

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

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Reviewing Panel: Members Biehl and Lowell.

Mattel, Inc., and its predecessors (hereinafter jointly referred to as the “employer”) request review¹ of Administrative Law Judge (ALJ) McCullough’s order that: (1) found claimant’s occupational disease claim for cholangiocarcinoma timely filed;² (2) declined to dismiss claimant’s request for hearing concerning its denial of the claimed occupational disease; and (3) upheld its denial without

¹ The employer has requested oral argument, contending that the resolution of this case may have a significant impact on the workers’ compensation system. 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, *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, the parties have thoroughly addressed the issues before us in briefs and arguments submitted in this case and in several companion cases (which we have also considered). 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).

² In an *en banc* decision, the Board previously found claimant’s occupational disease claim to be timely filed. *Gary L. Evans, Dcd.*, 60 Van Natta 3327, 3338 (2008) (*Evans I*). Although the employer has preserved that issue for appellate review, it does not request that the issue be revisited and has not provided new evidence concerning that issue. Therefore, in accordance with *Evans I*, the Board’s *en banc* decision, which includes Member Lowell’s dissenting opinion, is incorporated into this order.

determining whether claimant had established legal causation or any employment contribution concerning the denied claim.³ On review, the issues are the ALJ's procedural ruling and scope of issues.

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

The decedent worked for the employer from April 1, 1974 to March 31, 1998. 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, exceeding the 5 parts per billion drinking water standard established by the U.S. Environmental Protection Agency. (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).

In February 2005, claimant filed an occupational disease claim, asserting that workplace exposure to TCE caused the decedent's cholangiocarcinoma and resulting death. (Exs. 17, 18).

The employer denied the claim, both on grounds of timeliness of claim filing and compensability. Claimant requested a hearing.

In a prior order, we found that claimant timely filed her occupational disease claim, and remanded the compensability dispute to the ALJ, finding that the record was insufficiently developed. *See Gary L. Evans, Dcd.*, 60 Van Natta 3327 (2008) (*Evans I*). We directed the ALJ to admit exhibits proposed by both parties concerning the compensability dispute, to consider any proposed rebuttal evidence, and to conduct further proceedings in a manner that the ALJ deemed would achieve substantial justice. *Id.* at 3340-41.

³ Claimant is the surviving spouse of the deceased worker.

Thereafter, the ALJ admitted the employer's previously proposed exhibits, and granted claimant 30 days to submit any evidence regarding the compensability issue. On April 9, 2009, after receiving no objection from the employer, the ALJ admitted a report from Dr. Gruenberg, an oncologist, as well as some excerpts from certain administrative rules that were submitted by claimant on January 29, 2009. (Exs. CL11, CL12). Dr. Gruenberg opined that the decedent's workplace TCE exposure was a substantial factor and material cause, but not the major contributing cause, of his cholangiocarcinoma and death. (Ex. CL11). The ALJ informed the parties that the record would be kept open until August 3, 2009 for the submission of Dr. Gruenberg's deposition, which the employer had previously requested.

On June 30, 2009, the employer announced that it would not be deposing Dr. Gruenberg. The employer also requested that the ALJ not admit any exhibits from claimant, including the exhibits already admitted, until those exhibits were "formally proffered, and an opportunity [was] provided for objections to be made and ruled upon." In that same letter, the employer requested that the ALJ proceed by: (1) setting a deadline to allow the parties to submit evidence; (2) setting a briefing deadline to raise and brief evidentiary objections; (3) ruling on the evidentiary issues; and (4) setting a briefing schedule for closing arguments based on the evidentiary record.

On July 10, 2009, the ALJ stated that claimant's December 2008 submission of Dr. Gruenberg's report and the administrative rules had been considered as a formal offer of evidence. Reasoning that the employer had some four months to object before the April 2009 admission of Dr. Gruenberg's report, the ALJ declined to reconsider the previous admission of that evidence.⁴ Nevertheless, the ALJ permitted the employer to obtain a "rebuttal" report concerning Dr. Gruenberg's report.

On July 22, 2009, the employer responded that it had "expected that the ALJ would provide another more formal opportunity for the parties to present objections and finalize the record on remand once all discovery had been completed." The employer then "repeat[ed] its June 30, 2009 request for the ALJ to set a deadline for submission of objections to the newly admitted compensability record as supplemented on remand."

⁴ The ALJ noted that the employer did object to the admission of the administrative rules, but adhered to his previous ruling admitting that evidence.

The ALJ disagreed with the employer's interpretation of our order in *Evans I* and adhered to his July 10, 2009 letter, with the exception of extending the employer's time to submit a "rebuttal" report until August 31, 2009. On September 2, 2009, having received no rebuttal report from the employer, the ALJ closed the evidentiary record.

The ALJ upheld the employer's denial, finding that claimant had not established that the decedent's employment activities were the major contributing cause of the claimed occupational disease. See ORS 656.802(2). In doing so, the ALJ declined the employer's request to also make findings as to whether claimant had satisfied the "legal causation" prong of the compensability standard, and whether the decedent's workplace exposure had made *any* contribution to the claimed occupational disease.

On review, the employer acknowledges that claimant did not meet the major contributing cause standard for her occupational disease claim. The employer, however, asserts that, rather than affirm the ALJ's decision to uphold its denial, we should dismiss claimant's hearing request.

Alternatively, the employer contends that, rather than only addressing claimant's burden under the major contributing cause standard of ORS 656.802(2), we should determine that claimant did not establish *any workplace contribution* to the claimed occupational disease. The employer also argues that, even though claimant did not establish medical causation, we should make a separate finding that she also did not establish legal causation.

In *Ronnie L. Nielson, Dcd.*, 62 Van Natta 2319, *recons.*, 62 Van Natta 2682 (2010) (*Nielson II*), we addressed and rejected all of the employer's arguments advanced in the instant matter. Specifically, addressing ORS 656.019 and ORS 656.802(2), we held that we are not authorized to dismiss a hearing request based on the employer's assertion that a claimant purportedly pursued a strategy to intentionally "lose" a workers' compensation claim in order to file a civil action under ORS 656.019. 62 Van Natta at 2322. We noted that there was no statutory or administrative authority that would empower us to taken such an action, and that the insufficiency of medical evidence supporting a claim warranted upholding the employer's denial, not dismissing a timely filed request for hearing. *Id.*

We next addressed the employer's argument that the claimant had not "diligently and arduously pursued" the occupational disease claim consistent with the comments expressed in *Ronnie L. Nielson, Dcd.*, 60 Van Natta 2878

(2008) (*Nielson I*). *Nielson II*, 62 Van Natta at 2322-23. Observing that the record did not rebut the claimant's counsel's representation that he was unable to procure medical evidence establishing that employment conditions were the major contributing cause of the claimed occupational disease, we considered the employer's argument concerning claimant's efforts unsupported by the record. *Id.* at 2323.

Turning to the employer's contention that upholding the denial might be construed to endorse the claimant's future efforts to file a civil action under ORS 656.019(2) and *Smother's v. Gresham Transfer, Inc.*, 332 Or 83 (2001), we reasoned that the scope of our authority was to determine the compensability of claims under the Workers' Compensation Act, not to determine the impact of our decision in any ancillary litigation. *Id.*

We also rejected the employer's argument that the language of ORS 656.019 required a determination as to whether the claimant had established "legal causation," even though the medical evidence was insufficient to establish "medical causation." *Id.* at 2324-25. We reasoned that the statute set forth circumstances in which an injured worker could pursue a civil negligence action in a different forum, but did not prescribe that we adjudicate workers' compensation claims in any manner different from "an ordinary claim." *Id.* After reviewing the language of ORS 656.019, we concluded that the determination of whether an injured worker has a right to file a civil action under ORS 656.019 may take place only after our "order affirming the denial has become final," and was to be made by the forum where any civil action is filed. *Id.*

For similar reasons, we ruled that we were not required to determine whether the claimant had proven *any* employment contribution to the claimed occupational disease. *Id.* at 2325. Observing that our statutory obligation was to determine compensability based on the standard applicable to the filed claim, we found that the claimant had not established that employment conditions were the major contributing cause of the claimed occupational disease. *Id.* We reasoned that whether the claimant established any lesser degree of workplace contribution was not statutorily relevant to whether the claim was compensable under ORS 656.802(2). *Id.*

On reconsideration, we considered arguments that the employer advanced in several companion cases that were pending Board review.⁵ *See* 62 Van Natta 2682. Specifically, we addressed the employer’s assertion that where a claimant files a request for hearing with the intent of subsequently filing a civil action under ORS 656.019, we were required to make “clear and specific” findings as to whether the claimant satisfied some lesser level of employment contribution concerning the claimed occupational disease. *Id.* at 2683. Analyzing ORS 656.019 and *Smothers*, we found that neither point nor authority required us to make particular factual or causation findings whenever an injured worker declares an intent to subsequently file a civil negligence action. *Id.* at 2685.

We also rejected the employer’s assertion that ORS 656.019 requires a claimant to prove a “work-related injury” to the Board; rather, we reasoned that the statute provides an injured worker with a right to “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 * * *.” *See* ORS 656.019. In doing so, we noted that the substantive right created by ORS 656.019 was activated “*only after*” our order determining the claim to be not compensable had “become final.” 62 Van Natta at 2686 (emphasis in original).

Finally, we disagreed with the employer’s suggestion that not dismissing the claimant’s occupational disease claim would threaten to undermine the workers’ compensation system and our statutory role in adjudicating workers’ compensation disputes. *Id.* at 2688-89. We considered it unlikely that future claimants would intentionally “default” on occupational disease claims in the workers’ compensation system in order to pursue a civil negligence action. *Id.* In any event, we reiterated that our statutory duty was to determine whether the employer’s denial should be set aside or upheld. *Id.* at 2689. Having determined that the claimant did not establish that employment conditions were the major contributing cause of the claimed occupational disease, we upheld the employer’s denial. *Id.*

⁵ We also addressed the employer’s contention that we had not considered other “disputed issues,” specifically, claimant’s inability to prove: (1) the decedent’s exposure or the existence of a disease condition based on objective findings; and (2) subject worker status. 62 Van Natta at 2683. In light of our determination upholding the employer’s denial because claimant did not establish that employment conditions were the major contributing cause of the decedent’s occupational disease, we did not resolve those other “disputed issues.” *Id.* We apply that same rationale to the instant matter.

As noted above, the employer's arguments were all addressed and rejected in *Nielson II*.⁶ Furthermore, in accordance with the reasoning set forth in that case, we decline, in the instant matter, to grant the employer's motion to dismiss and reject the employer's alternative arguments. Consequently, we affirm.

ORDER

The ALJ's order dated November 24, 2009 is affirmed.

Entered at Salem, Oregon on December 8, 2010

⁶ In reaching our decision in *Nielson II*, we allowed the employer's request to consider arguments advanced in briefs in several pending companion cases (including the instant matter).