
In the Matter of the Compensation of
PEGGIE J. ABEYTA, Claimant
WCB Case No. 01-00662
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Bock, Langer, Lowell, Biehl, and Phillips Polich.¹ Members Biehl and Phillips Polich dissent.

Claimant requests review of Administrative Law Judge (ALJ) Mills' order that affirmed a Director's order denying her request for reclassification of her claim to "disabling." On review, the issue is claim classification.

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

Claimant began working for the employer, Barrett Business Services, in a position at HMT Technology in August 1999 as an inspector. Claimant worked a cyclic schedule, requiring her to work 7 p.m. to 7 a.m., four days one week and 3 days the next. Claimant sustained a compensable low back injury when she slipped and fell on November 25, 1999 during a Wednesday shift ending Thursday morning. Claimant was transported to a hospital where she received medical treatment from Dr. Graham, who told her to follow up in three days. Claimant was not scheduled to work those three days.

Claimant was transported back to work where she completed her shift, although she did nothing more than stand around. Claimant never "clocked out" until the end of her shift on Thursday morning.

As previously noted, claimant had the next three days off. Claimant returned to Dr. Crooks on November 28, 1999, who released her for modified work, with no lifting, pushing or pulling over 10 pounds. Claimant was also told to minimize bending and twisting. (Ex. 6). Claimant called in sick her next three scheduled days of work, but returned to modified work on December 5, 1999 at her regular wages.

¹ On June 7, 2002, pursuant to a notice of public meeting, the Board decided to sit together as a panel of five to review a designated group of cases. This case was one of that limited group. Although reviewed by all of the members, this case does not involve an issue of first impression that has a profound impact on the workers' compensation system.

The claim was accepted as “nondisabling” on January 5, 2000. Claimant then requested that the claim be reclassified as “disabling,” a request that the self-insured employer denied. Claimant appealed that decision to the Director, who issued an order denying the reclassification request. Claimant requested a hearing before the Hearings Division, contending that her claim should be reclassified to “disabling” because she was entitled to temporary disability.

The ALJ affirmed the Director’s order, finding that claimant was not entitled to temporary disability. In so doing, the ALJ first noted that no temporary disability benefits are due for temporary disability suffered during the first three calendar days after the worker leaves work or loses wages as a result of the injury. The ALJ reasoned that claimant’s first day of injury would not be considered the first day of the three-day waiting period because, while claimant left work for a time, she later returned to work to complete her shift. Concluding that the record established that claimant was paid for the full shift that day, the ALJ concluded that the first day of injury should not be considered the first day of the three-day waiting period. *See* OAR 436-060-0030(1)(a).²

The ALJ then concluded that the waiting period did not commence until the three-day period in which claimant was scheduled to work but did not. The ALJ noted that, after that time, claimant returned to modified work at the same wages that were paid prior to the injury and that, accordingly, there would be no entitlement to temporary partial disability. Thus, as a result of the application of the three-day waiting period, the ALJ concluded that claimant never became entitled to temporary disability. Therefore, the ALJ rejected claimant’s argument that her claim should be reclassified to “disabling.”

On review, claimant contends that the first day of injury should have been counted as part of the three-day waiting period because she “left work” that day within the meaning of ORS 656.212(1). Claimant asserts that the administrative rule the ALJ applied, OAR 436-060-0030(1)(a), is invalid because it is inconsistent with ORS 656.212(1). Therefore, claimant argues that it should not be applied in this case.³

² That rule provides that, if a worker leaves work but returns and completes the work shift without loss of wages, that day shall not be considered the first day of the three-day waiting period.

³ Claimant and the dissent argue that the record does not establish she was paid for her shift and, therefore, that the administrative rule does not apply on that basis. However, claimant testified that she did not “clock out” when she sought treatment, but rather returned to work and reported the end of the shift as 7 a. m. (Tr. 31). We find that this testimony supports that of the employer’s representative (Ms. Berardi), who testified that claimant was paid for the entire shift. (Tr. 42). Based on this evidence,

Specifically, claimant notes that ORS 656.212(1) provides that, if a worker “leaves work” on the day of injury, that day shall be considered the first day of the three-day waiting period. According to claimant, the administrative rule’s exclusion of the first day of injury from the three-day waiting period provision, where the worker leaves work but later returns to complete the shift without loss of wages, is inconsistent with the statute’s requirement that a worker merely “leave work.” Claimant asserts that the rule impermissibly creates two different criteria for leaving work: those instances where a worker leaves work but later returns to work that shift and those where the worker leaves work and cannot or chooses not to return to work.

Therefore, claimant urges us to not apply the administrative rule and consider the first day of claimant’s injury as part of the three-day waiting period. When that day is combined with the three shifts that she missed, claimant argues that her disability exceeded the three-day waiting period, thus entitling her to temporary disability and, hence, “disabling” claim status.

Claimant’s contentions notwithstanding, we agree with the ALJ’s disposition of this case. We reason as follows.

An administrative agency may not, by its rules, amend, alter, enlarge, or limit the terms of the statute. *Cook v. Workers' Compensation Department*, 306 Or 134, 138 (1988). In order to determine whether, as claimant argues, the Workers’ Compensation Division (WCD), on behalf of the Director, has exceeded its statutory authority by enacting OAR 436-060-0030(1)(a), it must be determined what the legislature intended by the term "leaves work" in ORS 656.212(1).

In determining legislative intent, we look first to the text and context of the statute. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). Because the focus is on the meaning of specific statutory terms, we follow the methodology set forth in *Springfield Education Assn. v. School Dist.*, 290 Or 217, 221-30 (1980), which held that there are three classes of statutory terms, each of which conveys a different responsibility for the agency promulgating the rules under the statute and for the administrative/judicial body reviewing the agency's rule making: (1) terms of precise meaning, whether of common or technical parlance, requiring only fact-finding by the agency and administrative/judicial review for substantial evidence; (2) inexact terms which require agency

we conclude that claimant was paid for her entire shift and, thus, completed the work shift without loss of wages. Thus, we conclude that the administrative rule is applicable, assuming it is otherwise valid.

interpretation and administrative/judicial review for consistency with legislative policy; and (3) terms of delegation which require legislative policy determination by the agency and administrative/judicial review of whether that policy is within the delegation.

We conclude that, as used in ORS 656.212(1), the phrase "leaves work" is a statutory term within the second class described in *Springfield*.⁴ That is, it is a statutory term that embodies a complete expression of legislative meaning, even though its exact meaning is not obvious. *See Tee v. Albertsons, Inc.*, 314 Or 633, 637-38 (1992) (reaching same conclusion regarding term "gainful occupation" in ORS 656.206(1)(a)). An inexact term gives the agency interpretive but not legislative responsibility. *See Springfield Education Assn. v. School Dist.*, 290 Or at 233. In determining whether the agency's interpretation is consistent with legislative policy, we must discern and apply the legislature's intent. The best indication of legislative intent is the words of the statute themselves. *State ex rel Juv. Dept. v. Ashley*, 312 Or 169, 174 (1991). Words of common usage should be given their "plain, natural and ordinary meaning." *PGE*, 317 at 611.

The plain meaning of the words "leaves work" would obviously be that a worker goes away from or departs from his or her employment. The issue here is whether the WCD's rule (which excludes from this phrase a temporary departure due to an injury from a work shift without loss of wages) amends, alters, enlarges, or limits the terms of ORS 656.212(1).

We conclude that the WCD's interpretation of the statute as reflected in the administrative rule is consistent with legislative policy. In this case, claimant temporarily "left work" during the shift in which the injury occurred. We find, however, that the WCD could within its rule-making authority interpret ORS 656.212(1) to require more than a temporary departure within a shift in order for that day to qualify as the first day of the statutory three-day waiting period. ORS 656.726(4) charges the Director "with duties of administration, regulation and enforcement of [ORS Chapter 656]." In the discharge of his duties, ORS 656.726(4)(a) authorizes the Director to "[m]ake and declare all rules * * * which are reasonably required in the performance of the director's duties."

⁴ "Exact terms" "impart relatively precise meaning, e.g., 21 years of age, male, 30 days, Class II, farmland, rodent, Marion County." *Springfield Education Assn. v. Springfield School Dist.*, 290 Or at 223. "Delegative terms," such as "good cause," "fair," "unfair," "undue" and "unreasonable," are those which the legislature uses when it cannot foresee all possible applications of a statute. *Id.* at 228.

Thus, the WCD, on behalf of the Director, is charged with promulgating the rules by which temporary disability waiting period is calculated. We find it reasonable for the WCD to have promulgated a rule by which it requires more than a temporary departure within a work shift to satisfy the statutory requirement that a claimant “leave work,” provided that the claimant is paid for the entire shift. As previously noted, we find that the record establishes that claimant was in fact paid for the entire shift. We, accordingly, conclude that OAR 436-060-0030(1)(a) is reasonably required in the performance of the Director's duties. It is, therefore, valid and the ALJ did not err in applying it.

ORDER

The ALJ's order dated May 18, 2001 is affirmed.

Entered at Salem, Oregon on July 25, 2002

Board Members Biehl and Phillips Polich dissenting.

The majority concludes that OAR 436-060-0030(1)(a) is valid and must be applied in this case. While we have significant concerns about the validity of that rule, we would nevertheless not apply the rule on the ground that the rule is not applicable on its face. That is, we would not find that claimant was paid for her entire shift. In light of this conclusion, OAR 436-060-0030(1)(a) does not apply and claimant's date of injury should count as part of the three-day waiting period under ORS 656.212(1). Because of this, we would find that the claim is “disabling.” Inasmuch as the majority reaches the opposite conclusion, we respectfully dissent.

As the majority notes, OAR 436-060-0030(1)(a) provides that, if a worker leaves work but returns to complete the work shift without wage loss, that day is not considered the first day of the three-day waiting period. The majority rejects claimant's argument that the record does not establish that she was paid for the entire shift and then proceeds to apply and uphold the validity of the rule. Contrary to the majority, we agree with claimant that this record does not contain sufficient evidence to support a finding that she was paid for the entire shift in which she was injured.

At the time of injury, claimant was working for the self-insured employer, Barrett Business Services (Barrett) in a position at HMT Technology (HMT). Ms. Berardi, a representative of Barrett, testified that, to her knowledge, claimant

was paid for her entire shift. Nevertheless, Berardi testified that Barrett did not have records of the actual days worked or amounts paid, but rather those records were kept at HMT. (Tr. 47). Although she stated that the records could be difficult to obtain, Berardi further testified that Barrett could “probably” get them. *Id.* The wage record contained in the admitted exhibits does not prove that claimant was paid for her entire shift as there is no breakdown of wages paid or the specific hours or days of work. (Ex. 33-2). As claimant contends, the best evidence of claimant’s hours worked and the amounts paid were not produced by the employer even though claimant’s counsel requested such documents. (Ex. 33B). Because Barrett did not obtain the records of the actual hours worked and amounts paid, it should be presumed that this evidence would be adverse to Barrett.

In conclusion, the evidence on the issue of whether claimant was paid for her entire shift is inconclusive at best. Thus, we cannot agree with the majority’s finding that the administrative rule applies, even assuming that it is a valid rule. Accordingly, we would find that the three-day waiting period should include the day of injury. Assuming that it is the case, then we would find that claimant was entitled to temporary disability and, hence, “disabling” claim status. For these reasons, we dissent.