

In the Matter of the Compensation of
RAMIRO RUIZ-SOLIS, DCD, Claimant

WCB Case No. 13-02820

ORDER ON REVIEW

Stephen F Mannenbach, Claimant Attorneys
Julie Masters, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Naugle's order that set aside its denial of claimant's survivor benefits claim.¹ Claimant cross-requests review, seeking an increased attorney fee award. On review, the issues are compensability and attorney fees.

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

Claimant and the decedent were not married, but had been in a relationship for approximately 15 years and had two children together. Claimant also had three other children, who lived with them.²

On April 2, 2013, the decedent died in a work-related accident. SAIF accepted a fatal injury. (Ex. 11). SAIF awarded benefits to the decedent's children with claimant. (Exs. 12, 14).

Claimant filed a claim for survivor benefits, which was denied by SAIF. (Exs. 8, 12). She requested a hearing.

At hearing, the issue was whether claimant and the decedent cohabited as husband and wife for over one year before the date of his death, pursuant to ORS 656.226. The ALJ explained that claimant and the decedent lived together with their children in a Salem apartment beginning in February/March 2012. The ALJ found that claimant and the decedent were temporarily separated in the summer of 2012, the fall of 2012, and from January/February 2013 until the decedent's death on April 2, 2013.

¹ Claimant, Eva Arevalo, is the alleged cohabitant of the deceased worker, Ramiro Ruiz Solis.

² Claimant's oldest child later moved out of the house. (Tr. 136).

After reviewing the record and testimony of several witnesses, including claimant, the ALJ determined that each separation was temporary and not permanent. The ALJ noted that there was testimony from Mr. McCullom (the decedent's employer), Mr. Amador (the decedent's coworker and friend), and Mr. Gaspar (one of the decedent's roommates), that the decedent had separated from claimant.³ However, the ALJ determined that only Mr. Amador addressed whether the separation was temporary or permanent, testifying that he believed that the decedent's separation from claimant was temporary. (Tr. 96).

The ALJ reasoned that claimant's and the decedent's financial and transportation issues were such that it was necessary for the decedent to live away from claimant and his children while he was working. Nevertheless, the ALJ found that claimant and the decedent visited each other during the separations and that the decedent returned to live with claimant once the work was over. The ALJ concluded that claimant established that she had cohabited with the decedent and met the requirements of ORS 656.226. Consequently, the ALJ awarded survivor benefits to claimant.

On review, SAIF argues that claimant is not entitled to survivor benefits because she did not prove the elements of "cohabiting" under ORS 656.226. SAIF contends that the essence of a cohabiting relationship is living together, and because the parties lived apart more than they lived together in the year before the decedent's death, they were not "cohabiting" within the meaning of the statute. Citing *Johnston v. Georgia-Pacific*, 35 Or App 231 (1978), SAIF argues that claimant's evidence must be "clear and convincing."

ORS 656.226 provides:

"In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation, the surviving cohabitant and the children are entitled to compensation under this chapter the same as if the man and woman had been legally married."

³ Adan Garcia-Negrete, a coworker and friend of the decedent, also testified that the decedent said that he had separated from claimant. (Tr. 87, 92). However, he also testified that, despite the decedent's troubles with claimant, the decedent returned home to claimant on weekends and later moved back with her. (Tr. 88, 90). His testimony does not support the conclusion that their separation was permanent.

To begin, we do not agree with SAIF that the standard of proof is “clear and convincing.” In *Johnston*, the claimant conceded that she did not qualify for benefits under ORS 656.226, but argued that a valid marriage in Colorado was established and that she was entitled to benefits as a spouse under ORS 656.204. Citing a Colorado case, the *Johnston* court explained that the elements required by Colorado law for a “common-law marriage” had been established by clear and convincing evidence. Consequently, the claimant was entitled to spousal benefits. 35 Or App at 234.

Here, in contrast, claimant is arguing that she is entitled to benefits under ORS 656.226, rather than spousal benefits under ORS 656.204. ORS 656.226 does not refer to a “clear and convincing” standard of proof. Cf. ORS 656.802(3)(d) (requiring “clear and convincing” evidence that the mental disorder arose out of an in the scope of employment); ORS 656.802(4) (“Denial of a claim for any condition or impairment of health arising under this subsection must be on the basis of clear and convincing medical evidence that the cause of the condition or impairment is unrelated to the firefighter’s employment.”). Under these circumstances, we conclude that claimant must establish that she is entitled to benefits under ORS 656.226 based on the preponderance of the evidence.

We turn to SAIF’s argument that one of the elements of “cohabiting” under ORS 656.226 requires that it was “continuously” in effect for over a year before the decedent’s death. We disagree.

In *Cottrell v. EBI Companies*, 304 Or 187 (1987), the claimant and the decedent had lived together as husband and wife for about three years and during that time they had a child together. Approximately one month before the decedent’s death, he moved out of the home and into a separate apartment because he and the claimant were having difficulties with their relationship. The issue on judicial review was whether ORS 656.226 required cohabitation of the claimant and the subject worker at the time of the fatal accident.

The Supreme Court in *Cottrell* explained that ORS 656.226 was ambiguous, but that no legislative history survived from the statute’s original enactment in 1927.⁴ *Id.* at 190. After reviewing the statutory scheme as a whole, the court explained:

⁴ The court explained that ORS 656.226 was amended in 1983 to provide survivor’s benefits to males who had cohabited with deceased female workers, but the amendment did not deal with the cohabitation requirement. *Id.* at 190.

“Under the Workers’ Compensation Law, a surviving spouse is eligible for benefits only if the surviving spouse’s marriage to the worker was in effect at the time of the worker’s death. Benefits are not available to a former spouse. ORS 656.204(3). Following the directive of ORS 656.226 therefore requires that benefits not be awarded if the cohabitation relationship has ended, i.e., the parties have gone through what was, for their relationship, the functional equivalent of a dissolution of marriage. The parties may separate temporarily without losing eligibility under ORS 656.226, but a permanent separation ends not only the relationship but also eligibility under the statute. We hold that, in order to qualify for survivor’s benefits under ORS 656.226, the cohabitation relationship must exist at the time of the worker’s death.” *Id.* at 191 (footnote omitted).

The *Cottrell* court also addressed the meaning of “cohabitation.” The court explained that, in *Bowlin v. SAIF*, 81 Or App 527, 532 (1986), the Court of Appeals stated that “[t]he nature of the relationship and not the number of days spent in the same location determines whether cohabitation exists” for the purpose of ORS 656.226. In *Bowlin*, the court noted that the claimant and the decedent “were not always together every day and every night, but there is *no* evidence that they ever intended to terminate their long term relationship.” *Id.* (emphasis in original).

The *Cottrell* court explained that, in *Wadsworth v. Brigham*, 125 Or 428 (1928), it had construed a statute that contained language almost identical to ORS 656.226.⁵ The court quoted from *Wadsworth*:

⁵ The statute addressed in *Wadsworth* provided:

“In case a man and a woman, not otherwise married heretofore, shall have cohabited in the state of Oregon as husband and wife, for over one year, and children shall be living as a result of said relation, said cohabitation, if children are living, is hereby declared to constitute a valid marriage and the children born after the beginning of said cohabitation are hereby declared to be the legitimate offspring of said marriage.” 125 Or at 459 (quoting Or Laws 1925, ch 269, § 1).

“[I]t is said that during this period of cohabitation John R. Brigham had rooms elsewhere. That would not prevent his cohabitation with the plaintiff’s mother, as cohabitation does not mean that the parties must live together in the same room continually or occupy one room, as the essence of cohabitation is the living together and the sexual relations, and there may be some degree of living apart and an occasional trip away without destroying the relation, so that it was not a part of the plaintiff’s case to prove that the three of them were huddled in one room all the time and never departed therefrom.” 304 Or at 192 (quoting *Wadsworth*, 125 Or at 482).

The *Cottrell* court determined that the Court of Appeals’ definition of “cohabitation” in ORS 656.226 (*i.e.*, that the “nature of the relationship and not the number of days spent in the same location determines whether cohabitation exists”) was consistent with *Wadsworth* and it approved that definition. *Id.*

Based on *Cottrell*, we do not agree with SAIF that ORS 656.226 requires that the cohabitation be “continuously” in effect for over a year before the decedent’s death. Instead, the “nature of the relationship and not the number of days spent in the same location determines whether cohabitation exists” for purposes of ORS 656.226. *Id.* at 191 (quoting *Bowlin*, 81 Or App at 532).

After reviewing the record, we agree with the ALJ’s conclusion that claimant and the decedent “cohabited” for over one year before the date of the decedent’s death, pursuant to ORS 656.226. We reason as follows.

At the time of his death, the decedent worked at a vineyard. (Ex. 5). Mr. McCullom, the general manager for the employer, explained that employees generally worked from January until October, six days a week. (Tr. 65). The employer’s address is in Rickreall, Oregon. (Ex. 5). During the Christmas season, most of Mr. McCullom’s employees, including the decedent, worked for another employer cutting Christmas trees. (Tr. 65; Ex. 25-2).

Claimant met the decedent in about 1997 and, at the time of the decedent’s death, they had been in a relationship for about 15 years. They had two children together. (Tr. 26, 27; Ex. 7- 5, -6). The record indicates that at least one of their children attended a Salem-Keizer public school. (Ex. 7-7). Claimant testified that

she and the decedent lived together as husband and wife during the 15-year period, but there were periods when they did not live together because of transportation problems involving the decedent's work. (Tr. 27, 28, 30, 31, 45, 53-54). She had no fears that the decedent was leaving permanently or that he was in a relationship with another person. (Tr. 29, 39). They had plans to marry, but there were difficulties with the decedent's illegal alien status. (Tr. 39-40).

In February/March 2012, claimant and the decedent lived together with their children in a Salem apartment. (Tr. 11, 25). Although claimant and her children continued to live in Salem during the year before the decedent's death, he lived at a location separate from claimant on three occasions. For the reasons described by the ALJ, we conclude that those separations were temporary and did not change the nature of their relationship.

During the year before April 2013, claimant and the decedent continued to have an apartment lease in Salem, which was in both of their names. (Tr. 11-12, 135; Ex. 7). The decedent continued to share the costs of the rent, utilities, and groceries in the Salem apartment. (Tr. 135). The decedent kept most of his belongings in the Salem apartment, except for the clothes he needed during the work week. (Tr. 45, 135).

Claimant explained that they had difficulties in their relationship, including serious financial problems, but there was no intent to leave each other. (Tr. 32, 53-54). She testified that the decedent stood by her side during her drug treatment and did not threaten to leave her. (Tr. 35-38). During the periods when the decedent was living in McMinnville, claimant and the decedent talked on the phone every day. (Tr. 139).

SAIF argues that claimant's testimony is inconsistent and unreliable, contending that her stated reason for the separation (transportation difficulties) is not credible.

The ALJ did not make any specific demeanor-based credibility findings. Where, as here, the issue of credibility concerns the substance of a witness's testimony, we are equally qualified to make our own determination of credibility. *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987); *Scott A. Long*, 65 Van Natta 2348, 2349 (2013).

We acknowledge that there are some inconsistencies in the testimony of claimant and other witnesses regarding the frequency of claimant's visits to the decedent when he was in other locations, the reason for unpaid rent, and some transportation and financial issues. Nevertheless, after evaluating claimant's testimony within the context of the other testimony and the record as a whole, we do not find any inconsistencies in her version of events sufficient to discount her testimony regarding the nature of the relationship between claimant and the decedent, which is the critical issue before us. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Crystal R. Emig*, 60 Van Natta 198, 199 (2008) (inconsistencies in the record did not lead to conclusion that the claimant's testimony was not credible).

Despite the fact that claimant and the decedent did not live together every day for the year before his death in April 2013, we find that their relationship during that period was and continued to be one of "husband and wife" under ORS 656.226. In reaching that conclusion, we acknowledge that claimant and the decedent had serious financial problems and transportation difficulties. However, the record does not establish that claimant and the decedent terminated their 15-year relationship as a couple. We conclude that claimant and the decedent "cohabited" as husband and wife for over one year prior to the date of the decedent's death, pursuant to ORS 656.226. Therefore, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review concerning the survivor benefits issue. 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 services on review concerning that issue is \$7,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief and his counsel's representations), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.⁶

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 438-015-019; *Gary E. Gettman*, 60 Van Natta 2862 (2008).

⁶ Claimant's attorney is not entitled to a fee for services related to the attorney fee issues raised on review. *See Eric V. Orchard*, 58 Van Natta 2574, 2582, *aff'd without opinion*, 218 Or App 229 (2008).

ORDER

The ALJ's order dated December 27, 2013 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$7,500, 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 July 11, 2014