M E M O R A N D U M

September 19, 2016

To: MLAC

From: Roger C. Pearson, WCB Managing Attorney

Subject: Court Case Summaries

Pursuant to your request, set forth below are some noteworthy appellate decisions addressing the workers' compensation system that issued during the past calendar year.

SUPREME COURT

Exclusive Remedy ("018"): *Smothers* Holding Overruled

Horton v. Or. Health & Sci. Univ., 359 Or 168 (May 5, 2016). The Supreme Court overruled its decision in *Smothers v. Gresham Transfer, Inc.*, 332 Or 82 (2001), which had previously determined that, if a workers' compensation claim for an alleged injury is denied because the worker has failed to prove that the work-related incident was major, rather than merely a contributing, cause of the injury, then the exclusive remedy provisions of ORS 656.018 (1995) are unconstitutional under the remedy clause in Article I, Section 10 of the Oregon Constitution.

In *Horton* (which concerned a medical malpractice suit involving a state employee doctor and the Tort Claims Act, which limited the doctor's tort liability), the Supreme Court held that the Act did not violate the aforementioned remedy clause. In reaching that decision, the Court explained that, contrary to the *Smothers* rationale, "the remedy clause does not protect only those causes of action that pre-existed 1857, nor does it preclude the legislature from altering either common law duties or the remedies available for a breach of those duties." *Horton*, 359 Or at 218-19. The Court further noted that "[b]ecause we overrule *Smothers*, it follows that its conclusion – that the

workers' compensation statute was unconstitutional as applied – cannot stand. We express no opinion on whether our remedy clause cases that preceded *Smothers*, which we affirm today, would lead to the same conclusion." *Horton*, 359 Or at 188 n 9.

Firefighter's Presumption: "802(4)" - Presumption Not Met By "Clear and Convincing Evidence" - Physician's "Not Major Cause" Opinion Did Not Satisfy "Unrelated to Employment" Requirement

SAIF v. Thompson, 360 Or 155 (August 4, 2016). Analyzing the "firefighter's presumption" as prescribed in ORS 656.802(4), the Supreme Court affirmed a Board decision, which had found that a carrier had not overcome, by clear and convincing evidence, the presumption that a firefighter's heart attack was related to his firefighting. Although acknowledging a physician's opinion that firefighting was not the major cause of the firefighter's atherosclerosis, the Court reasoned that, because the facts necessary to establish a "firefighter's presumption" under the statute had already been proven and, as such, it was presumed that the atherosclerosis "resulted from" the firefighter's employment. Identifying the determinative question as whether the firefighter's heart condition was "unrelated to [his] employment," the Supreme Court concluded that the Board could reasonably discount the persuasive value of the physician's opinion (*i.e.*, that the firefighter's employment was not the major contributing cause of his condition) because: (1) such an opinion did not mean that the condition was unrelated to his firefighting; and (2) the physician's opinion that atherosclerosis was unrelated to firefighting was at odds with the physician's testimony that the causes of atherosclerosis were unknown. Under such circumstances, the Supreme Court held that the Board could permissibly conclude that the carrier had not met its burden of persuasion of overcoming the "firefighter's presumption" by clear and convincing evidence.

COURT OF APPEALS

Extent: Impairment Findings - No Impairment Due to Compensable Injury - "Apportionment" Rule ("035-0013(1)") Not Applicable

Magana-Marquez v. SAIF, 276 Or App 32 (January 21, 2016). Applying ORS 656.214(1), the court held that a worker was not entitled to a permanent disability award for a low back strain injury because the record established that her permanent impairment (reduced range of motion and sensory loss) were wholly due to causes other than her compensable injury. Noting that the legislature had used the term "due to" in describing the *necessary causal relationship* between the compensable injury and the loss of use or

function of a body part or system for purposes of awarding permanent disability under ORS 656.214(1)(a), the court rejected the worker's contention that all of her impairment findings should, as a matter of law, be deemed to be due to her accepted condition. In reaching its conclusion, the court distinguished the present case from a Supreme Court decision (*Schleiss v. SAIF*), which had held that apportionment of impairment to conditions apart from compensable conditions was not permissible unless those other conditions would be "legally cognizable in a combined condition claim." Reasoning that there was no causal relationship between the worker's permanent impairment and her compensable injury, the court concluded that the present case did not involve an "apportionment of impairment" issue.

New/Omitted Medical Condition: "267" - Claimed Condition Must "Exist"

DeLos-Santos v. Si Pac Enterprises, Inc., 278 Or App 254 (May 11, 2016). Applying ORS 656.267, the court held that, when initiating a new/omitted medical condition claim, a worker must establish that the claimed condition is in existence. Although acknowledging that a worker is not required to prove a specific *diagnosis* to establish a new/omitted medical condition claim, the court reiterated that a "condition" (rather than merely symptoms) must be proven to prevail on such a claim. In reaching its conclusion, the court distinguished previous case decisions, which had determined that a compensable injury was established without addressing a specified condition. Noting that it was undisputed that the present worker had already suffered a compensable injury, the court reasoned that the issue in the present case was whether the carrier was required to also accept the claimed new/omitted medical "condition," which included its existence.

Mental Disorder Claim: "802(3)" - Applied to Physical Condition (Heart Attack)

Long v. SAIF, 278 Or App 88 (May 4, 2016). Citing ORS 656.802(1)(b), and ORS 656.802(3), the court held that, because the basis for the deceased worker's heart attack claim was mental stress from his employment conditions, his beneficiary was required to prove that the worker's employment was the major contributing cause of his heart condition (or its pathological worsening) and that, by clear and convincing evidence, the cardiac arrest arose out of and in the course of the worker's employment. Reasoning that there were sufficient facts in the record for the Board to give probative weight to a medical record reviewer's opinion (as substantiated by EKG findings and an operative report) that the worker's heart attack was caused by his preexisting conditions, the court concluded that the Board's order upholding the carrier's denial was supported by substantial evidence and reasoning.

TTD: "210(2)(b)(A)" - Supplemental Benefits - Carrier Must Receive Notice of "Secondary Job" W/I 30 Days of its Receipt of Claim - Notice to Employer Not "Imputed" to Carrier

DCBS v. Muliro, 359 Or 736 (June 16, 2016). Analyzing ORS 656.210(2)(b)(A), the Supreme Court held that a worker was not entitled to "supplemental" disability benefits because she had not communicated to her employer that she had "secondary employment" within 30 days of the insurer's receipt of her initial injury claim (*e.g.*, she had not checked a "secondary employment" box on either of two claim forms that she had completed) and because the insurer had not otherwise received actual notice of her "secondary employment" within the aforementioned 30-day period. After considering the text and context of the statute (as well as the 2001 legislative history from two nonlegislator witnesses), the Court disagreed with the worker's position that an insured employer's knowledge of the worker's "secondary employment" (regardless of how or when that knowledge was acquired) should be imputed to the insurer for purposes of satisfying the 30-day notice requirement.

Reasoning that the legislature intended the worker seeking "supplemental" disability benefits to bear the burden of proving notice of the "secondary employment" to the employer's insurer within the 30-day period, the Court observed that the "notice" obligation could be met by the worker providing the "secondary employment" information on the claim form either directly to the insurer or through the employer (who was statutorily obligated to transmit such information to its insurer). Determining that the statute plainly established a "30-day" time-frame during which the "secondary employment" information must be received by a designated entity (which did not include the employer, other than a "self-insured" employer) in order for a worker to receive "supplemental" disability benefits, the Supreme Court found no support for the worker's argument that her supervisors' knowledge of her "secondary employment" (at some unknown point that preceded her compensable injury) should be imputed to the insurer to satisfy the "notice" requirements of ORS 656.210(2)(b)(A).

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