award a permanent partial disability rating where the only deviation from a normal clinical examination was a general soreness and tenderness in the lower thoracic, upper lumbar spine. It reasoned that subjective complaints of tenderness, sensory loss (that cannot be related to the industrial injury), and decreased range of motion primarily related to the lumbar spine (an area that was symptomatic prior to the industrial injury and not impacted by it), did not provide a sufficient basis for a permanent partial disability award. *In re Sonja J. Ruffin, Dckt. No. 06 13212 (March 19, 2007).*

State Employment Law Update

Oregon Courts

Claim for unpaid wages may be based on failure to provide required rest breaks.

In *Gafur v. Legacy Good Samaritan Hospital, 213 Or App 303 (2007)*, employees brought private actions on behalf of a class of employees for the failure to receive paid breaks and unpaid lunch breaks. Employer argued that breaks were under the Bureau of Labor and Industries jurisdiction and employees could not bring a private cause of action. The Oregon Court of Appeals agreed the plaintiff had no private cause for unpaid lunch breaks. However, it disagreed regarding paid breaks. It noted that the failure to provide paid breaks was a failure to pay compensation due. Employees received four hours pay for four hours worked, while under Oregon law they were entitled to four hours pay for three hours and fifty minutes of work. This was the same as failing to pay the employees for ten minutes of each shift. The case has been sent back to the trial court to determine liability.

Board directors are employees for purposes of unemployment.

In a recent decision, *Necanicum Inv. Co. v. Employment Dept, 214 Or App 385 (2007)*, the Oregon Court of Appeals held that corporate directors are employees and fees paid to them are subject to payroll taxes. In the case before the court, the corporation had three directors, each of whom was paid \$6,000 as a director fee in 2003. The \$18,000 was not reported as payroll and unemployment taxes were not paid on that sum. After a routine audit, the Oregon Employment Department assessed taxes on the sum, taking the stance that fees paid to directors are payments to employees. The Court of Appeals agreed. It examined the statutory definition of employees and found it to be broadly stated as persons receiving remuneration for services from an employer. With the payment of fees, the directors fit this definition. The court also noted several exceptions have been defined, but none applicable to directors of a corporation.



SBH's first retiree, Dianne Dieterle, recently bid work and SBH farewell—yes, that is Wayne Newton on her cake!

Washington Courts

Interstate truck drivers subject to state minimum wage even if work hours accumulate outside of state.

The Washington appellate court held in ***Bostain v. Food Experience*, 159 Wash 2d 700 (2007)** that a truck driver remains subject to the state Minimum Wage Act while working in other states. Regardless of where the hours were worked, he was entitled to overtime rate for all hours worked over forty in a workweek. The state court of appeals initially held the driver was not due overtime, relying on RW 49.46.005. That statute specifies the legislator's intent to establish minimum wages and overtime rules for employment within the state. The Supreme Court reversed, rejecting the interpretation that the general policy statute somehow limited overtime depending on where Washington employees work. The Supreme Court found Bostain a Washington employee, hired in Washington, holding a Washington license, and dispatched from central operations in Washington. The court held that all hours worked, in whatever state, had to be considered for calculations of overtime pay.

Care Home Managers exempt from overtime under Administrative exemption.

In a recent case, ***Schryvers v. Coulee Community Hospital*, 158 P3d 113 (Wash App Div 3 2007)**, the Washington Court of Appeals held that a husband and wife who managed a hospital-owned adult residential care home were exempt from overtime requirements. The couple lived in a wing of the home and provided meals, personal assistance, cleaning, laundry and medication reminders for elderly or partially incapacitated adults. They argued they were not exempt from overtime laws because they lacked discretion in their jobs. Nurses outlined care and the hospital provided all supplies for the care home. Although recognizing this limit to discretion, the court noted the couple had almost complete control over day-to-day operations at the care home. At the operational level, the couple acted almost entirely without oversight, exercising significant judgment and discretion. This qualified under the administrative exemption from overtime laws.

Alert! New Law Regarding Credit Checks for Washington Employers.

As of July 1, 2007, a new law (SB 5827) went into effect that impacts Washington employers' ability to run credit checks on applicants and employees.

SB 5827 creates two requirements: notice and a valid reason. A credit check can be utilized only when "substantially job related" or required by law. If this requirement is met, a credit check may be utilized, but the employee must be notified. The applicant/employee must be notified in advance that a credit check will be conducted and may be considered for employment purposes. This notice may occur in application materials, but SBH recommends obtaining signed consent. Then, if the credit information will be used for adverse action, the employer must further provide the employee the name, address, and number of the credit reporting agency, a description of consumer rights as applicable to employment, and a reasonable opportunity to respond to any part of the report the employee disputes.

Notice to employee and valid reason (substantially job related) needed when obtaining credit checks.

Credit checks have become an increasingly utilized tool for employers. If you or your vendors conduct credit checks on your applicants or employees, please review your procedures to ensure compliance with the new law. If you have any questions, contact your SBH attorney or your Washington legal counsel.

Federal Employment Law Update

Ninth Circuit Court of Appeals

Unknown bias may result in liability.

Employment action by a biased decision-maker is discriminatory. But what if the decision-maker is objective but received input from biased persons? The Ninth Circuit addressed this question in its recent opinion in ***Poland v. Chertoff*, 494 F3d 1174 (9th Cir 2007)**. It held that the employer might still be liable for discrimination, even if the decision-maker is seemingly unaware of the taint.

In ***Poland v. Chertoff***, an allegedly biased employee precipitated an investigation that eventually led to discipline. In 1997, Poland filed a complaint with the EEOC that his supervisor Hillberry made ongoing age-related comments. Prior to the complaint, four notes about performance were placed in Poland's file. In the fourteen months following the EEOC filing, 23 more negative performance notes were generated. Spring of 1999, Hillberry requested an administrative inquiry into Poland's performance. A formal inquiry occurred with witness testimony from persons selected without Hillberry's input. The employer's review board recommended reassignment and Poland was transferred. Poland filed suit for age discrimination and retaliation.

The Ninth Circuit, affirmed judgment in favor of Poland. It held that "the subordinate's bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decision making process." The court explained that Hillberry's role in defining the scope of inquiry and leading the review board to unfavorable evidence tainted the transfer decision.

This standard should give employers pause. It is impossible to know the biases and motives of all employees, although direct supervisors are often aware when coworkers do not get along. Employers should outline a consistent procedure to ensure decisions are based on objective information. Especially when discipline is based on or initiated by subjective reports, investigation should encompass a wider scope than only that suggested by the reporting individual.

Check on EEOC guidance for workplace investigations at www.eeoc.gov

SBH Annual Claims Adjuster Workshop

Date & Time: November 2, 2007,
8:30 a.m. – 4:00 p.m.
Registration: 7:30 a.m. – 8:15 a.m.
Location: Multnomah Athletic Club

Topics:

- Appellate Update
- Effectively Processing Complex Claims
- Ten Claim Handling Tips
- Investigation & Defense of Stress Claims
- DCBS Overview
- Anatomy of a Hearing

Followed by a social hour!

Workers' Compensation Update in Oregon

Date & Time: November 28, 2007,
9:00 a.m. – 4:30 p.m.
Registration: 8:30 a.m.
Location: Hotel Monaco, Portland

SBH Topics:

- Linda Conratt: distinctions between injury and occupational disease claims, notice requirements, combined conditions and settlement;
- Jennifer Roumell: reinstatement of injured workers, how ADA & FMLA impact return-to-work issues.
- Other topics include: claim closure and disability update, employment discrimination, and Oregon's Employer Liability Law.

SBH HAPPENINGS

For More Information

Oregon and Washington Workers' Compensation

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SBH is pleased to welcome Stephen Verotsky & Lance Johnson!

Stephen Verotsky recently joined the firm as an associate attorney. Steve previously worked as an associate at Cummins Goodman Fish Denley & Vickers in Newberg. Prior to that, he was a law clerk at the City of Knoxville Law Dept. He attended Penn State University and Exeter University in England and obtained his law degree from the University of Tennessee College of Law. He is a member of the Oregon bar.

Lance Johnson has joined SBH as associate attorney. Lance previously worked as an associate at the Tarrall & Tarrall firm. Prior to that, he was a law clerk at the Southern Royalton Legal Clinic in Vermont. He attended Utah State University and Vermont Law School and obtained his law degree from the Northwestern School of Law at Lewis and Clark College. He is a member of the Oregon and Washington bars.

Other Notable SBH news:

Ron Pomeroy recently became a member of the Hawaii bar.

Aaron Bass has received a two-year appointment to the Multnomah Bar Association Young Lawyers Section Service to the Public Committee. This committee informs, educates and serves the general public to improve the public image of lawyers.

Several Upcoming Workshops:

November 2, 2007: SBH Annual Claims Adjuster Workshop
(7.0 hours of accredited training)

November 28, 2007: Workers' Compensation Update in Oregon
(6 credits towards PHR and SPHR, DCBS approval pending)

Other Upcoming Events:

December 4, 2007: Holiday Party at Rock Bottom Brewery, 4:30 p.m. to 8:00 p.m.

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.