

Newsletter - Winter 2008

Third-Party Claims: Not To Be Overlooked

When an Oregon worker gets injured everyone thinks "workers' comp claim." And it is true that a "comp claim" is the first source of money to pay wage loss and medical bills when a worker is injured on the job. But that was not always the case. Even today a comp claim may not provide the only remedy.

Before 1911, employees in Oregon could bring claims against their employers for injuries for common law negligence. But if the worker's own negligence contributed to the injury, even just in part, contributory fault barred recovery, and the worker was left in the cold.

In the face of the hardships this caused, the citizens of Oregon enacted the Employer Liability Act ("ELA") by ballot initiative in 1910. Codified in 1911, the ELA increased the standard of care required of employers engaged in inherently dangerous lines of work, and eliminated the contributory negligence bar to recovery. Even today, under the ELA, an employer engaged in dangerous work has the duty to use every precaution and safety device available, without regard to cost.

The ELA greatly increased the legal remedies that workers had against their employers. This, in turn, spurred employers to push for Oregon's Workers' Compensation Law ("WCL"), enacted in 1913. Under the new WCL, employees' right to sue their employer was sharply curtailed. In a trade-off, they no longer had to show fault on the part of their employers to obtain compensation for their on-the-job injuries; however, recoverable damages, or benefits as they were called, were substantially limited in even the most egregious cases of employer negligence.

Today, participation in WCL is mandatory for most employers. Consequently, most injured Oregon workers, who numbered more than 23,400 in 2006, are limited to the benefits available under WCL. The WCL, however, does not prevent injured workers from bringing civil claims against persons other than their employers or co-workers for on-the-job injuries. These are third-party claims, and where available, they allow an injured worker to recover a full measure of damages. Third-party claims also benefit the employer by shifting the burden of compensation for on-the-job injuries from the employer and its workers' compensation insurer to the wrongdoer through subrogation.

Third-party claims arise in almost all work environments, including construction, manufacturing, and transportation, to name just a few. For example, in *Smith v. Meissner & Wurst, et al.*, we represented an ironworker who was permanently disabled when the platform he was erecting collapsed under him. He landed in the mud, gravel, and twisted steel, and was rendered quadriplegic. Through his workers' compensation claim, this young man was entitled to medical and wage loss benefits for life. His workers' compensation award for permanent total disability, however, fell far short of his total damages. Following a thorough investigation of the accident, we brought a third-party claim on his behalf against the general

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contractor and others responsible for faulty design specifications and an overly aggressive building schedule. His third-party claim was settled after discovery but before trial resulting in a substantial increase in his total compensation.

Another case, *Lightner v. Brunner Engineering & Manufacturing, et. al.*, arose in a motor-home factory. There, two factory workers were severely burned when a defectively designed gauge dial on a propane tank caused a leak of propane with a resulting explosion. We brought a third-party claim for Mr. Lightner against the manufacturers of the tank and of the gauge. The case settled after two days of mediation before a Federal District Court judge, again greatly benefiting the injured workers and their employer.

Third-party claims can also arise out of outdoor maintenance work. In *Hernandez v. Altec Industries*, we represented a worker who was cutting tree limbs when the controls on an aerial lift he was using malfunctioned and lifted him into electric power lines. Mr. Hernandez was severely burned. The third-party claim we filed against the manufacturer of the lift was settled after discovery and shortly prior to trial, providing for him compensation in addition to what he received from his workers' compensation claim.

More third-party claims probably arise out of motor vehicle collisions than any other single workplace activity. In *Ervin v. J.A. Nelms Trucking, Inc.*, we prosecuted a claim for the family of an Emergency Medical Technician who was killed when a tractor trailer rig slid on an icy highway into his parked ambulance and crushed him. Although the truck driver was not charged with driving under the influence, post collision chemical testing revealed residual methamphetamine metabolites in his urine. Our experts established that even at the short distance of visibility reported by the police, the truck driver should have been able to stop or otherwise avoid the parked ambulance but for the truck driver's impairment from drugs and fatigue. Again, the third-party claim further benefited the family of the decedent as well as his employer.

The enactment of Oregon's Workers' Compensation Law ("WCL") and its bar on most claims against the injured worker's employer has significantly limited the applicability of the Employer Liability Act ("ELA"). However, where applicable, its heightened standard of care is still important. Under the ELA, an injured employee has a claim in negligence against an "indirect employer," such as an owner, general contractor or subcontractor, if such other party is in charge of the work and it involves "risk or danger."

In *Thoreson v. Chambers Construction Co.*, we prosecuted a wrongful death claim for the family of an apprentice, sheet-metal worker who was killed during the construction of a large commercial building. He fell through a hole cut in the building's concrete slab roof, 35 feet above ground, because the employee of another subcontractor had placed a sheet of plywood over the hole without any warning or indication that the plywood was covering a large opening in the roof. The young man attempted to pick up the sheet of plywood and was caused to fall through the unmarked hole.

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Under the WCL, the worker's surviving widow was entitled to death benefits until, if and when, she remarried. The third-party claim we brought on behalf of her husband's estate, alleging the breach of the enhanced duty owed under the ELA, significantly enhanced the total compensation for her loss, and effectively nullified the WCL remarriage clause.

Despite its flaws and shortcomings, Oregon's Workers' Compensation Law remains the first line of recourse for most injured workers. Where available, however, third-party claims can substantially increase an injured worker's compensation and help ease the financial hardship faced by injured workers and their families.

Every workplace accident resulting in death or serious injury should be investigated to determine whether a third-party claim exists in addition to the workers' compensation coverage.

Case Notes

Third-Party / Employer Liability Act

Unstable Load

Baldwin v. Bilet Products Co.-- Jerry Baldwin was an employed truck driver hauling lumber and lumber products up and down the I-5 corridor. On January 13, 2006, after delivering a load of lumber at the defendant's yard, Mr. Baldwin's trailers were loaded with wood pallets. As he was tying down the load, one of defendant's forklift operators attempted to straighten the load from the other side of the trailer. Two pallets were pushed off one of the stacks of pallets, striking Mr. Baldwin and inflicting, among others, a serious closed-head injury. Following depositions, the case settled before trial.

Driver Crushed

Green v. Interfor Pacific, Inc.-- On September 23, 2004, George Green was delivering for his employer a load of logs to the defendant's log-yard. Arriving at the yard, he placed the truck and trailer where the defendant directed. He then began to remove the wrappers from the load, so that the logs could be unloaded. As he did so, the log-loader operator backed into him, crushing him against the unloaded logs still on the truck and trailer, and killing him. We prosecuted a third-party claim for his wrongful death against the log-yard owner, alleging common law negligence, negligence per se, and violations of the Oregon Employer Liability Law. The case settled after mediation with a Federal District Court judge.

Head-On Truck Crash

Patrick Barker v. Estate of Laverne Ellen Wheeler, deceased; Tammie Barker v. Estate of Laverne Ellen Wheeler, deceased - Patrick Barker has been a lineman for Midstate Electric for 12 years. On October 30, 2006, Patrick, with two other Midstate Electric employees, was traveling in a Midstate Electric crew truck west on Hwy. 58. A pickup truck driven by Laverne Wheeler proceeding east on Hwy. 58, crossed the centerline and struck the crew truck head on. Patrick Barker suffered permanent disabling injuries, and his

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two co-workers suffered fatal injuries. In representing Patrick Barker, we cooperated with Bruce Brothers, who represented the estate of one of the decedents, and Carl Burnham and Jennifer Wells, who represented the estate of the other decedent. In a mediation conducted by Eric Lindauer the three claims settled for the available policy limits, conditioned upon resolution of the SAIF liens and consent of the insurer providing under insurance coverage for Midstate Electric. The SAIF liens have been resolved, the consent has been obtained, and the u-claims remain pending.

Unsafe Work Site

Bascom v. Hyundai Semiconductor America, Inc., et al. -- Warren Bascom was an employee of a company that provided hazardous trash and waste removal for various other businesses. One evening as he was picking up hazardous waste materials, he stepped in a hole in the tile floor made and covered over during remodeling and new equipment installation, causing him to suffer traumatic injury to his knee requiring surgery. We filed a third-party claim on Mr. Bascom's behalf against Hyundai and the contractors involved in the remodel work, alleging claims in negligence and under the Employer Liability Law. Allegations of fault included the failure to use every reasonable safety device to protect life and limb, including failure to cover the hole or place warning cones around it, and failure to warn employees of the uncovered hole. The case settled before trial.

Helicopter Crash

Mackey v. Weyerhaeuser Co., et al.-- Craig Mackey was a fire-suppression specialist with the Oregon Department of Forestry. He was in a Weyerhaeuser Company helicopter on October 14, 2003, searching for water holes suitable for the next fire-season's work. The Weyerhaeuser pilot flew into power lines suspended across the Siuslaw River near Swisshome. The helicopter plummeted out of control, crashing onto the bedrock along the river, crushing the passenger compartment and killing the pilot and Mr. Mackey. Our experts completed a detailed crash analysis and found that the sole cause of the fatal accident was Weyerhaeuser's negligent operation of the helicopter. We brought a third-party claim against Weyerhaeuser, and the case settled before trial.

Logging Loader

Jenks v. Short Bros., Inc.-- David Jenks was a truck driver who reported to defendant's logging site to pick up a load of logs. After defendants finished loading the logs, they signaled to Mr. Jenks to place his wrappers on the load. While Mr. Jenks was placing the wrappers, a log rolled off the load, striking and killing Mr. Jenks. The yarding and loading of logs inherently involves the use of heavy power equipment. We brought the third-party wrongful death claim under the Oregon Employer Liability Law for defendants' failure to use all practicable safety precautions, including failure to build the load so that each log was saddled and stable without wrappers, and failure to organize and maintain the landing so Mr. Jenks had a safe area to work alongside the truck and trailer while placing wrappers.

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STAFF NOTES

In January of 2008, Johnson, Johnson, Larson & Schaller, P.C. celebrates its 25th Anniversary of representing Oregonians harmed by dangerous conduct and defective products. It has been a pleasure to serve our clients and work with outstanding colleagues throughout this recent quarter of a century.

Johnson, Johnson, Larson & Schaller, P.C. is proud to thank its shareholder Douglas G. Schaller for his 20 years at the firm. Schaller has practiced with the firm since 1987, and has been a shareholder in the firm since 1993. His practice focuses on product liability, wrongful death, medical malpractice, truck and motor vehicle collisions, and appellate law. He is a member of the American Association for Justice, Oregon Trial Lawyers Association, and the Lane County Bar Association. He is admitted to practice in all Oregon state and federal courts and the Ninth Circuit Court of Appeals.

On Friday, November 9, 2007, Art Johnson and Derek Johnson delivered a two-hour presentation to University of Oregon Law School students enrolled in torts classes taught by Professor Dominick Vetri, himself a specialist in the field of torts. The presentation included stories and real-world lessons concerning discovery, evidence, ongoing investigation and strategy-building from cases successfully handled by the firm. The presentation was one of many events involving participation with University law students. The firm aims to build bridges to future trial lawyers, share with them insights into the practice of law and put their legal education into context. Senior Associates Scott Lucas and Michele Smith are also University of Oregon Law School graduates, giving the firm access to some of the best of future colleagues.

Congratulations to Scott Lucas for his outstanding article on "Managing Expectations: Your Client's Happiness," in the Fall 2007 edition of "TRIAL Lawyer," the Oregon Trial Lawyers Association's magazine. Realism and communication are part of the service we all should provide to our clients.

The firm continues to encourage and appreciate the excellent efforts by Michele Smith in leading SAIL (Supporting Access to Independent Living) Housing for developmentally disabled adults as this year's President. Smith's legal skills and professional writing and research helped the group receive 501(c)(3) status without lengthy or burdensome processing. The group is now actively seeking assistance in funding and development of property, construction and social service partnerships; if you can help, contact Michele at: 541-484-2434.