
In the Matter of the Compensation
WCB Case No. 06-05918,05-07919, 05-07918, 05-07917, 05-07916, 05-07915,
05-07914, 05-07705, 05-07704, 05-07703, 05-07438

RONNIE L. NIELSON, DCD., Claimant

ORDER ON REVIEW

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Reviewing Panel: *En Banc*. Members Biehl, Lowell, Herman, Langer, and Weddell. Chair Herman chose not to sign the order.

Mattel, Inc., and its predecessors (hereinafter jointly referred to as “employer”) request review of Administrative Law Judge (ALJ) McCullough’s order that: (1) declined to dismiss claimant’s request for hearing concerning its denial of her occupational disease claim for renal cell carcinoma; and (2) upheld its denial without determining whether claimant had established any employment contribution concerning the denied claim.¹ On review, the issues are the ALJ’s procedural ruling and scope of issues.

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

The decedent worked for the employer from April 1986 to April 1999. In 1998, trichloroethylene (TCE) was found in the groundwater that supplied the drinking water at the employer’s plant. (Ex. 1). TCE was detected in the employer’s well water at levels up to 1,670 parts per billion, exceeding the 5 parts per billion drinking water standard established by the Environmental Protection Agency (EPA). (Ex. 1-6). During his employment, the decedent drank water sourced from the employer’s plant and coffee from the employer’s cafeteria. (Ex. 138-76 through 81).

On September 26, 2004, the decedent died from metastatic renal cell carcinoma. On September 12, 2005, claimant filed an occupational disease claim, asserting that the decedent’s exposure at work to TCE in the drinking water caused his death.

¹ Claimant is the surviving spouse of the deceased worker.

The employer denied the claim, both on grounds of timeliness and compensability. Claimant requested a hearing.

In a prior order, we found that claimant timely filed her occupational disease claim, and remanded the compensability dispute to the ALJ, finding that the record was insufficiently developed. *See Ronnie L. Nielson, Dcd.*, 60 Van Natta 2878 (2008) (*Nielson I*).² 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.* at 2883-84.

Thereafter, the ALJ admitted the employer's previously proposed exhibits. On April 9, 2009, after receiving no objection from the employer, the ALJ admitted a report and *curriculum vitae* (CV) from Dr. Teitelbaum, an "out-of-state" doctor, and excerpts from certain administrative rules that were submitted by claimant on December 12, 2008. (*See Exs. CL8, CL9*). Dr. Teitelbaum opined that the decedent's workplace TCE exposure was a substantial factor and material cause of his renal cell carcinoma and death. (*Ex. CL8-1*). Dr. Teitelbaum could not "comfortably say that the TCE that [the decedent] ingested at work was a 'major contributing cause' to his disease." (*Ex. CL8-2*). The ALJ informed the parties that he would keep the record open until August 3, 2009 for the submission of Dr. Teitelbaum's deposition, which the employer had previously requested.

On June 30, 2009, the employer announced that it would not be deposing Dr. Teitelbaum. The employer also requested that the ALJ not admit any exhibits from claimant, including the exhibits already admitted, until those exhibits were "formally proffered, and an opportunity [was] provided for objections to be made and ruled upon." In that same letter, the employer requested that the ALJ proceed by: (1) setting a deadline to allow the parties to submit evidence; (2) setting a briefing deadline to raise and brief evidentiary objections; (3) ruling on the evidentiary issues; and (4) setting a briefing schedule for closing arguments based upon the evidentiary record.

On July 10, 2009, the ALJ stated that claimant's December 2008 submission of Dr. Teitelbaum's report and CV had been considered as a formal offer of evidence. Reasoning that the employer had some four months to object before the

² Specifically, we found that the ALJ's evidentiary rulings excluding evidence concerning the compensability of the claimed occupational disease were improper. Further details regarding that issue and the litigation history are summarized in *Nielson I*.

April 2009 admission of that evidence, the ALJ declined to reconsider the previous admission of that evidence. Nevertheless, the ALJ permitted the employer to obtain a response from its medical expert, Dr. Burton, concerning Dr. Teitelbaum's report.

On July 22, 2009, the employer responded that it had "expected that the ALJ would provide another more formal opportunity for the parties to present objections and finalize the record on remand once all discovery had been completed." The employer then "repeat[ed] its June 30, 2009 request for the ALJ to set a deadline for submission of objections to the newly admitted compensability record as supplemented on remand."

The ALJ disagreed with the employer's interpretation of our order in *Nielson I* and adhered to his July 10, 2009 letter. On September 2, 2009, having received no rebuttal report from the employer, the ALJ closed the evidentiary record.

In closing arguments, the employer argued that Dr. Teitelbaum's report was not sufficient to establish any degree of medical causation because, *inter alia*, as an out-of-state expert that did not treat or examine claimant, his report did not "fall within the limited hearsay exception established under ORS 656.310(2)."

The ALJ upheld the employer's denial, finding that claimant had not established that the decedent's employment activities were the major contributing cause of the claimed occupational disease. *See* ORS 656.802(2).³ In doing so, the ALJ declined the employer's request that he also make findings as to whether the decedent'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, however, asserts 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.

³ 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.

We disagree with the employer's contentions. We reason as follows.

The employer first asserts that we should dismiss claimant's hearing request because she has not "genuinely sought to obtain a worker's compensation remedy for" the claimed occupational disease. In other words, the employer contends that claimant pursued a strategy to intentionally "lose" her workers' compensation claim "in a certain way" so that she could file a civil action under ORS 656.019.

In advancing this argument, the employer does not identify, nor have we located, any authority that would empower us to dismiss claimant's hearing request. Indeed, in *Nielson I*, which issued at a stage where claimant had submitted *no* medical evidence that would warrant setting aside the employer's denial, we reasoned that:

"claimant's decision not to submit evidence in support of her request for hearing did not effectively constitute an 'abandonment' of the request for hearing. *See* OAR 438-006-0071. She participated throughout the pre-hearing proceedings, as well as at the hearing. Moreover, she has not withdrawn her hearing request. Under such circumstances, she is entitled to a decision regarding her request for hearing." *Nielson I*, 60 Van Natta at 2883.

After remanding to the ALJ for the admission of evidence from both parties, claimant submitted a medical report from Dr. Teitelbaum. In that report, Dr. Teitelbaum opined that the decedent's workplace TCE exposure was a "material cause" of the claimed occupational disease, but not the "major contributing cause" of that disease. (*See* CL8-1, -2). Such an opinion does not establish a compensable occupational disease claim under ORS 656.802(2)(a), which requires proving "that employment conditions were the major contributing cause of the disease." In such cases, the appropriate remedy is to uphold the employer's denial, not dismiss claimant's timely filed request for hearing. *See Nielson I*, 60 Van Natta at 2883.

The employer also argues that claimant has "not diligently and arduously pursue[d]" his occupational disease claim. *See Nielson I*, 60 Van Natta at 2883 n 12 (observing that the apparent legislative intention of enacting ORS 656.019(1) was that, before filing a civil claim under that statute, the "parties will diligently and arduously pursue their respective claims and defenses within the workers' compensation system"). However, claimant's counsel represents that "evidence

[that the work exposure was the] major contributing cause [of the claimed occupational disease] * * * did not exist.” (Claimant’s Brief at 6). Claimant’s counsel further asserts that his firm and client “had ‘done their homework’ [and] knew from the start that treating doctors **could not say** that TCE was the major contributing cause of [the decedent’s] disease.” (*Id.*) (emphasis in original). Therefore, asserting that claimant “only has evidence of * * * material causation,” his counsel maintains that there is nothing more that “an honest lawyer [could] do in that circumstance.” (*Id.*)

In reply, other than referring to the inadequacy of claimant’s submitted medical report, the employer does not refer to any portion of the record establishing that claimant’s counsel has engaged in “gamesmanship” in not fully garnering evidence in support of this claim. *See Nielson I*, 60 Van Natta at 2883 n 12. Nor have we been presented with evidence that disputes claimant’s counsel’s representation. As such, the employer’s “gamesmanship” argument is based on speculation, rather than probative evidence.⁴

The employer next asserts that, by affirming the ALJ’s decision upholding its denial, our order “might be construed to endorse claimant’s efforts” to file a civil action under ORS 656.019(2) and *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001). The validity (or lack thereof) of any potential civil action that claimant may file, however, is beyond the scope of our authority, which is to determine the compensability of claims under the Workers’ Compensation Act.⁵ Therefore, in the absence of any statutory authority or appellate court directives, we are not authorized to dismiss claimant’s hearing request; any impact of our decision upholding the employer’s denial in an ancillary litigation is not for us to determine.

Alternatively, the employer requests that we modify the ALJ’s compensability finding by recognizing that claimant also failed to establish legal causation. *See Darla Litten*, 55 Van Natta 925, 926 (2003) (legal causation is established by showing that the claimant engaged in potentially causative work

⁴ We further note that ORS 656.390(1) provides for sanctions against an attorney for the filing of a hearing request when the request is frivolous, or was filed in bad faith or for the purpose of harassment. Here, sanctions were not sought at the hearing level.

⁵ As explained in more detail below, ORS 656.019 sets forth certain procedural parameters regarding an injured worker’s right to pursue a civil action for certain work-related injuries. The statute does not, however, include a role for the Board other than determining that a work-related injury is not compensable because the worker “failed to establish that a work-related incident was the major contributing cause of the worker’s injury.” *See* ORS 656.019(1)(a).

activities; whether those work activities caused the claimant's condition is a question of medical causation). In advancing that argument, the employer acknowledges that, to have a compensable claim, claimant must prove both legal and medical causation by a preponderance of the evidence. *See Harris v. Farmer's Co-op Creamery*, 53 Or App 618 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff'd without opinion*, 184 Or App 761 (2002). In other words, if claimant does not establish *one* of the prongs, her claim is not compensable.

Here, the ALJ upheld the employer's denial because claimant did not establish medical causation. The employer does not contend that the expert medical evidence establishes that the decedent's workplace exposure was the major contributing cause of the claimed occupational disease. The employer also acknowledges that it is not uncommon for us to decide compensability disputes solely on medical causation (*see, e.g., Kyle G. Andersen*, 61 Van Natta 2117 (2009); *Jeffery S. Taylor*, 59 Van Natta 2263 (2007); *Vernon L. Minor*, 52 Van Natta 320 (2000), *aff'd without opinion*, 172 Or App 296 (2001)), or just on legal causation (*see, e.g., Alfred C. Derosier*, 62 Van Natta 201 (2010); *George E. Sells*, 61 Van Natta 1785 (2009); *Donald R. Damron, Jr.*, 60 Van Natta 335 (2008)). Nevertheless, the employer asserts that, although such determinations may be permissible "in an ordinary claim," ORS 656.019 obligates us to determine *both* legal and medical causation.

We disagree with the employer's assertion, reasoning as follows.

ORS 656.019 states, in relevant part:

"(1)(a) An injured worker may 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 only after an order determining that the claim is not compensable has become final. The injured worker may appeal the compensability of the claim as provided in ORS 656.298, but may not pursue a civil negligence claim against the employer until the order affirming the denial has become final."

Thus, ORS 656.019 sets forth circumstances in which an injured worker may pursue a civil negligence action in a different forum. It does not, however, prescribe that we review or adjudicate workers' compensation claims in any

different manner than “an ordinary claim.”⁶ Rather, the statute speaks to the right of injured workers to file a civil claim in a separate forum, and to do so “only after an order determining that the [workers’ compensation] claim is not compensable has become final.”⁷ *Id.* Thus, whether an injured worker has a right to pursue a separate civil action pursuant to ORS 656.019 is not a determination for us to make; rather, that determination is for the forum where any civil action is filed, and arises only *after* “the order affirming the denial has become final.” *Id.*

For similar reasons, we disagree with the employer that, under ORS 656.019, we must make a finding that claimant has not proven *any* employment contribution to the claimed occupational disease. We are unable to identify any provision in ORS 656.019 supporting that assertion. Under the workers’ compensation statutory scheme, when a carrier denies a claim for compensation, we must decide whether to set aside or uphold that denial. That determination is based on the statutory compensability standard applicable to the filed claim. As set forth above, compensability in the instant matter is determined by claimant establishing that employment exposure was the major contributing cause of the claimed occupational disease. ORS 656.802(2). We have determined that claimant has not met that burden. Whether claimant established any lesser degree of workplace contribution is not statutorily relevant to whether her claim is compensable under ORS 656.802(2). Accordingly, we decline the employer’s request to specify some lesser degree of workplace contribution, if any, concerning the claimed occupational disease.

Finally, in support of its assertion that claimant did not establish *any* workplace contribution to the claimed occupational disease, the employer argues that Dr. Teitelbaum’s report did not constitute “prima facie evidence” of the medical matters contained therein under ORS 656.310(2), because he was an out-of-state doctor that was neither a treating nor examining physician. *See Downey v. Halvorson-Mason*, 20 Or App 593, 598 (1975) (concluding that ORS 656.310(2)

⁶ The employer does not suggest, nor are we able to ascertain, when a claim would be deemed “ordinary” versus “extraordinary.” Indeed, the implausibility of making such a determination is apparent, given that a right to initiate a civil action under ORS 656.019 arises only *after* we have made a compensability determination. The employer’s position would have us somehow forecast that an ORS 656.019 civil action would be filed in the future, and then review or adjudicate those claims in a different manner than an “ordinary” claim. Nothing in ORS 656.019 or any other statute provides for such an approach.

⁷ That compensability determination must be made by the Board in the first instance, although “[t]he injured worker may appeal the compensability of the claim as provided in ORS 656.298,” which sets forth procedures for judicial review of a Board order. *See* ORS 656.019(1)(a); ORS 656.298.

limited the admissibility of out-of-state doctor reports to a “treating or examining doctor,” and affirming the Board’s ruling that 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 medical report inadmissible under ORS 656.310(2) because the out-of-state doctor authoring the report did not treat or examine the claimant). Because we have concluded that, for compensability purposes, it is unnecessary for us to determine the precise degree of workplace contribution short of “the major contributing cause,” we do not reach the issue of what impact Dr. Teitelbaum’s report may have on establishing some lesser level of workplace contribution.⁸

ORDER

The ALJ’s order dated November 24, 2009 is affirmed.

Entered at Salem, Oregon on September 15, 2010

⁸ The employer did not seek to exclude Dr. Teitelbaum’s report as inadmissible under ORS 656.310(2). Regardless, even were that report excluded, we would still find that claimant has not established that the decedent’s employment conditions were the major contributing cause of the claimed occupational disease. Likewise, the exclusion of the report would have no effect on our determinations regarding the other arguments posed by the employer.