

In the Matter of the Compensation of
GARY L. EVANS, DCD., Claimant

WCB Case No. 05-04676, 05-02615, 05-02614, 05-02613, 05-02612, 05-02611,
05-02610, 05-02609, 05-02608, 05-02607, 05-02606

ORDER ON REVIEW (REMANDING)

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Reviewing Panel: *En Banc*. Members Biehl, Lowell, Herman, Langer and Weddell. Board Members Langer and Lowell dissent in part and concur in part.

Mattel, Inc., and its predecessors (hereinafter jointly referred to as the “employer”) request review of Administrative Law Judge (ALJ) McCullough’s order that: (1) found that the occupational disease claim from claimant, a surviving beneficiary of the decedent, was timely filed; (2) declined to admit certain exhibits submitted by the employer for the purposes of the compensability issue; and (3) upheld the employer’s denials of that claim. On review, the issues are timeliness of claim filing, evidence, and compensability.¹ We affirm in part, vacate in part, and remand.

FINDINGS OF FACT

We adopt the ALJ’s findings of fact with the following summary and supplementation.

Claimant’s husband (the decedent) began working for the employer on April 1, 1974. The decedent held several management positions. His last day of employment was March 31, 1998.

¹ Pages 80, 89 and 90 of Exhibit 9, pages 2 and 3 of Exhibit 20, and pages 57 and 58 of Exhibit 26, were not included in the record on review. The missing pages have been forwarded to the Board for inclusion in the record. Having provided the parties with an opportunity to authenticate the proposed exhibit pages or to object to them, and having received no objection, we proceed with our review.

In March 1998, trichloroethylene (TCE) was found in the well water at the facility where the decedent worked. The test results showed that the water supply had a TCE reading of 1,600 parts per billion, whereas the U.S. Environmental Protection Agency's health and safety standard is 5 parts per billion. (Ex. 22-1). The well provided water for industrial purposes and for human consumption. (Ex. 7-112). Most sinks, water fountains and cafeteria machines were served by the well water. (Exs. 7-73, 21-90). The decedent drank the water at the facility and ate lunch at the employer's cafeteria. (Ex. 9-15, -16, -17; Tr. I-169, I-244). Soon after the contamination was discovered, the well was shut down. (Ex. 7-112).

In late 2001, the decedent was diagnosed with cholangiocarcinoma. (Exs. 10-12). He died on February 20, 2002. The death certificate listed cholangiocarcinoma as the immediate cause of death. (Ex. 16).

Following the decedent's diagnosis and continuing after his death, claimant became involved in a variety of activities that addressed the potential causal connection between the TCE found in the water at the decedent's place of employment and subsequent health problems experienced by several employees. Through these activities, claimant became aware of information that indicated an association/relationship between TCE and cancer. By late 2002 or early 2003, claimant had formed a belief that the decedent's cancer was due to TCE exposure at work.

Claimant signed a form 827 on February 15, 2005 and a form 801 on February 28, 2005. (Exs. 17, 18). The forms indicated that the cause of the decedent's cholangiocarcinoma was related to drinking water contaminated with TCE at work.

The parties stipulated to information relating to the coverage provided by the insurers for the decedent's employers during the time he was employed.² The employer denied claimant's claims, and she requested a hearing on the denials.

² The stipulations are contained in the record as an attachment to a February 14, 2007 letter from one of claimant's attorneys.

CONCLUSIONS OF LAW AND OPINION

Timeliness – ORS 656.807(2)

At hearing, the employer argued that more than a year before February 2005 (when claimant filed a workers' compensation claim), she discovered, or in the exercise of reasonable care should have discovered, that the cause of the decedent's death was due to an occupational disease. *See* ORS 656.807(2). Consequently, the employer contended that the claim was untimely filed.

The ALJ relied on similar "discovery" language in other statutes interpreted by the Supreme Court in *Keller v. Armstrong World Industries, Inc.*, 342 Or 23 (2006), and *Gaston v. Parsons*, 318 Or 247 (1994). The ALJ reasoned that the awareness of the causation element of the claim must be informed by a medical diagnosis/opinion supporting the existence of that causation element. The ALJ determined that, under ORS 656.807(2), claimant must have discovered that her husband's death was "due to an occupational disease," which meant that his employment conditions were the major contributing cause of his disease. The ALJ concluded that there was no evidence that, more than one year prior to the filing of her claim in February 2005, claimant was aware, or with the exercise of reasonable care should have become aware, of such a "major cause" medical diagnosis/opinion. Consequently, the ALJ held that claimant's occupational disease claim was timely filed under ORS 656.807(2).

On review, the employer argues that claimant's claim is time-barred because she knew or should have known of her claim more than one year before it was filed. Both parties look to guidance from court cases that have interpreted other statutes with similar "discovery" language. *See Keller*, 342 Or at 23 (interpreting ORS 30.907(1), which defines when a product liability action based on exposure to asbestos products must be commenced); *Gaston*, 318 Or at 247 (interpreting ORS 12.110(4), which pertains to claims arising from medical treatment).

The text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). ORS 656.807 provides:

“(1) All occupational disease claims shall be void unless a claim is filed with the insurer or self-insured employer by whichever is the later of the following dates:

“(a) One year from the date the worker first discovered, or in the exercise of reasonable care should have discovered, the occupational disease; or

“(b) One year from the date the claimant becomes disabled or is informed by a physician that the claimant is suffering from an occupational disease.

“(2) If the occupational disease results in death, a claim may be filed within one year from the date that the worker’s beneficiary first discovered, or in the exercise of reasonable care should have discovered, that the cause of the worker’s death was due to an occupational disease.

“(3) The procedure for processing occupational disease claims shall be the same as provided for accidental injuries under this chapter.”

Subsection (1) addresses claims filed by a worker. Subsection (2) pertains to a claim filed by a worker’s beneficiary. A beneficiary’s claim does not derive from any claim of the deceased worker, but is an independent claim granted by the legislature. *Fossum v. SAIF*, 289 Or 787, 792 (1980) (addressing former ORS 656.807(2)).

ORS 656.807(2) provides that an occupational disease claim for death benefits “may” be filed within the dates provided. In *Gronquist v. SAIF*, 25 Or App 27 (1976), the court interpreted a previous version of ORS 656.807(2), which provided: “If the occupational disease results in death, a claim may be filed within 180 days after the date of death * * *.” The court interpreted the “may” language to mean “must.” The court explained: “The language of ORS 656.807(2) is clear. It simply says that a death claim must be filed within 180 days after the date of death and contains no exceptions.” *Id.* at 30.

Based on *Gronquist*, we interpret “may” in ORS 656.807(2) to mean that, if a beneficiary chooses to file an occupational disease claim for a worker’s death, the claim shall be filed “within one year from the date that the worker’s beneficiary first discovered, or in the exercise of reasonable care should have discovered, that

the cause of the worker's death was due to an occupational disease.”³ *Dilger v. School District 24 CJ*, 222 Or 108, 117 (1960) (“If necessary to carry out the intention of the legislature it is proper to construe the word ‘may’ as meaning ‘shall.’”).

Court precedent interpreting similar “discovery” language in other statutes provides guidance for interpreting the “discovery” language in ORS 656.807(2). In *Keller*, the statute at issue was ORS 30.907(1), which defines when a product liability action based on exposure to asbestos products must be commenced. 342 Or at 31. ORS 30.907(1) provides that a product liability civil action for damages resulting from asbestos-related disease shall be commenced not later than two years after the date on which the plaintiff “first discovered, or in the exercise of reasonable care should have discovered, the disease and the cause thereof.”

In addressing the issue of whether the plaintiff “in the exercise of reasonable care should have discovered” that he had an asbestos-related disease and the cause thereof more than two years before he filed the action, the *Keller* court quoted *Gaston*, which interpreted the phrase “in the exercise of reasonable care should have been discovered,” as follows:

“Actual knowledge * * * is not required. On the other hand, a mere suspicion is insufficient to begin the statute of limitations to run. We believe that a quantum of awareness between the two extremes is contemplated by the statute.” *Keller*, 342 Or at 36 (quoting *Gaston*, 318 Or at 256).

Accordingly, the court explained that such a statute of limitations begins to run when the individual knows or in the exercise of reasonable care should have known facts that would make a reasonable person aware of a “substantial possibility” that each of the necessary elements of an action exists. *Gaston*, 318 Or at 256.

Here, the applicable statute is ORS 656.807(2), which provides that if the occupational disease results in death, “a claim may be filed within one year from the date that the worker’s beneficiary first discovered, or in the exercise

³ In this regard, we note that, in some circumstances, a deceased worker’s beneficiary could possibly file a timely occupational disease claim under ORS 656.807(2), even when the worker’s claim (if filed before his/her demise) may have been void as untimely under ORS 656.807(1). Such an interpretation is consistent with the *Fossum* rationale that the “beneficiary” death claim under subsection (2) is independent from the worker’s claim under subsection (1).

of reasonable care should have discovered, that the cause of the worker's death was due to an occupational disease." The operative phrase ("in the exercise of reasonable care should have discovered") is identical to the phrase interpreted by the Supreme Court in *Keller* and *Gaston*.

Thus, applying the *Keller/Gaston* analytical framework to this occupational disease claim under ORS 656.807(2), the one-year statute of limitations begins to run when the worker's beneficiary first discovered, or in the exercise of reasonable care should have discovered, facts that would make a reasonable person aware of a substantial possibility that *each* of the elements of the claim existed. *Gaston*, 318 Or at 246. The analysis of whether a reasonable person would be aware of such facts is an objective inquiry. *Keller*, 342 Or at 36 (citing *Gaston*, 318 Or at 256). A "mere suspicion" does not rise to the level of a "substantial possibility." *Id.*

Consistent with the *Gaston* rationale, we determine the reasonableness of claimant's awareness of her claim regarding each element of the occupational disease claim. 318 Or at 246 ("reasonable person must be aware of a substantial possibility that *each* of the * * * elements * * * exists") (emphasis supplied). To do so, we examine the statutory scheme concerning the composition of an occupational disease claim.

ORS 656.802(1)(a) provides, in part:

"As used in this chapter, 'occupational disease' means any disease or infection arising out of and in the course of employment caused by substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein, and which requires medical services or results in disability or death * * * [.]"

In *Dethlefs v. Hyster Co.*, 295 Or 298, 310 (1983), the Supreme Court held that this provision required that the work exposure be "the major cause of the disease." Thereafter, the courts consistently recognized that, under ORS 656.802(1)(a), the causative employment substances or activities must be the major contributing cause of the occupational disease. *See, e.g., SAIF v. Noffsinger*, 80 Or App 640, 645-46, *rev den*, 302 Or 342 (1986) ("Of course, because ORS 656.802(1)(a) requires that the disease be one 'to which an employee is not ordinarily subjected or exposed other than during a period of regular actual

employment therein,’ the claimant must also prove that work conditions, when compared with non-work conditions, were the major contributing cause of the disease”) (citing *Dethlefs; SAIF v. Gygi*, 55 Or App 570, rev den, 292 Or 825 (1982)).

Subsequently, “the legislature codified the ‘major contributing cause’ standard in ORS 656.802(2)(a) and ORS 656.005(7)(A). Ore Laws 1990, ch 2, §§ 3, 43 (Spec Sess).” *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 134 n 22 (2001). See ORS 656.802(2)(a) (“[t]he worker must prove that employment conditions were the major contributing cause of the disease”). Although this amendment created some redundancy, it did not nullify that ORS 656.802(1)(a) itself requires that the work conditions be the major contributing cause of the occupational disease.

Thus, ORS 656.802(1)(a) incorporates “the major contributing cause” standard as a necessary element of a compensable occupational disease claim.⁴ In other words, because a compensable occupational disease must be one caused by substances or activities “to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment,” the work exposure must contribute to the disease more than other causes combined. *Dethlefs*, 295 Or at 310; ORS 656.802(1)(a). Accordingly, applying the *Gaston* rationale to this occupational disease claim for a deceased worker under ORS 656.807(2), we conclude that, before the one-year statute of limitations begins to run, claimant must have been aware of a substantial possibility that the TCE exposure was the major contributing cause of the disease resulting in her husband’s death.⁵

Moreover, where the causation of the occupational disease is medically complex, medical evidence will necessarily be required before it can be said that an individual was aware of a substantial possibility that the work exposure

⁴ Where a claimant does not have a *compensable* occupational disease, that individual may pursue a civil negligence action only after a final determination of noncompensability. ORS 656.019. However, where the work exposure is the major contributing cause of the disease, the worker’s exclusive remedy lies with the workers’ compensation system.

⁵ In some cases, there may not be multiple potential causes of the claimed disease; in such instances, the discovery of the major contributing cause of the claimed disease will be relatively straightforward. In contrast, where the medical evidence identifies numerous potential causes, a factual determination of whether the worker was aware of a substantial possibility that the work exposure was the major contributing cause of the disease will be much more complicated.

contributed to the disease more than any other cause.⁶ Under the circumstances of this case, considering the complexities regarding the worker's death from cancer and its relationship to his employment, we conclude that medical information regarding the substantial possibility of such a causal connection is required before the one-year "limitation" period is triggered.

The employer argues that such an approach confuses the awareness of the existence of a claim with the burden of proving the claim. We disagree.

For an occupational disease claim to be untimely filed under ORS 656.807(2), the record must establish that a reasonable person should have known facts that would make that person aware of a *substantial possibility* that each of the statutory elements for an occupational disease claim existed. Such a requirement is appreciably different from that placed on a worker's beneficiary in proving compensability of the claim, who must establish each of the components recited in ORS 656.802(1) and (2), including that the employment conditions *were* the major contributing cause of the claimed disease that caused the worker's death. In other words, a claimant's awareness of a "substantial possibility" that a worker's death was caused by an occupational disease presents a different question than whether the facts ultimately establish that employment conditions were the major contributing cause of the claimed disease.

Having identified the appropriate analysis for determining the timeliness of claimant's occupational disease claim, we turn to the record. In doing so, we recognize that because the statute of limitations is an affirmative defense, the employer has the burden of persuasion on that issue. *See Keller*, 342 Or at 38 n 12 (citing *Nelson v. Hughes*, 290 Or 653, 664-65 (1981)); *Karen M. Godfrey*, 58 Van Natta 2892, 2895 (2006) (on remand) (the "issues of timely notice of the injury and timeliness of claim filing are qualitatively different affirmative defenses that must be preserved at every level of appeal"). Based on the following reasoning, we are not persuaded that the claim was untimely filed.

We acknowledge that claimant's husband believed that his cancer was caused by exposure to TCE at work. Similarly, claimant has a belief that her husband's cancer was caused by work exposure to TCE.

⁶ Such a conclusion is in keeping with the standard requirement that expert medical evidence is necessary to establish the compensability of a claim involving a complex medical issue. *See Uris v. Compensation Department*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993).

In addition, claimant asked her husband's physicians about the association with TCE and his cancer. However, none of those physicians knew about the effect of TCE on humans. (Ex. 9-34, -35, -55, -56, -57, -60, -115, -118; Tr. I-191, -192, -217, -220, -221; Tr. II-199, -200, -206). Claimant told the physicians that she suspected that TCE was related to her husband's cancer. (Ex. 9-117; Tr. I-220, -221; Tr. II-200, -206).⁷ Yet, no doctors or health care professionals told her that TCE exposure caused her husband's cancer.⁸ (Ex. 9-56, -60, -115, -118; Tr. I-218). At most, they said there "may" be a relationship between the TCE and her husband's cancer. (Tr. I-221). No doctors told claimant that her husband had an occupational disease. (Ex. 9-115). Moreover, no epidemiologist or medical person on behalf of the state or anyone from the employer suggested to claimant that there might be a link between her husband's death and his TCE exposure. (Tr. II-200).

Since her husband's death in 2002, claimant has tried to find evidence to confirm her suspicion of the causal relationship between his TCE exposure and his cancer and death. (Tr. I-205, -206; Tr. II-203). She contends that the employer has not provided any evidence that she would have learned about the connection between TCE exposure and her husband's death, had she engaged in further inquiry. Instead, she refers to the employer's information provided to employees, which repeatedly indicated that the studies of TCE exposure were "inconclusive" and that health effects of TCE on humans were "unlikely." For example, in January 2003, the employer's educational material concerning TCE exposure stated that "[w]e have also [been] told by experts that the levels of TCE in the well water at the plant should cause no health impacts to our workers." (Ex. 5-42).⁹

Similarly, Mr. Nottage, a former general manager for the employer who was later involved in the "TCE project," testified that he told employees and the news media that their scientists and medical experts did not expect to see health

⁷ Claimant has a bachelor's degree in nursing, as well as a master's degree, and is employed as a Director of Patient Care Services at a hospital. (Tr. I-162 to -164, -215). However, neither claimant nor her husband had expertise in determining the etiology of cancer.

⁸ Although ORS 656.807(2) does not require that a beneficiary be informed by a physician that the deceased suffered from an occupational disease (*compare* ORS 656.807(1)(b)), information from a physician regarding the cause of the worker's death is nevertheless a relevant factor in determining whether, under ORS 656.807(2), claimant discovered, or in the exercise of reasonable care should have discovered, that the cause of her husband's death was due to an occupational disease.

⁹ The January 2003 document indicates that it is a revision of a document originally shared in April 1998, which had been updated to reflect new information. (Ex. 5-42).

impacts based on TCE exposure. (Tr. II-26, -31, 48, -52). Mr. Nottage testified that the employer had not changed its position that there were no known health effects from TCE exposure, even after the January 2005 “town hall” meeting that discussed the most recent epidemiological study. (Tr. II-72).¹⁰

Reports from ODHS indicated that more research was needed and that their studies were inconclusive. (*See generally* Ex. 7). A January 2003 ODHS report recommended a more thorough investigation because there was not enough information to assess the full impact that the TCE contamination may have had on the health of people who were exposed. (Ex. 7-11). A later December 2004 ODHS report explained that “[i]n conclusion, the findings and limitation of the PMR [proportionate mortality ratio] analysis underscores the need for more thorough investigation of the impact of oral TCE exposure on the health of former workers of the [employer’s] factory.” (Ex. 7-135).

Finally, the decedent’s February 21, 2002 autopsy report provided, in part:

“[The decedent] worked for more than 20 years at a local plant where the drinking water was found to have very high levels of trichloroethylene (TCE), and therefore he was most probably, chronically exposed to TCE. Trichloroethylene has been demonstrated to be a carcinogen in animal studies. The role of TCE in promoting tumors, including liver tumors in humans, is suspected but has not [been] definitively proven. Most probably with TCE, as with many other carcinogens, the risk of developing tumors is probably a function of duration of exposure to the carcinogen agent, intensity of exposure and individual susceptibility.

“* * * * *

¹⁰ The employer provided some information to employees indicating that they needed to have a doctor’s opinion that their illness was linked to TCE before they could file a workers’ compensation claim. (Tr. II-35, -41 to -43; *e.g.*, Ex. 21-43 (“If, after testing and evaluation, your doctor believes a health problem to be TCE related, a workers compensation claim will be filed.”), -105 (“If a doctor and you decide that a health problem is due to TCE, you will file a workers’ compensation claim.”), -120, -155, -171, -197, -228).

Moreover, the employer repeatedly assured its workers that any work-related TCE exposure was not harmful to their health. (*See, e.g.*, Ex. 5-42 (employer’s educational material stating that experts concluded that TCE in the employer’s well water “should cause no health impacts to our workers”); Tr. II-26, -31, 48, -52, -72 (former manager testifying that he told employees and the news media that scientists and medical experts expected no health impact on employees due to TCE exposure, and that employer maintained this position even after a January 2005 “town hall” meeting discussing the most recent epidemiological study)).

“[Claimant] worked for more than twenty years at [the employer], and his past social and medical history is significant for exposure to the industrial solvent, [TCE,] which was documented to be present in the plant’s drinking water well at 300 times the government’s allowable limit, per news report. The plant was closed shortly thereafter. * * *” (Ex. 15-2).

The employer contends that the autopsy report, standing alone, should have caused a reasonable person to conclude that there was a substantial possibility of a connection between the decedent’s TCE employment exposure, the development of his cancer, and his death. Alternatively, in addition to the autopsy report, the employer also particularly refers to: (1) a 2000 article, which is a review of the epidemiologic evidence from several studies regarding the possible carcinogenicity of TCE (Ex. 2-38)¹¹; and (2) an August 2003 ODHS Health Study that discussed carcinogenic effects of TCE (Exs. 7-68 to -110). Based on the following reasoning, we disagree.

The autopsy report stated that the decedent was probably exposed to TCE, which had been demonstrated to be a carcinogen in animal studies. However, the report indicated that the role of TCE in promoting tumors in humans, was “suspected,” but had not been “definitely proven.” “Suspect” means “to imagine to be or be true, likely, or probable: have a suspicion, intimation, or inkling, of” “to imagine (one) to be guilty or culpable on slight evidence or without proof.” *Webster’s Third New Int’l Dictionary* 2303 (unabridged ed 1993). “Suspicion” means “the act or an instance of suspecting: imagination or apprehension of something wrong or hurtful without proof or on slight evidence” or “INKLING, INTIMATION, HINT <there had after all been nothing but whispered ~s, old wives’ tales, fables invented by men>” or “a slight touch: a mere trace: suggestion.” *Id.* at 2304.

After reviewing the report, we do not believe that a causal connection between TCE exposure and cancerous tumors must be “definitely proven” in order to satisfy the “substantial possibility” test. *See Keller*, 342 Or at 36 (“actual knowledge” is not required). Nevertheless, we are not persuaded that the coroner’s statement that a causal relationship was “suspected” would cause a

¹¹ The title of the article is unclear from the record, but the article indicates that the project was supported by a contract from the U.S. Environmental Protection Agency and by a National Institute of Environmental Health Sciences grant. (Ex. 2-38).

reasonable person to conclude that there was a “substantial possibility” that each of the elements necessary to establish an occupational disease claim regarding the worker’s death existed. *See Keller*, 342 Or at 36 (“a mere suspicion is insufficient to begin the statute of limitations to run”). Consequently, we are unable to conclude that the autopsy report intimating a “suspicion” of the decedent’s exposure to TCE rose to the requisite level of a “substantial possibility” that such exposure was the major contributing cause of the disease resulting in his death.

Likewise, the 2000 article and the 2003 ODHS health study discuss the possible carcinogenic effects of TCE exposure. Nonetheless, whether considered individually, collectively, or in conjunction with the autopsy report and the remainder of the record, such information did not establish a substantial possibility of each of the statutorily required elements of an occupational disease claim for the deceased worker.

At most, some physicians and health care professionals consulted by claimant stated that there “may” be a relationship between her husband’s TCE exposure and his cancer. The term “may” does suggest a “possibility” of a causal relationship between TCE exposure and cancer. Yet, lacking further elaboration, the term does not rise to the level of “*substantial* possibility.” Moreover, even when coupled with the autopsy report (which “suspected” a causal relationship), the record does not persuasively lend itself to a conclusion that claimant was aware of sufficient medical information that would constitute a substantial possibility that each of the “occupational disease” statutorily-required elements existed.

In conclusion, the employer has not demonstrated that, more than one year before claimant filed a workers’ compensation claim in February 2005, she had facts that would make a reasonable person aware of a substantial possibility that each of the elements of an occupational disease claim existed. Consequently, the record does not establish that the claim was not filed more than one year from the date that claimant first discovered, or in the exercise of reasonable care should have discovered, that the cause of the worker’s death was due to an occupational disease. ORS 656.807(2). Accordingly, claimant’s beneficiary claim was timely filed.

Evidence/Offer of Proof

At hearing, claimant conceded that she had no medical evidence that met the “major contributing cause” standard for proving an occupational disease. The ALJ did not admit the employer’s exhibits concerning the compensability

issue, reasoning that such evidence was not relevant or necessary because claimant had no medical evidence that needed to be countered by the employer, and the employer had no burden of proof regarding compensability.¹²

On review, the employer contends that the ALJ erred by excluding its exhibits concerning compensability and allowing claimant's "offer of proof." Claimant argues that she offered the concession that she did not have medical evidence to establish "major contributing cause" in an attempt to streamline the proceedings and save resources. She asserts that the ALJ excluded the employer's exhibits on the compensability issue because the issue was already effectively decided as a result of her concession. Based on the following reasoning, we consider the ALJ's ruling to constitute an abuse of discretion.

The ALJ is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, and may conduct a hearing in any manner that will achieve substantial justice. ORS 656.283(7). The ALJ has broad discretion regarding the admissibility of evidence. *Brown v. SAIF*, 51 Or App 389, 394 (1981). We review the ALJ's evidentiary rulings for abuse of discretion. *E.g.*, *Thomas M. Thorson*, 52 Van Natta 2119, 2120 (2000), *on recons*, 53 Van Natta 76 (2001), *aff'd without opinion*, 188 Or App 489 (2003); *David F. Stevenson*, 49 Van Natta 454 (1997).

In *Ronnie L. Nielson*, 60 Van Natta 2878 (2008), a decision issued subsequent to the ALJ's order, we addressed a similar exclusionary ruling. As with the instant matter, the ALJ in *Nielson* excluded the employer's evidence on compensability because the claimant conceded an inability to establish that work exposure was the major contributing cause of the claimed occupational disease. In finding that such a ruling constituted an abuse of discretion, we explained:

"the employer is entitled to present evidence in defense of its claim processing actions and its denial. The ALJ's role is to evaluate the entire record and produce an order containing an organized set of facts and conclusions of law with an explanation why the facts supported by evidence lead to the conclusion." *Id.* at 2881 (citing *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 205-06 (1988); *Jack S. Koehler*, 45 Van Natta 1728 (1993)).

¹² Over the employer's objection, claimant was allowed to make an "offer of proof" consisting of the following statement: "If called to testify, one or more qualified medical expert(s) would provide opinion evidence stating that based on a reasonable medical probability, trichlorethylene (TCE) exposure at work was at least a substantial factor in causing [the decedent's] illness and death."

By excluding the employer from submitting its “compensability” evidence in *Nielson*, we found that the ALJ deprived the employer of the opportunity to put on evidence regarding its denial of the occupational disease claim, which it has a right to do as a party to the hearing. *Id.* In doing so, we acknowledged that “the ALJ’s ruling was apparently designed to streamline the compensability analysis and arguably save administrative resources.” *Id.* at 2883. Nevertheless, we held that “a more expansive presentation of evidence regarding the denied claim was required.” *Id.* We emphasized that, because the workers’ compensation system is “the sole and exclusive source and means” for receiving benefits for injuries and diseases arising out of and in the course of employment, it was “incumbent upon the parties to garner their evidence in support of their respective positions regarding the procedural and substantive validity of a beneficiary’s claim under ORS 656.807(2).” *Id.* at 2383-84 n 12.

We find the instant matter indistinguishable from *Nielson*. Because the employer was denied a right to put on otherwise admissible evidence regarding its denial, only because claimant offered a “concession” regarding what she could not prove, we find an abuse of the ALJ’s discretion in excluding the employer’s proposed evidence. As such, we find the current record to be incompletely and insufficiently developed, and, accordingly, find a compelling reason to remand. *See* ORS 656.295(5); *Nielson*, 68 Van Natta at 2884; *see also Kienow’s Food Stores v. Lyster*, 79 Or App 416 (1986) (remand appropriate upon a showing of good cause or another compelling basis). As we observed in *Nielson*, 68 Van Natta at 2883-84 n 12, upon remand, we expect the parties “to fully avail themselves of their individual and mutual opportunities to litigate their dispute before the administrative forum expressly designated for the resolution of such conflicts” consistent with the principles and objectives espoused in Chapter 656.¹³

¹³ ORS 656.012(1)(c) provides that the Legislative Assembly finds that “[a]n exclusive, statutory system of compensation will provide the best societal measure of those injuries that bear a sufficient relationship to employment to merit incorporation of their costs into the stream of commerce.” ORS 656.012(2)(e) provides that one of the objectives of the Workers’ Compensation Law is “[t]o provide the sole and exclusive source and means by which subject workers, their beneficiaries and anyone otherwise entitled to receive benefits on account of injuries or diseases arising out of and in the course of employment shall seek and qualify for remedies for such conditions.”

Consistent with these objectives and the statutory scheme, it is incumbent on the parties to garner their evidence in support of their respective positions regarding the procedural and substantive validity of a beneficiary’s claim under ORS 656.807(2). Likewise, in accordance with those principles, it would appear to be the legislature’s express intent that the parties will fully avail themselves of their individual and mutual opportunities to litigate their dispute before the administrative forum expressly designated for the resolution of such conflicts.

At that time, the parties will have an opportunity to present their proposed evidence.¹⁴

In summary, because the ALJ excluded the medical evidence from both parties regarding compensability, we conclude that the record before us is incomplete. Where a case has been “improperly, incompletely or otherwise insufficiently developed,” we have discretion to remand the case. ORS 656.295(5); *Bailey v. SAIF*, 296 Or 41, 44 (1983); *Scarlet M. Allen*, 58 Van Natta 3049, 3057-58 (2006); *Nancy L. Cook*, 45 Van Natta at 978. Therefore, we remand this case to the ALJ for the admission of evidence from both parties regarding compensability.

Accordingly, the ALJ’s order dated April 6, 2007 is affirmed in part and vacated in part. This matter is remanded to ALJ McCullough for further proceedings consistent with this order. The ALJ is directed to admit the disputed exhibits and to consider any other evidentiary matters resulting from our decision.

In this regard, we note that 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. ORS 656.019(1). Some definitions for the word “fail” include “to miss attainment: fall short of achievement or realization;” “to end without success: miss successful achievement of a result;” “to miss success: be unavailing;” “to be inadequate.” *Webster’s Third New Int’l Dictionary* 814 (unabridged ed 1993). Such terminology connotes an attempt or effort, which has not been successful.

Incorporating that term into the statutory scheme (including the objectives of the workers’ compensation law to provide an exclusive, statutory system of compensation), it appears that the legislative intention is that parties will diligently and arduously pursue their respective claims and defenses within the workers’ compensation system. Thereafter, in the event that the worker (or beneficiary) is unsuccessful in litigating the denied claim (*i.e.*, the worker, (or beneficiary) has “failed to establish” the compensability of the claim), the worker (or beneficiary) is then authorized to initiate a civil negligence action.

Thus, any effort by a party that does not represent a full-fledged effort to satisfy the statutory requirements for a compensable claim as prescribed within the workers’ compensation system would not appear to have comported with the principles and objectives espoused in Chapter 656. *See Mullenau v. Dept. of Revenue*, 293 Or 536, 541 (1982) (“A party does not exhaust his administrative remedies simply by stepping through the motions of the administrative process without affording the agency an opportunity to rule on the substance of the dispute. Exhaustion of administrative remedies is not accomplished through the expedience of default.”). Moreover, such an approach would resemble gamesmanship, which likewise has no place in the workers’ compensation dispute resolution system.

¹⁴ Because we are remanding the case to the ALJ, we do not address the remaining issues. The parties may direct their arguments regarding those issues to the ALJ on remand.

These proceedings shall be conducted in any manner that the ALJ deems will achieve substantial justice. The ALJ, upon receipt of this additional evidence and closure of the evidentiary record, shall reconsider the disputed issues. The ALJ shall then issue a final, appealable order.

IT IS SO ORDERED.

Entered at Salem, Oregon on December 16, 2008

Board Members Langer and Lowell, dissenting in part and concurring in part.

We agree with the majority that, to prevail on its affirmative defense, the employer must establish that, more than one year before filing the occupational disease, claimant was aware, or a reasonable person should have been aware, of a substantial possibility that the TCE exposure was the major contributing cause of the disease resulting in her husband's death. However, because we disagree with the majority's conclusion that claimant lacked, or a reasonable person would have lacked, that requisite awareness, we dissent from that portion of the majority's opinion finding that claimant's occupational disease claim was timely filed.¹⁵

As the majority opinion explains, in *Dethlefs v. Hyster Co.*, 295 Or 298, 310 (1983), the Supreme Court held that, for a condition to qualify as an occupational disease under ORS 656.802(1)(a), the workplace exposure must be the major contributing cause of the claimed disease. Thereafter, the legislature codified that standard in ORS 656.802(2)(a) and ORS 656.005(7)(A). *See* Or Laws 1990, ch 2, §§ 3, 43 (Spec Sess). In doing so, the legislature left intact the language of ORS 656.802(1)(a), which the Court had already interpreted as requiring claimant to meet "the major contributing cause" standard.

We would not, as does the majority, just assume that the legislature intended to create a "redundancy" by retaining the major contributing cause as the definitional standard of an occupational disease under ORS 656.802(1)(a), while also inserting that same standard as a separate burden of proof under ORS 656.802(2)(a). Rather, we would look to the legislative history to determine the legislature's intent. *See PGE v. Bureau of Labor and Industries*, 317 Or 606,

¹⁵ Had we considered the claim to be timely filed, we would concur with the majority's decision to remand for further development of the record. *Ronnie L. Nielson*, 60 Van Natta 2878 (2008).

611 (1993) (where the intent of the legislature is not clear from the text and context of the statute, legislative history may be considered). Upon examining that legislative history, we agree that the legislature intended to retain the major contributing cause as a definitional element of an occupational disease under ORS 656.802(1)(a). Specifically, as explained below, the legislative history shows that the statutory amendment codifying the burden of proof under ORS 656.802(2)(a) was unrelated to *Dethlefs* and its interpretation of ORS 656.802(1)(a); rather, the codification of the major contributing cause standard burden of proof under ORS 656.802(2)(a) was in response to a Board decision (*Donna E. Aschbacher*, 41 Van Natta 1242 (1989)), which held that, after the 1987 amendments to the statute, the major contributing cause standard only applied to toxic exposure cases, and not other occupational diseases.

While *Aschbacher* was pending before the Court of Appeals, the legislature met in a special session to correct the Board's conclusion in that case by way of the 1990 amendments. See *Aschbacher v. Aetna Casualty Co.*, 107 Or App 494, 500-03, *rev den*, 312 Or 150 (1991) (explaining this history). On appeal, and after the 1990 codification of the major contributing cause standard under ORS 656.802(2)(a), the *Aschbacher* court reversed our decision. In doing so, the court looked to the legislative history of the 1990 amendments; that history, the court concluded, showed that the legislature never intended "to change the kind of proof required for occupational disease claims." *Id.* at 501 (citing Tape Recording, Interim Special Workers Compensation Committee, May 3, 1990, Tape 7, Side A at 010); See also Senate Floor Debate, SB 1197, May 7, 1990, Tape 3, Side A, statement of Senator Kitzhaber, Chairperson of Special Committee on Workers' Compensation (explaining that the 1990 amendment was designed to return to the pre-*Aschbacher* major contributing cause standard and to retain the major contributing cause standard as part of the definition of an occupational disease).

Based on this legislative history (as recognized in *Aschbacher*, 107 Or App at 500-03), we agree with the majority that ORS 656.802(1)(a) defines an occupational disease as requiring that the work exposure be the major contributing cause of the claimed disease, even after codification of that same standard as a burden of proof under ORS 656.802(2)(a). Accordingly, because the major contributing cause standard is an essential element of an occupational disease claim, we agree with the majority that, before the one-year statute of limitations begins to run, claimant must have been aware (or a reasonable person should have been aware) of a substantial possibility that the TCE exposure was the major

contributing cause of the disease resulting in her husband's death; that is, that the exposure contributed to the disease more than any other causes combined. *McGarrah v. SAIF*, 296 Or 145, 166 (1983).¹⁶

With that understanding, we now turn to the facts in the instant matter. In or around March 1998, claimant learned about the presence of TCE in the well at her husband's workplace. (Tr. 9-13, -14). Thereafter, and before her husband was diagnosed with cancer in 2001, she received regular mailings from the employer concerning the TCE well water, which she read and kept on file. (Ex. 9-14).

Claimant's husband was diagnosed with cancer in 2001. (Ex. 9-8, -9). He told her at that time that the TCE exposure caused his illness and told treating physicians (in her presence) the same thing. (Ex. 9-32, -35). Likewise, claimant's daughter, who had spoken to multiple physicians about a causal relationship between the TCE exposure and her father's death, told claimant that her husband's death was "related to TCE exposure." (Ex. 9-58, -59).

Throughout her husband's treatment, claimant demonstrated that she was already aware of at least a substantial possibility that TCE exposure caused his death. Specifically, in speaking with various physicians, she "always" told them that her husband's exposure to TCE was "an important risk factor" for his condition. (Tr. II: 206; *see also* Exs. 9-35, 55, -57).¹⁷ She also told her husband's treating physicians that she "strongly suspected" that TCE caused his cancer. (Ex. 9-117). Some of those physicians responded that there was a possible connection between the TCE exposure and her husband's death, and others told her that they had treated other workers at her husband's workplace. (Ex. 9-57; Tr. I: 221). No other "risk factor" was discussed with her husband's doctors. (Ex. 9-35).

Additionally, claimant, her husband and other family members related their concerns, suspicions and beliefs that TCE exposure caused her husband's illness to various media outlets. (Ex. 9-32, -37).

¹⁶ The discovery of the major contributing cause need not be based on "magic words." Even though a claimant may not be aware of the statutory "major contributing cause" term, the statute of limitations starts running once a claimant is aware of a substantial possibility that the work exposure contributed to the disease more than any other causes combined.

¹⁷ She also spoke with an epidemiologist about a health study on employees working at her husband's workplace. (Ex. 9-95, -96).

Claimant acknowledged that, at the time of her husband's death, she already believed that the TCE work exposure caused her husband's death. (Ex. 9-9). She further asserted that she never believed that anything other than the workplace TCE exposure caused her husband's death. (Ex. 9-9). Her conviction regarding that causal relationship was so strong that, when her husband died, she secured tissue samples from her husband's body to show that TCE exposure "was a big contributor to his illness." (Exs. 9-42, -43; 15).

After her husband's death, she continued to demonstrate her awareness of a substantial possibility that workplace TCE exposure caused her husband's cancer. Specifically, she collected articles and medical studies supporting her belief that TCE exposure caused her husband's cancer and subsequent death. (Exs. 2-38, -70; 9-53; 9-108; 9-114-117; Tr. I: 232, 240-41; Tr. II: 204-05). From these articles and studies, claimant learned that the impact of TCE exposure was "very latent" and that, over time, TCE exposure caused "cumulative injury or damage." (Ex. 9-54).

Her awareness of a substantial possibility that TCE exposure caused her husband's cancer was no secret. Rather, in addition to the media interviews, claimant told others of her suspicion that TCE caused her husband's death; such a relationship, claimant asserted, was "hard to ignore." (Ex. 9-103, -104). In 2002, she wrote a letter to family and friends asserting that her husband's disease was caused by years of exposure to TCE in the drinking water at her husband's workplace. (Ex. 3-14; Tr. I: 233-35). These unequivocal assertions regarding a causal relationship between workplace TCE exposure and her husband's disease more than satisfy the quantum of awareness necessary to trigger the statute of limitations.

Other conduct by claimant also establishes her awareness of a substantial possibility that TCE exposure caused her husband's disease. In particular, claimant was the initial sole financial backer of Victims of TCE Exposure (VOTE), an organization founded by claimant's daughter on the belief that TCE exposure caused cancer. (Ex. 9-61, -62, 71). VOTE installed a "memory wall" in claimant's garage to commemorate employees in her husband's workplace that claimant suspected had died of workplace TCE exposure. (Ex. 9-68).¹⁸

¹⁸ Claimant also was an adviser with a Citizens Advisory Group (CAG) that sought to secure technical expertise on a study regarding the link between TCE exposure and negative health effects. (Ex. 9-82, -84).

Lastly, by 2003, claimant had consulted with a lawyer regarding a lawsuit over her husband's death based upon his work exposure to TCE. (Tr. I: 269).

The majority concludes that claimant's awareness of a causal relationship between the TCE exposure and her husband's cancer amounted only to a "suspicion" that the TCE exposure caused her husband's cancer. The evidence, however, establishes much more than that. Although claimant testified that she only "suspected" that the TCE exposure caused her husband's cancer, her actions are not those of someone who simply "suspected" some type of nebulous association between TCE exposure and her husband's death. Rather, they are the actions of an individual already convinced that the workplace exposure (and nothing else) caused her husband's cancer. (*See* Ex. 9-9). Because claimant's conduct confirms that she was aware of a substantial possibility that the TCE exposure caused her husband's disease, and because all of the above discussed actions occurred more than one year before the filing the occupational disease claim, we would find the claim untimely under ORS 656.807(2).¹⁹

Moreover, claimant's belief regarding the cause of her husband's death was not based upon mere supposition; rather, it was grounded in articles and medical studies linking TCE exposure to cancer, as well as conversations with physicians and the autopsy report on her husband. (*See, e.g.*, Tr. I: 221, 240-41, II: 204-205; Exs. 2-38-, 70; 15).²⁰

In particular, the February 2002 autopsy report noted that claimant's husband was "chronically exposed" to "very high levels" of TCE. (Ex. 15-2). That report characterized TCE as a "carcinogen" and added that it played a suspected role in causing liver tumors. (*Id.*) The report concluded that the risk of developing tumors as a result of TCE exposure was "probably a function of duration of exposure * * *, intensity of exposure and individual susceptibility." (*Id.*)

Claimant also understood that some of the medical studies that she read provided data supporting a connection between TCE exposure and cancer. (Tr. II: 205; Exs. 2-56, -72-, 74; 9-114, -117; *see also* Exs. 7-5, -24; 8-2, -3). She was also aware that TCE was classified by at least one scientific body (the National Academy of Science) as a "probable carcinogen." (Ex. 9-88, -92).

¹⁹ It is undisputed that all of the foregoing statements and actions occurred more than one year before claimant filed her occupational disease claim.

²⁰ She also attended numerous town hall meetings that discussed the health hazards associated with TCE exposure. (Ex. 9-94).

The foregoing medical evidence all contributed to claimant's belief that the workplace TCE exposure caused her husband's illness and death. (*See, e.g.*, Tr. I: 241). Thus, contrary to the majority, we would find that, more than one year before she filed her claim, claimant discovered that her husband's workplace TCE exposure caused his disease.

This finding is sufficient to end our inquiry. Once claimant became aware of a substantial possibility that the workplace exposure caused her husband's illness, the statute of limitations was triggered; thereafter it would not be necessary to determine the date that she "should have" made that same discovery. *See McKillop v. Bohemia, Inc.*, 112 Or App 261, 264 n2 (1992) ("[o]bviously, the date that a worker should have discovered and occupational disease can never be *after* the date that the worker actually discovered the disease") (emphasis in original).²¹

The evidence also establishes that, more than one year before claimant filed her claim, a reasonable person should have discovered that there was a substantially possible causal connection between the workplace TCE exposure and her husband's death. In addition to the autopsy report and all of the articles and medical studies available to claimant more than one year before she filed her claim, she was also aware that other employees had filed workers' compensation claims because of the TCE exposure at her husband's workplace. (Ex. 9-40, -41, 50-, 51). She also knew that the TCE contamination in the water at the workplace was more than 300 times that permitted by federal standards and that her husband "drank lots of water" and "washed his hands a lot." (Exs. 3-14; 9-15; 22-19). Furthermore, she was aware that her husband had "rough hands" and that TCE could be absorbed through the skin. (Ex. 9-15, -16).

Based on the foregoing, we would conclude that a reasonable person should have been aware that there was *at least a substantial possibility* that the workplace TCE exposure caused claimant's husband's death. As set forth above, the evidence shows that, more than one year before claimant filed her occupational disease claim, she was aware that TCE was rated as a probable carcinogen in humans, and that her husband, who "drank lots of water," consumed contaminated drinking water for approximately 20 years; that water contained concentrations of TCE 300 times more than the allowable federal limits. Claimant was unaware of any other potentially causative agent, or any significant exposure to TCE other than her husband's work. (Ex. 9-26).

²¹ We would also conclude that, with all the information she obtained, claimant's belief that the work exposure caused her husband's illness was reasonable.

She was also aware of data in medical studies supporting a connection between TCE exposure and cancer. Likewise, the autopsy report informed claimant that TCE's role in her husband's cancer would depend on the duration and intensity of exposure, along with individual susceptibility. Although the record contains no information on her husband's susceptibility, the evidence (including the autopsy report) demonstrably establishes significant and "very high levels" of TCE exposure for a prolonged duration. (*See* Ex. 15-2). Under these circumstances, we would find that a reasonable person would be aware, at a minimum, of a substantial possibility that claimant's husband's TCE work exposure caused his disease.

The majority opinion arrives at a different conclusion primarily by isolating individual pieces of evidence and determining that each piece would not, on its own, establish a "substantial possibility" that the TCE exposure caused claimant's husband's disease. In particular, the majority emphasizes reported assurances that the employer made to claimant (and other workers) minimizing the health risks of the TCE exposure. Putting aside the reasonableness of a worker relying on managers' representations on medical issues, the evidence establishes that claimant did not rely on those representations. As set forth above, despite any employer statements, claimant believed that the TCE exposure caused her husband's death and she "always" told physicians that such exposure was "an important risk factor" to his disease. (*See* Ex. 9-9, 35, 55, -57; Tr. II: 206). She also authored and distributed a letter asserting that her husband's cancer was caused by years of workplace TCE exposure. (Ex. 3-14; Tr. I: 233-35).

Thus, despite the majority's attempt to identify some minor facts that *could* lead to some doubt regarding the cause of claimant's husband's death, the collective evidence establishes that, more than one year before filing her claim, a reasonable person should have discovered a substantial possibility that the TCE exposure caused the claimed disease. Indeed, armed with this collective evidence, claimant has repeatedly acknowledged her belief that nothing other than the TCE exposure caused her husband's cancer. She consequently engaged in a pattern of conduct consistent with someone who not only "suspected," but strongly believed, that her husband's death was most likely caused by his TCE exposure. Accordingly, after considering the evidence as a whole, we conclude that a reasonable person would have discovered a substantially possible connection between the TCE exposure and claimant's husband's disease.

In sum, we would find that, more than one year before claimant filed her occupational disease claim, she was aware, or a reasonable person should have been aware, of a substantial possibility that her husband's TCE exposure was the major contributing cause of the disease resulting in his death.²² Because the majority concludes otherwise, we respectfully dissent.

²² We note that the record does not support a contention that claimant believed that the TCE exposure was only a "material," rather than "the major" contributing cause of her husband's disease. Specifically, claimant acknowledged that she believed that the workplace TCE exposure, and only that exposure, caused the cancer resulting in her husband's death. (*See, e.g.*, Ex. 9-9).