



Another Approach

WHEN THE WORKERS' COMPENSATION CASE IS MORE THAN IT APPEARS



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Not all on-the-job-injuries are created equal. Some result in straightforward workers' compensation claims. Some result from the injured employee's own negligence or no negligence. Others may result from the negligence of others. In the latter situation, claims under Oregon's Employers Liability Law (ELL) can result. However, there may be the rare situation in which a lawsuit must be filed against the injured employee's own employer. Two examples are presented below:

The *Smothers* effect

An employee sustains injury after falling, the result of unmarked oil being left

on the floor by a co-employee. A workers' compensation claim is filed and accepted for a low back strain. After three months, the insurer denies the current condition and ongoing need for medical treatment because the work injury is no longer the "major contributing cause" of the employee's continued need for treatment—in this case, the need for spinal surgery to repair a destabilized spondylolisthesis. The attorney for the employee appeals the denial and the administrative law judge upholds the denial. There are good facts supporting liability and sufficient damages, but you expect a comparative negligence claim. What is the next step?

When an injured employee's workers' compensation claim is denied based on "major contributing cause," *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001) and ORS 656.019 are the main legal authorities supporting the employee's

right to sue his or her own employer based on negligence. The claim should not be made for injuries accepted during the workers' compensation claim, but only for those injuries subsequently denied under the "major contributing cause" standard, defined as being "51 percent or more" the result of the work exposure.

In *Smothers*, the plaintiff had filed an "occupational disease" claim for lung disorder after exposure to fumes and mist containing acids that drifted into the area where he worked as a lube technician. His workers' compensation claim was denied because he could not prove that the exposure was the "major contributing cause" of his lung condition. The 1995 changes to the Oregon Workers' Compensation law had deemed workers' compensation to be the "exclusive remedy" for work-related injuries even if a claim was not compensable under the workers' compensation scheme. This left *Smothers* without any apparent remedy.

Smothers then filed a civil lawsuit and alleged that his employer was negligent in subjecting him to the acids that caused him permanent injury to his lungs. The trial court dismissed the lawsuit and the Oregon Court of Appeals affirmed, finding that the "exclusive remedy" of ORS 656.018 applied regardless of the result under the "major contributing cause"

See Another Approach p. 16

standard. The Oregon Supreme Court reversed, holding that if the workers' compensation claim is denied based on a failure to prove "major contributing cause," then ORS 656.018 violates the remedies clause of Article I, Section 10 of the Oregon Constitution. This was because the "major contributing cause" standard is higher than that required for common law negligence claims (i.e., material or substantial cause) and there would be a resulting class of injured employees left without a remedy when their injury did not meet the higher causation standard.

Smothers does not change the "major contributing cause" requirement in certain workers' compensation cases, be it for industrial injury or occupational disease. What *Smothers* does allow is for your client whose claim is denied on the "major contributing cause" standard to now sue his employer in cases where the employer's (or co-employee's) negligence was a material contributing factor to injury. The employer can be held liable for the denied injuries in the same way as in traditional personal injury lawsuits.

Not long after *Smothers*, our firm tried the case on behalf of the client who fell because of the unmarked oil left on the floor in her workplace. Her injuries included destabilized spondylolisthesis that required surgery. The employer was self-insured as to civil liability and workers' compensation losses and chose to fight

both claims to the end. In the civil trial, we were able to obtain a significant amount of damages that far exceeded

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what the employer would have paid had it accepted the full extent of the amount sought in the workers' compensation claim.

Before trial, we had to deal with various affirmative defenses and summary judgment motions. The defense filed motions based on the "exclusive remedy" provision of ORS 656.018, yet the impact of *Smothers* and "material contributing cause" made defeating these relatively easy. More notably, the defense filed defenses and motions based on "contributory negligence" and "assumption of the risk," both of which had been repealed in the 1970s and replaced with our present comparative fault system. Essentially, the defense argued that if the plaintiff was entitled to the common law remedy available before we had workers' compensation, the defendant was therefore entitled to those defenses available at that time. However, we demonstrated that there is no constitutional right to an affirmative defense and a comparative

fault system was appropriate to address common law claims.

We also had to defeat motions based on the outdated "fellow servant" defense. This defense was grounded in the expectation that an employee would voluntarily assume the natural and ordinary risks of employment. We argued that this defense essentially tied into assumption of the risk. That said, we knew that the "fellow servant" defense was preserved to some extent in ORS 654.330, part of the Oregon Employers Liability Law. However, this statute is principally one of exclusion so long as one of the five subsections is satisfied. As an aside, whether this statute truly applies outside of the ELL context should be argued.

However, care should be taken to make sure that your facts will not run afoul of this defense. It will also help to focus some of your deposition questions in light of the statute, to make sure that the facts fit within one or more of the subsections.

Keep in mind the statute of limitations applicable to these claims. Oregon has a special statute to deal with *Smothers* claims. ORS 656.019 allows *Smothers* claims to be filed within the later of two years of the date of the accident or within 180 days from the date the order affirming that the workers' compensation claim is not compensable (because of the "major contributing cause" standard) becomes final. This seemingly allows a direct lawsuit to be filed after a workers' compensation claim is lost at the hearings level (as was in our case) without having to worry about exhausting all available appellate remedies within the workers' compensation system.

The personal injury case

A car salesman employee wants to ride another employee's motorcycle within the confines of the car lot during a "down time" where no customers are present. Permission is granted and as the employee nears the end of his brief ride, another employee backs a car out from a

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parking space and directly into the motorcycle's path. A collision ensues and the employee sustains a serious ankle fracture. The accident occurred during work hours and there was no specific work prohibition as to riding motorcycles, but there was no work purpose in riding the motorcycle. What are the next steps?

This was a case we had several years ago. We filed a workers' compensation claim with the intent of showing that our client was injured while working within the course and scope of employment. After we prevailed at the hearings division level, the Workers' Compensation Board reversed. That reversal was upheld by both the Oregon Court of Appeals and Oregon Supreme Court. See *Roberts v. SAIF*, 341 Or 48 (2006).

While the workers' compensation claim remained unresolved, we filed a lawsuit against our client's employer as a protective measure. The claim was filed before the two-year statute of limitations expired and the circuit court agreed to

abate the claim until a full and final resolution of the workers' compensation matter. After receiving the decision from the Oregon Supreme Court, we moved forward with the personal injury claim. The case proceeded as any typical auto personal injury claim and we were eventually able to obtain a significant settlement.

The key with the above case was to recognize the potential negligence and possibility of making a personal injury claim against the employer. This is, of course, easier if the client retains you long before the statute expires. If you intend to file the workers' compensation claim, assess whether there may be a "course and scope of employment" defense. If so, file the personal injury claim just to cover all the bases. At worst, the workers' compensation claim is accepted and the personal injury claim is dismissed because of the exclusivity of the workers' compensation system. If the compensation claim is denied, you will have already

protected your client via the personal injury claim. The reason the claim can proceed in this scenario is because the injury was found not "arising out of and in the course of employment" and so the "exclusive remedy" provision of ORS 656.018(7) did not apply.

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