

In the Matter of the Compensation of
ELLEN E. HALE, Claimant

WCB Case No. 06-05986 06-02185, 06-02184, 06-02115, 06-02114, 06-01389,
06-00663, 06-00662, 06-00661, 06-00660, 06-00528, 06-00453 ,06-00452

ORDER ON REVIEW

Law Offices of Karl G Anuta PC, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys
Wallace Klor & Mann PC, Defense Attorneys
Maher & Tolleson LLC, Defense Attorneys
Andersen & Nyburg, Defense Attorneys
MacColl Busch Sato PC, Defense Attorneys
Gilroy Law Firm, Defense Attorneys
Jeff R Gerner, SAIF Legal, Defense Attorneys
Reinisch Mackenzie PC, Defense Attorneys
Ronald W Atwood & Assocs, Defense Attorneys
Sather Byerly & Holloway, Defense Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Mattel, Inc., and its predecessors (herein jointly referred to as “the employer”) request review¹ of Administrative Law Judge (ALJ) Wren’s order that: (1) declined to dismiss claimant’s request for hearing concerning its denial of the claimed occupational disease; and (2) upheld its denial without determining whether claimant had established any employment contribution concerning the denied claim. In her respondent’s brief, claimant contends that the ALJ improperly excluded a medical opinion. On review, the issues are the ALJ’s procedural ruling, scope of issues, and evidence. We affirm.

¹ The employer has requested oral argument, contending that the resolution of this case may have a significant impact on the workers’ compensation system. We do not ordinarily entertain oral argument. OAR 438-011-0015(2). We may, nevertheless, allow oral argument where the case presents an issue of first impression that could have a substantial impact on the workers’ compensation system. See OAR 438-011-0031(2); *Joe R. Ray*, 48 Van Natta 325, *recons*, 48 Van Natta 458 (1996); *Jeffrey B. Trevitts*, 46 Van Natta 1767 (1994). The decision to grant such a request is solely within our discretion. OAR 438-011-0031(3).

Here, the parties have thoroughly addressed the issues before us in briefs and arguments submitted in this case and in several companion cases (which we have also considered). We are not persuaded that oral argument would assist us in reaching our decision. Accordingly, we decline to grant the request for oral argument. See *Dale F. Cecil*, 51 Van Natta 1010 (1999); *Raymond L. Mackey*, 47 Van Natta 1 (1995).

FINDINGS OF FACT

From 1965 through 2000, claimant worked at the employer's Hall Street plant.² (Ex. 110). She drank water daily from the water fountains at the plant and occasionally drank tea from the plant cafeteria. (Ex. 128-30, -31, -32).

In March 1998, the employer was notified that well water from the Hall Street plant, which was used for drinking and sanitation, contained trichloroethylene (TCE). (Exs. 85-29, 98-7, -8, 106-2).³ TCE was detected in the well water at up to 1600 parts per billion, exceeding the drinking standard of 5 parts per billion established by the Environmental Protection Agency (EPA). (Exs. 98-7, 106-2). It was estimated that TCE had been present in the drinking water for at least 20 years, although the precise levels over the years were unknown. (Ex. 106-2)

In November 2005, claimant filed an occupational disease claim, asserting that her workplace exposure to TCE caused non-Hodgkins lymphoma, seizures, and hearing loss. (Ex. 109). The employer denied the claim. Claimant requested a hearing.

In a prior order, we remanded the compensability dispute to the ALJ, finding that the record was insufficiently developed. *See Ellen E. Hale*, 60 Van Natta 3459, 3461-62 (2008), *recons*, 61 Van Natta 389 (2009) (*Hale I*). We directed the ALJ to admit exhibits proposed by both parties concerning the compensability dispute, to consider any proposed rebuttal evidence, and to conduct further proceedings in a manner that the ALJ deemed would achieve substantial justice. *Id.*

Thereafter, the ALJ conducted a hearing, at which he admitted the employer's previously proposed exhibits. The ALJ excluded, however, a report from Dr. Teitelbaum, an "out-of-state" doctor, which had been submitted by claimant.

² Claimant was laid off for a brief period of time in 1997. (Ex. 128-51, -52).

³ We correct the ALJ's order finding that the employer became aware of the TCE contamination in September 1998.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the employer's denial, finding that claimant had not established that her employment activities were the major contributing cause of the claimed occupational disease.⁴ *See* ORS 656.802(2). In doing so, the ALJ found that claimant had established "legal," but not "medical" causation. The ALJ also declined the employer's request to also make findings as to whether claimant's workplace exposure had made *any contribution* to the claimed occupational disease.

On review, the employer acknowledges that claimant did not meet the major contributing cause standard for her occupational disease claim. The employer asserts, however, that rather than *affirm* the ALJ's decision to uphold its denial, we should *dismiss* claimant's hearing request.

Alternatively, the employer contends that, rather than only addressing claimant's burden under the major contributing cause standard of ORS 656.802(2), we should determine that claimant did not establish *any workplace contribution* to the claimed occupational disease. The employer also maintains that the ALJ incorrectly determined that claimant established "legal causation," and requests that we find that "legal causation" has not been established. Claimant counters that the ALJ properly upheld the employer's denial, but requests that we reverse the ALJ's ruling concerning the admissibility of Dr. Teitelbaum's report.

We do not reach the issue of whether claimant established "legal causation" because such a determination is not necessary for resolution of this dispute. With respect to all other arguments raised by the parties, we affirm the ALJ's order.⁵ We reason as follows.

⁴ The ALJ also denied the employer's motion to dismiss claimant's hearing request due to the lack of evidence presented in support of the claim.

⁵ We disagree with claimant's contention that the ALJ impermissibly excluded Dr. Teitelbaum's report. Claimant concedes that Dr. Teitelbaum was an "out-of-state" medical expert, and that Dr. Teitelbaum did not "treat" or "examine" claimant. Claimant also acknowledges that, in *Downey v. Halvorson-Mason*, 20 Or App 593, 598 (1975), the court held that ORS 656.310(2) limited the admissibility of out-of-state doctor reports to a "treating or examining doctor," and consequently excluded reports because the "out-of-state" physician did not treat or examine the claimant). *See also Harold T. Bird, Dcd.*, 43 Van Natta 1732, 1733 (1991) (finding a medical report inadmissible under ORS 656.310(2) because the out-of-state doctor authoring the report did not treat or examine the claimant). Nevertheless, claimant contends that Dr. Teitelbaum's report should have been admitted because *Downey* was incorrectly decided. We are not permitted, however, to disregard the court's holding in *Downey*. Therefore, we find that the ALJ correctly excluded Dr. Teitelbaum's report.

In *Ronnie L. Nielson, Dcd.*, 62 Van Natta 2319, *recons.*, 62 Van Natta 2682 (2010) (*Nielson II*), a companion case, we addressed and rejected all of the employer's arguments advanced in the instant matter.⁶ Specifically, addressing ORS 656.019 and ORS 656.802(2), we held that we are not authorized to dismiss a hearing request based on the employer's assertion that a claimant purportedly pursued a strategy to intentionally "lose" a workers' compensation claim in order to file a civil action under ORS 656.019. 62 Van Natta at 2322. We noted that there was no statutory or administrative authority that would empower us to take such an action, and that the insufficiency of medical evidence supporting a claim warranted upholding the employer's denial, not dismissing a timely filed request for hearing. *Id.*

We next addressed the employer's argument that the claimant had not "diligently and arduously pursued" the occupational disease claim consistent with the comments expressed in *Ronnie L. Nielson, Dcd.*, 60 Van Natta 2878 (2008) (*Nielson I*). *Nielson II*, 62 Van Natta at 2322-23. Observing that the record did not rebut the claimant's counsel's representation that he was unable to procure medical evidence establishing that employment conditions were the major contributing cause of the claimed occupational disease, we considered the employer's argument concerning claimant's efforts unsupported by the record. *Id.* at 2323.

Turning to the employer's contention that upholding the denial might be construed to endorse the claimant's future efforts to file a civil action under ORS 656.019(2) and *Smother's v. Gresham Transfer, Inc.*, 332 Or 83 (2001), we reasoned that the scope of our authority was to determine the compensability of claims under the Workers' Compensation Act, not to determine the impact of our decision in any ancillary litigation. *Id.*

We also rejected the employer's argument that the language of ORS 656.019 required a determination as to whether the claimant had established "legal causation," even though the medical evidence was insufficient to establish "medical causation." *Id.* at 2324-25. We reasoned that the statute set forth circumstances in which an injured worker could pursue a civil negligence action in a different forum, but did not prescribe that we adjudicate workers' compensation claims in any manner different from "an ordinary claim." *Id.* After reviewing the language of ORS 656.019, we concluded that the determination of whether an

⁶ In reaching our decision in *Nielson II*, we allowed the employer's request to consider arguments advanced in briefs in several pending companion cases (including the instant matter).

injured worker has a right to file a civil action under ORS 656.019 may take place only after our “order affirming the denial has become final,” and was to be made by the forum where any civil action is filed. *Id.*

For similar reasons, we ruled that we were not required to determine whether the claimant had proven *any* employment contribution to the claimed occupational disease. *Id.* at 2325. Observing that our statutory obligation was to determine compensability based on the standard applicable to the filed claim, we found that the claimant had not established that employment conditions were the major contributing cause of the claimed occupational disease. *Id.* We reasoned that whether the claimant established any lesser degree of workplace contribution was not statutorily relevant to whether the claim was compensable under ORS 656.802(2). *Id.*

On reconsideration, we considered arguments that the employer advanced in several companion cases that were pending Board review, including this case.⁷ *See* 62 Van Natta 2682. Specifically, we addressed the employer’s assertion that where a claimant files a request for hearing with the intent of subsequently filing a civil action under ORS 656.019, we were required to make “clear and specific” findings as to whether the claimant satisfied some lesser level of employment contribution concerning the claimed occupational disease. *Id.* at 2683. Analyzing ORS 656.019 and *Smothers*, we found that neither point nor authority required us to make particular factual or causation findings whenever an injured worker declares an intent to subsequently file a civil negligence action. *Id.* at 2685.

We also rejected the employer’s assertion that ORS 656.019 requires a claimant to prove a “work-related injury” to the Board; rather, we reasoned that the statute provides an injured worker with a right to “pursue a civil negligence action for a work-related injury that has been determined to be not compensable because the worker has failed to establish that a work-related incident was the major contributing cause of the worker’s injury * * *.” *See* ORS 656.019. In doing so, we noted that the substantive right created by ORS 656.019 was activated “*only after*” our order determining the claim to be not compensable had “become final.” 62 Van Natta at 2686 (emphasis in original).

⁷ We also addressed the employer’s contention that we had not considered other “disputed issues,” specifically, claimant’s inability to prove: (1) the decedent’s exposure or the existence of a disease condition based on objective findings; and (2) subject worker status. 62 Van Natta at 2683. In light of our determination upholding the employer’s denial because claimant did not establish that employment conditions were the major contributing cause of the decedent’s occupational disease, we did not resolve those other “disputed issues.” *Id.* To the extent that the employer contends that such “disputed issues” need to be considered in the instant matter, we apply that same rationale.

Finally, we disagreed with the employer's suggestion that not dismissing the claimant's occupational disease claim would threaten to undermine the workers' compensation system and our statutory role in adjudicating workers' compensation disputes. *Id.* at 2688-89. We considered it unlikely that future claimants would intentionally "default" on occupational disease claims in the workers' compensation system in order to pursue a civil negligence action. *Id.* In any event, we reiterated that our statutory duty was to determine whether the employer's denial should be set aside or upheld. *Id.* at 2689. Having determined that the claimant did not establish that employment conditions were the major contributing cause of the claimed occupational disease, we upheld the employer's denial. *Id.*

As noted above, the employer's arguments in the instant matter were all addressed and rejected in *Nielson II*. In accordance with the reasoning set forth in that case, we decline, in the instant matter, the employer's motion to dismiss. Consequently, we affirm the ALJ's order upholding the employer's denial.

ORDER

The ALJ's order dated May 10, 2010 is affirmed.

Entered at Salem, Oregon on December 17, 2010