

In the Matter of the Compensation of
PATRICIA J. SCHIFFER, Claimant

WCB Case No. 06-02186, 06-02149, 06-02147, 06-02113, 06-01621, 06-01382,
06-00856, 06-00481, 06-00454, 06-00386, 06-00385, 06-00383

ORDER ON REVIEW (REMANDING)

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Reviewing Panel: Members Langer and Biehl.

Mattel, Inc., and its predecessors (hereinafter referred to as the “employer”) request review of Administrative Law Judge (ALJ) Wren’s order that: (1) denied its motion to dismiss claimant’s hearing request; (2) found that claimant’s occupational disease claim was timely filed; (3) declined to admit certain exhibits submitted by the employer for the purposes of the compensability issue; and (4) upheld the employer’s denials of the occupational disease claim. The employer also moves for oral argument. In her brief, claimant argues that the ALJ should not have decided the issue of legal causation. Alternatively, claimant contests the ALJ’s decision to deny her motion to reopen the record to “redesignate” evidence as applicable to the legal causation issue. On review, the issues are oral argument, dismissal, timeliness of claim filing, evidence, and compensability. We deny the request for oral argument, vacate, and remand.

FINDINGS OF FACT

We adopt the ALJ’s “Findings of Fact” and the “Ultimate Findings of Fact,” with the exception of the second paragraph. We briefly summarize the relevant facts.

From September 9, 1968 to March 27, 1998, claimant worked at the employer’s Hall Street plant in Beaverton. While working, she routinely drank water drawn from an on-site well.

In August 1997, claimant was diagnosed with renal cell carcinoma in the left kidney, for which she underwent a radical left nephrectomy. In September 1998, the employer was notified that well water from the Hall Street plant, which was used for drinking and sanitation, contained trichloroethylene (TCE), a probable human carcinogen.

In September 1998, claimant asked her family physician, Dr. Ellerbrook, about a causal connection between her health problems and the TCE exposure. Dr. Ellerbrook stated that claimant's kidney cancer "potentially could have been secondary to the TCE," that claimant was notified of this, and that claimant was having intermittent problems with eczema and rash which "possibly could be related to TCE."

In February 1999, claimant filed a civil complaint against the owners of the Hall Street plant, alleging that, as a result of the owners' negligence, she was exposed to contaminated water, resulting in clear cell cancer. The case was subsequently dismissed without prejudice.

In November 2005, claimant filed an occupational disease claim. The employer denied the claim. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Before the scheduled hearing, claimant conceded that she could not prove that her TCE work exposure was the major contributing cause of her claimed disease. The employer argued that, regardless of that concession, it should be permitted to introduce evidence regarding the compensability of the claimed condition. In an interim ruling, the ALJ excluded the employer's proposed evidence, reasoning that, in light of claimant's concession, such evidence was irrelevant. The ALJ subsequently declined to grant claimant's motion to redesignate exhibits, which had previously been admitted solely for the purpose of determining whether a timely occupational disease claim had been filed, to also include "legal causation" purposes.

In his Opinion and Order, the ALJ denied the employer's motion to dismiss the hearing request, finding that claimant neither abandoned her hearing request nor engaged in conduct resulting in unjustifiable delay. The ALJ also found that the occupational disease claim was timely filed, reasoning that claimant was neither informed by a physician that she suffered from an occupational disease nor discovered that she had an occupational disease more than a year before filing her

occupational disease claim in November 2005. Lastly, the ALJ determined that claimant did not produce evidence sufficient to meet her burden of proving legal causation. Because she conceded that she could not establish medical causation, the ALJ upheld the employer's denials.

On review, the employer argues that the occupational disease claim was not timely filed. The employer also challenges the procedure by which the denials were upheld, asserting that the ALJ's evidentiary ruling did not result in a substantive hearing process necessary for the issuance of a final order. The employer further contends that the ALJ should not have upheld its denial, but rather should have dismissed the hearing request. Finally, the employer asserts that, if the claim is not dismissed, the rationale for upholding the employer's denial should be limited to a failure to prove legal causation.

Claimant responds that the ALJ's order should be upheld with the exception of his ruling on legal causation, which she contends the ALJ need not and should not have reached. Alternatively, claimant contends that the ALJ should have granted her request to redesignate the exhibits pertaining to the timeliness issue as also applicable to legal causation.

Oral Argument

The employer has requested oral argument. However, we do not ordinarily entertain oral argument. OAR 438-011-0015(2). We may, nevertheless, allow oral argument where the case presents an issue of first impression that could have a substantial impact on the workers' compensation system. *See* OAR 438-011-0031(2); *Joe R. Ray*, 48 Van Natta 325, *on recons*, 48 Van Natta 458 (1996); *Jeffrey B. Trevitts*, 46 Van Natta 1767 (1994). The decision to grant such a request is solely within our discretion. OAR 438-011-0031(3).

Here, through their briefs, the parties have adequately addressed the issues before us and we are not persuaded that oral argument would assist us in reaching our decision. Accordingly, we decline to grant the request for oral argument. *See Dale F. Cecil*, 51 Van Natta 1010 (1999); *Raymond L. Mackey*, 47 Van Natta 1 (1995).

Timeliness – ORS 656.807(1)

The employer argues that claimant “discovered” or “should have discovered” her occupational disease and/or that she was informed by a physician that she suffered from an occupational disease more than a year before

filing her claim. As set forth below, a worker may file an occupational disease claim within one year from the *latest* of four eligible dates under ORS 656.807(1). Consequently, we need only determine whether claimant filed her claim within one year of the latest possible eligibility date.

Here, because the record does not establish that a physician told claimant, more than one year before filing the claim, that she suffered from an occupational disease, we find the claim was timely filed.¹ We reason as follows.

ORS 656.807(1) provides that an occupational disease claim is void unless filed one year from the later of the following dates: (1) the date the worker first discovered the occupational disease; (2) the date that, in the exercise of reasonable care, the worker should have discovered the occupational disease; (3) the date the claimant became disabled; or (4) the date the claimant was informed by a physician that the claimant was suffering from an occupational disease. *Freightliner LLC v. Holman*, 195 Or App 716 (2004); *Vida Eghani*, 58 Van Natta 979, 981 (2006).

In *Wayne-Dalton Corp. v. Mulford*, 190 Or App 370, 374-75 (2003), the court determined that the word “informed” should be accorded its ordinary meaning of “importing information or making the listener aware of information.” Thus, the court held that under the ordinary meaning of the word “informed,” as used in ORS 656.807(1)(b), the statute of limitations does not begin to run “until a physician tells the claimant expressly or in substance that the patient is suffering from an occupational disease.” *Id.* at 375. *See also Leonard F. Staley*, 57 Van Natta 552 (2005) (where a physician implicated work activities as causing the claimant’s disease and the claimant understood as much, the physician informed the claimant, at least in substance, that he was suffering from an occupational disease).

¹ Accordingly, we do not address when claimant “discovered” or “should have discovered” the existence of his occupational disease or whether her complaint in the civil proceeding evidenced “constructive discovery” of an occupational disease. That complaint did not assert that a physician informed claimant that she suffered from an occupational disease. In other words, even if we assume that the complaint evidenced that claimant “constructively discovered” that she had an occupational disease, under ORS 656.807(1) the statute of limitations would not begin to run until claimant was *informed by a physician* that she suffered from an occupational disease. The complaint contains no such admission. Thus, we need not determine whether claimant’s complaint constitutes an “admission” that she “discovered” her occupational disease at an earlier point.

Here, we find insufficient evidence that a physician informed claimant that she was suffering from an occupational disease. In September 1998, Dr. Ellerbrook wrote:

“The patient has had a kidney cancer which potentially could have been secondary to the TCE; patient was notified of this. She also has been having intermittent problems with eczema and rash, which possibly could be related to TCE.”

We do not find that this chart note told claimant “either expressly or in substance” that she suffered from an occupational disease. At most, Dr. Ellenbrook informed claimant of a possible connection between her work exposure and the claimed kidney cancer. The employer has not identified, nor have we found in our *de novo* review, any other evidence indicating that a physician told claimant that she suffered from an occupational disease.² Accordingly, we find that claimant timely filed her occupational disease claim.

Evidentiary Ruling

The ALJ barred the employer from submitting evidence in support of its denial, reasoning that claimant’s “major contributing cause” concession rendered such evidence irrelevant. Based on the following reasoning, we consider the ALJ’s ruling an abuse of discretion.

ORS 656.283(7) provides that the ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. Thus, the ALJ has broad discretion regarding the admissibility of evidence at a hearing. *Brown v. SAIF*, 51 Or App 389, 394 (1981); *Debra A. Gillman*, 58 Van Natta 2041 (2006). We review an ALJ’s evidentiary ruling for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002); *Jesus M. Delatorre*, 51 Van Natta 728 (1999).

² The employer contests the ALJ’s conclusion that, to trigger the statute of limitations under ORS 656.807(1)(b), a physician must have informed claimant that the work exposure to TCE was *the major contributing cause* of the claimed disease. However, because none of the physicians told claimant either expressly or in substance that her claimed disease was caused, in any part, by work TCE exposure, we need not determine what level of causation satisfies ORS 656.807(1)(b).

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

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.

Nielson is controlling. 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. ORS 656.295(5); *Nielson*, 68 Van Natta at 2884; *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. At that time, the parties will have an opportunity to present their proposed evidence.³

Accordingly, the ALJ’s order dated May 2, 2008, as amended on May 20, 2008, is vacated and the case is remanded to ALJ Wren for further proceedings consistent with this order. These proceedings shall be conducted in any matter that the ALJ deems will achieve substantial justice. After closure of the evidentiary record, the ALJ shall reconsider the disputed issues and issue a final, appealable order.

IT IS SO ORDERED.

Entered at Salem, Oregon on December 23, 2008

³ 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.