

---

In the Matter of the Compensation of  
**RONALD J. CAPPS, Claimant**  
WCB Case No. 00-08387, 00-08386, 00-05462, 00-03678  
ORDER ON REVIEW  
Doblie & Associates, Claimant Attorneys  
Johnson Nyburg & Andersen, Defense Attorneys  
Bruce A Bornholdt, SAIF Legal, Defense Attorneys  
Mark P Bronstein, Defense Attorneys

Reviewing Panel: *En Banc*. Board Chair Bock and Member Langer specially concurring.

Pinnacle-SIMS Inc., on behalf of Goodwill (Goodwill/Pinnacle), requests review of Administrative Law Judge (ALJ) Crumme's order that: (1) set aside its denial of claimant's right wrist condition; and (2) upheld denials of the same condition issued by Liberty Northwest Insurance Corporation and the SAIF Corporation, on behalf of Oregon Linen. On review, the issues are compensability and potentially, responsibility.

We adopt and affirm the ALJ's order with the following supplementation.

We begin by summarizing the relevant facts. Claimant is 62 years old. In about 1988, he began working for Oregon Linen as a route driver. In that job, he picked up and delivered laundry. He lifted up to 100 pounds at a time.

Claimant had no wrist injuries or problems until May 4, 1998, when he picked up a heavy bag during his work for Oregon Linen and had a sharp pain in his right wrist. Claimant told his supervisor about the injury that same day. However, claimant did not provide Oregon Linen with written notice of the injury for more than a year. Liberty was Oregon Linen's insurer at the time of the May 4, 1998 incident.

Subsequent to the May 4, 1998 injury, claimant's right wrist continued to constantly bother him. However, he did not miss any work for an extended period due to that condition. Further, he did not initially seek any medical treatment. Instead, he self-treated.

---

On October 1, 1998, SAIF began insuring Oregon Linen.

In March 1999, after being off work due to a left knee injury, claimant transferred to a new job with Oregon Linen as a washerman in the laundry room. He used his right wrist extensively during that work.

On December 14, 1999, during his work for Oregon Linen, claimant's right hand hurt worse after it became caught on a machine. He still did not miss any work or seek medical treatment for his right wrist even though the wrist continued to hurt constantly.

On March 17, 2000, Oregon Linen laid off claimant.

On March 20, 2000, claimant began working for Goodwill in the same laundry room doing the same job. Pinnacle is the claim processing agent for Goodwill.

On April 11, 2000, claimant's right wrist symptoms were especially bad during work. The wrist hurt worse than it had on March 17, 2000. On April 12, 2000, claimant first sought treatment for his right wrist. After April 12, 2000, claimant did not have any new injuries involving his right wrist. He had continuing symptoms, received further treatment and missed time from work due to the right wrist condition. SAIF issued a denial of claimant's right wrist claim on May 1, 2000 on the ground that claimant did not give timely notice of the claim.

In May 2000, x-rays of claimant's right wrist showed extensive abnormalities, including dissociation of the articulation between the scaphoid and lunate bones and arthritic changes, mostly in the lunate bone. SAIF issued an amended denial of compensability and responsibility on June 6, 2000. The amended denial continued to assert that notice of the claim was untimely. On June 6, 2000, Pinnacle denied responsibility and compensability. Liberty denied compensability and responsibility on April 2, 2001. Liberty amended its denial at the hearing to include the ground that the claim was untimely filed.

Although the ALJ found that claimant's May 4, 1998 injury claim against Oregon Linen was time-barred, he concluded that claimant's claim was compensable as to Goodwill/Pinnacle. In reaching this conclusion, the ALJ found that the May 4, 1998 injury that was time-barred against Oregon Linen/Liberty, could nevertheless be considered as a work-related cause against

Goodwill/Pinnacle because the late claim defense under ORS 656.265 was not available to Goodwill/Pinnacle and because Goodwill/Pinnacle did not raise the defense. Considering claimant's work activities as a whole, including the May 4, 1998 injury, the ALJ found claimant's right wrist condition compensable as to Goodwill/Pinnacle. The ALJ then found Goodwill/Pinnacle responsible for claimant's claim.

On review, Goodwill/Pinnacle argues that because the May 4, 1998 injury claim was time-barred, it constitutes a noncompensable, preexisting condition and cannot be considered as a work-related cause of claimant's right wrist condition against Goodwill/Pinnacle. Goodwill/Pinnacle contends that claimant's work exposure after May 4, 1998 was not the major contributing cause of a pathological worsening of the right wrist condition. Claimant argues that Dr. Sandell's opinion is persuasive and that under the last injurious exposure rule (LIER), claimant's employment at Goodwill/Pinnacle independently worsened his condition.

We first address the issue of whether the time-barred May 4, 1998 Liberty/Oregon Linen injury can be considered a work-related cause in determining the compensability of claimant's right wrist condition under an occupational disease theory<sup>1</sup> against Goodwill/Pinnacle, the last employer.<sup>2</sup> Under the analysis set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993), to determine the meaning of a statute, we first examine its text in context, turning to the legislative history only if we cannot discern the meaning of the statutes from that review.

ORS 656.265(4) provides that: "Failure to give notice as required by this section *bars a claim under this chapter* unless the notice is given within one year after the date of the accident and: (a) The employer had knowledge of the injury

---

<sup>1</sup> We analyze claimant's claim as an occupational disease because claimant is relying on his work exposure over a number of years to contend that his right wrist condition is compensable.

<sup>2</sup> ORS 656.265(5) provides that: "The issue of failure to give notice must be raised at the first hearing on a claim for compensation in respect to the injury or death." We need not decide whether Goodwill/Pinnacle was required to raise the timeliness defense at hearing. In this regard, if Goodwill/Pinnacle was required to raise the defense at hearing and did not do so, we conclude that the May 4, 1998 injury can be considered in determining compensability of claimant's occupational disease claim. Likewise, even if Goodwill/Pinnacle was not required to raise the defense at the hearing, we conclude, based on the reasoning expressed in this order, that the May 4, 1998 time-barred injury claim against Liberty/Oregon Linen can be considered in determining compensability of an occupational disease claim against Goodwill/Pinnacle under the LIER rule of proof.

or death; or (b) The worker died within 180 days after the date of the accident.” (Emphasis added). Based on the text of the statute, an injury claim under Chapter 656 is barred if notice is not given in the manner prescribed by the statute. The “notice” to which the statute refers is to be given to the employer. The “employer” as that term is used in the statute refers to the employer at the time of the claimant’s injury. Thus, based on the text of ORS 656.265(4), we conclude that the statute bars a “claim under this chapter” only against the employer at injury. Accordingly, we agree with the ALJ that the injury can be considered as a work-related cause (in an occupational disease claim) against a later carrier.<sup>3</sup>

Our decision is supported by the holdings of *Silveira v. Larch Enterprises*, 133 Or App 297 (1995); *UPS v. Likos*, 143 Or App 486 (1996); *Wallowa County v. Fordice*, 181 Or App 222 (2002); and *Bennett v. Liberty Northwest Insurance Corp.*, 128 Or App 71 (1994). In *Silveira*, the court held that for purposes of establishing that an occupational disease is work related under the LIER rule of proof, a claimant may rely on all employments, even those that are not subject to Oregon’s workers’ compensation laws. In *Likos*, the court held that the claimant’s period of self-employment as a sole proprietor, during which she chose not to be subject to the Workers’ Compensation Act or to obtain coverage for her own possible injuries, could be considered for the purpose of determining whether her condition was work related under the LIER rule of proof. In *Fordice*, the court found that a claimant’s military service was considered an employment exposure for the purposes of the LIER rule of proof.

In *Bennett*, the claimant filed occupational disease claims against two employers and settled his claim with one of the employers, Caterpillar, by entering into a disputed claim settlement (DCS). The claimant proceeded to hearing against the other employer, Siltec, and the court ruled that under the LIER rule of proof, the claimant could rely on his employment exposure with Caterpillar (which had been settled by DCS) to establish compensability of his claim against Siltec.

---

<sup>3</sup> The pertinent language providing that the failure to give notice as required by the statute *bars a claim* appeared in the first version of the newly enacted ORS 656.265 in 1965. See Or Laws 1965, Chapter 285, section 30a. Although we do not find the statute to be ambiguous, we found no legislative history from 1965 that addressed the issue of whether an injury claim that is time-barred under ORS 656.265(4) can nevertheless be considered as a work-related cause in an occupational disease claim against a subsequent employer.

Based on the reasoning expressed in *Silveira*, *Likos*, and *Fordice*, the LIER rule of proof has been extended to cover employment exposures outside of Chapter 656. The *Silveira* court specifically held that a claimant may rely on all employments to establish compensability of an occupational disease claim, even those not subject to Oregon's workers' compensation laws. In the present case, claimant's May 4, 1998 injury, although time barred against another employer, is otherwise an employment exposure as were the "non-Chapter 656" exposures in *Silveira*, *Likos* and *Fordice*.

In addition, in *Bennett*, even an employment exposure within Chapter 656 (a claim settled with an Oregon employer through a DCS under Oregon law) could be considered in determining compensability of a claim against another employer under the rule of proof. We find *Bennett* to be analogous to the present case.

In *Bennett*, the claimant's claim against Caterpillar was barred because he had entered into a DCS with that employer. Nevertheless, the claimant's employment exposure with Caterpillar could be considered under the rule of proof against Siltec. Similarly, here, claimant's claim for his employment exposure with Oregon Linen/Liberty, although time barred under Oregon law, can, like the claim settled by a DCS in *Bennett*, be considered as a work-related cause against Goodwill/Pinnacle.

Consistent with the holdings discussed above, we conclude that claimant's May 4, 1998 injury can be considered as an employment exposure for purposes of the LIER rule of proof against Goodwill/Pinnacle.<sup>4</sup>

---

<sup>4</sup> In response to the special concurrence, we make the following points. The concurrence asserts that claimant had an opportunity to file a timely claim for the May 4, 1998 injury but failed to do so. The concurrence also states that to allow claimant to use the time barred claim against another employer "allows this claimant to establish the compensability of his claim against a subsequent carrier based primarily on evidence regarding his work activities for a prior carrier." We would assert that the LIER already allows a worker to establish compensability of a claim based primarily on work activities for a prior employer.

The concurrence also discusses the court's decision in *Henwood* in a footnote. We note that the *Henwood* court did not rely on the fact that the claimant's California claim was compensable in reaching its decision.

Additionally, we consider the time-barred injury claim against Liberty/Oregon Linen to be different than a determination on the merits that the injury was not work-related. This situation is similar to a denial for lack of coverage or because the worker is an out-of-state worker. In other words, there has been no determination on the merits that claimant's wrist condition was not related to his Oregon Linen employment while Liberty was providing coverage.

Having found that the May 4, 1998 injury can be considered, we turn to compensability. The ALJ found that claimant had established compensability of his occupational disease under the last injurious exposure “rule of proof.” In *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997), the Court described the LIER as follows:

"[The last injurious exposure rule] imposes full responsibility on the last employer, from the time of the onset on the disability, if the claimant was exposed there to working conditions that could have caused the type of disease suffered by the claimant. The last injurious exposure rule is a rule of proof and a rule of assignment of responsibility.

"As a rule of proof, the last injurious exposure rule allows a claimant to prove the compensability of an injury without having to prove the degree, if any, to which exposure to disease-causing conditions at a particular employment actually caused the disease. The claimant need prove only that the disease was caused by employment-related exposure."  
(Citations omitted).

There are two medical opinions that address the cause of claimant’s right wrist condition. Dr. Sandell, an orthopedic surgeon who treated claimant, concluded that if there was no significant history of trauma prior to the May 4, 1998 injury, then that injury was the initiating event.<sup>5</sup> (Ex. 46-18). Dr. Sandell felt that the event that initiated the scapholunate dissociation (the May 4, 1998 injury) was the major contributing cause of the right wrist condition. Dr. Sandell believed that claimant’s work activities after the May 4, 1998 injury pathologically worsened the condition. Dr. Brazer deferred to Dr. Sandell’s opinion regarding causation of claimant’s right wrist condition.

Dr. Button examined claimant and determined that claimant’s most likely diagnosis was that of Kienbock’s disease. He indicated that the etiology of this condition was unknown.

---

<sup>5</sup> Based on the record, there was no significant history of trauma to the right wrist prior to May 4, 1998.

For the reasons given by the ALJ, we find Dr. Sandell's opinion to be the most persuasive opinion regarding the nature and cause of claimant's left wrist condition. Based on Dr. Sandell's opinion, we are persuaded that claimant's left wrist condition was caused by an employment related exposure. Thus, claimant has established compensability of his condition under the LIER "rule of proof." See *James R. Jenkins*, 53 Van Natta 248 (2001).

The ALJ found that Goodwill/Pinnacle was presumptively responsible because claimant did not seek medical treatment until he worked for Goodwill. See *Agricomps Ins. v. Tapp*, 169 Or App 208, 213 (2000). Based on this record, we agree.

An employer that otherwise would be responsible under the LIER may avoid responsibility if it proves either: (1) that it was impossible for conditions at its workplace to have caused the disease in this particular case; or (2) that the disease was caused solely by the conditions at one or more previous employments. See *Roseburg Forest Products v. Long*, 325 Or at 313. Here, Goodwill has not shown that it was impossible for conditions at its employment to have caused the condition or that it was solely caused by conditions at previous employers. In this regard, Dr. Sandell believed that claimant's work activities after the May 4, 1998 injury pathologically worsened the condition. Accordingly, we agree with the ALJ that Goodwill is responsible for claimant's condition.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$1,200, payable by Goodwill/Pinnacle. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, and the value of the interest involved.

### ORDER

The ALJ's order dated October 5, 2001 is affirmed. For services on review, claimant's attorney is awarded \$1,200, payable by Goodwill/Pinnacle.

Entered at Salem, Oregon on February 21, 2003

---

Board Chair Bock and Board Member Langer specially concurring.

We disagree with the majority's interpretation of ORS 656.265(4) and its decision that the time-barred May 4, 1998 Liberty/Oregon Linen injury can be considered a work-related cause in determining the compensability of claimant's right wrist condition under an occupational disease theory against Goodwill/Pinnacle, the last employer. Nevertheless, we concur in the majority's decision to affirm the ALJ's order. We reason as follows.

ORS 656.265 provides:

- (1) Notice of an accident resulting in an injury or death shall be given immediately by the worker or a dependent 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. A report or statement secured from a worker, or from the doctor of the worker and signed by the worker, concerning an accident which may involve a compensable injury shall be considered notice from the worker and the employer shall forthwith furnish the worker a copy of any such report or statement.
- (3) Notice shall be given to the employer by mail, addressed to the employer at the last-known place of business of the employer, or by personal delivery to the employer or to a foreman or other supervisor of the employer. If for any reason it is not possible to so notify the employer, notice may be given to the Director of the Department of Consumer and Business Services and referred to the insurer or self-insured employer.
- (4) Failure to give notice as required by this section bars a claim under this chapter unless the notice is given

within one year after the date of the accident and:

(a) The employer had knowledge of the injury or death;

or

(b) The worker died within 180 days after the date of the accident.

(5) The issue of failure to give notice must be raised at the first hearing on a claim for compensation in respect to the injury or death.

(6) The director shall promulgate and prescribe uniform forms to be used by workers in reporting their injuries to their employers. These forms shall be supplied by all employers to injured workers upon request of the injured worker or some other person on behalf of the worker. The failure of the worker to use a specified form shall not, in itself, defeat the claim of the worker if the worker has complied with the requirement that the claim be presented in writing.

Based on the text of the statute, *see PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993) (setting forth statutory interpretation analysis), a workers' compensation injury claim under Chapter 656 is barred if notice is not given in the manner prescribed by the statute. If a workers' compensation claim is barred under Chapter 656, it follows that a condition arising from such a barred claim cannot be considered a compensable or work-related condition. Thus, we would find that a condition stemming from a time-barred injury claim is statutorily precluded from consideration as a work-related condition. Furthermore, because the late claim for compensation is unconditionally barred under Chapter 656, we would conclude that it cannot be considered as a work-related cause against a later carrier.

In reaching this conclusion, we disagree with the majority's reasoning. The majority concludes that "the employer" as used in ORS 656.265(4) is the employer at injury but then leaps to a conclusion that "a claim" is barred only against that employer. We agree that the statutory references to "the employer" are specific enough to mean the employer at injury. Unlike subsections (1) through (3), however, subsections (4) and (5) use general language without specific references to the employer at injury. Particularly, ORS 656.265(4) states that failure to give

notice as required bars “a claim under this chapter.” ORS 656.265(5) states that the issue of failure to give notice “must be raised at the first hearing on a claim for compensation in respect to the injury or death.” Had the legislature intended to restrict the use of a late-claim defense to the employer at injury, it could have stated expressly that failure to give notice bars a claim under this chapter against *the employer*, and that *the employer* must raise the issue at the first hearing. In our opinion, the use of the term “a claim ” indicates any claim based on that time-barred injurious exposure, not just the specific claim against the employer at injury. Furthermore, the use of the term “must be raised” indicates that any employer may raise such a defense, and must do so at the first hearing on a claim for compensation in respect to the injury.

The majority asserts that the LIER rule of proof has been expanded to cover employment exposures outside of Chapter 656, such as military service, out-of-state employment and self employment, *Silveira v. Larch Enterprises*, 133 Or App 297 (1995); *UPS v. Likos*, 143 Or App 486 (1996); *Wallowa County v. Fordice*, 181 Or App 222 (2002), as well as in- state exposures involving employers who have settled the worker’s claim by means of a DCS. *Bennett v. Liberty Northwest Insurance Corp.*, 128 Or App 71 (1994). However, none of those cases involved application of ORS 656.265(4) and its express directive that the failure to provide timely notice of a claim “bars a claim under this chapter.” Therefore, we disagree with the majority that those cases control.<sup>6</sup>

---

<sup>6</sup> The ALJ cited *SAIF v. Henwood*, 176 Or App 431 (2001) to support his conclusion that the condition was compensable if claimant’s work activities as a whole were the major contributing cause of the condition. We find *Henwood* distinguishable. There, the court held that under the last injurious exposure rule (LIER) “rule of proof,” all of a claimant’s employment, including out-of-state jobs could be used to establish compensability of an occupational disease. In *Henwood*, however, the claimant had received workers’ compensation benefits in California. The California employment was the major contributing cause of the claimant’s condition, but the Oregon employment contributed slightly. The court found that the claim was compensable under the LIER because the major contributing cause of the disease was the claimant’s employment conditions. Here, in contrast to *Henwood*, the major contributing cause of claimant’s disease was not an out-of-state compensable claim. Instead, the major contributing cause was a prior time-barred injury claim. Thus, here unlike in *Henwood*, the prior exposure was not from a work-related employment condition, but was instead from a time-barred injury claim that is therefore not considered a work-related exposure.

We likewise find *Kepford v. Weyerhaeuser Co.*, 77 Or App 363 (1986) distinguishable. In *Kepford*, the court found that the cumulative effect of a claimant’s job injuries and employment conditions could be considered in determining compensability of an occupational disease claim. In *Kepford*, unlike in the present case, the job conditions and injuries were work-related causes that could be considered. Here, the prior injury claim was barred and thus could not be considered in determining the major contributing cause of claimant’s disease.

In the present case, claimant had an opportunity to file a timely claim for the May 4, 1998 injury. He failed to do so. Thus, the claim for that injury is not compensable “under this chapter” and may not be used against another employer to establish compensability. To do otherwise allows this claimant to escape the consequences of his failure to provide timely notice of an injury to the employer at injury and to establish the compensability of that injury claim against a subsequent carrier in the context of an occupational disease claim based primarily on evidence regarding his work activities for a prior carrier.<sup>7</sup> We believe that such results conflict with the purpose of ORS 656.265 to require timely notice of any injury claim in order to facilitate prompt investigation and diagnosis of the injury, make an accurate record of the occurrence and decrease the chance for confusion due to intervening or nonemployment-related causes. *Colvin v. Industrial Indemnity*, 301 Or 743, 747 (1986), *quoted in Argonaut Insurance Co. v. Mock*, 95 Or App 1, 5, *rev den* 308 Or 79 (1989). Accordingly, we are in disagreement with the majority’s interpretation of ORS 656.265.

Nevertheless, we agree with the ALJ’s conclusion that Goodwill/Pinnacle failed to raise the late-claim defense at the hearing and, therefore, the defense cannot be considered. ORS 656.265(5).

The statutory requirement that the issue be raised no later than the first hearing on a claim clearly purports to provide timely notice of the defense to other parties. As discussed above, because we interpret ORS 656.265(4) to bar “a claim under this chapter,” whether it is asserted against the employer at injury or subsequent employers, we also interpret ORS 656.265(5) to require the employer who wants to raise a defense under that subsection to provide timely notice of the defense to other parties. In other words, having concluded that any employer joined in a proceeding has the right to assert the defense, we would conclude that any employer also has the obligation to raise it timely.

---

<sup>7</sup> Again, we distinguish *Kepford*, 77 Or App 363. There, the issue was whether the claimant was precluded from relying upon disability caused by a previously accepted injury in presenting an occupational disease claim against the same employer. Here, claimant relies upon a time-barred claim in presenting an occupational disease claim against a subsequent employer. Likewise, we distinguish *Mark A. Lantz*, 52 Van Natta 639 (2000), upon which Goodwill/Pinnacle relied. There, we concluded that the claimant’s condition subject to his occupational disease claim was not the result his repetitive work activities but rather the result of an injury.

---

Because Goodwill/Pinnacle did not comply with ORS 656.265(5), we would conclude that it cannot rely upon the late-claim defense and claimant's work exposure during his Liberty/Oregon Linen employment may be considered in determining whether claimant established a compensable occupational disease claim for which Goodwill/Pinnacle is responsible. Further, because we agree with the majority's assessment of the medical evidence and responsibility analysis, we concur in the final result.