What Every Attorney Needs to Know about Workers' Compensation

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What is Workers' Compensation and when do I have to care about it?

Basics

Workers' Compensation is the administrative system that's the court of original jurisdiction over work injuries.

Law and Resources

1. **ORS 656** – Oregon Revised Statue covering Workers' Comp.

2. **OAR 438** – Admin. Rules for the Workers' Compensation Board (i.e. the "judicial" branch)

3. **OAR 436** – Admin. Rules for Workers' Comp. Division (i.e. the "administrative" branch)

4. http://www.oregon.gov/wcb/Pages/index.aspx – Board's website - Has links to laws, bulletins, and forms.

5. http://wcd.oregon.gov/Pages/index.aspx – Division's website - Has links to laws, bulletins, and forms.

6. **OSB's Workers' Compensation Section**
    a. Join us! Multiple CLEs a year, and a small, congenial, and helpful practice area.

7. **Van Natta Reporter** – the reporter for Board cases. Can be searched here: http://www.oregon.gov/wcb/board-orders/Pages/index.aspx

Structure

1. **Hearings Division** – Trial level. ALJ's hear cases.

2. **Workers' Comp. Board Review** – Appellate level. A panel of Board members review ALJ orders.
   NOTE: it's always *de novo*, via written argument, limited to evidence/issues raised at the Hearings Division.

3. **Court of Appeals** – Destination for appeals of Board Orders on Review.

Common phrases / acronyms

1. **DOI** – date of injury.

2. **TD** – temporary disability. This refers to lost wages or "time loss."

3. **PD** – permanent disability. Measured as a percentage with a dollar amount equivalent. This refers to the degree to which a worker is permanently disabled based on how they were at the time they were hurt.

4. **RFH** – request for hearing. The form that commences litigation.

5. **AP** – attending physician. The singular doctor responsible for monitoring and guiding a worker's treatment.

6. **IME** – independent/insurer medical exam.

7. **NOC** – notice of closure.

8. **Form 801** – report of injury tendered by employer, completed by worker.

9. **Form 827** – report of injury completed by workers' doctor.

Formal rules of evidence and procedure are not required.

ORS 656.283(6): Except as otherwise provided in this section and rules of procedure established by the board, the Administrative Law Judge is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, and may conduct the hearing in any manner that will achieve substantial justice.

PRACTICE TIP: Each judge is different. Some judges enforce the rules, while others don't. Err on the side of making the objection or procedural argument and see what happens. The prudent practitioner must be fluent and competent with the Oregon Rules of Evidence.

In a recent case, CARMEN M. FRANCISCO, 68 Van Natta 897, at 900 (2016), the Board stated the principal this way:

"An ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. ORS 656.283(6). That statute gives the ALJ broad discretion on determinations concerning the admissibility of evidence. See Brown v. SAIF, 51 Or App 389, 394 (1981). We review the ALJ's continuance and evidentiary rulings for an abuse of discretion. SAIF v. Kurcin, 334 Or 399 (2002). In doing so, we consider whether the record supports the ALJ's decision. Id. at 406. If the record would support the ALJ's decision, but would also support a different decision, there is no abuse of discretion. Id."

In another 2016 case, RICKY J. MORIN, 68 Van Natta 725, at 725-26 (2016), the Board stated:

"The ALJ's evidentiary discretion continues after the hearing and closure of the record, and we review "post-closure" evidentiary decisions for an abuse of discretion. See OAR 438-007-0025(1) (an ALJ may reopen the record and reconsider a decision before a request for review is filed or, if none is filed, before the time for requesting review expires); Rodney C. Walters, 63 Van Natta 114 (2011) (it was within the ALJ's discretion to admit evidence that was submitted after the initial written argument); Howard D. Smith, 57 Van Natta 1796 (2005) (admission of "post-hearing" evidence was within the ALJ's discretion).

Jurisdiction

Exclusive Remedy

ORS 656.018 Effect of providing coverage; exclusive remedy. (1)(a) **The liability of every employer** who satisfies the duty required by ORS 656.017 (1) **is exclusive and in place of all other liability** arising out of injuries, diseases, symptom complexes or similar conditions **arising out of and in the course of** employment that **are sustained by subject workers**, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom, specifically including claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such conditions, except as specifically provided otherwise in this chapter.

This statute had been amended in 1995 to make Workers' Comp. the exclusive remedy *whether or not* a claim was deemed compensable. It was challenged and made unconstitutional in the 2001 case Smothers v. Gresham Transfer, Inc., 332 Or. 83, 23 P.3d 333 (2001). In *Smothers*, the claimant alleged a compensable injury caused by toxic exposure, and the claim was denied. Claimant then tried to bring a civil suit, however the Circuit Court dismissed the case on the argument that it was barred by the Exclusive Remedy clause of .018. The Supremes reversed, finding ORS 656.018 unconstitutional because it left a worker with no remedy on a denied case.

NOTE: the recent case of Horton v. Oregon Health & Sci. Univ., 359 Or. 168, 376 P.3d 998, (2016) overruled a part of *Smothers,* but left the general holding intact. The overruled portion spoke to the idea that the legislature was locked in place by the common-law that existed at the time the Oregon Constitution was drafted. The operative portion of *Smothers* (that a denied WC claim may bring a civil suit) remains the law.

KEY TAKEAWAY – If a person is injured on the job, then the Workers' Comp. system is their exclusive remedy and the employer is protected from civil suit. However, if the Workers' Comp. claim is denied, then the person has the right to bring suit and the employer is no longer protected.

What is an "Employer"?

ORS 656.005(13)(a) "Employer" means any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal corporations, school districts and other public corporations or political subdivisions, who contracts to pay a remuneration for and secures the right to direct and control the services of any person.

(b) Notwithstanding paragraph (a) of this subsection, for purposes of this chapter, the client of a temporary service provider is not the employer of temporary workers provided by the temporary service provider.

(c) As used in paragraph (b) of this subsection, "temporary service provider" has the meaning for that term provided in ORS 656.850.

NOTE: "Contract" can be implied. There doesn't have to be a formal contract. Also, "remuneration" is deliberately vague. It doesn't have to be cash.

Subject Employer

This term refers to Employers who are "subject" to ORS 656. It's defined as "*every employer employing one or more subject workers in [Oregon]*." (ORS 656.023).

Who's a "Worker"?

ORS 656.005(30) "Worker" means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an inmate or ward of a state institution or as part of the eligibility requirements for a general or public assistance grant. For the purpose of determining entitlement to temporary disability benefits or permanent total disability benefits under this chapter, "worker" does not include a person who has withdrawn from the workforce during the period for which such benefits are sought.

Subject Worker

ORS 656.027: All workers are subject to this chapter

EXCEPTIONS – there are about 28 in total, all listed in ORS 656.027. These are the most common:

1. Domestic servants. (Including home health care workers)
2. Home workers. (Gardening, maintenance, repair, remodeling or similar work)
3. "Casual" workers.
4. Federal workers.
5. Worker engaged in the transportation in interstate commerce of goods…and whose employer has no fixed place of business in this state.
6. Police/Fire workers for a city of over 200,000 people and which has a disability/retirement system.
7. Sole proprietors. (Excluding licensed landscapers and licensed construction contractors, which are presumed to be independent contractors).
8. Members, or member managers, of LLCs who qualify as an IC.
9. Corporate officers. (With many conditions).
10. Newspaper carrier.
11. Armature athlete.
12. Certain volunteers, workers at religious housing institutions, foster parents.
13. Independent contractors.
14. Ski patrol and ski workers who are paid in lift tickets.
15. Recreational river boat workers. (Fishing, rafting, etc.)
16. Taxi (and Uber/Lyft) drivers.
17. Golf caddies.
18. Recreational sports referees.

PRACTICE TIP: There can be a lot of nuance in determining the exact nature of the relationship between a potential employer, and the potential worker. The independent-contractor test, the relative-to-the-nature-of-the-work test, and the right-to-control test may be relevant. Reading the case law is key.

Arising out of and in the course of employment ("Course and Scope")

Once you know that an employer is an employer, and a worker is a worker, then it must be determined whether or not the injury arose out of and in the course of the employment.

Compensable Injury

ORS 656.005(7)(a) A "compensable injury" is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or

not due to accidental means, if it is established by medical evidence supported by objective findings.

"Compensable injury" does not include: (Per ORS 656.005(7)).

1. Injuries from combat outside job assignment, or from a deviation of duties.
2. Injuries from recreational activities primarily for the worker's pleasure.
3. Injuries where the major contributing cause was the consumption of alcohol, unless the employer permitted, encouraged, or had actual knowledge of the consumption.

Prong 1: Arising out of…

This prong requires a causal link between their injury, and their employment.

Prong 2: In the course of…

This prong concerns the time, place, and circumstance of an injury.

Examples

NOTE: these analyses are incredibly fact specific, and largely driven by case law. Common analysis include:

Was the claimant performing activities reasonably incidental to her employment?
Did the injury result from a risk connected with the claimant's employment?

1. A bus driver **was** within the course and scope when she fell while getting out of the bus when it stopped across the street from her employment. Tri-Met, Inc. v. Lamb, 193 Or App 564, 92 P3d 742 (2004).

2. Claimant **was not** within the course and scope when he injured his eye while using a company grinder to grind his own butcher knife on his day off, despite the fact that he had permission from the employer to do that. Ken Griffin, 57 Van Natta 1365 (2005).
NOTE – this is a good case to start on for a Course and Scope analysis.

3. An on-call EMT **was** in the course and scope when she stopped an accident on her way between work and home (was not dispatched to). Pearlene Gavlik, 54 Van Natta 789, 793 (2002).

4. An ambulance driver was **not** in the course and scope when she fell at home while preparing to drive her car to the hospital and respond to a call to transport patient. Claudia M. Tacy, 57 Van Natta 668 (2005).

Personal-comfort doctrine

Halfman v. SAIF, 49 Or App 23, 29, 618 P2d 1294 (1980):

"[T]he compensability of on-premises injuries sustained while engaged in activities for the personal comfort of the employee can best be determined by a test which asks: Was the conduct expressly or impliedly allowed by the employer?"

Examples:

Wallace v. Green Thumb, Inc., 296 Or 79, 82, 672 P2d 344 (1983): Worker killed when getting his lunch off the top of a hot glue press machine.

Jill K. Thornton, 56 Van Natta 3781 (2004): worker tripped on the sidewalk after having gone outside to escape paint fumes. "claimant's brief departure from employment did not remove her from the course and scope of her employment."

Going and Coming Rule

The general rule is that an injury sustained by an employee on the way to or returning from the place of employment is not compensable in the absence of special circumstances. Brown v. SAIF, 43 Or App 447, 452, 602 P2d 1151 (1979)

There are many caveats and exceptions: the greater-hazard exception, the special-errand exception, and the parking-lot exception are most common.

On the job falls and unexplained falls

Risks "distinctly associated with the employment" are universally compensable; risks "personal to the claimant" are universally noncompensable; and neutral risks are compensable if the conditions of employment put claimant in a position to be injured.
Phil A. Livesley Co. v. Russ, 296 Or 25, 30, 672 P2d 337 (1983).

There are many caveats and exceptions.

Intentional Injuries

ORS 656.156(1) prohibits the payment of workers' compensation benefits for intentional injuries: "If injury or death results to a worker from the deliberate intention of the worker to produce such injury or death, neither the worker nor the widow, widower, child or dependent of the worker shall receive any payment whatsoever under [ORS chapter 156]."

Another statute sets forth a "rebuttable presumption" that an injury "was not occasioned by the willful intention of the injured worker to commit self-injury or suicide." ORS 656.310(1)(b).

Prohibited conduct

The Workers' Compensation Act is a no-fault system. However, "[a]n employee who is injured while engaged in a prohibited activity that is outside the boundaries defining his or her ultimate work cannot prevail on a claim that the injury is work connected." Andrews v. Tektronix, Inc., 323 Or 154, 163–164, 915 P2d 972 (1996).

Horseplay

"Injuries caused by horseplay may or may not be compensable. . . . Under Oregon case law, an active participant or instigator in horseplay who is injured may not receive compensation unless the employer knew or should have known of and acquiesced in the behavior." Kammerer v. United Parcel Service, 136 Or App 200, 204, 901 P2d 860 (1995), citing Stark v. State Industrial Acc. Com., 103 Or 80, 98, 204 P 151 (1922)

So the injury is compensable, what now? What does the worker actually get?

Benefits of an accepted claim:

1. Lifetime medical benefits for accepted conditions.
2. Temporary disability payments when the attending physician takes a claimant off work.
3. Vocational retraining.
4. Permanent disability award.
5. Aggravation rights.

The "life" of a claim:

1. Injury.
2. Claim.
3. Insurer accepts, or denies claim.
4. If accepted, the claim is processed based on the scope of the conditions indicated in the notice of acceptance.
5. Claimant receives medical treatment as directed by the attending physician.
6. Claimant is made medically stationary by the attending physician.
7. Insurer "closes" the claim. As part of this process, the percentage and monetary value of any permanent disability is established and paid.
8. Claimant has the right to claim an aggravation of the injury within five years of the date the claim was closed.
9. If there five years has elapsed, the claimant may still claim an aggravation or a new/omitted condition; it just falls under a different set of rules.

Common areas of litigation

1. **Scope of acceptance and/or total claim denial**.

In worker's compensation, the burden is on the worker to prove the nature and extent of injury. (ORS 656.266). The insurer may accept a claim however may not necessarily accept the claim for all of the conditions that the worker feels are related to the injury. When a claim is been completely denied, or when the insurer has partially denied a claim by denying certain conditions, the question of whether or not the denial should stand is presented before and ALJ at the Hearings Division.

2. **Temporary disability** - When payments are owed and when they're not, the amount of payments, and the timeliness of payments.

3. **Claim closure** – Whether or not permanent disability is owed and/or the amount; The correctness of periods of temporary disability; and whether or not the claim was even ripe for closure in the first place.

4. **Processing errors** – too many to list.

Key timelines, deadlines, and practice traps.

When to file a claim – Within 90 days (or 1 year w/ Employer notice)

ORS 656.265(1)(a) Notice of an accident resulting in an injury or death shall be given immediately by the worker or a beneficiary of the worker to the employer, but not later than 90 days after the accident. The employer shall acknowledge forthwith receipt of such notice.

(2) The notice need not be in any particular form. However, it shall be in writing and shall apprise the employer when and where and how an injury has occurred to a worker.

Insurer investigation – Must accept/deny within 60 days

See ORS 656.262 – Claims processing statute. Note, the claimant has a duty to cooperate with his investigation. That includes providing a recorded statement, and attending an IME.

Appeal of Denial – 60 days

NOTE - it is possible, and sometimes advantageous, to appeal the Notice of Acceptance. It is, however, very uncommon.

Appeal of Notice of Closure – 60 days

This starts the "Reconsideration" process administered by the WCD. After WCD issues an Order on Reconsideration, that Order can be appealed to an ALJ at the Hearings Division.

Reimbursement of costs – within 2 years

OAR 436-009-0025.

Appeal of Claims Processing errors – 2 years

ORS 656.319(6) – A hearing for failure to process or an allegation that the claim was processed incorrectly shall not be granted unless the request for hearing is filed within two years after the alleged action or inaction occurred.

Disabling Classification – 1 year from DOI

"Non-disabling" means that a claim requires medical services only. It's a claim where temporary disability is not due, and/or there is no reasonable expectation disability.

"Disabling" status entitles a worker to receive temporary disability, and requires that an insurer go through the formal closure process which awards permanent disability.

Practice tip - Always read the notice of acceptance to see whether or not the claim is been classified as disabling, or non-disabling. That classification will have a big impact on the benefits received by a worker.

See ORS 656.005(7)(c) and (d), ORS 656.277.

Aggravation – 5 years from NOC

The claim for aggravation is a claim that a previously accepted and closed condition has become aggravated, which is defined as a pathological worsening. This means more than just a waxing and waning of symptoms. If an aggravation is proved, the claim is reopened which entitles the worker to again be eligible for temporary disability payments and additional permanent disability.

Evidence and discovery

General

In general, the system encourages full and regular reciprocal discovery. This is not trial by ambush. The ALJs have broad discretion to promote full and complete discovery of all relevant facts, and are further required to ensure that the record has been fully developed before taking the matter under consideration.

Statutes and Rules

See OAR 438-007-0015, -0018, OAR 438-006.

NOTE: if a RFH has **not** been filed, the WCD rules contained in OAR 436 control. If a RFH has been filed, the WCB rules contained in OAR 438 control.

Important discovery deadlines:

1. Insurer has 15 days to tender initial discovery.
2. Both parties have 7 days after receipt of a document to discover it to the other side.
3. When an expert report is submitted to the hearing exhibits by a party, the other party as 7 days to reserve the right to cross-examine – OAR 438-006-0081
4. Defense must submit hearing exhibits 28 days prior to the date of the hearing. Hearing exhibits must contain all relevant documents that are not privileged, or withheld for impeachment purposes.

   NOTE: the exhibits must include a master ledger listing each exhibit in chronological form and with particular information, and the exhibits must be numbered in a particular way.

5. Claimant may submit supplemental exhibits 14 days prior to the hearing, or within 7 days of receipt of the defense exhibits.

PRACTICE TIP: It is very common at a hearing for one side or the other to submit a last-minute exhibit. As long as the exhibit is being submitted, and "discovered" or noticed to the other side within seven days of the date the exhibit was received by the submitting party, it will likely be admitted into the record. However, it is equally likely that the other party will be able to reserve the right to cross-examine that that exhibit's author.

At hearing, it's very important to understand which parties have the burdens of proof, and therefore have the final presentation of evidence, on each issue. This will control which party has the right to get rebuttal evidence, and cross-examination evidence, of the various documents that have been submitted.

Discovery Violations

Discovery violations can be bargaining chips, but rarely have a major impact on a case. That said, they can be useful in excluding evidence if it's presented at hearing without having been discovered previously. In those cases, it can have a big impact.

How do I make money?

Be a defense attorney. Or, better, be a Claimant's attorney. For Claimant's attorneys, fees are contingency, and are either statutory, or assessed.

NOTE: a claimant's attorney must have a compliant retainer agreement.

Assessed Fee

An assessed fee is paid in addition to a worker's compensation. An assessed fee is paid by an Insurer or by a Self-Insured Employer. An assessed fee does not reduce the amount of benefits/money to the Claimant and is not based on a percentage formula. The assessed fee most often takes into account a number of factors, which are set out in the Administrative Rules as follows:

OAR 438-015-0010 (4): In any case where an Administrative Law Judge or the Board is required to determine a reasonable attorney fee, the following factors shall be considered:
(a) The time devoted to the case;
(b) The complexity of the issue(s) involved;
(c) The value of the interest involved;
(d) The skill of the attorneys;
(e) The nature of the proceedings;
(f) The benefit secured for the represented party;
(g) The risk in a particular case that an attorney's efforts may go uncompensated; and
(h) The assertion of frivolous issues or defenses.

Out-of-compensation Fee

There are several examples in the statutes of where a claimant's attorney is paid by receiving a portion of money that is directed to the claimant. That portion is usually about 10%. There too many to list for this CLE.

Settlement

CDA - claims disposition agreement. This is a settlement document that addresses claims/conditions which have been accepted.

DCS - disputed claim settlement. This is a settlement document that addresses claims/conditions which have been denied.

Stipulation - can be used for any number of disputes, but most commonly used for disputes involving time loss, or what it insurer simply agrees to accept the denied claim without litigation.

Attorney's fee on a CDA or DCS - 25% of the first $50,000, plus 10% of anything above $50,000.

Common overlap between workers compensation and other practice areas

Employment Law

- Failure to Reinstate
- Failure to Reemploy
- Workers' Comp. Discrimination
- Many other – terminations, wage and hour issues, etc.

Labor Law

- Union issues
- Effects of CBAs on the workplace and injuries

Personal Injury

Third Party Cases - great cases to have!

Election pursuant to ORS 656.578 – worker must elect whether to recover damages from the third person – have client sign when you first meet with them.

ORS 656.593(1) – gives w/c carrier a lien against third party proceeds; notice of election must be given to w/c carrier by service or registered or certified mail

Make sure client aware **scope of your representation** - PI, comp, both?

Collaboration with comp attorney - key

Remind client's w/c doctors that there's a **different burden of proof in PI cases**

Workers comp is primary, but **PIP still in the picture**

If PIP pays doctors erroneously (didn't realize w/c claim), doctors must repay PIP carrier, then w/c will pay

Settlement of 3rd party cases

- Need w/c carrier's written authority to settle
- Workers' Comp. carrier will normally agree if receives statutory share
- Settlement breakdowns by statute

  1/3, 1/3, 1/3 Rule – ORS 656.593(1)
- Review w/c 3rd party lien ledgers carefully

  Must not include payments to IME doctors, MCO costs, DCS, workers comp attorney fees

  Consider using w/c IMEs to your benefit when determining what treatment should be included in the lien

UM/UIM 3rd party cases – workers comp carrier does not get paid any "lien" in UM/UIM cases; however, the UM/UIM carrier simply gets an offset for amounts injured worker received from w/c carrier – but amount of w/c payments reduces the amount of plaintiff's total damages, not the UM/UIM limits. ORS 742.504(7)(b); Bergmann v. Hutton, 337 Or 596, 610 (2004)