

In the Matter of the Compensation of  
**WALTER H. KREUZER, DCD, CLAIMANT**  
WCB Case No. 11-06043  
ORDER ON REVIEW

Bottini Bottini & Oswald, Claimant Attorneys  
Julie Masters, SAIF Legal Salem, Defense Attorneys  
Raymond Smitke, Law Office of Thomas A Andersen PDX, Defense Attorneys

Reviewing Panel: Members Lowell and Lanning.

Claimant requests of Administrative Law Judge (ALJ) Lipton's order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for mesothelioma.<sup>1</sup> On review, the issue is subjectivity. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." We summarize the pertinent facts.

The decedent worked for SAIF's insured from approximately 1950 to 1984 and was exposed to asbestos as a result of that work. He developed mesothelioma in December 2010, which resulted in his death in April 2011.

Claimant filed a federal workers' compensation claim for widow's benefits under the Longshore & Harbor Workers' Compensation Act (LHWCA), which was accepted by SAIF. (Ex. 33). She also filed the instant claim, which SAIF denied on the ground that her claim for death benefits was accepted under the LHWCA. (Ex. 34). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld SAIF's denial, reasoning that claimant was not a subject worker under ORS 656.027(4).<sup>2</sup> On review, claimant contends that

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<sup>1</sup> Claimant, Lois Kreuzer, is the surviving spouse of Walter H. Kreuzer, the deceased worker. As such, she is the statutory beneficiary.

<sup>2</sup> The ALJ's order was captioned as an "Interim Order." Nevertheless, the ALJ's order finally determined the amount or entitlement to compensation. *See Lindamood v. SAIF*, 78 Or App 15, 18 (1986) (a decision that neither denies the claim, nor allows it and fixes the amount of compensation, is not a final appealable order). Moreover, the ALJ's order included a statement explaining the parties' rights of appeal under ORS 656.289(3) and ORS 656.295. Under such circumstances, the ALJ's order was a final, appealable order. Consequently, we proceed with our review of this denied claim.

ORS 656.027(4) does not apply because the decedent was also exposed to asbestos while working for SAIF's insured during a period not subject to the LHWCA. We disagree with claimant's contention, reasoning as follows.

ORS 656.027(4) provides:

“All workers are subject to ORS [chapter 656] except those nonsubject workers described in the following subsections:

“ \* \* \*

“(4) A person for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States.”

Thus, where the “LHWCA, a ‘law of the United States,’ provides coverage for [a] claimant’s work-related disability, [the claimant] is not a subject worker under ORS chapter 656.” *Mann v. SAIF*, 91 Or App 715, 716, (1988) (citing ORS 656.027(4)); *see also Thomas A. Wuellett*, 42 Van Natta 1927, 1928 (1990) (where a claim is conclusively determined to be within the jurisdiction of the LHWCA, the claimant is not a subject worker under Oregon workers’ compensation law).

Here, claimant does not dispute that coverage for the decedent’s death is provided by (and has been accepted under) the LHWCA. Nevertheless, she asserts that she “is entitled to pursue a separate claim under [Oregon workers’ compensation law] due to [the decedent’s] later exposure while working [in Oregon] that independently contributed to his condition.” In support of that position, claimant cites to “responsibility” cases concerning the last injurious exposure rule (LIER).<sup>3</sup>

Those cases, however, do not concern ORS 656.027(4), which expressly applies where “a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States.” The LHCWA is a law of the United States that provides a “rule of liability” for the decedent’s “death

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<sup>3</sup> Claimant also relies on *Arlan F. Caya, Dcd.*, 48 Van Natta 1136 (1996). In *Caya*, we determined that the LHCWA did not provide compensation for the claimant’s condition; therefore, ORS 656.027(4) did not apply. Here, unlike *Caya*, there is no dispute that the LHCWA has provided compensation for claimant’s mesothelioma and resulting death. Therefore, *Caya* is inapposite.

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arising out of and in the course of employment.” SAIF has accepted claimant’s death benefits claim (due to the deceased worker’s mesothelioma) under the LHCWA; allowing a separate death benefits claim (also due to his mesothelioma) under ORS chapter 656 cannot be squared with ORS 656.027(4).<sup>4</sup>

ORDER

The ALJ’s order dated August 29, 2012 is affirmed.

Entered at Salem, Oregon on February 4, 2013

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<sup>4</sup> This case does not involve different injuries or occupational diseases, but rather a single claim for death benefits arising out of a single condition (mesothelioma).