

In the Matter of the Compensation of
GURDEV S. SOHL, DCD, Claimant

WCB Case No. 08-03436

ORDER ON REVIEW

Radler Bohy & Replogle LLP, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman.

Claimant, a surviving beneficiary of the deceased worker, requests review of Administrative Law Judge (ALJ) Kekauoha's order that upheld the SAIF Corporation's denial of her injury claim. On review, the issue is subjectivity. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

The decedent was a member of a limited liability company (LLC) that operated a gas station. SAIF provided the LLC with workers' compensation coverage for its subject workers since 1996. (Tr. 56).

In August 2000, the decedent wrote a letter directed to SAIF stating:

"We would like to cover the following member (partner)
of the LLC:

Name:	[The decedent]
Annual Salary:	\$31,198.68
Duties:	General Gas Pump Work" (Ex. 13).

SAIF received the letter, but never took any action in response to it. (Tr. 51).

In February 2008, the decedent was killed while at work. Claimant filed a claim for survivor benefits, but SAIF denied the claim, asserting that the decedent was not a subject worker at the time of his death. (Ex. 51). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the denial, applying ORS 656.128(1), which states:

“Any person who is a sole proprietor, or a member, including a member who is a manager, of a limited liability company, or a member of a partnership, or an independent contractor pursuant to ORS 670.600, may make written application to an insurer to become entitled as a subject worker to compensation benefits. Thereupon, the insurer may accept such application and fix a classification and an assumed monthly wage at which such person shall be carried on the payroll as a worker for purposes of computations under this chapter.”

Under that provision, the ALJ concluded that SAIF was permitted to accept or reject the decedent’s request for coverage. Because SAIF never accepted the decedent’s coverage request, the ALJ reasoned, he was not covered as a subject worker at the time of his workplace injury.

The ALJ rejected claimant’s argument that ORS 656.039(4) should instead be applied. That provision states:

“Notwithstanding any other provision of this section, a person or employer not subject to this chapter who elects to become covered may apply to a guaranty contract insurer for coverage. An insurer other than the State Accident Insurance Fund Corporation may provide such coverage. However, the State Accident Insurance Fund Corporation shall accept any written notice filed and provide coverage as provided in this section if all subject workers of the employers will be insured with the State Accident Insurance Fund Corporation and the coverage of those subject workers is not considered by the State Accident Insurance Fund Corporation to be a risk properly assignable to the assigned risk pool.”

Alternatively, the ALJ held that, even if ORS 656.039(4) applied, the decedent was nevertheless not covered because SAIF did not accept the decedent’s written notice electing coverage or provide coverage.

On review, claimant contends that ORS 656.128 does not apply in these circumstances, and that, under ORS 656.039(4), SAIF was required to accept the decedent’s election of coverage. We agree with claimant that, on these facts, ORS 656.039(4) applies, and that, pursuant to that statute, the decedent was a subject worker at the time of his workplace injury. We reason as follows.

In interpreting statutes, we ascertain the intentions of the legislature by examining the text of the statute in its context, along with any relevant legislative history, and, if necessary, relevant canons of statutory construction. *State v. Gaines*, 346 Or 160, 171-73, (2009); *PGE v. Bureau of Labor & Indus.* 317 Or 606, 610-12 (1993); *State v. Rocha*, 233 Or App 1, 5 (2009). The objective of statutory interpretation is to “pursue the intention of the legislature if possible.” *Gaines*, 346 Or at 165; *see also* ORS 174.020 (“In the construction of a statute, a court shall pursue the intention of the legislature if possible.”).

Here the parties disagree not so much with what ORS 656.128 and ORS 656.039(4) say, but with which provision applies. Claimant argues that the decedent elected coverage with SAIF as “a person * * * not subject to” Chapter 656. *See* ORS 656.039(4). Because the decedent applied for such coverage with SAIF, claimant argues, SAIF was required to “accept any written notice filed and provide coverage as provided in this section” because all of the LLC’s workers were “insured with [SAIF] and the coverage of those subject workers [was] not considered by [SAIF] to be a risk properly assignable to the assigned risk pool.” *Id.*

SAIF argues, however, that ORS 656.128 applies because it is more specific than ORS 656.039(4). Specifically, SAIF contends that ORS 656.039(4) refers to the broad category of nonsubject workers, whereas ORS 656.128 expressly applies to a subcategory of such workers, including any member of an LLC, such as the decedent.

In isolation, both ORS 656.039(4) and ORS 656.128 are arguably applicable to the decedent, who was a nonsubject worker by way of being a member of an LLC, and who elected to obtain coverage with SAIF. *Compare* ORS 656.039(4) (applying to “a person * * * not subject to [Chapter 656] who elects to become covered * * *”) and ORS 656.128 (applying to any “person who is * * * a member * * * of a limited liability company * * * [that makes] written application to an insurer to become entitled as a subject worker to compensation benefits”). The statute does not contain direct language that would reconcile or harmonize these provisions. Thus, we find the text of the statutes ambiguous in terms of their applicability to the instant matter.

The legislative history of the statutes, however, sheds some light on the intentions of the legislature. By way of background, both ORS 656.039 and ORS 656.128 are longstanding statutes, first enacted in 1965 and 1957, respectively. Subsection 4 of ORS 656.039, however, was not added until 1983.

See 1983 Or Laws, ch 816, § 1. Substantively, ORS 656.128 has remained essentially unchanged, although the inclusion of LLCs, a new type of employer entity, occurred in 1995. *See* 1995 Or Laws, ch 93, § 33.

Before the 1983 addition of subsection 4, ORS 656.039 and ORS 656.128 may be understood as parallel statutes, with the former addressing the rights of employers to make nonsubject workers subject workers (*see* ORS 656.039(1)) and the latter permitting owner/worker-type entities (*i.e.*, sole proprietors, independent contractors, *etc.*) to elect coverage for themselves. However, subsection 4 creates some potential overlap or ambiguity by also allowing any nonsubject *person* (in addition to a nonsubject employer) to apply to a guaranty contract insurer for coverage; as evidenced by the present case, when that nonsubject person is also in that group of persons referenced in ORS 656.128 (*i.e.*, a member of an LLC), the statute is ambiguous regarding which provision(s) should govern.

Thus, we turn to the legislative history of subsection 4 of ORS 656.039 to ascertain the intent of the legislature in enacting that provision. Subsection 4 was added by Senate Bill (SB) 215 in 1983. At that time, the operative provisions of ORS 656.128 were in place. As initially proposed, SB 215 did not include any of the qualifiers for SAIF-required coverage that were ultimately included in the final bill; *i.e.*, there was no requirement that all subject workers of the employers be insured with SAIF or that the coverage of those subject workers was not considered by SAIF to be a risk properly assignable to the assigned risk pool. The committee summary of the bill described it as follows:

“Requires the State Accident Insurance Fund Corporation to accept and provide coverage to any person or employer that elects to become covered or elects to provide workers’ compensation coverage for their nonsubject workers.” House Labor Committee, SB 215, June 13, 1983, Ex. F.

The rationale for the bill was given as follows:

“Many employers that should be providing coverage for their workers are denied coverage because the insurers in the state are unwilling to write workers’ compensation coverage for them. This situation is particularly prevalent in cases where the subjectivity of the person or worker is questionable or the person requesting coverage has not actually hired anyone at the time application is made.

As a result, such employers are forced to obtain coverage through a broker in the assigned risk pool at a considerably higher premium when, in fact, they have not established, through their experience, that they are a high insurance risk. In many cases because of the cost or lack of understanding of the assigned risk pool, these employers become noncomplying employers.” *Id.*

SAIF objected to this language and proposed deleting all of subsection 4 and keeping ORS 656.039 as it then existed. *Id.* at 2. The Workers’ Compensation Division (WCD) opposed SAIF’s amendment, arguing that “one of the justifications for any state fund is to provide guaranteed coverage for all employers who wish coverage * * *.” *Id.*

Subsequently, at a July 6, 1983 House Labor Committee meeting, a representative from SAIF and from the WCD responded to inquiries from lawmakers. Minutes, House Labor Committee, SB 215, July 6, 1983, Tape 255, Side A. SAIF stated that its objection to the bill was the “administrative nightmare” that would be created if it were required to cover elected *nonsubject* workers of a particular employer, while another carrier covered the *subject* workers of that employer. *Id.* SAIF asserted that, if the WCD felt strongly about requiring SAIF to provide coverage whenever requested, then SAIF would do so on the condition that the employer would have to insure all of its workers through SAIF. *Id.* The WCD responded that that was an “excellent idea.” *Id.*

Noting that SAIF and the WCD had been characterizing the bill as permitting an employer to request coverage, a representative asked about the applicability of a worker requesting coverage. *Id.* SAIF responded that it was unsure what the legal requirements were; at which point, the WCD asserted that a worker could not individually elect coverage, only the employer. *Id.* The representative countered that he was thinking “about a partner or sole proprietor,” in other words, that group of workers referenced in ORS 656.128. When the WCD responded that those individuals were “not workers,” the representative asked: “In other words, if they [sole proprietors and partners) elect to get coverage, then there’s no problem?” The WCD responded that there would be no problem for those workers electing to get coverage. *Id.*

The following day, SAIF changed its amendment to the language that was ultimately adopted as subsection 4. Minutes, House Labor Committee, SB 215, July 7, 1983, Tape 258, Side B. SAIF characterized the amendment as a

compromise worked out between SAIF and the WCD with the following effect. If an employer wanted to cover a nonsubject worker, the employer could go shopping in the open market, and, if a private company could be found that would provide coverage, the employer could insure that nonsubject worker with that private carrier. *Id.* If the employer was denied coverage because of the nonsubject worker, SAIF would be required to cover that nonsubject worker, with the understanding that all of the employer's employees would be covered by SAIF, and with the provision that if the "subject coverage" was a candidate for the assigned risk pool, then those employees would go into the assigned risk pool, rather than be covered by SAIF. *Id.* The amendment was then adopted.

Although much of the legislative history of ORS 656.039(4) focused on an *employer*¹ seeking to cover nonsubject workers, the language of the enacted amendment expressly applies to any "*person * * * not subject to [Chapter 656] who elects to become covered*" for purposes of workers' compensation. Thus, despite any opinion expressed in testimony before the legislature that a worker could not individually elect coverage, ORS 656.039(4) in no uncertain terms permits any "employer or person" not subject to Chapter 656 to apply for workers' compensation coverage. Moreover, the legislative history indicates that, in any event, there would be no impediment to the election of coverage by nonsubject workers who are also permitted to apply for coverage under ORS 656.128. *See Minutes, House Labor Committee, SB 215, July 6, 1983, Tape 255, Side A.* This would include individuals, like claimant, who are LLC members.

Accordingly, we conclude that ORS 656.039(4) applies to a nonsubject person who elects to become covered, including a person who could also elect to be entitled to workers' compensation benefits as a subject worker under ORS 656.128.² Although ORS 656.039(4) permits other insurers to provide such coverage, SAIF would presumptively be *required* to do so. *See* ORS 656.039(4) (SAIF "*shall accept any written notice filed and provide coverage*" unless certain qualifying conditions are not met). However, the text of the statute and the legislative history also indicate that coverage with SAIF would not be absolute,

¹ The legislative history routinely refers to "employers" generally, whereas the text of the amendment refers only to employers not subject to Chapter 656.

² Because we find that the intent of the legislature may be determined by the text, context and legislative history, we find it unnecessary to resort to any canons of statutory construction. *See Rocha*, 233 Or App at 5 (in determining legislative intent, "we examine the text of the statutes in context, along with any relevant legislative history, and, if necessary, we apply relevant canons of statutory construction.").

but subject to the two criteria set forth above: (1) that all of the subject workers of the employer would be insured with SAIF; and (2) that the coverage of those subject workers was not considered by SAIF to be a risk properly assignable to the assigned risk pool.

Based on the foregoing, we find that ORS 656.039(4) applies to the present circumstances. In doing so, we do not find that ORS 656.039(4) and ORS 656.128 are necessarily in conflict; in other words, the statutes may be read in a way to give effect to both provisions. *See* ORS 174.010 (“where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all”); *State v. Stamper*, 197 Or App 413, 419, *rev den*, 339 Or 230 (2005). ORS 656.128 permits, *inter alia*, LLC members to “make written application to an insurer to become entitled as a subject worker to compensation benefits.” That same provision also allows any insurer to “accept such application.” *Id.* Under ORS 656.039(4), when that insurer is SAIF, SAIF must “accept any written notice filed and provide coverage * * * if all subject workers of the employer[] will be insured with [SAIF] and the coverage of those subject workers is not considered by [SAIF] to be a risk properly assignable to the assigned risk pool.”³

Here, the decedent, an LLC member and a person not otherwise subject to Chapter 656, elected to become covered as a subject worker with SAIF. Under both ORS 656.039(4) and ORS 656.128, he was permitted to do so. Because he elected to become covered with SAIF, SAIF was required, pursuant to ORS 656.039(4), to accept his written notice and provide coverage to him if: (1) all of the LLC’s subject workers would be insured with SAIF; and (2) SAIF did not consider the coverage of those subject workers to be a risk properly assignable to the assigned risk pool.

³ Because we do not find that the statutes present an irreconcilable conflict, we do not address SAIF’s argument that we should apply ORS 656.128 because it is necessarily more specific than ORS 656.039(4). ORS 174.020(2); *see also Smith v. Multnomah County Bd. of Comm’rs*, 318 Or 302, 309 (1994) (when two statutes conflict, and both would otherwise have equal force and effect, the specific provisions control over the general provisions); *Jeannine M. Dietz*, 60 Van Natta 2854, 2856 (2008) (same); *Olsen v. Deschutes County*, 204 Or App 7, 13, *rev den*, 341 Or 80 (2006) (the “specific controls over the general” statutory maxim only applies where statutes conflict). In any event, we do not agree with SAIF that ORS 656.128 is necessarily more specific than ORS 656.039(4). At first blush, one might conclude that ORS 656.128 is more specific than ORS 656.039(4) because ORS 656.128 references a subcategory of nonsubject persons, whereas ORS 656.039(4) speaks more generally of any nonsubject person. However, one could equally conclude that ORS 656.039(4) is more specific than ORS 656.128, because ORS 656.039(4) specifically applies where a nonsubject worker elects to be covered by SAIF, whereas ORS 656.128 only speaks of the right to apply to *all* insurers and the rights of those non-SAIF insurers to accept such an application.

The record establishes that all of the LLC's subject workers were already covered by SAIF. Moreover, the record does not establish that SAIF "considered" that the coverage of the LLC's subject workers was "a risk properly assignable to the assigned risk pool." Indeed, the continuing insuring of those subject workers belies any legitimate argument that their coverage would constitute such a risk.

Accordingly, we conclude that, under ORS 656.039(4), SAIF was required to accept the decedent's written notice electing coverage and to provide that coverage. Because SAIF was so required, the decedent was a subject worker covered by SAIF at the time of his workplace injury. Accordingly, we reverse.⁴

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). In awarding such a fee, we use the factors set forth in OAR 438-015-0010(4) as applied to the particular circumstances of this case. Those factors are: (1) the time devoted to the case; (2) the complexity of the issues involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; and (8) the assertion of frivolous issues or defenses.

Claimant's counsel asserts that 103 hours of time were spent in presenting the case, and that both attorneys working on the case charge a customary rate of \$200 per hour.⁵ Claimant's counsel also noted the collective 65 years of experience of both practitioners and the contingency nature of the case. Claimant's counsel also argues that this case, which was one of first impression, possessed significant legal complexity. Moreover, claimant's counsel has calculated the benefits at stake at approximately \$750,000 to \$800,000. SAIF has not responded to or contested any of these representations.

Based on these uncontested representations and the factors above, we find that claimant's attorneys have devoted an extraordinary amount of time to a case of great legal complexity with considerable benefits at stake. Given the complexity of the issue and SAIF's vigorous defense, we also find that the risk of going uncompensated was high. Further, counsel for both parties are highly skilled and experienced attorneys, who presented their positions in a thorough,

⁴ SAIF does not argue any other basis on which its denial should be upheld.

⁵ Although the time devoted to the case is a factor to be considered, we have held that "an attorney's 'hourly rate' is not included as a factor prescribed in OAR 438-015-0010(4)." *Edward G. Sprague*, 58 Van Natta 2418, 2423 (2006), *aff'd*, 346 Or 661 (2009).

well-reasoned and skillful manner. The nature of the proceedings consisted of a one-day hearing lasting approximately 2 hours, with 78 exhibits admitted and 4 witnesses testifying. In addition, claimant's counsel submitted a 7-page appellant's brief and a 4-page reply brief, analyzing this complex issue and compensability of this denied claim. Lastly, no frivolous issues or defenses were presented.

After considering the previously enumerated factors and applying them to this case, we find that a reasonable fee for claimant's attorneys' services at hearing and on review is \$35,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case, the considerable legal complexity of the issue, the high value of the interest involved and the significant benefits secured for the represented party, the skill of the attorneys and the risk that the attorneys' efforts would go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated April 30, 2009 is reversed. SAIF's denial is set aside and the claim is remanded to it for processing according to law. For services at hearing and on review, claimant's attorneys are awarded an assessed fee of \$35,000, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on March 8, 2010