
In the Matter of the Compensation of
RONNIE L. NIELSON, DCD., Claimant
WCB Case No. 06-05918, 05-07919, 05-07918, 05-07917, 05-07916, 05-07915,
05-07914, 05-07705, 05-07704, 05-07703, 05-07438
ORDER ON REVIEW (REMANDING)
Law Offices of Karl G Anuta PC, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys
Andersen & Nyburg, Defense Attorneys
VavRosky MacColl PC, Defense Attorneys
Law Offices of Steven T Maher, Defense Attorneys
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Reviewing Panel: *En Banc*; Members Biehl, Lowell, Weddell, Langer, and Herman.

Mattel, Inc., and its predecessors (hereinafter jointly referred to as “employer”) request review of Administrative Law Judge (ALJ) McCullough’s order that: (1) declined to admit Exhibits 1 through 137 and 141 (as identified in an exhibit index entitled “Master Exhibit List”) for the purposes of the compensability issue; (2) found that claimant’s occupational disease claim for renal cell carcinoma was timely filed;¹ and (3) upheld the employer’s denials of that claim. On review, the issues are the ALJ’s evidentiary ruling, timeliness of claim filing, and compensability. We vacate and remand.

FINDINGS OF FACT

This proceeding involves an occupational disease death benefit claim, which claimant filed on September 12, 2005. The claim was subsequently denied by the employer and claimant requested a hearing.

Before the scheduled hearing, a recorded teleconference was held. At that time, the parties agreed that the disputed issues were compensability and timeliness of the claim. (Tr. 6, 11). Claimant then conceded that she had no medical evidence satisfying the causation requirements (major contributing cause) for an

¹ Claimant is the surviving spouse of the deceased worker.

occupational disease claim under ORS 656.802.² (Tr. 11). Also at that time, the employer offered Exhibits 1 through 137 and 141.³ These exhibits addressed the compensability issue. (Tr. 13).

Claimant objected to this submission as irrelevant under OAR 438-007-0018(3), given her concession that she was unable to prove major contributing cause. (Tr. 22). Claimant did not, however, withdraw her request for hearing challenging the employer's compensability denial.

The ALJ declined to admit the employer's offered "compensability" exhibits (Exhibits 1-137 and 141). The ALJ reasoned that, because the employer had no burden of proof regarding compensability, and because claimant had no medical evidence that needed to be countered by the employer, the exhibits offered by the employer concerning the compensability issue were not relevant or necessary. (Tr. 37-40).

Because the employer maintained its untimely claim filing defense, the ALJ allowed the submission of documentary evidence regarding the timeliness issue. In this regard, the exhibits offered by the employer solely for the timeliness issue (Exhibits 1-45) were admitted.⁴ (Tr. 18-19).

Thereafter, the parties agreed to present the case to the ALJ "on the record," *i.e.*, without a hearing. The parties' written closing arguments regarding the timeliness issue were subsequently presented. In its closing argument, the employer moved for dismissal of claimant's hearing request because there was no compensability issue to be determined given her concession of a lack of sufficient medical evidence to establish compensability.

CONCLUSIONS OF LAW AND OPINION

In his eventual order, the ALJ recited the evidentiary issues discussed during the teleconference. The ALJ denied the employer's motion to dismiss. In doing so, the ALJ reasoned that, because claimant had not withdrawn her request for

² The employer also did not have any medical evidence to offer that would establish major contributing cause. (Tr. 11).

³ Although not discussed in the transcript, Exhibit 141, a report from Dr. Burton, was subsequently added to the "Master Exhibit List."

⁴ The ALJ also admitted Exhibits 138, 139, 140, 142, CL-2, CL-6 (as identified in the "ALJ's Master Exhibit List") for purposes of the timeliness issue.

hearing, nor had the employer withdrawn its compensability denial or its untimely claim filing defense, the compensability issue was still viable. Acknowledging that the outcome of that issue was a foregone conclusion given claimant's concession, the ALJ determined that a conclusion on the merits of the compensability issue (and a disposition of the employer's denial) was required. On the merits, the ALJ found that the claim was timely filed and upheld the employer's denial.

On review, the employer preserves its timeliness defense.⁵ Regarding compensability, it contends that the ALJ could not validly base substantive compensability findings on a "concession" in lieu of evidence. Should we agree that the record was not adequate to support a substantive compensability determination, the employer further argues that claimant waived the right to seek remand for further development of the record. Alternatively, the employer requests that we uphold the denial and find that claimant adduced "no evidence" to support her claim that decedent's death resulted from an occupational disease.

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.

We first address the evidentiary issue. As previously noted, the ALJ excluded the disputed "compensability" exhibits. 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 admissibility of evidence. *Brown v. SAIF*, 51 Or App 389, 394 (1981). We review the ALJ's evidentiary rulings for abuse of discretion.

⁵ We agree, for the reasons expressed by the ALJ, that claimant's claim was timely filed under ORS 656.807(2), which provides that "[i]f the occupational disease results in death, a claim may be filed within one year from the date 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." The record establishes, and the parties agree, that claimant's claim was filed on September 12, 2005. (Ex. 32-36; *see* Coverage and Claims Stipulation and Employment Stipulation, pp. 1-5). The record also establishes that the worker expired on September 26, 2004. (Ex. 31; *see* Coverage and Claims Stipulation and Employment Stipulation, p. 5). Because claimant filed her claim within one year from the date of the decedent's death, her claim was timely filed (per the terms of the statute, the one-year claim filing period does not begin to run until after the worker's death).

SAIF v. Kurcin, 334 Or 399 (2002). Finally, we may remand to the ALJ if we find that the case has been “improperly, incompletely or otherwise insufficiently developed.” ORS 656.295(5).

Claimant has the burden of proving that an injury or occupational disease is compensable. ORS 656.266(1). In this case, legal causation is established by showing that the decedent engaged in potentially causal work activities; whether those work activities caused the decedent’s condition is a question of medical causation. *See Cai Ling Huang*, 55 Van Natta 3445, 3448 (2003). Likewise, 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. *Jack S. Koehler*, 45 Van Natta 1728 (1993); *see Armstrong v. Asten-Hill Co.*, 90 Or App 200, 205-06 (1988).

We find this case analogous to *Nancy L. Cook*, 45 Van Natta 977, *on recons*, 45 Van Natta 1117 (1993). In that case, the ALJ (then Referee) dismissed the claimant’s request for hearing regarding the carrier’s “back-up” denial after granting the carrier’s motion to dismiss. The ALJ accepted the carrier’s counsel’s representation that the carrier would provide testimony that would clearly satisfy the carrier’s burden to prove that the claimant’s claim was not compensable. Because the ALJ found it “clear” that the carrier would prevail, he did not require the carrier to produce the testimony that it represented was available. Instead, he issued an order dismissing the claimant’s request for hearing.

In *Cook*, we concluded that the ALJ erred by not requiring the carrier to present evidence, and instead relying on the counsel’s representation that evidence was available from several witnesses. We explained that the carrier should have been required to present its evidence and that the ALJ should have considered the entire record before making a decision on the merits. We reinstated the claimant’s request for hearing and remanded the case to the ALJ for the admission of additional evidence required to complete the record, and to allow the claimant the opportunity of rebuttal. 45 Van Natta at 977-78; *see also Koehler*, 45 Van Natta at 1728-29 (remand appropriate where the ALJ granted the carrier’s motion to dismiss without convening a hearing or admitting exhibits).

Here, by declining the employer’s request to admit its proposed “compensability” exhibits, the ALJ deprived the employer of the opportunity to put on evidence, which it has a right to do as a party to the hearing regarding its denial of this occupational disease claim. Claimant chose to file a claim and, in

response, the employer investigated the claim, garnered evidence, and issued a denial contesting the claim on timeliness and compensability grounds. After claimant requested a hearing contesting its denial, the employer timely disclosed its claim processing documents/proposed exhibits as required by the Board's rules and presented such documents for admission into the record. *See* OAR 438-007-0015(2);⁶ OAR 438-007-0018(1),⁷ (3).⁸

Claimant objected to the admission of the proposed evidence submitted by the employer, conceding that she could not prove compensability.⁹ Although admission of the proposed exhibits may be of limited probative value given claimant's concession regarding compensability, the exhibits are nonetheless relevant to the employer's defense of the claim and its contention that work had no contribution in the worker's death.¹⁰ For example, among other contentions, the employer argues that claimant did not prove the decedent's exposure or the existence of a disease condition based on objective findings, *see* ORS 656.802(1),

⁶ Under this rule, the carrier must provide all documents within 15 days of receiving the request for hearing or demand for production.

⁷ OAR 438-007-0018(1) requires the carrier to provide to claimant "copies of all documents that are relevant and material to the matters in dispute in the hearing, together with an index" not later than 28 days before the hearing.

⁸ OAR 438-007-0018(3) provides:

"Before or at the hearing, the parties shall delete from their indexes and packets of documents those documents which are cumulative, or which no party can in good faith represent to be relevant and material to the issues, and the revised indexes and packets of documents shall be submitted to the Administrative Law Judge. For compliance with this rule, it is sufficient for the parties to mark neatly through the index description of the documents not being offered in evidence with ink, and to remove the corresponding documents from the packets submitted to the Administrative Law Judge."

⁹ We acknowledge that the basis for claimant's objection was not that the proposed exhibits did not pertain to the denied claim or were untimely admitted. Rather, claimant's sole objection to the admission of the proposed exhibits was that the documents were irrelevant given her concession that she could not meet the "major contributing cause" standard. Nevertheless, for the reasons expressed above, we conclude that the disputed exhibits must be admitted.

¹⁰ Our determination that the employer may present evidence in support of its request for a definitive ruling that the deceased worker's employment did not contribute to his death should not be interpreted as a directive to the ALJ to make such a ruling. Instead, for the reasons expressed above, we are merely holding that the employer must not be precluded from developing the record in support of its contention and its request for such a ruling.

and that she did not satisfy her burden to prove subject worker status. Notwithstanding claimant's concession, those issues remained pending before the ALJ.¹¹

In conclusion, we consider it an abuse of discretion for the ALJ to have excluded the evidence from both parties regarding compensability. In doing so, we disagree with the employer's argument that claimant "waived" the opportunity to make an evidentiary record. *See Drews v. EBI Companies*, 310 Or 134, 150 (1990) (waiver is "the intentional relinquishment of a known right"); *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685 (1995) (waiver must be "plainly and unequivocally manifested"). To the contrary, the record indicates that claimant was willing to present evidence, but was limited from doing so by the ALJ's rulings. Specifically, in response to the employer's submission of the disputed exhibits, claimant indicated that if the employer was allowed to develop the record on compensability, she could present medical evidence supporting a material cause relationship (albeit, not major contributing cause). (Tr. 31). Under such circumstances, we conclude that claimant preserved her right to present evidence.

Similarly, claimant's decision not to submit evidence in support of her request for hearing did not effectively constitute an "abandonment" of the request for hearing. *See* OAR 438-006-0071. She participated throughout the pre-hearing proceedings, as well as at the hearing. Moreover, she has not withdrawn her hearing request. Under such circumstances, she is entitled to a decision regarding her request for hearing. We acknowledge that the ALJ's ruling was apparently designed to "streamline" the compensability analysis and arguably save administrative resources. Nevertheless, considering the parties' respective positions, a more expansive presentation of evidence regarding the denied claim was required. ORS 656.012(1)(c) and (2)(e).¹²

¹¹ In reaching this conclusion, we also consider this situation analogous to cases following *Zurita v. Canby Nursery*, 115 Or App 330 (1992), *rev den*, 315 Or 443 (1993). In those cases, although the claimant failed to appear at the hearing, the hearing request was not dismissed, and exhibits were presented by the carrier in defense of the carrier's claim denial. *See, e.g., Lawrence E. Phillips*, 56 Van Natta 3366 (2004); *Ernesto Guevara*, 55 Van Natta 3341 (2003); *Janette Valles-Key*, 55 Van Natta 2280 (2003); *Troy A. Gascon*, 47 Van Natta 926 (1995); *Cook*, 45 Van Natta at 977-78. For example, in *Cook*, we explained that, although the claimant did not appear at hearing and thereby chose not to rebut the employer's case regarding the "back-up" denial, her failure to appear did not obviate the employer's need to present clear and convincing evidence that the claimant's employment did not cause her injury. 45 Van Natta at 978 (citing *Zurita*).

¹² 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

Consequently, in light of the ALJ's evidentiary rulings, we consider the current record to be incompletely and insufficiently developed, and we find a compelling reason to remand. ORS 656.295(5); *Kienow's Food Stores v. Lyster*, 79 Or App 416 (1986) (remand is appropriate upon a showing of good cause or other compelling basis); *see also George D. Robinson*, 55 Van Natta 1871, 1875 (2003) (ALJ's evidentiary ruling overturned and case remanded to the ALJ for allowance of cross-examination or rebuttal evidence); *Cathy A. Ray*, 55 Van Natta 406 (2003) (remand appropriate to allow the claimant the opportunity to submit rebuttal evidence); *Richard N. Wigert, on recons*, 46 Van Natta 756 (1994) (Board remanded for admission of the claimant's evidence and directed the ALJ to allow the insurer to cross-examine or rebut the claimant's evidence).

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.

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 International Dictionary* 814 (unabridged ed 2002). 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. Moreover, such an approach would resemble gamesmanship, which likewise has no place in the workers' compensation dispute resolution system.

In this way, the parties will have an opportunity to present, for the ALJ's consideration, their proposed evidence, including any proposed rebuttal evidence.¹³ *See* OAR 438-007-0023.

Accordingly, the ALJ's order dated June 29, 2007 is vacated and the case is remanded to ALJ McCullough for further proceedings consistent with this order. These proceedings shall be conducted in any manner 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.

Entered at Salem, Oregon on November 7, 2008

¹³ 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.