

May 2007

Highlights:

- Several bills currently before the Oregon legislature impact employers
- New and returning faces at SBH

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Managing PTD Awards

by Norman Cole

If you are not careful, changes in Oregon law applicable to claim closures on and after January 1, 2006 could result in permanent total disability (PTD) benefits being awarded to workers capable of working in minimum wage jobs.

PTD is "the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker at a *gainful* and suitable occupation." Employment is not gainful unless, in most claims, it provides the worker with the lesser of 66.67% of the worker's average weekly wages from all employment in the fifty-two weeks prior to the injury or the most recent federal poverty guidelines for a family of three—now established as \$330.19 per week, or \$8.25 per hour for a 40 hour per week job. In other words, if a worker's average weekly wage is at least \$495.29 (\$12.38 per hour for a 40 hour week), the worker must be able to earn at least \$330.19 per week to have *gainful* employment. Minimum wage in Oregon is currently \$7.80 per hour (or \$312.00 per week)—below the gainful employment threshold.

The gainful employment threshold is just one part of the PTD equation. When evaluating PTD, preexisting disabilities—as they existed at the time of injury—must be considered. However, post-injury conditions that have not been accepted must be disregarded. Although a worker may in fact be PTD, that status may not be due to the injury in combination with preexisting disabilities.

PTD awards usually can be avoided if vocational consultants document a worker's ability to earn income in excess of the gainful employment threshold and base the evaluation on the correct legal standards. Attorneys at SBH can answer any questions you have regarding PTD evaluations and help prevent workers from receiving PTD awards.

Oregon WC Claims: Court

Always investigate the 5 W's when there is a course and scope question: who, what, when, where, why, and how.

Talk to all parties involved in order to confirm statements between parties and to develop a record in the event memories fade over time.

Employee struck by car while crossing the road to buy beverage at the grocery store during lunch found possibly compensable under special errand exception.

The court remanded the Board's order that found claimant's injury arose out of and in the course of employment. The claimant was struck by a car while crossing a street in front of his workplace to return to his work from a "lunch" break. The Board relied on the "special errand" exception to the "going and coming" rule under the theory claimant's supervisor had expressly directed him to buy his bottle of water at a store across the street from the employer's workplace and not at one a few blocks away so the claimant could return to the workplace as soon as possible to be available to work as needed.

Citing *Cope v. West American Ins. Co.*, 309 Or 232, 237 (1990), the court stated that injuries sustained by an employee while traveling to or from work are generally not considered to be in the course of employment. Furthermore, relying on *White v. SIAC*, 236 Or 444, 447 (1964), the court observed that an unpaid break during which an employee leaves the employer's premises is generally noncompensable under the "going and coming" rule. Nonetheless, the court recognized that a "special errand" exception applies to situations in which "either the employee was acting in the furtherance of the employer's business at the time of the injury or the employer had a right to control the employee's travel in some respect." *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 528 (1996) (emphasis in original).

Turning to the case at hand, the court determined that if claimant chose to follow his supervisor's instructions because he reasonably understood he had been directed to return to work *before the end* of his break to be available for a possible surge in customers, then the errand would be in furtherance of his employer's business. As such, it would be subject to the "special errand" exception. The court remanded for clarification. ***JAK Pizza, Inc.--Domino's v. Gibson*, 211 Or App 203 (February 28, 2007).**

Washington WC Claims: Court

Employer contributions to a union trust for health care benefits must be included in a worker's monthly wage calculation.

The Washington Supreme Court further expanded *Cockle* in *Dep't of Labor & Indus. v. Granger*. In this case, the worker was a member of a union that used an hour bank system to determine eligibility for medical benefits. At the time of his injury, the worker did not have enough hours to be eligible for coverage, as his hours had dropped previously. Independent of a worker's eligibility for healthcare coverage, the employer paid money into the trust account based on every hour the claimant worked. The court focused on the payment of the benefit and not whether the worker was entitled to the coverage at the time of the injury. It also found WAC 296-14-526 partially invalid based on its conflict with the holding that receiving at the time of injury language in RCW 51.08.178 means payments made for the benefit and not on eligibility for coverage itself. Unless you have a final wage order, employers will need to carefully delineate the amount and type of union benefits that are being paid at the time of injury in order to calculate a person's monthly wage rate. ***Dep't of Labor & Indus. v. Granger*, 159 Wash2d 752, 153 P.3d 839 (March 1, 2007).**



Aaron Bass, Bruce Byerly & Rebecca Watkins at the recent WCCA seminar

Worker injured while getting a drink of water in the break room prior to beginning his shift found to not be in the course of employment by Court of Appeals.

An employee was reading magazines in the employer-provided break room prior to starting his shift. He injured himself when he got up to get a glass of water. The court found the employee was not acting in furtherance of the employer's direction or in furtherance of the employer's business at the time of injury. The court confirmed coverage only exists under RCW 51.08.013 if: (1) the worker is acting at the employer's direction or in the furtherance of the employer's business; (2) while the employee is going to or coming from work on premises occupied, used or contracted for by the employer for its business; (3) immediate to the time the employee is to engage in the work process in areas controlled by the employer; (4) outside the fixed and compensated work time of the injured employee; and (5) regardless of whether the injury occurred within the time limits on which industrial insurance premiums are payable. The court acknowledged no one had ever defined "immediate" and concluded the employee failed to satisfy the first prong of the test and never addressed the other prongs. **Johnson v. Safeway, 2007 WL 512540 (Wn.App. Div. 1 (February 20, 2007) (Unpublished))**.

If an injury appears to have occurred off hours, identify the following:

- *what worker was doing;*
- *why worker was doing activity;*
- *location of the injury; and*
- *evaluate whether there was any employer benefit from or directive for the activity to assess whether a rejection order is appropriate.*

Oregon WC Claims: Workers' Compensation Board

A current condition DCS does not preclude compensability of future expansion requests in accepted claim when not mentioned in the DCS document.

When settling claims on a global settlement that include a current condition denial and Claim Disposition Agreement, it is helpful to bring in other claims as part of the settlement to provide more certainty regarding future processing.

Claimant had an accepted 1998 right shoulder claim referenced in a 2002 DCS. The DCS also referenced claimant's, then current, right shoulder adhesive capsulitis and impingement syndrome. However, claimant had an accepted 1988 low back claim, which was NOT referenced in the 2002 current condition DCS. After the DCS was approved, claimant sought treatment for her low back condition under Own Motion. The Board held there was no bona fide dispute over compensability of the low back at the time of the 2002 DCS and therefore no preclusive effect to prevent the expansion request. **Felix R. Sanchez, 59 Van Natta 524 (2007)**.

No obligation to pay interim compensation for pending Own Motion claim reopenings or unperfected, omitted conditions.

Generally, interim compensation must be paid when the worker is not able to perform regular work and the claim is in "deferred" status. Exceptions exist for Own Motion claims and unperfected, omitted condition claims.

Claimant requested a variety of relief, including interim compensation pending acceptance of his Own Motion claim. The Board reaffirmed interim compensation was not available in an Own Motion claim. **Joseph D. Hapka, 59 Van Natta 214 (2007)**.

The Board also upheld that no interim compensation was due for unperfected, omitted condition claims. On December 2, 2005, claimant requested acceptance of left shoulder rotator cuff tear and SLAP lesion as omitted conditions but argued he should have been paid interim compensation from November 21, 2003 to October 28, 2004 as timeloss was authorized for these conditions at that time. The Board held that interim compensation was not due before a formal claim was made. **David L. Cross, 59 Van Natta 191 (2007)**.



Celebrating one year in the US Bank Corp. Building—Ron Holloway, Brian Perko, Ron Pomeroy, Cheri Roskey & Donee Allen.

Treatment in lieu of hospitalization (not just in lieu of surgery) needed to qualify for Own Motion benefits.

Own Motion reopening for a worsened condition under ORS 656.278 requires, among other things, hospitalization, surgery (inpatient or out patient) or other curative treatment prescribed in lieu of hospitalization necessary to enable the worker to return to work. Here, the Board determined that proposed steroid injections for right knee degenerative arthritis made in “lieu of surgery” did not qualify for reopening because the injections were not requested “in lieu of hospitalization” as required by statute. **Daren Johnson, 59 Van Natta 687 (2007).**

Job description should be clearly identified in cases where claimant moves between two similar, but different, jobs and included in the reconsideration record.

As they say, the devil is in the details. This saying certainly applies to claim closure and the reconsideration process. When closing claims, it is imperative to have all records made part of the reconsideration record, as well as clearly identify concurrences from physicians.

The Board upheld SAIF’s appeal of a permanent partial disability (PTD) determination. The claim was reclosed after an expansion request with 6% PPD for a low back condition. The Order on Reconsideration affirmed closure. At hearing, the award was increased to 31%, as claimant had not returned to her job-at-injury or been released to return to that job and was thus entitled to an evaluation of social/vocational factors. Permanent disability is rated as of the date of the Order on Reconsideration. Claimant’s job-at-injury was a cook’s assistant. Later, she worked as a cook. Although the attending physician released claimant to “regular job duties,” the job description he reviewed was not made part of the official reconsideration record. Therefore, claimant was awarded the greater base functional capacity and received a larger PPD award. **Rosalia B. Cordova, 59 Van Natta 646 (2007).**

Employment Law Update

Arbitration clause in employment contract upheld.

Motsinger, a terminated employee, sued her former employer for sexual harassment. Her contract included an arbitration clause, which Ms. Motsinger claimed was one-sided and unconscionable. The court disagreed. Under Oregon law, an arbitration clause is unenforceable if it is both procedurally and substantively unconscionable. Ms. Motsinger argued procedural unconscionability because she was only 19 when hired, had no opportunity to negotiate, signed the form within a stack of 70 forms and would not have been hired if she had refused to sign. While the court found unequal bargaining power, it did not find deception, compulsion, or any high-pressure tactics. Employer allowed Ms. Motsinger to review the forms, ask questions, and view a video regarding hiring forms.

Ms. Motsinger also argued the contract was substantively unconscionable because it was one-sided and did not provide for company payment of fees. Again the court disagreed.



Laurel Hough, the mastermind behind SBH marketing coordination

Tip: Be sure to include any job descriptions in the official reconsideration record.

Legislation Watch

The Oregon legislature has several bills before it this session impacting employers:

HB 2673: would authorize the Oregon Bureau of Labor and Industries to adopt regulations mandating overtime pay for employees who work more than 8 hours in one day (or 10 hours on a 4/10 schedule). Employers and employees may both be concerned that this removes flexibility in the workplace.

HB2254: would provide a penalty for ORS 652.750, the statute that entitles employees to a copy of their personnel records. The new language provides a 45-day window for providing records and outlines a \$1,000 fine, paid into a state fund.

HB 2259: would expand the time period for filing retaliation complaints under state occupational safety laws. The current limitation is 30 days and the proposed amendment would increase that time to 90 days.

HB 2260: would expand remedies available for unlawful employment practices based on race, religion, color, sex, national origin, marital status or age. This legislation may increase damages on such claims but might also help preclude wrongful termination claims. Unfortunately, it may also encourage more claims by increasing possible recoveries.

SH 1035: would make it an unlawful employment action to permit or engage in "bullying." Similar laws have been introduced three times before, and in other states, with no success. The legislation is sponsored by [bullybusters.org](http://www.bullybusters.org).

Employers and interested parties will find information on how to testify before the legislature or contact their legislators at <http://www.leg.state.or.us/citizenguide>.

The arbitration process contained provisions requiring an arbiter who was a retired Oregon judge, decision based on law, did not limit recovery, and provided for a second arbiter appeal process. The court remanded to the trial court for abatement of litigation pending arbitration. This decision highlights a trend in the courts to encourage alternative dispute resolution clauses in employment contracts. ***Motsinger v. Lithis Rose-FT, Inc., 211 Or App 610 (2007).***

Conduct resulting from a disability is part of the disability and not a separate basis for termination.

After her termination, Ms. Gambini sued her former employer for discrimination under Washington's Law Against Disability (WLAD). After hire, Ms. Gambini was diagnosed with bipolar disorder, which increased in severity. Her supervisors, unaware of the condition, created a performance improvement plan based on attitude and poor performance issues. When presented with the plan, Gambini reacted by throwing the paperwork and cursing the supervisors. The next day, Ms. Gambini checked into a hospital and her bipolar diagnosis was confirmed. Via phone, supervisors told her she was terminated based on her reaction at the meeting. Ms. Gambini replied in a letter stating her reaction was likely a product of bipolar disorder, but employer refused to reconsider the termination. At trial, a jury found in favor of the employer. The Court set aside the verdict for failure to provide a jury instruction explaining that conduct resulting from a disability is part of a disability and not a separate basis for termination.

This case provides a good reminder for employers that actions taken against an employee for disability-related reasons, even when behavioral, may still be considered discriminatory. Rather, the employer should seek to tie employment actions to essential job functions and--when aware of disability--consider whether there is an obligation to discuss possible accommodations with the employee. ***Gambini v. Total Renal Care, Inc., 2007 WL 1191929 (9th Cir WA 2007).***

Trend towards class action wage lawsuits and importance of solid accounting practices.

Ongoing litigation against employer US Bank should be monitored for its impact on employers. This case signifies a trend towards class action wage lawsuits, and emphasizes the importance of solid accounting practices. The suit against US Bank was brought on behalf of hourly employees using time sheets in which hours were rounded down to the nearest tenth for payroll. The plaintiffs contended they lost 1 to 5 minutes of pay each day and thus were not fully compensated.

Employers finding themselves the target of a class action wage claim should become familiar with the Class Action Fairness Act, which allows removal to federal court. Specific requirements must be met of numerosity, minimal diversity, and amount in controversy. In the US Bank litigation, the employer was unable to remove the litigation to federal court because it was unable to demonstrate, with enough certainty, that the threshold amount in controversy (\$5,000,000) had been met. ***Lowdermilk v. US Bank National Association, 479 F3d 994 (9th Cir OR 2007).***

For More Information

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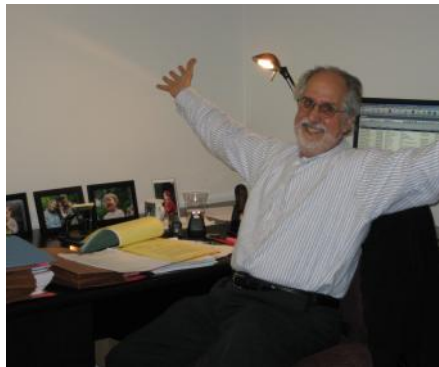
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SBH Notables

Sather, Byerly & Holloway is pleased to welcome Emmanuel Meneakis and Lacey Jones!

With more than 25 years of paralegal/case manager experience with firms such as Coons, McKeown & Cole; Stoel, Rives; Mitchell, Lang & Smith; Francesconi & Associates; Swanson, Thomas & Coon; and VavRosky, MacColl, Olsen, **Emmanuel Meneakis** is proving to be a valuable addition to our team. He is primarily assisting attorneys Deborah Sather and Linda Conratt with Washington workers' compensation claims and attorney Norman Cole with longshore and Oregon workers' compensation claims.



Lacey Jones has joined SBH as our Office Administrator. She has a vast background in law firm work, ranging from legal secretary, to paralegal, to Office Administrator at two larger firms--Mitchell, Lang and Smith and Bogle and Gates.



Two Beautiful Girls!



Attorney **Karen Varney** and her husband Jim became the proud parents of identical twin girls, Vivian and Isadora, on February 4, 2007.

We are pleased to have Karen back in the office.

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