

---

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 RECONSIDERATION

Law Offices of Karl G Anuta PC, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys  
Andersen & Nyburg, Defense Attorneys  
MacColl Busch Sato PC, Defense Attorneys  
Law Offices of Steven T Maher, Defense Attorneys  
Reinisch Mackenzie PC, Defense Attorneys  
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: *En Banc*. Members Biehl, Lowell, Herman, Langer, and Weddell. Board Chair Herman specially concurs.

On October 8, 2010, we abated our September 15, 2010 order that affirmed an Administrative Law Judge's (ALJ's) order that: (1) declined to dismiss claimant's hearing request concerning the employer's denial of her occupational disease claim for renal cell carcinoma; and (2) upheld the employer's denial without determining whether claimant had established any employment contribution concerning the denied claim.<sup>1</sup> We took this action in response to the employer's request for reconsideration in which it: (1) contends that we neglected to consider other "disputed issues"; and (2) requests that we consider its arguments in several companion cases presently pending Board review. Having received claimant's response and the employer's reply, we proceed with our reconsideration.

The employer first contends that our September 15, 2010 order did not resolve a dispute concerning the ALJ's use of a stipulation for resolving a compensability dispute that the employer purportedly only agreed to use on a question of timeliness. However, we subsequently vacated and remanded that prior order. *See Ronnie L. Nielson, Dcd.*, 60 Van Natta 2878 (2008) (*Nielson I*). The ALJ's current order, which our September 15, 2010 order affirmed, did not rely on any earlier stipulation, but rather the evidence submitted by the parties subsequent to our remand instructions in *Nielson I*. Therefore, the employer's objection to an earlier order, which we vacated, is moot.

---

<sup>1</sup> Claimant is the surviving spouse of the deceased worker.

The employer next contends that our September 15, 2010 order did not resolve other “disputed issues” that it “preserved,” but did not argue before the ALJ subsequent to our remand. We understand that the employer is referring to claimant’s inability to prove “the decedent’s exposure or the existence of a disease condition based on objective findings, *see* ORS 656.802(1), and that [claimant] did not satisfy her burden to prove subject worker status.” *See Nielson I*, 60 Van Natta at 2882-83. In light of our determination upholding the employer’s denial because claimant has not established that employment conditions were the major contributing cause of the decedent’s occupational disease, we need not resolve these other “disputed issues.”

The employer also requests that we consider, in the instant matter, arguments advanced in briefs in several pending companion cases. Claimant opposes the request, raising concerns that consideration of these arguments will further delay the resolution of this case. Given the similarity of issues intertwined in these cases, and the relative novelty of the arguments posed therein, we have considered the employer’s briefs in those companion cases in our deliberations. We now address those arguments.

The employer does not dispute that if a worker has not established, either by way of legal causation or medical causation, that employment conditions were the major contributing cause of an occupational disease claim, then a carrier’s denial should be upheld. *See* ORS 656.802(2). The employer contends, however, that where a claimant files a request for hearing with the intent of subsequently filing a civil action under ORS 656.019, we are required to make “clear and specific” findings as to whether claimant satisfied some lesser level of employment contribution concerning the claimed occupational disease. According to the employer, both ORS 656.019 and *Smothers v. Gresham Transfer, Inc.*, 332 Or 23 (2001), require that we make such findings. We disagree.

In *Smothers*, the court held that a determination of whether the exclusive remedy provisions of ORS 656.018 (1995) violated the remedy clause of Article I, section 10, of the Oregon Constitution requires a case-by-case analysis.<sup>2</sup>

---

<sup>2</sup> In particular, ORS 656.018(7) provides that:

“[t]he exclusive remedy provisions and limitation on liability provisions of this chapter apply to all injuries and to diseases, symptom complexes or similar conditions of subject workers arising out of and in the course of employment whether or not they are determined to be compensable under this chapter.”

332 Or at 135. The court explained that the “first inquiry is whether a workers’ compensation claim alleges an injury to an ‘absolute’ common-law right that the remedy clause protects.” *Id.* The court added:

“If it does, and the claim is accepted and the worker receives the benefits provided by the workers’ compensation statutes, then the worker cannot complain that he or she has been deprived of a remedial process for seeking redress for injury to a right that the remedy clause protects. Neither can the worker complain that he or she has been deprived of a remedial process if a compensation claim is denied because the worker is unable to prove that the work-related incident was a contributing cause of the alleged injury, which is what a plaintiff would have had to prove in a common-law cause of action for negligence. However, if a workers’ compensation claim for an alleged injury to a right that is protected by the remedy clause is denied because the worker has failed to prove that the work-related incident was the major, rather than merely a contributing, cause of the injury, then the exclusive remedy provisions of ORS 656.018 (1995) are unconstitutional under the remedy clause, because they leave the worker with no process through which to seek redress for an injury for which a cause of action existed at common law.” *Id.*

Applying those principles to the facts before it, the court first determined that the plaintiff would have had a common-law cause of action for his alleged injury when the drafters wrote the Oregon Constitution in 1857. *Id.* Additionally, the plaintiff had “followed the procedures prescribed by Oregon statutes and first filed a workers’ compensation claim,” but an ALJ held that the claimant/plaintiff “had not suffered a compensable injury because, although the work exposure might have contributed to his injuries, [the] plaintiff could not prove that the work exposure was the major contributing cause of his injuries.” *Id.* Under such circumstances, the court held that the exclusive remedy provisions of ORS 656.018 (1995) could not constitutionally bar the plaintiff’s civil action claim, and that he should have been allowed to proceed with his negligence action. *Id.* at 136.

Subsequent to the *Smothers* decision, the legislature enacted ORS 656.019. See *Hudjohn v. S&G Machinery Co.*, 200 Or App 340, 347 n 3 (2005) (noting that ORS 656.019 was enacted in response to the Supreme Court’s holding in *Smothers*). ORS 656.019 provides, in relevant part, that:

“[a]n 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. The injured worker may appeal the compensability of the claim as provided in ORS 656.298, but may not pursue a civil negligence claim against the employer until the order affirming the denial has become final.”

Emphasizing the use of the phrase “work-related injury” in ORS 656.019, as well as the observation in *Smothers* that a worker cannot “complain that he or she has been deprived of a remedial process if a compensation claim is denied because the worker is unable to prove that the work-related incident was a contributing cause of the alleged injury” (*see* Or 332 at 135), the employer argues that we are required to make a finding as to whether claimant established “material causation,” even though the claimed occupational disease is subject to “the major contributing cause” standard. Neither of the highlighted texts, however, makes such a declaration, and the employer has not identified any language in the text of the statute or any legislative history that would require an ALJ or the Board to make the requested finding. Accordingly, we decline to do so.

As set forth above, *Smothers* only addressed the constitutionality of the exclusive remedy provisions of ORS 656.018; it did not prescribe that, in finding certain claims not compensable, we must make particular factual or causation findings whenever an injured worker declares an intent to subsequently file a civil negligence action. As explained in our prior order,

“ORS 656.019 sets forth circumstances in which an injured worker may pursue a civil negligence action in a different forum, but does not prescribe that we review or adjudicate workers’ compensation claims in any different manner than ‘an ordinary claim.’”

*Ronnie L. Nielson*, 62 Van Natta 2319, 2324-25 (2010) (*Nielson II*). Moreover, any substantive rights under ORS 656.019 arise “*only after* an order determining that the claim is not compensable has become final.” ORS 656.019(1)(a). Simply put, we do not agree with the employer that *Smothers* and ORS 656.019 mandate that we determine whether claimant has satisfied some lesser standard of causation than that applicable to the disputed claim.

The employer also contends that, because a civil tribunal must determine a worker’s compliance with ORS 656.019 before permitting a civil negligence action to proceed, we must make a finding as to whether that worker established that employment conditions were a “material cause” of the alleged injury or disease. In advancing that argument, the employer reiterates its argument that ORS 656.019 only permits civil negligence actions for “a work-related injury,” and that we must determine the existence of such an injury. According to the employer, a “work-related injury” is synonymous with a finding that employment conditions were a “material contributing cause” of the claimed injury/occupational disease. The employer’s contentions are not persuasive.

As an initial matter, the employer does not explain why the phrase “work-related injury” must necessarily mean a “material contributing cause” of the claimed injury/occupational disease. Likewise, the employer does not explain why the civil court, the authority empowered to determine whether a civil action may proceed, is incapable of determining whether an injured worker complied with the provisions of ORS 656.019.

In any event, ORS 656.019 does not require that the injured worker prove a “work-related injury” to the Board; rather, the statute provides an injured worker with a right to “pursue a civil 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 \* \* \*.” The substantive right created by ORS 656.019 is activated “*only after*” our order determining that the claim is not compensable “has become final.” ORS 656.019(1)(a) (emphasis added). Therefore, we disagree with the employer that ORS 656.019 obligates us to make a finding as to whether claimant established *any* employment contribution concerning the claimed occupational disease.

Moreover, it is unclear how this line of argument advances the employer’s position. ORS 656.019 is not the exclusive source for all civil negligence actions; rather, it is only the source by which an injured worker may pursue such an action

for a “work-related injury” within the parameters set forth in that provision, despite the otherwise exclusive remedy provisions of ORS 656.018, which “apply to all injuries and to diseases, symptom complexes or similar conditions of subject workers arising out of and in the course of employment whether or not they are determined to be compensable under [ORS 656].” Therefore, any finding that claimant had not established a “work-related injury” (*i.e.*, that claimant was not a subject worker or that an injury or disease did not arise out of and in the course of employment) would suggest that the exclusive remedy provisions of ORS 656.018 and the procedural requirements of ORS 656.019 do not apply. In such instances, there would appear to be no statutory bar to claimant filing a civil negligence action, ORS 656.019 notwithstanding. In any event, as previously explained, “the validity (or lack thereof) of any potential civil action that claimant may file \* \* \* is beyond the scope of our authority, which is to determine the compensability of claims under the Workers’ Compensation Act.” *Nielson II*, 62 Van Natta at 2323.

Alternatively, the employer requests that we dismiss claimant’s hearing request, because she has only “procedurally,” but not “substantively,” complied with her obligations under ORS 656.019 and *Nielson I*, 60 Van Natta at 2883 n 12. In other words, the employer alleges that claimant did not “diligently and arduously pursue” her claim within the workers’ compensation system. In doing so, the employer argues that, subsequent to our remand, claimant only submitted a single medical report in support of her claim.

The record, however, does not establish that claimant withheld other evidence related to her claim. Moreover, the employer acknowledges that claimant: (1) did not withdraw her request for hearing; and (2) appeared and participated in the proceedings and arguments. Although the medical evidence submitted by claimant was not sufficient to establish a compensable occupational disease claim, the remedy in such circumstances “is to uphold the employer’s denial, not dismiss claimant’s timely filed request for hearing.” *Nielson II*, 62 Van Natta at 2322.<sup>3</sup>

---

<sup>3</sup> Citing *Mullenaux v. Dep’t of Revenue*, 293 Or 536, 541 (1982), the employer argues that claimant “is disqualified from obtaining an order that will be cited as proof of \* \* \* compliance [with ORS 656.019 and *Nielson I*] before a civil court judge.” In *Mullenaux*, the court affirmed a tax court judgment that did not reach the merits of the plaintiffs’ appeal because the plaintiffs failed to appear at a hearing before the administrative agency whose ruling they were challenging. *Id.* at 540-41. The court reasoned that the plaintiffs’ failure to timely and adequately address the merits of the dispute before the administrative agency precluded them from arguing those merits on judicial review. *Id.*

Here, as set forth above, claimant has appeared at all proceedings and presented extensive arguments on the merits of the dispute. Moreover, *Mullenaux* was not concerned with the administrative agency’s dismissal of the plaintiffs’ complaint due to their failure to appear, but rather the propriety of

Finally, the employer argues that a claimant's strategy of "defaulting" on workers' compensation claims due to a preference of litigating in civil court will create "a grave risk that even meritorious occupational disease claims will be pursued, litigated and compensated (or not compensated) outside of the workers' compensation system." The employer further contends that not dismissing claimant's hearing request in the instant matter threatens to undermine the workers' compensation system and our statutory role in adjudicating workers' compensation disputes. We do not share that view.

ORS 656.019 only permits civil negligence actions for a subset of work-related injuries—namely, those that have "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 \* \* \*." ORS 656.019(1)(a). Any civil action may proceed "only after an order determining that the claim is not compensable has become final." *Id.* Thus, any claimant who seeks to pursue a civil negligence action must have a claim subject to the major contributing standard, and must first pursue that claim within the workers' compensation system. *See Nielson I*, 60 Van Natta at 2883 n 12. When such a claim is initiated, the carrier may accept the claim, "and the worker receives the benefits provided by the workers' compensation statutes \* \* \*." *Smothers*, 332 Or at 135. In such circumstances, the worker could not then "complain that he or she has been deprived of a remedial process for seeking redress for injury to a right that the remedy clause protects." *Id.*

Moreover, a claimant "electing" to pursue a civil negligence action in lieu of a remedy under the workers' compensation system would need to endure a significant wait and forego the more immediate and expedient benefits available under the workers' compensation system. That prolonged wait would include a hearing before an ALJ, at which the carrier is entitled to present evidence regarding its denial (*Nielson I*, 60 Van Natta at 2881-82), as well as potential Board and appellate court reviews, and any subsequent civil court proceedings. Any such worker would also be bypassing a remedy in the "no-fault" workers' compensation system in favor of the uncertainty of establishing the requisite "fault" in a civil negligence action.

---

the tax court's response to that failure. Therefore, *Mullenaux* is inapposite. In any event, as previously explained, "any impact of our decision upholding the employer's denial in an ancillary litigation is not for us to determine." *Nielson II*, 62 Van Natta at 2322.

Additionally, during the litigation of the workers' compensation claim, if a request for hearing or review is frivolous, or filed in bad faith or for the purpose of harassment, sanctions are available under ORS 656.390.<sup>4</sup> Furthermore, were an injured worker to subsequently produce "new" expert medical evidence in a civil proceeding that was not presented at hearing before an ALJ during the litigation of the workers' compensation claim, that worker would presumably need to explain to the civil court why that evidence was not submitted in the earlier workers' compensation proceeding.

We believe that the aforementioned factors make it unlikely that future claimants will intentionally "default" on occupational disease claims in the workers' compensation system in order to pursue a civil negligence action. In any event, regardless of the accuracy of the employer's forecasting of such events, for the reasons previously explained, our statutory duty is to determine whether the employer's denial in the instant matter should be upheld. *See Nielson II*, 62 Van Natta at 2323, 2325. Having determined that claimant has not established that employment conditions were the major contributing cause of the claimed occupational disease, the appropriate remedy is to uphold the employer's denial, not to dismiss claimant's timely-filed request for hearing. *Id.* at 2322.

Accordingly, on reconsideration, we republish our September 15, 2010 order, as supplemented herein. The parties' rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on October 29, 2010

Board Chair Herman, specially concurring.

I acknowledge this Board's longstanding practice of refraining from resolving issues that are not necessary to the ultimate decision. There are strong policy reasons for this approach, which enables a reviewing body to reach consensus on a determinative component of a statutory requirement and allows for the issuance of a timely decision. This approach also defers resolution of a more contentious component of the required analysis to a future decision when that particular aspect of the analysis is determinative to the outcome of the parties' dispute.

---

<sup>4</sup> The employer has acknowledged that it did not seek such sanctions in the instant matter.

Consistent with this practice, the lead opinion chooses not to engage in an analysis of several aspects of this disputed claim; *e.g.*, whether claimant established “legal causation” between the worker’s death from cancer and his employment, and the extent to which the worker’s employment contributed to his death. In reaching this conclusion, the lead opinion reasons that answering these questions is unnecessary in that the disputed occupational disease claim would still not be compensable because the medical record does not establish that the worker’s employment exposure was the major contributing cause of his claimed cancer.

The lead opinion emphasizes that there is no statutory mandate under ORS 656.019 to answer these questions. I agree that the decision to decline to address the above issues is within the Board’s discretion as an appellate reviewing body. ORS 656.295(6) (the Board’s powers on review are plenary).

Nevertheless, I submit that, considering the potential significance of the issues posed in this particular case (which concerns the role of this agency and its decision in future civil litigation under ORS 656.019), as well as the employer’s timely and repeated requests for such rulings, we should have drawn a distinction between this specific situation and other Board cases where resolution of non-determinative issues was deemed unnecessary.

In reaching this conclusion, I fully recognize that addressing such matters might have no impact on subsequent civil actions. It is likewise possible that addressing such questions might raise controversial points that could prolong this body’s review and the eventual issuance of its opinion. Nonetheless, in light of the extensive time and effort that the parties have contributed in the presentation of their respective positions, and consistent with this agency’s role as the dispute resolution forum for all matters pertaining to a claim under the workers’ compensation laws, I would have preferred to have addressed and decided the issues pertaining to legal and medical causation posed by the employer in this compensability dispute. In this way, the agency’s stated mission of providing substantial justice to the parties would have been better met.

In conclusion, consistent with the principles of *stare decisis*, I follow the lead opinion’s decision not to consider the above issues. However, based on the reasoning expressed above, I respectfully offer this concurring opinion.