

January 2007

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- Dept of Labor & Industries Website

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Social Activity Defense

by Deborah Sather

The Board found claimant was compensably injured during his unpaid lunch break while helping a coworker shake a 200-pound lunchroom vending machine to dislodge an item for another person.

The SBH appellate team is asking the Oregon Court of Appeals to reverse the Board's decision and find such an activity social in nature and primarily for the worker's personal pleasure. The Court of Appeals has reviewed several cases addressing the recreational activity defense, but to date, none concerning the social activity defense. Our brief follows the approach utilized by the court in the recreational defense cases by examining dictionary definitions of "social" and "pleasure." These terms have very broad definitions which we encourage you to consider when evaluating compensability.

"Social" encompasses several applications including:

"marked by or passed in pleasant companionship with one's friends or associates * * * taken, enjoyed, or engaged in with friends or for the sake of companionship, forming or having a tendency to form cooperative and interdependent relationships with one's fellows * * * relating to human society * * * relating to, or concerned with the welfare of human beings as members of society. * * * Enjoyed for its own sake without ulterior motive * * *."

Webster's Third New Int'l Dictionary (unabridged ed 2002);

"Pleasure" is also a term of broad understanding, including:

"INCLINATION, WILL * * * an agreeable sensation or emotion, the excitement, relish, or happiness provided by expectation or enjoyment of something good, delightful or satisfying * * *."

Webster's Third New Int'l Dictionary (unabridged ed 2002);

From these definitions, it is clear that "social activity primarily for the worker's personal pleasure" includes not only formal company picnics and parties, but also informal, spontaneous activities in small settings. For example, in our case, the worker was shaking the vending machine to help his coworker with a non-work-related task. Obviously, this is a "social activity" reduced to the simplest terms; it involves a voluntary interaction with another person, done for its own sake without ulterior motive. The "personal pleasure" component, also reduced to its simplest terms, requires nothing more than an act of will or inclination.

In considering this potential defense to compensability, you must examine the worker's activity in context of whether there is any work component; gossiping while working is certainly both social and pleasurable, but would not support use of the social activity defense if claimant is primarily working at the same time. Additionally, this defense will defeat compensability even if AOE/COE is not contested.

A New Year, A Better Workplace

by Rebecca Watkins

All employee handbooks must include:

-FMLA/OFLA policy;

-harassment policy and reporting procedure;

-at will provision stating handbook is not a contract for employment.

Employers use employee handbooks as a reference, to create a sense of unity, to instruct new employees, or to lay a legal framework for employment actions. If you go to the time and expense of creating a handbook, it should be used to its fullest potential. A yearly review of your employee policies and/or handbooks is recommended to ensure optimum benefit. What better time than the start of a new year?

During review of an existing handbook or policy, check for legal changes, inaccurate contact information, and benefits or workplace rules that have become obsolete or need to be added.

All handbooks at the minimum must have the following: (1) Family Medical Leave Act (FMLA) / Oregon Family Leave Act (OFLA) policy; (2) Harassment policy and reporting procedure; and (3) At will provision stating the handbook is not a contract for employment.

Several other policies may also be important in your workplace, such as a light duty policy, drug testing policy, internet and email usage policy, or cell phone policy.

Don't stop with reviewing your handbook. If you make any changes or additions to policies, take two more steps to ensure your handbook works for you. First, provide all employees with new or revised policies and have them acknowledge in writing that they have reviewed the new policies. Second, train supervisors in any changes to procedures that they will be implementing (give them a refresher on other policies at the same time).

Unless new policies are known and consistently applied, the time you spend on your handbook will be undermined.

Use the Department of Labor & Industries' Website when Processing Claims

by Linda Conratt

Useful features included on Dept of Labor & Industries website:

-Provider Bulletins;

-IME directory;

-approved interpreter directory.

Although the Washington State Department of Labor & Industries' website is constantly changing, there are number of useful features. You can quickly find Provider Bulletins to utilize when discussing compensability of medical conditions and medical necessity of treatment with attending physicians and independent medical examiners. Medical rates, vocational services, hearing aids and your liability on these claims are also included in the Bulletins. Are you experiencing problems with providers disclosing medical records based on the HIPAA laws? The Department has a Bulletin on this issue. Do you need to address whether a surgery is appropriate? The Department outlines what it requires before finding surgery medically necessary and proper for multiple conditions. Referring to these Bulletins when discussing a case with an attending physician and/or IME provider is helpful. It is surprising how many medical providers are unaware of their existence. The link for the Provider Bulletin Directory is <http://www.lni.wa.gov/ClaimsIns/Providers/Billing/ProvBulletins/default.asp>

Two other useful tools on the Department's website include their IME directory which allows you to identify potential independent medical examiners by specialty and location. The link to this tool is <https://fortress.wa.gov/lni/imets/>. If you need an interpreter, you can locate an approved interpreter at <https://fortress.wa.gov/lni/ils/>.

Oregon WC Claims: Court

For seasonal workers, average weekly wage is determined by the wages worker earned during the particular weeks actually worked for the employer.

Court holds that OAR436-060-0025(5)(a)(A) applies to seasonal workers.

Seasonal employment was recently addressed by the Oregon Supreme Court in **Tye v. McFetridge, _ Or _ (December 14, 2006)**. The worker worked for the employer off and on over several years. There was no contractual arrangement, oral or written, that entitled the worker to return to work at the end of the seasonal layoff or required the employer to offer work. The court held OAR 436-060-0025(5)(a)(A) applied to seasonal workers when calculating their average weekly wage.

Personal activity on the worksite but off hours found not compensable.

The Court of Appeals recently addressed an AOE/COE issue. Claimant was injured when a personal knife he was grinding shattered and a piece flew into his eye. The employer had permitted claimant to use its grinding equipment to practice sword and knife making, but only on his own time. The injury occurred on claimant's day off. The employer was at the shop that day, however, and had asked claimant to unload an anticipated shipment of metal, if it arrived while claimant was there. The shipment arrived after claimant's injury. Although the court held the "arising out of" prong of ORS 656.005(7)(a) was satisfied because the employer had authorized the use of its equipment, the court found claimant failed to satisfy the "in the course of" prong based on the facts the injury occurred on claimant's day off, he was not paid for his time that day, and he was engaged in a personal activity. Moreover, the court held claimant was not required to remain on employer's premises to receive the anticipated shipment of metal. **Griffin v. SAIF Corp., _ Or App _ (January 24, 2007)**.

Washington WC Claims: Court

The Courts have been very quiet this past quarter. We will hopefully have more to report next quarter.

Washington WC Claims: Board of Industrial Insurance

The Board has not issued its decision on what cases will be designated as Significant Decisions for the last quarter of 2006. However, it did issue a very interesting Statistical Report January 5, 2007. In 2006, it received 5,984 total Board appeals. Surprisingly, only 211 cases were appealed to superior court in 2006.

Oregon WC Claims: Workers' Compensation Board

Notice of overpayment was found to qualify as unreasonable resistance to the payment of compensation.

It is counter-intuitive to think an overpayment notice to claimant could be held as an unreasonable resistance to payment of compensation, but the Board found otherwise in this case. A Notice of Closure did not award TTD for 02/11/05 to 07/13/05 even though benefits had been paid from 12/09/04 to 08/31/05. The insurer performed an audit and notified claimant of an overpayment. Claimant challenged the overpayment and the insurer defended on the basis no attorney fees were due because the timeloss benefits that were the basis of the overpayment had been paid prior to the NOC. The Board found that the overpayment letter could have resulted in money being returned by claimant or created offsets being available against future TTD or PPD awards and therefore constituted resistance to payment of compensation under ORS 656.382(1). **Justin D. Rhodes, 58 Van Natta 3011 (2006)**.

An overpayment notice to claimant may be held as unreasonable resistance to payment of compensation.



Janis Baumbach & Kelly Williams at the November SBH workshop.

IME physicians must provide detailed medical and claimant-specific rationales to be found persuasive.

Asking IME physicians to examine a worker and review prior medical records is not enough to create a persuasive medical opinion. The physicians cannot rely upon generalized knowledge but must address the specificity of the case at hand in order to prevail on a contested denial. The following case highlights the need for detailed IME reports.

Claimant was a housekeeper for 25 years when she filed an occupational disease claim for CTS. The attending physician addressed how the nine tendons in the carpal tunnel move with hand use and compared the hours worked per day versus off-the-job activities. The IME physicians discussed general factors such as gender, age, genetics, wrist size and smoking, but they failed to particularize the data to the claimant before concluding idiopathic etiology. In particular, the IME physicians did not provide a reason claimant's type of work activity could not cause her CTS.

Ask IME physicians to address all adverse causation opinions on a point-by-point basis to overcome a treating physician's opinion by relying on reasoning and specificity to the worker. **Lea C. Covey, 58 Van Natta 2920 (2006).**

The Board will only look at medical evidence in existence on the date TTD was terminated.

Dotting all the i's and crossing all the t's is paramount in terminating TTD on an open claim. The Board furthered the strict rules by only reviewing the medical evidence in existence at the time TTD was terminated.

Here, the attending physician approved a specific modified job during August 2004. Claimant began work at the modified job on 08/14/04. He was terminated for disciplinary rule violation 12/08/04. Claimant was then provided with a modified work release 12/12/04 after undergoing surgery 12/08/04. Time loss was paid from 12/08/04 - 12/28/04 and then stopped due to a new release to modified work. The Board held the reauthorization of temporary disability post-surgery created a new need by the employer to pay TTD that could only be reduced or terminated by attending physician reapproval of a new modified job. Despite no changes in claimant's work restrictions, they would not imply continued ability to perform the same job even when the attending physician approved the same job by concurrence letter of April 2005. **James G. Botsford, 58 Van Natta 3069 (2006).**

In combined condition injury cases, beware of conceding an "otherwise compensable injury" within the context of opinions that do not support a combined condition.

Combined conditions continue to be difficult to process and the case law is wrought with ambiguity. This case involved an expansion request for annular injuries at C6-7 and L4-5 for accepted cervical thoracic and lumbar conditions. Conceding there was an "otherwise compensable injury," the carrier relied on IME findings that the requested conditions were unrelated to the work injury to support their argument the "otherwise compensable injury" was not the major cause of disability or the need for treatment of the combined condition. The Board held the IME physicians were more persuasive than the attending physician, even though the IME did not find a combined condition.



Krishna Balasubramani & Debbie Hopkins at the November SBH Seminar.

Reauthorization of TTD post-surgery may create a new need for employer to pay TTD.



Dianne Schnepf, Bruce Byerly & Leanne Sneath catch up with one another at SBH's November workshop.

The dissent distinguished earlier case law of ***Coleman v. SAIF, 203 Or App 442 (2005)*** that allowed reliance on an opinion of no combination because that case did not involve a concession of an "otherwise compensable injury."

We may have to wait for the Court of Appeals to settle this matter; in the meantime, think twice before conceding an "otherwise compensable injury." ***Yakov Funk, 58 Van Natta 3033 (2006)***.

Employment Law Update

Individuals cannot be personally liable under ADA.

The Ninth Circuit extended prior case law referring to Title VII claims to find that individuals cannot be personally liable under the ADA. An employee with OCD worked for the state of Nevada. After two years of good reviews, her behavior deteriorated under a new supervisor. The supervisor and the agency failed to meet with employee to discuss accommodation of the disability. When the employee felt compelled to resign, she brought action against both Nevada and two individual supervisors. The Ninth Circuit concluded that the ADA does not provide for individual liability. ***Walsh v. Nevada Dept of Human Resources, 2006 WL 3704779 (9th Cir 2006)***.

Terminated for performing important public duties.

Employee, a financial administrator for the County, brought a wrongful discharge claim contending she was terminated for performing important public duties. Employee did not approve of several decisions by a new fire chief concerning training. After a training accident caused the death of an employee, the complaining employee was tasked with assisting in a NIOSH investigation. She confronted the chief with what she believed was a "cover up" of training deficiencies. Soon thereafter she was terminated because she made widespread derogatory remarks and accusations regarding training and a cover up. The Court of Appeals agreed she had raised a genuine factual issue regarding whether she was terminated for exercising an important public duty and allowed the employee's claim to proceed to a jury trial. ***Love v. Polk County Fire Dept, 2006 WL 3501338 (Or App 2006)***.

Employee handbook expressly incorporated into employment contracts.

Two former teachers brought wage claims contending entitlement to unused sick pay and termination pay. The dispute centered on the employee handbook that was expressly incorporated into the employment contracts.

The handbook stated employees were eligible for up to 20 sick days per contract period. It did not define whether the eligibility to the full period occurred at the start of the year, whether sick days carried over into the next year or whether it was paid out on termination. A separate section of the handbook explained that unpaid benefits earned and unused, including vacation or sick days, would be paid out separate from severance payment. Though the trial court granted judgment in favor of the employer, the Court of Appeals reversed, finding more than one plausible interpretation to the contract and thus a factual dispute to be submitted to a jury.

This case presents an unusual and unwanted scenario of the employee handbook becoming in essence a contract. It highlights the clarity needed in drafting pay and benefit provisions to avoid wage lawsuits that may be long and expensive. ***Madson v. Western Oregon Conference Ass'n of Seventh-Day Adventists, 2006 WL 3501246 (Or App 2006)***.



Participating in the November SBH workshop, Dr. Price Gripekoven provided valuable insight regarding IMEs.

Employers and supervisors cannot be personally liable for ADA violations.



Our very own Rebecca Watkins in character as claimant --"Mona" --for the IME skit.

For More Information

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SBH Notables

Sather, Byerly & Holloway is pleased to introduce attorney Aaron Bass!



Aaron, a native of Hillsboro, Oregon joined the firm in November 2006. He earned his bachelor at the University of Miami (Florida) and his law degree at Seattle University School of Law, graduating *cum laude*. Aaron was admitted to the Oregon State Bar in 2006. He will be representing employers and insurers in workers' compensation, OSHA, and related employment matters.

Have you visited our website lately? Newly redesigned to offer you easier access to our newsletter, upcoming events, attorney bios, and more. Visit us at www.sbhlegal.com.



Bruce Byerly & Deborah Sather being festive at the SBH Holiday Party.



Not to be outdone, Krishna Balasubramani, Melanie Perko and Jennifer Roumell celebrate the holiday season and Jennifer's birthday!

About our Newsletter ...

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