

**MLAC Significant Cases Subcommittee
Compilation of Cases and Summaries
UPDATED after 6/9/08 Meeting
Prepared by the Workers' Compensation Division**

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60 Van Natta 447 (2008)

www.cbs.state.or.us/external/wcb/2008/review/mar/0607602b.pdf

Issue: Course and scope of employment; exclusion of injuries to active participants in assaults.

Suggested by: SAIF Corporation

Date presented: June 9, 2008 (by SAIF Corporation)

Summary:

Claimant worked as an auto mechanic. His employer directed him to tell a co-worker, Julian, to drive a car to DEQ for testing. Julian, who was a detailer, was buffing a vehicle when claimant approached. To get Julian's attention claimant pinched Julian's nipple. One thing led to another and the two got into a physical altercation. Another co-worker broke the two apart. While walking away claimant was cussing and swearing and Julian responded similarly. Claimant came back towards Julian and the other co-worker left the area to inform a supervisor. A second physical alteration occurred. Claimant pulled a work knife from his pocket, and Julian grabbed a brush used in detailing. During the fight, Julian struck claimant's left forearm with the brush handle, breaking claimant's arm. SAIF denied claimant's claim on the basis that the injury did not arise out of or occur within the course of claimant's employment, and the injury was excluded from compensability because it was the result of an assault in which claimant was an active participant. The ALJ set aside SAIF's denial and the board affirmed.

The statute excludes from the definition of "compensable injury" an injury to an active participant in an assault which is not connected to the job assignment and which amounts to a deviation from customary duties. The board determined that this exclusion did not apply because although claimant was an active participant in the assault, his injury was connected to his job duties because the altercation arose out of a specific work assignment that he was directed to complete.

The board also determined that claimant's injury arose out of and in the course of claimant's employment. As to the "arising out of" prong, the board reasoned that the altercation was not connected to off-work animosity but rather directly arose from claimant's actions in obtaining Julian's attention so he could inform him about performing a task for the benefit of their employer. As to the "course of employment" prong, the board reasoned that the injury occurred during work hours, on work premises, and during a work communication benefiting the employer.

Freightliner LLC v. Holman

195 Or App 716 (2004)

www.publications.ojd.state.or.us/A122945.htm

Issue: Statute of limitations in occupational disease claims

Suggested by: Deborah Sather and Norman Cole

Date presented: March 14, 2008

Summary:

At issue in this case was whether the worker's hearing loss claim was timely filed. During his 29 years working for the employer, the worker was regularly exposed to loud noise. He knew he suffered from work-related hearing loss although he did not have medical confirmation, nor was his condition disabling. He filed a workers' compensation claim six years after leaving his employment. Shortly thereafter his physician verified that he had work-related hearing loss. The employer denied his claim as untimely. An ALJ set aside the denial and the board affirmed.

The Court of Appeals, again noting the "imperfect drafting" of the statute, examined the text and context of ORS 656.807(1), which provides that an occupational disease claim must be filed by the later of one year from the date the worker first discovered or should have discovered the occupational disease or one year from the date the worker becomes disabled or is informed by a physician that the worker has an occupational disease. The court concluded that the start of the one-year limitation period is suspended until the last of the four events occurs. The court stated, "[E]mployer argues that ORS 656.807(1) as interpreted by the board creates a potentially limitless statute of limitations * * * . That argument, however, must give way to the statute's textual indicators and its legislative history."

Godfrey v. Fred Meyer Stores

202 Or App 673 (2005)

www.publications.ojd.state.or.us/A124562.htm

Issue: Statute of limitations in injury claims

Suggested by: Deborah Sather and Norman Cole

Date presented: March 14, 2008

Summary:

ORS 656.265 requires that a worker give the employer notice of an accident resulting in injury or death. The issue in this case was whether a worker's oral report of an injury to her employer was legally sufficient notice.

The worker orally advised her supervisor that she injured her wrist at work the day before. The supervisor then made an entry into the employer's computerized database under "Employee Incident Report." More than a year later, the worker filed a written claim, which the employer denied. The employer argued that the statute requires a worker to submit written notice within 90 days of an accident, or within one year if the employer knew of the injury. The worker argued that she was only required to provide notice within one year, and the notice does not need to be in writing. The board upheld the denial.

The Court of Appeals, noting that the drafting of ORS 656.265 is less than perfect, examined the text of the statute and discussed two possible interpretations. Under the first possibility, the worker's notice to the employer of an accident or injury must be in writing. Under the second possible interpretation, notice of an injury may be given in one of three ways: 1) written notice apprising the employer when, where, and how an injury has occurred; 2) a report or statement secured from the worker concerning an accident which may involve a compensable injury; and 3) use of a form prescribed by the director. The court concluded that under the second way of providing notice – a report or statement secured from the worker – the notice need not be in writing. Noting that the purpose of the notice is to ensure that employers obtain enough information to enable them to determine whether to investigate an accident, the court concluded that an oral report from a worker is sufficient, if it contains the required information. Accordingly, the worker's notice was timely.

On remand the board set aside the employer's denial of the claim. The board declined to consider the employer's argument that claimant failed to timely file her injury claim because it was not filed within one year of the injury, holding that employer failed to preserve the argument. The board noted the distinction between timely notice of an injury and timely filing of a claim.

Board Order on Remand:

Karen M. Godfrey, 58 Van Natta 2892 (2006).

www.cbs.state.or.us/external/wcb/2006/remand/nov/0304253a.pdf

The board's Order on Remand was appealed to the Court of Appeals, and the court released its opinion on March 19, 2008. The court affirmed, finding that the board acted within its discretion in finding that employer had not preserved the issue of whether claimant was required to bring her claim within one year of the date of injury.

Fred Meyer Stores v. Godfrey, ___ Or App ___ (2008).

<http://www.publications.ojd.state.or.us/A134247.htm>

Related case:

Jose Amador, 59 Van Natta 2115 (2007).

Board Order on Reconsideration: www.cbs.state.or.us/external/wcb/2007/recon/aug/0601101.pdf

In this Order on Reconsideration the board, citing *Godfrey*, rejected the employer's argument that ORS 656.265(4) requires a claim to be filed within one year of the accident, stating that ORS 656.265(4) refers to notice of an accident, but does not impose a requirement regarding the timeliness of claim filing.

Jose Amador, 59 Van Natta 1538 (2007).

Board Order on Review: www.cbs.state.or.us/external/wcb/2007/remand/jun/0601101a.pdf

Karjalainen v. Curtis Johnston & Pennywise, Inc.

208 Or App 674 (2006), rev denied 342 Or 473 (2007)

www.publications.ojd.state.or.us/A127490.htm

Issue: Scope of definition of “arthritis or arthritic condition” for purposes of establishing a pre-existing condition.

Suggested by: Sommer Tolleson (Attorney) and DCBS

Date presented: Nov. 13, 2007

Summary:

Claimant was injured when he fell down a flight of stairs at work. Employer accepted a claim for a nondisabling thoracic strain. Medical tests revealed claimant had a herniated disc as well as moderate degenerative disc disease. Claimant asked that the scope of acceptance be expanded to include the herniated disc and a lumbar strain. Employer accepted the lumbar strain but denied the herniated disc. At issue was whether the claimant’s disc herniation was a result of his work injury and a pre-existing condition of degenerative disc disease (arthritis or arthritic condition) and therefore a “major contributing cause” standard applied, as the employer argued. Or, as the claimant argued, that his degenerative disc disease was not a pre-existing condition (arthritis or an arthritic condition) and a material contributing cause standard applied.

A preexisting condition must have been diagnosed or treated prior to the injury, unless it is arthritis or an arthritic condition. The court held that the definition of arthritis is a question of law, and the term should be given its ordinary (i.e. dictionary) meaning. The court defined arthritis as a matter of law as an “inflammation of one or more joints.” The court rejected the position that the term should be defined by medical experts on a case-by-case basis. Consequently, the court remanded the case to the board for reconsideration based on this definition.

On remand, the board reversed its prior position that claimant’s degenerative disc disease was an arthritic condition and found that the record did not persuasively establish that degenerative disc disease involved inflammation of a joint and concluded that it was not a pre-existing condition so a material contributing cause standard applied.

Analysis:

This case narrows the definition of arthritis, which may reduce the number of pre-existing conditions. As a result, the number of claims subject to the “major contributing cause” standard may decrease, which could increase the number of compensable claims. However, as a result of this position, parties in future similar claims may adjust the focus of their dispute to whether the medical opinions persuasively established “inflammation of one or more joints,” instead of whether the claimant has “arthritis or an arthritic condition.”

In addition, the definition of pre-existing conditions was revised under SB 485 as part of the legislative response to the Smothers decision. Smothers held that the exclusive remedy provisions of workers' compensation law were unconstitutional because a worker was precluded from obtaining a remedy for a work-related condition and, as such, the worker could sue the employer in circuit court for damages from a work-related condition. SB 485 intentionally funneled more workers into the workers' compensation system by requiring that work-related claims be initially directed into the system and a noncompensability determination be reached before a civil negligence action could be pursued against the employer. SB 485 also amended the statutory scheme in a manner that narrowed the number of claims that could be successfully defended based on the major contributing cause standard. The statutory requirements for a "pre-injury" diagnosis or treatment (subject to the arthritis exception) in order to qualify as a "pre-existing condition" were expected to increase the number of compensable "combined condition" claims by 10 percent.

Specifically, the during the discussions on SB 485 these definitions were proposed:

SB 485 Oct 13, 2000 Management proposed this language which labor did not agree with:

For the purposes of this section, "arthritis" or an "arthritic condition" means the process of post-traumatic, developmental, joint, vertebra, or proximate ligamentous, fibrous or cartilaginous structures, regardless of whether such changes are yet symptomatic.

October 19, 2000 definition from staff to MLAC:

"For the purposes of this subparagraph only, "arthritis" or an "arthritic condition" means inflammation of a joint, usually accompanied by pain, swelling and, frequently changes in structure."

The court in Karjalainen looked at the legislative history and found it inconclusive and gave examples of testimony. When the administrator of the Workers' Compensation Division was asked if the courts had interpreted arthritis, his response was that he did not know. An MLAC co-chair stated that there was sufficient legal precedent that determined what arthritis meant and it was defined in case law. Another witness said the definition would work out case by case. The same witness said ultimately the Court of Appeals and the Supreme Court will come up with language "we'll all start being comfortable with."

Board Order on Remand:

Adam M. Karjalainen, 59 Van Natta 3076 (2007).

www.cbs.state.or.us/external/wcb/2007/remand/dec/0306069a.pdf

Roberts v. SAIF Corp.

341 Or 48 (2006)

www.publications.ojd.state.or.us/S52078.htm

Issue: Tort law implications of excluding a class of work-related injuries from compensability and restricting the worker's remedy (recreational/social activity exclusion).

Suggested by: DCBS

Date presented: Nov. 13, 2007

Summary:

Claimant's claim arose out of and in the course of employment but was excluded from compensability because it was incurred while engaging in recreational activities primarily for the worker's personal pleasure. Justice Durham issued a concurring opinion addressing the potential tort law ramifications of excluding a class of work-related injuries from the scope of compensable injuries and restricting the worker's remedy for a work-related injury to the workers' compensation system whether or not the injury is compensable.

Analysis: The interesting issue in this case is the concurring opinion by Justice Durham. The question is whether an injury is considered work related and therefore covered under workers' compensation or, as in this case, work related but not covered. If a class of injuries is not covered it raises the issue of Smothers, that is, a class of injuries that are not compensable may mean the exclusive remedy provisions of workers compensation for that class are unconstitutional. In that event, the tort system would provide the remedy, if any, for the plaintiffs. The policy question is whether to provide workers the possibility of a remedy under the workers compensation system, or the tort system.

59 Van Natta 2422, abated 59 Van Natta 2729 (2007)

www.cbs.state.or.us/external/wcb/2007/remand/oct/0507566b.pdf

Issue: Denials for unperfected new and omitted condition claims.

Suggested by: SAIF

Date presented: DCBS summary presented April 11, 2008

Summary:

Claimant had an accepted injury claim for a disabling left chest wall contusion and left 8th rib fracture. Claimant requested acceptance of “chronic chest wall pain as a result of the 8th rib fracture condition” as a new or omitted medical condition. The insurer responded with a “No Perfected Claim” letter, which stated that claimant’s claim was not perfected because he requested acceptance of a symptom rather than a medical condition or diagnosis. Claimant appealed, arguing that the letter was a denial. The ALJ upheld the insurer’s *de facto* denial of chronic chest wall pain.

On review the board found that claimant had perfected his claim. The board reasoned that whether claimant’s request described a condition or merely a symptom was a question to be resolved when determining compensability. Because claimant had clearly requested acceptance of chronic chest wall pain, he had perfected his claim for a new medical condition under ORS 656.267(1). Because the insurer had neither accepted nor denied the claim within the required time period, the claim was *de facto* denied.

The board abated its order and the parties subsequently settled, so the case is not binding in future cases.

Order of Abatement:

Francisco G. Rodriguez, 59 Van Natta 2729 (2007).

www.cbs.state.or.us/external/wcb/2007/miscellaneous/nov/0507566.pdf

48 Van Natta 395 (1996)

www.cbs.state.or.us/wcd/sandoval.doc

Issue: Backup denials and mistakenly accepted claims.

Suggested by: SAIF

Date presented: DCBS summary presented April 11, 2008

Summary:

SAIF provided coverage for the employer on Oct. 6, 1992, the date of claimant's injury. CNA assumed coverage for the employer effective Jan. 1, 1993. Claimant filed his claim in March 1993 using a CNA claim form. CNA accepted the claim. The employer subsequently realized the mistake and notified its parent corporation, which notified CNA. CNA issued a disclaimer of responsibility; advised claimant to file a claim with SAIF; rescinded its acceptance of claimant's claim; denied responsibility for claimant's injury; and requested designation of a paying agent. SAIF issued a compensability denial (which it later rescinded) and a responsibility disclaimer. The ALJ determined that CNA could rescind its acceptance, CNA was not prohibited from issuing a back-up denial on the merits, and SAIF was responsible for claimant's injury. The ALJ ordered SAIF to reimburse CNA for its claim costs.

The board reversed those portions of the ALJ's order, concluding that CNA's denial was not based on "later obtained evidence" sufficient to support a back-up denial under ORS 656.262(6). The board reasoned that at the time the claim was filed CNA, as a corporate entity, knew or should have known that it was not providing coverage, even if accurate coverage information was not available to the branch office.

Related case:

Oregon Insurance Guaranty Assoc. v. Hall, 200 Or App 128, rev den 339 Or 544 (2005).

www.publications.ojd.state.or.us/A122994.htm

Reliance provided workers' compensation coverage to employer until Aug. 1, 2000. AAIC began providing coverage to employer on Aug. 1, 2000. Claimant sustained an injury on Sept. 13, 2000 and filed a claim. Employer mistakenly sent the claim to Reliance, which in turn mistakenly accepted the claim. When Reliance became insolvent on Oct. 3, 2001, OIGA assumed Reliance's rights, duties, and obligations. OIGA notified claimant that his claim was not a covered claim and that it would not be assuming responsibility for it. Claimant asked AAIC to process the claim and AAIC denied responsibility, acknowledging that it would have been responsible had another insurer not accepted the claim. The ALJ and board found that OIGA was responsible.

The Court of Appeals reversed and remanded, finding that the claim was not a “covered claim” under the OIGA statutes because the policy with Reliance was not in force at the time of claimant’s injury. The court stated that OIGA steps into the shoes of an insolvent insurer only if the claim is a “covered claim.” The court noted that OIGA is intended to be the insurer of last resort and in this case OIGA was not claimant’s insurer of last resort because AAIC provided coverage on the date of injury and remained a solvent insurer.

On remand, the board held AAIC responsible for claimant’s claim.

Board Order on Remand:

Mark S. Hall, 58 Van Natta 1461 (2006).

<http://www.cbs.state.or.us/external/wcb/2006/remand/jun/0207574.pdf>

Sisco v. Quicker Recovery

218 Or App 376 (2008)

www.publications.ojd.state.or.us/A132394.htm

Issue: Course and scope of employment.

Suggested by: SAIF Corporation

Date presented: June 9, 2008 (by SAIF Corporation)

Summary:

Claimant worked as a tow truck driver. Claimant's employer had a contract with the Gresham Police Department to tow impounded vehicles. The contract required a tow truck to arrive on-scene within 30 minutes of the tow request. While responding to a tow request claimant was speeding and got pulled over by the police. Claimant called his dispatcher to tell him that he may not make the 30 minutes. The dispatcher told claimant to cooperate with the police. Claimant understood that employer required him to comply with police and that he could lose his job if he did not comply. The officer requested claimant's identification. Claimant refused, claiming that it was his sovereign right to refuse to present his driver's license. The officer told claimant he was under arrest for refusing to present his driver's license. Claimant locked his door and started to roll up his window. The officer ordered claimant to get out of the tow truck, and claimant refused. Officers used a stun gun and forcibly removed claimant from his truck. Claimant was pinned to the ground while he was being handcuffed. He filed a claim for a neck injury resulting from the altercation with police. His claim was denied and the ALJ and board affirmed the denial. The Court of Appeals reversed.

The court first determined that claimant's injury occurred within the course of claimant's employment. The court distinguished between a violation of an employer's directive regarding the boundaries of the ultimate work to be done (which is outside the course of employment) and a violation of an employer's directive regarding the method of accomplishing that ultimate work (which is within the course of employment). Claimant's ultimate work was responding to tow calls and towing impounded vehicles, which necessarily involved some interaction with police. *How* claimant interacted with police related to the *method* of performing that ultimate work. Because claimant's conduct related to the method, his injury was incurred in the course of his employment.

The court next determined that claimant's injury arose out of his employment based on the principle that, where the nature of the work necessarily exposes a worker to proximate interaction with others, the risk of injury-producing physical contact with third persons is sufficiently related to employment to satisfy the "arising out of" prong. The court reasoned that claimant's injury was sufficiently linked to a risk connected with the nature of the work or a risk to which the work environment exposed claimant.