

November 2006

## Highlights:

- New caution about arthritis evidence in OR wc claims
- Comings and Goings at SBH

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## Accommodating Religious Beliefs in the Work Place

by Rebecca Watkins

A recent decision from the Court of Appeals has brought the issue of religious accommodation to the forefront. In ***Nakashima v. Board of Education, 204 Or App 535, affd on review, 206 Or App 568 (2006)***, the Court of Appeals determined that the Oregon School Activities Association (OSAA) was not required to provide special scheduling to accommodate the Sabbath day of one of its member high schools. Nakashima addressed a complaint by Portland Adventist Academy against OSAA for scheduling high school basketball tournaments on its Sabbath. The issue before the court was whether changing all schedules for 2A schools amounted to an "undue hardship." Ultimately, the court found it did create a substantial burden for the OSAA and dismissed the complaint.

The case is instructive for employers. Employers must provide reasonable accommodations for employees with sincerely held religious beliefs, unless doing so creates undue hardship.

### ***When does an employee have a sincerely held religious belief?***

Although the law protects only "sincerely held religious beliefs," challenging this standard is not easy. Unless the employer has credible information that casts doubt on the validity of the religion or the belief, there may be more to lose than gain in making the employee "prove" the sincerity of belief. (Sometimes a quick google search is enough to reveal that a religion you never heard of has quite a following.)

### ***What is a reasonable accommodation?***

According to the EEOC, a reasonable religious accommodation is any adjustment to the work environment that allows the employee to practice his or her religion. This could include changes in scheduling, reassignment or transfer to comparable positions, and modification of workplace policies or procedures. What is reasonable will depend on the job. For example, religious garb that conflicts with OSHA mandated safety equipment is unlikely to be reasonable. Allowing an employee to trade off religious day work may be reasonable.

### ***What is an undue hardship?***

If accommodating a religious practice requires extraordinary administrative costs, hampers efficiency in other jobs, impairs safety or causes other co-workers to carry the employee's burdensome work, then an undue hardship may exist. An employer does not have to accommodate a religious belief that causes an undue hardship. The key is the impact of the accommodation on legitimate business interests. The standard under Oregon law is higher than under federal law. Under federal law, any accommodation requiring more than minimal costs creates an undue burden. ***Opuku-Boateng v. California, 95 F3d 1461 (1996)***. However, in *Nakashima*, the Oregon Court of Appeals required a significant or substantial burden before finding an undue hardship.

(See sidebar on page 2)

*Employers must provide reasonable accommodations for employees with sincerely held religious, unless doing so creates undue hardship.*

*In Nakashima, a significant or substantial burden was required before finding an undue hardship.*

So, what do you do when an employee requests a different schedule or dress code because of his or her religion? Similar to the realm of disability discrimination laws, the initial step is to start an interactive process. Sit down with the employee and ask him or her to suggest possible accommodations. Investigate the feasibility of such accommodations in the context of the job the employee holds. Even if you know that the belief cannot be accommodated, do not skip the process. Failure to interact with the employee may create liability in itself.

## Oregon WC Claims: Court

### Court holds arthritis or an arthritic condition is inflammation of a joint.

In *Adam M. Karjalainen v. Curtis Johnson Pennywise, Inc.*, \_\_\_ Or App \_\_\_ (October 18, 2006), the court found it was a question of law as to the presence of arthritis or an arthritic condition in a dispute over the compensability of a disc herniation. The court found the dictionary defined arthritis as inflammation of one or more joints. Evidently, there was no evidence in the record that the disc herniation involved or resulted from inflammation of a joint and the court concluded as a matter of law the herniation did not involve arthritis or an arthritic condition, so a combined condition analysis involving a preexisting arthritic condition did not apply. When dealing with degenerative disc disease, always ask the physician whether the condition involves inflammation of the facet joints.

### Court changes definition of material as used in ORS 656.245.

In *Mize v. Comcast Corp.*, \_ Or App \_ (October 11, 2006), the court considered whether a claim accepted for medial meniscus tear was a material contributing cause of the worker's need for a second surgery. The worker had a congenital anatomic configuration of his patella, which was the major contributing cause of the need for surgery. The attending physician testified that the injury was only a minor contributing factor. The court defined material as a fact of consequence and thus a minor contribution may be material. It is unknown whether the court will apply this definition of material in compensability cases and held they did not help in discerning the meaning of "in material part" contained in ORS 656.245. Consequently, there is hope the definition will be limited to medical service claims.

### Two prong test for evaluating whether a penalty is due when an insurer fails to timely respond to a closure request from the worker.

The court reversed a penalty award and found the Board applied the wrong standard in *Red Robin Int'l v. Dombrosky*, 207 Or App 476 (August 30, 2006). The insurer failed to respond to the worker's claim closure request within the 10-day period prescribed in ORS 656.268(5)(b). The court concluded the Board cannot assess a penalty based on the sole fact the carrier did not comply with the 10-day provision. The fact finder must first determine whether the insurer refused to close the claim. If so, it must determine if the refusal was unreasonable based on a factual inquiry into the reasonableness of the insurer's refusal to close under the circumstances of the specific claim.

Seek clarification from medical providers regarding whether arthritic condition involves inflammation of a joint.

**Time loss rate based on post injury collective bargaining agreement that retroactively increased the worker's hourly rate of pay.**

The court determined a worker's wage at the time of injury is not what the worker actually received on the date of injury; rather, the amount is what the worker was contractually entitled to receive on that date as a result of a valid, operative, and binding agreement in ***United Airlines v. Anderson, 207 Or App 493 (August 30, 2006)***. The fact the union and employer were in negotiations at the time of the injury most likely led to this decision.

**Date of injury referenced in a Stipulation not binding on subsequent litigation.**

In ***Weyerhaeuser Co. v. Ellison, \_ Or \_\_ App \_ (October 11, 2006)***, the court held an approved Stipulation which agreed to accept and process an occupational disease hearing loss claim did not preclude the worker from requesting reconsideration of a Notice of Closure on the basis the insurer used the wrong date of injury for calculation of permanent partial disability benefits. The court reasoned the agreement only involved acceptance and the insurer's obligation to further process the claim. It seems the court failed to consider the fact both parties agreed to the date of injury contained in the caption of the settlement document.

**Agreement to accept sprain/strain precluded insurer from subsequently accepting a combined condition and issuing a preclosure current combined condition denial.**

Compared to the previous case, the court issued a conflicting opinion in ***Richard Robuck v. SAIF, \_ Or App \_ (September 20, 2006)***. The court held SAIF was precluded from issuing a combined acceptance and denial after it agreed to accept a claim for lumbosacral strain/sprain. The acceptance was issued pursuant to a stipulation purporting to settle "all issues raised or raisable." The court reasoned the compensability of the preexisting degenerative condition had been raised by the worker in his initial claim for benefits and by SAIF in its denial. Evidently, the original denial contained language that the work injury combined with preexisting conditions. Thus, it was an issue raised before the stipulation and foreclosed by that stipulation from being raised again. This case is a reminder that one needs to be very careful when drafting settlement documents.

**In order to be able to issue a preclosure current combined condition denial, the injury must cease being the major contributing cause of the combined condition after the effective date of the acceptance of the combined condition.**

In ***Oregon Drywall Systems, Inc. v. Bacon, \_ Or App \_ (September 27, 2006)***, the insurer issued a modified acceptance that stated the combined condition was accepted "as of this date" and then denied the combined condition within a few days. There was no medical evidence the worker's condition changed during that time and no proof the injury ceased being the major contributing cause between the date of the modified notice of acceptance and the denial. The court rescinded the denial. The following rule applies: (1) When the acceptance of the combined condition does not specify an effective date different from the date of the original acceptance of the work-related injury, the acceptance of the combined condition is deemed to supersede and augment the initial acceptance and date of the original acceptance becomes the baseline for evaluation of any changes in the medical condition; (2) If the acceptance of the combined condition expressly refers to the date of injury, the effective date of the acceptance is the date of injury and the date of injury becomes the baseline; and (3) If the modified acceptance expressly states a date, then that date becomes the baseline for evaluation of a change in the condition.

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*As recent rulings have emphasized, be very careful with the wording in settlement documents.*

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*Ellen Rensklev and Laura Martin enjoying themselves on the annual SBH Crystal Dolphin Cruise*

## Washington WC Claims: Court

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*No significant court rulings made this quarter.*



*Bruce Byerly gearing up for the annual WCCA Golf Tournament*

## Washington WC Claims: Board of Industrial Insurance

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*The Board recently designated a case as a Tentative Significant Decision.*

**Spouse can prove entitlement to survivor benefits even though worker was not fixed and stable at time of death unrelated to claim.** The Board found a spouse can prove entitlement to survivor benefits by establishing the worker would not have returned to gainful employment once the compensable condition reached maximum medical improvement. In this case, the worker died from cancer before his industrially related conditions were fixed and stable. The Board now requires the survivor prove that, at the time of death, disability caused by the industrial injury resulted in worker's unemployment and, although further proper and necessary treatment was contemplated, that treatment would not be expected to return the worker, had he survived, to reasonably continuous gainful employment. **In re *Russell C. Fredericks, Dec'd.*, BIIA Dec., 05 18867 (June 30, 2006).**

## Oregon WC Claims: Workers' Compensation Board

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**Injuries incurred while being an active participant in an assault after termination found compensable.**

It is counter-intuitive for most employers that a worker who is injured while voluntarily engaging in an assault can have a compensable claim--much less for a worker who has been terminated. However, the Board found otherwise in the following case.

The worker had conflicts with coworkers, and on one occasion got into a "scuffle" where his tooth was knocked out. He later got into an argument with the same coworker while on a job assignment in Spokane. When he returned to the employer's premises, he was terminated. The employee believed he was terminated because of the incident in Spokane, but the employer maintained it was due to conflicts with other employees. Directly after terminating the worker, the employer offered to buy the worker's tools back. The worker retrieved a heat gun from his truck and returned to the employer's office. A "scuffle" between the two ensued. The worker sustained injuries and filed a workers' compensation claim.

The claim was not excluded by ORS 656.005(7)(b)(A). Although the worker was an active participant in the assault, the subject matter of the assault was directly related to the employee's work, i.e. attitude and behavior on the job. The Board rejected the insurer's contention that the assault arose out of the worker's unhappiness over his termination and was thus unconnected to his job assignment.

Although the worker was terminated at the time of his injury, he remained within the course of employment for a reasonable period while winding up his affairs (retrieving the heat gun). ***Clyde J. Green, 58 Van Natta 1984 (2006).***

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

**Injury sustained while “surfing” a chassis line found compensable, although conduct violated employer’s policy against horseplay.**

Defending claims based on horseplay has always been difficult for employers. A primary defense is when a worker is injured while engaged in prohibited behavior with which the employer has not acquiesced. However, as the following case illustrates, even when employers take all reasonable and necessary steps to prohibit horseplay, it may not be enough to prevent a compensable workers’ compensation claim.

The employer had a written policy against “fighting, horseplay, scuffling, running or throwing things on company premises.” The worker’s job duties as a production worker included standing on a chassis line that could be moving. On the day of his injury, the worker was on the chassis line when it lurched then began moving. He then assumed a “surfing” position, lost his balance, and fell, injuring his knee. The worker alleged the line “lurched” causing him to fall. Witnesses testified the line was in motion before he fell and was “goofing around and acting like he was surfing on the chassis.”

The Board found, “despite the variation in testimony as to what caused the worker to have his arms out in an effort to maintain his balance,” it was consistent the worker was in a wide stance with his arms out when he fell. The Board found this position would be the same if the rail unexpectedly lurched forward. Therefore, the worker’s job exposed him to the risk of losing his balance when the chassis was in motion and required him to make efforts to steady himself by widening his stance and throwing out his arms. The worker had not significantly departed from his work activities to sever the relationship between his injury and work duties. Further, even if he was “surfing” he was still fulfilling work duties, albeit in an unusual manner.

The Board acknowledged that the employer had a policy against horseplay and did not “acquiesce” in the conduct. However, the employee was not prevented from working on the chassis while it was moving. His “surfing” did not constitute such a deviation from his duties because the “surfing” stance would be similar to the stance if the line indeed had lurched. ***Eric V. Orchard, 58 Van Natta 2574 (2006).***

**Injuries compensable when sustained while driving home after stopping at the grocery store.**

The employer provided company owned trucks deemed for private or restricted use to some employees in its pest control company. The employer charged a monthly fee which covered gas, insurance, etc. The worker used the driving privilege and his use was deemed “private.”

On the day of injury, the employee completed several service calls with a new technician he was training. He then dropped the technician off, stopped at the grocery store within a few blocks of his normal route home and continued to his residence. He was rear-ended while stopped and waiting to make a turn.

The Board acknowledged that the scope of the worker’s travel duties (within the Portland metropolitan area) did not rise to the level of those covered by other traveling employees generally noted in case law. However, because his work involved regular or frequent travel away from the employer’s premises, the worker was a traveling employee. The Board also determined his traveling employee status did not end when he was finished working for the day.

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

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*Even though employer had a policy against horseplay, worker was not prevented from working on the chassis while it was moving. Therefore, "surfing" stance on chassis line found compensable.*

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Whether or not the worker was "on-call," his injuries would still be compensable because he was traveling in the employer's vehicle for which he was paid a monthly usage fee and provided a gas card. The vehicles were provided to assist the workers to better perform their assigned duties. The worker had permission to take the vehicle home and the record did not indicate he was prohibited from stopping at the grocery store. He was still subject to the employer's rules while driving the car, and the vehicle served as an advertisement for the employer and its services. **John E. Schlosser, 58 Van Natta 2275 (2006).**

#### **Temporary disability payments may be terminated seven days after mailing of MCO letter.**

Worker's attending physician restricted her from working through August 12, 2005. On August 5, 2005, the carrier sent worker a letter advising she was enrolled in an MCO and to select a physician from the approved MCO list. The employer argued that the worker became subject to the MCO's restrictions three days after the mailing of an MCO enrollment letter pursuant to ORS 656.245(4)(a) and thus not entitled to time loss after that period. The worker argued a carrier may only terminate temporary disability payments seven days after mailing of the MCO letter pursuant to ORS 656.262(4)(a). The Board reasoned that because ORS 656.245(4)(a) applies generally to medical services and ORS 656.262(4)(i) applies specifically to payment of temporary disability, worker's temporary disability did not cease until seven days after mailing of the MCO letter. Therefore, the worker was entitled to time loss through August 12, 2005. The employer was entitled to terminate time loss on August 13, 2005; on that date an MCO physician had not authorized restrictions. The Board also rejected worker's contention that the mailing of the MCO letter by an uncertified claims examiner was invalid. **Jennifer Butters, 58 Van Natta 1952 (2006).**

#### **Beware of late processing fees.**

If carriers unreasonably resist payment of compensation due, the worker's attorney may be entitled to a fee pursuant to ORS 656.382(1). In two recent Board cases, the issue came up when carriers untimely accepted new or omitted condition claims. Whether a fee was awarded was very fact specific and illustrates the need to timely process claims:

The Board ordered an attorney fee for an untimely acceptance of an omitted or new condition claim pursuant to ORS 656.382(1) for unreasonable resistance to the payment of compensation. The worker was entitled to a permanent partial disability award for surgery; thus, there was compensation due. **Darren K. Tirral, 58 Van Natta 2108 (2006).**

In a similar case with a different outcome, the Board found an attorney fee was not due pursuant to ORS 656.382(1), even though the carrier unreasonably and untimely accepted a new or omitted condition claim. Although the worker might have been entitled to compensation in the future through vocational services or a permanent disability award, those entitlements were only speculative. **Daniel S. Murray, 58 Van Natta 2567 (2006).**

## Employment Law Update

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### Employee's Self-Initiated Investigation of Coworker not a Matter of Public Policy.

Two public safety officers (PSOs) were fired for investigating a coworker. They brought suit against the employer for wrongful discharge: termination for promoting important public policy. The PSOs grew suspicious of coworker Dixson, who claimed to have been a law enforcement officer for 30 years with the VA and had two separate registration numbers. Dixson was fired when his driver's license was revoked, but the PSOs were not promptly informed. In the interim, Dixson had two disputes at a local bar during which he represented himself as a deputy sheriff. Plaintiff PSOs found out when the local police called to check his status. Still no one told plaintiffs that Dixson had been terminated.

The PSOs began an investigation without informing anyone and found one registration number belonged to a different individual, and the employment at the VA was actually two years of being a patient at the VA. When terminated for their unauthorized investigation, the PSOs claimed they were concerned Dixson was committing the crime of impersonating a police officer and they were thus performing an important public duty. The court disagreed because they were not investigating the bar incident, and believed Dixson was still employed (PSOs are special deputies of the sheriff). The court granted directed verdict for the employer, finding termination of the PSOs was lawful. ***Brown v. Board of Educ.*, 207 Or App 163 (2006).**

### Significant Damages Awarded to Corrections Officer for Harassment by Prisoners.

Freitag, a female corrections officer at Pelican Bay State Prison, brought complaints to her superiors of sexual harassment (including lewd behavior) by male prisoners. Throughout 1998 and 1999, she made several complaints, including write-ups in the prisoner files, reports to supervisors, and eventually contacting her Senator. Prison officials disregarded, even threw away, her disciplinary reports regarding the prisoners, and instead began investigating Freitag due to inconsistencies in reports. She was ultimately terminated for falsifying reports regarding disciplinary measures used by male coworkers. The Ninth Circuit upheld a jury verdict that the state correctional department failed to promptly and appropriately investigate and respond to Freitag's harassment complaints. Finding a hostile work environment and retaliation against Freitag under both Title VII and for exercising her 1<sup>st</sup> amendment rights, the jury awarded \$600,000 in compensatory damages. ***Freitag v. Ayers*, \_\_\_F3d\_\_\_, 2006 WL 2614120 (9<sup>th</sup>Cir 2006).**

### Plaintiff Sanctioned for Destroying Evidence.

In this day of emails and computer records, both employers and employees may get the urge to delete records that could potentially be troublesome at trial. In ***Leon v. IDX Systems Corp.*, \_\_\_F3d\_\_\_ (9<sup>th</sup> Cir 2006)**, the Court gave a clear message that such actions could prove costly. While acting as the director of medical informatics with the employer, Dr. Leon complained of financial irregularities. Employer placed Dr. Leon on unpaid leave and sought to terminate him. Dr. Leon then filed retaliation and whistleblower claims. However, after express instruction to preserve data on his employer-provided laptop, which he was allowed to use while finishing some audits, Dr. Leon wiped data from the computer. The court found Dr. Leon very evasive when questioned. In response to his destruction of evidence, it dismissed his lawsuit *and* sanctioned him \$65,000. The federal courts have imposed new requirements on the protection and production of electronic evidence beginning November 1, 2006.



Barb Petrick, Ron Pomeroy, Paul Altstadt & Norm Cole get ready to golf at the WCCA Golf Tournament

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## SBH Notables

### It's a girl!



Longtime SBH secretary, **Deborah Flowerday**, welcomed Grace Olivia on October 6, 2006 (6 lbs., 10 oz., 19 ½ inches)

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

### Bon Voyage Robb!!

SBH attorney **Robb Schotthoefer** and family are relocating to Paris, France. His wife's job has offered them the chance of a lifetime. Robb plans to become fluent enough in French to work for an International Aid Agency. We'll miss you Robb!

### New faces at SBH!

**Zita Bitz** joined SBH in January as legal secretary to Bruce Byerly and Ron Pomeroy. Her 13 ½ years as a legal secretary includes experience in general practice plaintiff, medical malpractice litigation and workers' compensation defense. In addition, Zita is a diehard Philadelphia Eagles fan!

Paralegal **Lisa Snider** recently joined the SBH team and is currently assisting Deborah Sather with Washington workers' compensation claims. For the last eight years, Lisa has experience in Oregon workers' compensation, personal injury, insurance defense and medical malpractice.



## 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.