

Fall 2012

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111 SW Fifth Ave.  
Suite 1200  
Portland, OR 97204  
503-225-5858

## SBH Case Becomes “Arising Out of” Precedent<sup>1</sup>

By Lance Johnson

On June 27, 2012, the Court of Appeals issued *Legacy Health Systems v. Theresa A. Noble* (2012). A line of litigation preceded the court’s decision. In *Legacy Health Systems v. Noble*, 232 Or App 93 (2009) (*Noble I*), the Court of Appeals held the injury, when claimant fell in a parking lot while walking from the workplace to a credit union to deposit a personal check on a paid break, was “in the course of” employment. The *Noble I* court remanded for the board to determine if the injury “arose out of” employment. The board concluded the injury did arise out of employment. In what will now likely be known as *Noble II*, the court reversed. The fact key to the court’s decision was the lack of an “environmental nexus” to claimant’s work. Although the employer owned the parking lot, claimant did not use it to park her car, thus employment was “causally immaterial to the injury.”

The Court of Appeals concurrently issued *City of Eugene v. Carolyn G. McDermed* (2012). In *McDermed*, the court held a police lieutenant’s injury while walking across a public street to get a cup of coffee arose out of and in the course of employment. Key to the “course of” aspect of the court’s decision was the fact that the claimant “did not cease being an on-duty police officer when she left her office and entered the street.” The court noted the claimant was “still on duty” during her trip and was expected to carry a cell phone and return to the office if needed. The court further held the injury “arose out of” employment because the job involved a community policing component that “required interacting with people on the streets to discuss public issues,” which exposed the claimant to the risk of being struck by a motor vehicle.

<sup>1</sup> The underlying case originated at Sather Byerly & Holloway; Jerald P. Keene argued the appeal and filed the briefs.

## Under Attack – Employer’s Exclusive Remedy Protection under the Longshore and Harbor Workers’ Compensation Act (LHWCA)

By Steve Verotsky

Generally, State and Federal workers’ compensation acts limit an employer’s liability for an employee’s injury to the payment of workmen’s compensation benefits. This exclusive remedy protection has been expanded by several workers’ compensation statutes to specifically preclude a third-party tortfeasor from obtaining reimbursement, contribution, or indemnification from an employer in the absence of a written agreement to that effect entered into prior to the

injury to the employee. The legal rights and duties among longshoreman, employers vessel owners and other third parties have evolved over the last several decades but this evolution has not necessarily resulted in clarity for employers of longshore and harbor workers. Third-party tortfeasors continue to look to employers for indemnity and contribution. A recent case filed in Washington Superior Court and successfully defended by Sather Byerly & Holloway attorneys Krishna Balasubramani and Stephen Verotsky illustrates this attack on an employer's exclusive remedy protection. *An Ngoc Thai v. HEKO Services*, Case No., 10-2-22213-8 KNT.

SBH represented Puget Sound Repair, a Washington company who was in the business of dismantling and reconfiguring vessels. Puget Sound Repair had a long term relationship with KRS-Marine. In 2009 KRS Marine acquired the barge *Alaska* in the name of KRS. *Alaska* had a large housing structure which was to be removed. KRS contracted with Puget Sound to remove the large housing structure. This was an oral contract. At the same time it engaged Puget Sound to perform the dismantling work, KRS owners also formed a new company – HEKO Services. HEKO employed riggers or workers who specialize in the lifting and moving of large or heavy objects with cranes.

On January 23, 2010, a few months after the barge project had begun, Puget Sound employee An Thai was assisting HEKO employees in rigging a steel beam. Mr. Thai sustained significant injuries when part of the housing structure collapsed. Mr. Thai filed workers compensation claims under both the Washington State Act and the Federal LHWCA. In addition to securing workers' compensation benefits, he also filed a negligence claim against HEKO, a third party. In turn, HEKO filed an indemnity action against Puget Sound Repair alleging that in every maritime contract there is an implied warranty of "workmanlike" performance. HEKO argued Puget Sound Repair had impliedly agreed to indemnify KRS Marine and HEKO for any damages it may have to pay to Plaintiff Thai. Puget Sound filed a motion to dismiss the claim on the grounds that Puget Sound had exclusive remedy protection not only from any civil claims filed by An Thai but also any indemnity claims filed by third parties. Puget Sound's motion was denied by Judge Hollis Hill and the parties proceeded with the discovery phase of litigation.

Puget Sound renewed its exclusive remedy argument in a motion for summary judgment. In the meantime, the case was transferred to a new judge, Judge Regina Cahan. In briefs filed with the Court, Puget Sound traced the evolution of indemnity and contribution claims under the LHWCA and argued the 1972 amendments to the LHWCA may not have explicitly eliminated indemnity or contributing claims brought by nonvessel third parties like HEKO but it did so implicitly. The 1972 amendments eliminated harsh strict liability causes of action by injured workers' against third parties and instead permitted negligence claims. It was the harshness of strict liability that had led the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 US 124 (1956) to recognize implied warranty claims as a mitigating factor. Without strict liability there was no longer a need to for implied warranty claims.

After the 1972 amendments, most courts have been reluctant to permit indemnity under an implied covenant or warranty of workmanlike performance running from the employer to the nonvessel third party, either because of a view that no such warranty exists following the elimination of the vessel's liability under the seaworthiness doctrine, or because of a finding that under the particular circumstances of the case, the relationship between the nonvessel and the employer was not sufficiently close for a warranty or covenant to be inferred.

Judge Cahan was persuaded by the arguments advanced by Puget Sound Repair and granted the employer's motion for summary judgment. An Thai continues to receive workers' compensation benefits and his civil negligence claim against HEKO continues. However, as a result of Judge Cahan's ruling, HEKO cannot look to Puget Sound to indemnify or cover any

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damages that may be awarded in the civil claim. HEKO can elect to appeal Judge Cahan's ruling which would require the Washington Court of Appeals to also address the bonds of an employer's exclusive remedy protection.

Employers of longshore and harbor workers are encouraged to carefully review their contracts with legal counsel to determine whether the contract provides enough protection against these potentially costly indemnity claims.

## WASHINGTON WORKERS' COMPENSATION

By Lee Ann Lowe

### What You Should Know About Handling Washington Claims ...

- **New 2012 Benefits Schedule**

On June 2012, the Department announced the 2012 benefits schedule. The cost of living adjustment (COLA) rate increase is 1.03596, based on a statewide average weekly wage of \$49,894 for 2011. The new COLA rate will be effective July 1, 2012 through June 30, 2013. RCW 51.32.072 continues to apply, meaning for injuries on or after July 1, 2012, COLA does not apply until the **second** July after the date of injury.

Other notable changes in benefits effective July 1, 2012 include:

- For **dates of injury on or after July 1, 2012:**
  - The maximum monthly time loss rate is \$4,989.40
  - 15 percent of the state's average monthly wage is \$623.68
- For loss of earning power benefits, 1.5 times the average monthly wage is \$6,236.75 (\$207.89 daily).

For more information, see:

<http://www.lni.wa.gov/ClaimsIns/Insurance/SelfInsure/Claims/Calculations/Default.asp>

- **New Process for Pension Reviews**

As of April 23, 2012, there are new procedures for review by the pension adjudicators. All new pension requests will require a completed Pension Review Coversheet and must include all necessary documentation. In addition, a Self-Insurance Vocational Report Form (SIVRF) will no longer be considered a request for pension review.

For more information on the new pension review processes, see:

<http://sbhlegal.com/wp-content/uploads/2012/04/New-Process-for-Self-Insured-Pension-Reviews.pdf>.

The Pension Review Coversheet can be found at:

<http://www.lni.wa.gov/ClaimsIns/Files/SelfIns/ClaimMgt/PensionReviewCoversheet.pdf>.



Noree Guerin with The Confederated Tribes of Warm Springs presented Ron Holloway with a vest she made. The design on the vest represents "Healing Hands." Noree has worked for Warm Springs for 35 years and wanted to honor Ron with this vest in appreciation for his legal services over the years.



*Brian Perko, Bruce Byerly and Karen Thompson*

# The Crystal Dolphin 2012



*Amber Trump, Jane Reeve & Valerie Cheeley*



*Nancy Fidel, Paul Bisby, Lauren Oda & Joe Fincham*



*Lee Ann Lowe & Donee Allen*

# SBH in the Community

## 2012 Race for Justice

This year, the Race for Justice raised a record \$153,641 for the St. Andrews Legal Clinic. Each year, SALC helps more than 2,000 families in crisis. The money raised at this year's Race for Justice means that 276 families will get the support they need. It also means:

- 193 single moms can get the support they need to provide a stable home for their children.
- 83 fathers can negotiate for their fair share of parenting time.
- 290 kids get a chance to live in a home where they can thrive.
- 93 survivors of domestic violence can get protection from their abusers.

In attendance from SBH were Norm Cole, The Wines family, Hollie and Brian Felisiano, and Donee and Larkin Allen.

## Youth Junk to Fashion Funk



SBH was a proud sponsor of Youth Junk to Fashion Funk (YJ2FF), a charity event and fashion show to raise funds for homeless and at risk teenagers. Started as a community service project by Daniell Tea Pelley (17-year-old daughter of Robert Pelley at Gallagher Bassett) and two of her senior classmates, YJ2FF donated over \$12,000 in financial contributions and clothing last year to HOME Youth & Resource Center in Salem. YJ2FF is working to make this an annual event through their school which will carry on after they graduate.

Morgan Holloway and Nicole Williams



## Buddy Walk

September 23, 2012 marked the 10<sup>th</sup> anniversary of the Buddy Walk for the Down Syndrome Network Oregon at Millenium Park in Lake Oswego. In attendance to show support for Nicole Williams, daughter of Nancy Williams at Chartis Insurance, were The Holloway family (Ron, Dinda, Sam, Robin, Morgan and Sasha), the Allen family (Donee, Wes and Larkin) and Lee Ann and Brody Lowe.

*I love all of you at SBH. Thank you so much. The kids are so extraordinary I get overwhelmed when I think about what they are doing and accomplished in the past. You should see how they really interact with the kids they are attempting to help when they visit or make deliveries. It's sincere, genuine and they have no fear, no social barriers.*

*SBH is investing not only in the kids who are at risk/homeless, but you are reinforcing what is right in the world to my daughter and her teammates. These will be the future professionals of the world and your firm's example will set the precedence of expectations for themselves.*

*- Rob Pelley, Gallagher Bassett--  
Reference to Youth Junk to Fashion Funk*



At the 9<sup>th</sup> annual SBH bowling party, “Team Gilligan” won the award for best team spirit. Pictured from left are Dena, Norm, Nancy, Ben and Jamie.



The annual “SBH Family Day” was held at Jeld-Wen Field to watch the Portland Timbers play the Seattle Sounders. Pictured above are the youngest members of the SBH family.



Deborah Sather, Lauren Oda, Lee Ann Lowe and Jeana Wines attended WSIA. The conference theme was “Reeling in the Years” and each booth represented a song from 40 years ago. SBH’s booth was Black and White by Three Dog Night. Deborah and Lauren posed with Elvis in the “Burning Love” booth.



### New Attorney – Sarah Ewing

Sarah attended the University of California at Santa Barbara for her undergraduate degree in Geography. She received her law degree from Lewis and Clark Law School in May of 2009. Since that time, she has served as a Deputy District Attorney in Umatilla County, a volunteer attorney for Legal Aid Services of Oregon, and a Contract Attorney with several local employment law firms.

Sarah enjoys running, volunteer work with “Girls on the Run,” and part-time work as a fitness instructor.

## SBH HAPPENINGS

### For More Information

#### Contributors to this Edition:

**Lance Johnson, Associate**  
OR & WA Workers'  
Compensation

503-595-2137

[ljohnson@sbhlegal.com](mailto:ljohnson@sbhlegal.com)

**Steve Verotsky, Associate**  
OR Workers' Compensation &  
Longshore

503-595-2136

[sverotsky@sbhlegal.com](mailto:sverotsky@sbhlegal.com)

**Lee Ann Lowe, Associate**  
OR & WA Workers'  
Compensation

503-595-2138

[llowe@sbhlegal.com](mailto:llowe@sbhlegal.com)

#### General Newsletter Comments

Natasha Denyer  
503-412-3113

[ndenyer@sbhlegal.com](mailto:ndenyer@sbhlegal.com)

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



*Clockwise from top left: Dena Closson, Beth Brune, Cynthia Landreth, Kristen Johnson and Tara Watson.*

### SBH Arrivals and Departures

Legal assistant **Molly Vida** has moved to southern California. We wish Molly and her family the best of luck and plenty of sunshine! SBH is pleased to welcome **Cynthia Landreth** as the new legal assistant for Ron Holloway and Lance Johnson. Cynthia was a judicial assistant at the Portland Workers' Compensation Board for the past six years.

After nine years in the SBH billing department, **Laine Reams** has retired. We wish Laine a very happy and relaxing retirement after many years of outstanding work. She will be missed! **Kristen Johnson** is our newest addition to the billing department. Kristen has 15 years of accounting experience and has been an excellent addition to SBH. Kristen's family includes husband Zach, son Isaac and daughter Teagan.

**Beth Brune** is our new part-time paralegal who will assist primarily on Precision Castparts files. Beth was a senior paralegal at Liberty Mutual/Northwest for many years and most recently worked with attorney Judy Johnson on the Precision Castparts account.

### *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.