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The Game of Compensability: Comparing and Contrasting Compensability Issues in Oregon & Washington

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Reinisch Wilson Weier PC at-a-glance

The Facts

Founded in 1983

Office Locations

- » Portland
- » Seattle

Practice Areas

- » Oregon Workers' Compensation Defense
- » Washington Workers' Compensation Defense
- » Washington Industrial Safety and Health Act Defense
- » Longshore and Harbor Workers' Compensation Defense

Practice Groups: Attorneys and Legal Staff

- » Oregon: 45
- » Washington: 30

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Reinisch Wilson Weier PC provides decades of experience as the Pacific Northwest's largest dedicated workers' compensation defense and employment counsel to leading self-insured businesses, insurers and claims services companies in Oregon and Washington:

Leadership: since our inception in 1983, our attorneys have resolved nearly 30,000 of some of the most complex workers' compensation claims cases.

Strategy: focusing on our clients' interests, we promote and aggressively defend their goals whether in negotiation or in adversarial litigation.

Execution: we develop and execute creative administrative action plans, engage in cost-effective negotiations and present well-organized arguments to achieve the best possible outcomes.

Education: we continually share our time and experience as leaders and speakers in over 30 educational seminars and individualized training to clients, associations and the industry annually.

As statutes and administrative rules have evolved, so have our attorney's success before administrative law and appellate judges. Many of our cases have been at the forefront of case law that have resulted in changes made by the legislatures and by the Oregon Workers' Compensation and Washington State Labor and Industry divisions.

We provide more than advice and representation. We provide confidence. ■



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The Game of Compensability: The Kingdoms of Oregon and Washington



BEWARE: HERE THERE BE SPOILERS

The characters and the incidents described here are purely fictional accounts in the fictional lands of Oregon and Washington. Any resemblance to real or fictional characters, claimants or adjusters is unintentional.



No. 1: Mother of all (dragon) issues: differences in causation



Tyrion Lannister sustained injuries at the Battle of Blackwater while under the employ of the King of Westeros, Joffrey Baratheon. His face was scarred and (in the books) he lost a portion of his nose. Suppose later, while working as the Hand of the Queen for Daenerys Targaryen, he develops an infection in the nasal cavities from a single, identifiable contact with Daenerys' dragons.

Question:

What is the threshold standard to determining whether an industrial injury is compensably related to employment activities?

Discussion: Oregon

In Oregon injury cases, the worker must prove the injury was a “material cause,” meaning a substantial or important cause, but not necessarily the only cause for the worker’s disability and need for treatment. In occupational disease claims, the worker must prove the work exposure is the “major contributing cause,” or 51 percent or more of the cause, of the worker’s condition.

The major causation standard is also applied to consequential and combined condition claims. However, in the context of combined conditions, the burden shifts to the employer, who must show the accepted condition is not the major contributing cause of the worker’s disability and need for treatment.

Discussion: Washington

The standard here is different than in Oregon. It is first important to note the analytical focus to determine compensability is directed to whether a qualifying event occurred. In Washington, a specific workplace incident need be only “a” cause rather than “the” cause or the “major” cause of a condition. The fact that preexisting infirmities contributed to a medical condition does not defeat a claim for benefits. If the workplace incident is one among several causes of the condition, it is sufficient to determine causation for the purposes of assessing compensability.

No. 2: The Hound vs. The Mountain: Active participant in combat



Sandor (the Hound), while employed as Joffrey Baratheon's guard, attends a jousting tournament, whose opponent is Sir Loras. Sandor intervenes to save Sir Loras from a dishonorable killing. The Hound and his brother, Gregor (the Mountain), viciously fight one another at the tournament until King Robert orders them to stop. Sandor and Gregor have a troubling sibling relationship to say the least. When Sandor was a young child he played with one of Gregor's toys without his elder brother's permission and in response, Gregor held Sandor's face over an open fire until it melted, resulting in permanent scarring.

Question:

Imagine the Hound is injured while fighting his brother and files a workers' compensation claim against King Robert Baratheon. Did his injury arise out of and in the course of his employment? Was this a personal feud between brothers or was the Hound acting in his capacity for his employer as a skilled warrior/participant in the tournament?

Discussion: Oregon

ORS 656.005(7)(b)(A): Injuries sustained by a worker as an active participant in combat or an assault are not compensable except where such activities are sufficiently connected to the job assignment.

Jordan v. Western Electric, 1 Or App 441 (1970)

Applying the *Jordan* Factors:

- Whether the activity was for the benefit of the employer
- Whether the activity was contemplated by the employer and employee either at the time of hiring or later,
- Whether the activity was an ordinary risk of, and incidental to, the employment, was paid for the activity
- Whether the activity was on the employer's premises,
- Whether the activity was directed by or acquiesced in by the employer,
- Whether the employee was on a personal mission of his own.

Discussion: Washington

Under RCW 51.08.013, a worker is outside the course and scope of employment when engaging in social activities, recreational or athletic activities, events, or competitions, and parties or picnics, whether or not the employer pays some or all of the costs thereof, unless:

- The participation is during the employee's working hours, not including paid leave;
- The employee was paid monetary compensation by the employer to participate; or
- The employee was ordered or directed by the employer to participate or reasonably believed the employee was ordered or directed to participate.

In determining whether an injured worker is covered under the industrial insurance laws, it is important to look at the reason for an altercation between workers, an assault by one worker on another, or an assault on a worker by a non-worker. If the dispute which led to the fight arose out of an employment situation, the injured worker will receive coverage. However, coverage is precluded if the dispute concerned purely personal issues.

The Hound served as a guard for the prince, and the competition in question was put on by the king. The king allowed the contest between the brothers to play out when Sandor intervened to save Sir Loras. Thus: the participation was during Sandor's working hours, as he was actively protecting Joffrey at the time of the altercation. He is presumably paid for his services as bodyguard. He intervened to protect Sir Loras from a dishonorable killing, which would have disrupted his employer's festival and competition. As the king initially allowed Sandor to engage in the fight with his brother, he may have reasonably believed he was ordered or directed to participate.

No. 3: Greyscale, a.k.a. Prince Gavín's Curse: Occupational Disease Claim or Injury



Greyscale is a dreaded and usually fatal disease that can leave flesh dead and stone-like to the touch. The number of people infected by greyscale is large enough that colonies are often established in old ruins such as at Valyria where Stone Men are dumped off to keep them quarantined from the rest of civilization. As Jorah Mormont heads to Meereen by sailing through one of these colonies, he is ambushed by the stone men. Jorah manages to fight them off, but Jorah has been infected with the disease, having been touched on the wrist by one of the stone men.

Question:

If Jorah filed a worker's compensation claim against his employer, Queen Daenerys Targaryen, regarding his contraction of Greyscale, would the illness be considered an occupational disease or injury?

Discussion: Oregon

ORS 656.802:

“(1)(a) ‘Occupational disease’ means any disease or infection arising out of and in the course of employment caused by substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein, and which requires medical Services or results in disability or death, including:

(A) Any disease or infection caused by ingestion of, absorption of, inhalation of or contact with dust, fumes, vapors, gases, radiation or other substances.

(B) Any mental disorder, whether sudden or gradual in onset, which requires medical Services or results in physical or mental disability or death.

(C) Any series of traumatic events or occurrences which requires medical Services or results in physical disability or death.

An occupational disease stems from conditions that develop gradually over time. ORS 656.802; *Mathel v. Josephine County*, 319 Or. 235, 240, (1994). In contrast, an injury is sudden, arises from an identifiable event, or has an onset traceable to a discrete period of time. *Active Transportation Co. v. Wylie*, 159 Or.App. 12, 15, (1999); *Valtinson v. SAIF*, 56 Or.App. 184, 188, (1982).

Discussion: Washington

RCW 51.08.100: "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom

RCW 51.08.140: "Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

"Naturally" means the condition is a natural consequence of the distinctive conditions of employment, rather than from working in general or everyday life. "Proximately" means the condition would not have arose, had the worker not been engaged in his distinct conditions of employment. These requirements must be supported by probable medical opinion and objective medical findings. *Dennis v. Dept. of Labor & Indus*, 109 Wn.2d 467, 477, 481, 745 P.2d 1295 (1987).

RCW 51.32.180 establishes that a worker's benefits for an occupational disease begin on the date of manifestation of the disease. WAC 296.14.350 clarifies that the date of manifestation is the date the disease first required medical treatment or became totally or partially disabling.

In Jorah's situation, this presents as an industrial injury. The contact with the Stone Man was a sudden and tangible happening, which produced an immediate result and subsequent physical condition. It does not fit as neatly as an occupational disease because the exposure to greyscale was not necessarily a natural consequence of the distinctive conditions of his employment.

As a real-world example, an infectious disease claim that resulted from a pin-stick or other exposure to the disease is considered an industrial injury under RCW 51.36.010.



No. 4: Brienne of Tarth Witnesses the Death of her Employer: PTSD Claim



Brienne joins the forces of King Renly of Baratheon as a Kings guard. One night, as Brienne is removing Renly's armor, a shadow creature emerges and stabs Renly in the back. Brienne cries out and catches Renly as he falls, getting his blood all over herself. Brienne is devastated at witnessing the death.

Question:

If Brienne files an occupational disease claim for PTSD against her employer, House Baratheon, would her claim be found compensable?

Discussion: Oregon

Under Oregon law, a “mental disorder” is considered an occupational disease and thus, in order for the disorder to be found compensable, the worker must prove that employment conditions were the major contributing cause of the disease. ORS 656.802(2)(a). In addition to the heightened causation standard attached to an occupational disease under ORS 656.802(3)(a)-(d), a mental disorder is not compensable unless the claimant establishes that the working conditions existed in a real objective sense; the employment conditions are conditions other than conditions generally inherent in every working situation; there is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community; and, there is clear and convincing evidence that the mental disorder arose out of and in the course of employment.

Discussion: Washington

RCW 51.08.142: The department shall adopt a rule pursuant to chapter 34.05 RCW that claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease in RCW 51.08.140.

WAC 296-14-300: Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease. BUT: Stress resulting from exposure to a single traumatic event will be adjudicated as an industrial injury. Examples of single traumatic events include: Actual or threatened death, actual or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury. These exposures must occur in one of the following ways:

- (i) Directly experiencing the traumatic event;
- (ii) Witnessing, in person, the event as it occurred to others; or
- (iii) Extreme exposure to aversive details of the traumatic event.

For Brienne, the situation where she found three dead women and was attacked by men was a single event involving actual or threatened death and physical assault. Under WAC 296-14-300, she could likely file an industrial injury claim for that distinct event due to her direct experience in the event.

No. 5: Jaime Lannister Loses the Upper Hand: Timely Notice to Employer/Prosthetic Device



While being escorted back to King's Landing, Jaime Lannister and Brienne of Tarth are ambushed and taken prisoner by men of House Bolton. Tiring of Jaime's frequent attempts to bribe him, the leader of the unit orders his men to chop off Jaime's hand. Jaime eventually escapes and after his return to the capitol, his sister, Queen Cersei offers Jaime a golden hand to cover his stump.

Question:

Three and a half months after his hand is chopped off and upon his return to the capitol, imagine Jaime informs the House of Lannister of his recent injury and submits a workers' compensation claim. Would Jaime's notice to his employer be timely?

Imagine Jaime's claim is processed and closed. Five years later, his golden hand is damaged during a fight. Would the repair be covered?

Discussion: Oregon

Oregon law generally requires a worker to notify their employer, either in writing or orally, of all work-related accidents resulting in death or injury within 90 days of the date of injury. ORS 656.265(1)(4); *Jose Amador*, 59 Van Natta 1538, 59 Van Natta 2115 (2207) (oral notice is sufficient notice). If the worker fails to give notice of the injury and no other exception applies, the claim is barred. Id. The 90-day notice requirement for providing notice of injury is extended to one year under the following circumstances: (1) the employer otherwise has knowledge that the worker sustained a potentially work-related injury within 90 days; (2) the worker died within 180 days of the accident; or (3) the worker can establish good cause for failing to file the claim within the 90 days. ORS 656.265(4)(a)-(c). In contrast, occupational disease claims require workers to provide notice within one year from discovering the disease or from the time in which the worker becomes disabled. ORS. 656.807.

In Oregon, the right to medical treatment of the injury continues for the life of the worker. ORS 656.245(1)(b).

Once a claimant is deemed medically stationary and a claim is closed, the statute terminates the open ended authorization for all *reasonable and necessary treatment* and restricts further treatment to a *specified list of types of medical Services*. Other than these specified Services, the statute provides that all other medical Services are “not compensable.” ORS 656.245(1)(C); OAR 436-010-0090. The statute is somewhat vague, but the most frequently contested limitation is that placed on “palliative care.” ORS 656.005(20); OAR 436-010-0090(2)(a). *Palliative Care* is defined as a medical Service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition as compared to those medical Services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition. ORS 656.005(20); OAR 436-010-0090(2)(a).

Oregon exceptions to the rule--when Palliative Care is permitted:

- Where it consists of prescription medication;
- Where it is prescribed for a worker who has been determined to be permanently and totally disabled;
- *Where it is requested in order to repair or replace a prosthetic device; or,*
- Where an attending physician prescribes it as necessary to enable a worker to continue current employment or a vocational training program (subject to insurer and or Department approval.)

Discussion: Washington

RCW 51.28.050: injury claims must be filed within one year after the day of the injury. The date used to calculate timely filing is the accident report (generally the SIF-2) first received date by the department or the self-insured employer.

Under RCW 51.26.020 in Washington, every worker whose injury results in the loss of one or more limbs or eyes shall be provided with proper artificial substitutes. It is not even necessary to reopen a closed claim to repair or replace a prosthesis originally supplied under the claim. (See WAC 296-20-124(4).) Pursuant to WAC 296-20-1102, the employer is responsible for repair and replacing originally provided damaged, broken, or worn-out prosthetics, orthotics, or special equipment devices upon documentation and substantiation from the attending doctor. Lost or stolen prosthetics do not fall under this requirement.

When receiving a request for prosthetic replacement, there are several factors to consider:

- Check the length of time since previous replacement. Very active amputees usually need replacements or major modifications every two to three years.
- The use of multiple prosthetic socks or those of extra thick ply would indicate excessive stump shrinkage. This may require relining the socket, a new socket, or replacing the prosthesis.
- Only two check sockets are allowed per prosthetic construction. A check socket is a temporary trial socket to check the fit. In some cases, x-rays may be required to determine where bone is located to avoid pressure points, which can lead to skin ulcers.



No. 6: The Night's Watch: Bunkhouse Rule



The Night's Watch is a military order which guards the Wall, an immense ice structure which separates the northern border of the Seven Kingdoms from the lands beyond. The Night's Watch is organized in three departments: the Rangers, who fight and defend the Wall; the Builders, who maintain the Wall; and the Stewards, who support and feed the members of the Watch.

Question:

Imagine one of the members of the Watch suffers frost bite one night while sleeping and files a workers' compensation claim against the Lord Commander. Is the claim compensable?

Discussion: Oregon

Under Oregon law, where workers must live in employer-provided premises as a circumstance of their employment, injuries caused by the condition of such premises are deemed compensable even if sustained while the worker is off-the-clock. *Lee Polehn Orchards. V. Hernandez*, 122 Or. App 241 (1993).

Because the living quarters at that Night's Watch were not adequately heated, the Lord Commander will be liable for the claimant's frost bite.

Discussion: Washington

First things first, under RCW 51.12.050: offenders performing community restitution pursuant to court order may be deemed employees and/or workers at the option of the state, county, city, town, or nonprofit organization under whose authorization the community restitution is performed.

Unlike Oregon law, though, Washington does not have a statutory "bunkhouse" rule. In a case such as this, one would instead look at the course and scope of employment questions noted before. The Board previously determined that resident workers who are on-call 24 hours per day are within the course of employment the entire time they are on the premises. *In re Christine Maier*, BIIA Dec., 18,224 (1963). If the Watch member could be interpreted as on-call while sleeping, the Lord Commander may be responsible for this workers' compensation claim.

Attorney Biographies





Casondra J. Albrecht

Casondra Albrecht is an attorney in the firm's workers' compensation practice. Casondra rejoined Reinisch Wilson Weier PC where she was a legal secretary before beginning law school. She is resident in the Portland office.

Born and raised in a tiny town in central Utah, Casondra aspired to be a lawyer starting in the sixth grade when she made her first business card. After relocating to Oregon, Casondra completed her bachelor degree in the evenings while working for the firm. During law school, Casondra clerked for the Marion County District Attorney and in private practice with an employment lawyer. She also served as president of the Willamette Women's Law Caucus, assisted the Legal Research and Writing class and wrote for Willamette Law Online. Casondra rejoined the firm in 2014 as a law clerk and joined the workers' compensation practice upon admission to the Oregon State Bar in 2014. She was admitted to the Washington State Bar Association in 2015.

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Practice Areas

- » Washington Workers' Compensation Defense

Admissions

- » Oregon State Bar, 2014
- » Washington State Bar Association, 2015

Client Service

A successful workers' compensation practice requires not only an understanding of the applicable law, but also the ability to help clients meet their goals. I serve my clients knowing they operate in a fast-paced field that requires focus on the details as well as the big picture. Communication is essential; I am always available to provide personalized attention and advice in a prompt manner.

In order to provide the most effective advice, I strive to continue to educate myself about changes in the legal and medical field. I understand every client has needs as unique as the claims themselves, and I develop defense strategies with those needs in mind.

Education

- » Juris Doctor, Willamette University College of Law, 2014
- » Bachelor of Science, Criminal Justice, ITT Technical Institute, 2010

Recent publications

- » "You're not the boss of me: when Washington claimants don't cooperate," June 6, 2016
- » "Case Law Update: Washington Supreme Court reverses lower court decision in *Boeing & Doss v. DLI*," June 26, 2015

Recent speaking topics

- » "Game of Compensability: Comparing, contrasting compensability issues in Washington and Oregon," Washington Self-Insurers Association Webinar, June 19, 2017; Washington Self-Insurers Association Annual Conference, May 11, 2017
- » "You're not the boss of me: when claimants don't cooperate," client continuing education seminar, April 26, 2017, and June 7, 2017

Read more about Casondra at: <http://rwwcomplaw.com/person/casondra-j-albrecht>



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Kelly Niemeyer is a partner with Reinisch Wilson Weier PC. She practices Oregon workers' compensation litigation in the firm's Portland office. Kelly is licensed to practice law in the states of Oregon and Washington.

Kelly graduated with honors from the University of Portland where she received bachelor degrees in Political Science and Communications. She then attended Willamette University College of Law where she received her Juris Doctorate and a Certificate in Dispute Resolution. While in law school Kelly clerked for two years at Marion County District Attorney's Office. Kelly joined Reinisch Wilson Weier PC shortly after graduating from law school.

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Admissions

- » Oregon State Bar, 2005
- » Washington State Bar, 2006

Client Service

Employers and insurers strive to manage claims in a manner that is both fair to the worker and in compliance with the law. However, this is not always easy. In fact, employers and insurers in Oregon are subject to a high level of regulation and oversight, which carries with it a slew of penalties, sanctions and reprimands for noncompliance.

I serve my clients knowing and appreciating that they work in a fast-paced and highly regulated field. I understand that the best outcome is finality to a claim whenever possible, be it through litigation or mediation. This is achieved through preparation, aggressive advocacy and common sense.

My clients are my number one priority. I am easily accessible and make a point of being responsive. I can be reached at any time with general questions on Oregon law, claim management and processing or litigation defense.

Education

- » Juris Doctor, Willamette University College of Law, 2005
 - » Certificate in Dispute Resolution
- » Bachelor of Arts, Communications, University of Portland, 2002
- » Bachelor of Arts, Political Science, University of Portland, 2001

Professional Membership and Activities

- » Oregon Women Lawyers
- » Oregon State Bar Workers' Compensation Section

Recent Publications

- » "Fifty shades of *Brown*: the saga of *Brown v. SAIL in Oregon*," March 31, 2017
- » "Attorney fee update: Oregon WCB adopts amendments to Division 015 (Attorney Fee) rules," January 26, 2017
- » "What happens when leaders from the largest third party administrators sit down for a roundtable?," September 12, 2016

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