

In the Matter of the Compensation of
REBECCA M. MULIRO, Claimant

WCB Case No. 11-03496, 11-02720

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys
Carol A Parks, Dept of Justice - GCD-BAS, Defense Attorneys
Law Office of Thomas A Andersen, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman. Member Langer dissents.

ComPro, Inc. (ComPro)¹ requests review of that portion of Administrative Law Judge (ALJ) Wren’s order that awarded claimant supplemental disability benefits. On review, the issue is supplemental disability benefits.

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

The ALJ determined that, as of claimant’s April 10, 2010 injury, the employer knew that she worked for more than one employer. Relying on *Nada Lovre*, 56 Van Natta 598 (2004), the ALJ reasoned that such knowledge was imputed to the insurer. As such, the ALJ concluded that claimant was not disqualified from receiving supplemental disability benefits because she did not communicate her secondary employment directly to “the insurer” within the 30-day period prescribed by ORS 656.210(2)(b)(A). Accordingly, the ALJ directed ComPro to process her claim for supplemental disability benefits.

On review, ComPro concedes that the employer had knowledge/notice of claimant’s other employment, but contends that the “imputed notice” holding in *Lovre* was “legal error,” and requests that we disavow that case. Instead, ComPro argues that it is *claimant’s* responsibility to provide notice of secondary employment to the *insurer* within 30 days of the initial claim.

We decline ComPro’s request to disavow *Lovre*. In *Lovre*, we relied on ORS 656.210(2)(b) (2001),² and explained that for the claimant to obtain

¹ ComPro is the assigned processing administrator of supplemental disability benefits for the Workers’ Compensation Division (WCD). (Tr. 34; Ex. 8).

² ORS 656.210(2)(b) (2001) provided:

“Notwithstanding paragraph (a)(B) of this section, the weekly wage calculated under paragraph (a)(A) of this subsection shall be used for workers employed in more than one job at the time of injury unless,

supplemental disability benefits, the statute required that the insurer: (1) receive notice of a second job within 30 days of the initial claim; and (2) receive verifiable documentation of wages from such additional employment. 56 Van Natta at 601. Reasoning that the notice provided by a claimant to an insured employer may be imputed to the insurer, we determined that the insurer had notice of the claimant's secondary employment, directly or through its insured, when the employer received a second 801 Form (17 days after its receipt of the initial claim) reporting that the claimant had more than one employer. *Id.* at 600-01. We also concluded that the 30-day limitation did not extend to the insurer's receipt of verifiable documentation of secondary employment wages because there was no statutory support for such a limit. *Id.* at 601-02.

Subsequently, in 2009, the legislature amended ORS 656.210(2)(b) to provide that the worker must provide verifiable documentation of wages from secondary employment within 60 days of the date a request for verification is mailed. It also restructured the "notice" and "verifiable documentation" provisions to subparagraphs (A), and (B), respectively.³ Or Laws 2009, ch 313, § 1. Although modified slightly due to the restructuring, the operative language of the "notice" requirement was unchanged; *i.e.*, the statute continues to provide that "the insurer" receives "[w]ithin 30 days of receipt of the initial claim, notice that the worker was employed in more than one job with a subject employer at the time of injury." ORS 656.210(2)(b)(A). Thus, the statutory amendments do not affect our reasoning in *Lovre* regarding the imputation of notice.

within 30 days of receipt of the initial claim, the insurer, self-insured employer or assigned claims agent for a noncomplying employer receives notice that the worker was employed in more than one job with a subject employer at the time of injury and receives verifiable documentation of wages from such additional employment."

³ ORS 656.210(2)(b) now provides:

"Notwithstanding paragraph (a)(B) of this subsection, the weekly wage calculated under paragraph (a)(A) of this subsection shall be used for workers employed in more than one job at the time of injury unless the insurer, self-insured employer or assigned claims agent for a noncomplying employer receives:

"(A) Within 30 days of receipt of the initial claim, notice that the worker was employed in more than one job with a subject employer at the time of injury; and

"(B) Within 60 days of the date of mailing a request for verification, verifiable documentation of wages from such additional employment."

Moreover, while the lead cases dealing with “imputation” between an employer and its insurer dealt with various claim processing actions, and were decided before 2001 (when ORS 656.210(2)(b) was enacted),⁴ *Lovre* applied that principle to a supplemental disability case. We acknowledge that the express language of ORS 656.210(2)(b)(A) provides that notice must be received by the “insurer.” However, as reasoned in *Lovre*, it is “well settled that, with respect to the processing of claims, notice provided by a claimant to an insured employer may be imputed to the insurer.” 56 Van Natta at 600. This principle has been applied in many contexts, including supplemental disability, and is independent of the express statutory text. *See, e.g., Anfilofieff*, 52 Or App at 134-35 (“Read literally, [former ORS 656.262(8)] does not address penalties against SAIF for the conduct of contributing employers or noncomplying employers. * * *. Construing ORS 656.262(8) literally not to authorize penalties for unreasonable conduct of employers insured by SAIF would substantially detract from [the purpose of the penalty provision].”).

Thus, based on the foregoing reasoning, we decline to disavow our *Lovre* rationale regarding the imputation of “notice” when applying ORS 656.210(2)(b)(A). Moreover, as in *Lovre*, we find that rationale applicable to the case at hand. We reason as follows.

ComPro has specifically accepted the ALJ’s findings of fact, which included a finding that the employer had knowledge at the time of the injury that claimant worked for more than one employer. (*See O & O*, p 2; Appellant’s Brief, p 2). Further, as noted by the ALJ, ComPro did not challenge claimant’s characterization of the “coordinators,” whom she testified knew that she worked for other agencies, as her “boss[es].” (*See Tr.* 11). Nor did it argue that the coordinators’ knowledge of claimant’s secondary employment would not suffice to establish employer knowledge/notice. On review, ComPro does not dispute this finding or characterization of its position by the ALJ. Thus, on this record, ComPro concedes that the employer had knowledge/notice of claimant’s secondary

⁴ *See SAIF v. Abbott*, 103 Or App 49, 53 (1990) (attributing the employer’s knowledge of the claimant’s misrepresentations to its insurer); *Nix v. SAIF*, 80 Or App 656, 660, *rev den*, 302 Or 158 (1986) (penalty assessed based on the employer’s unreasonable conduct that was attributable to the insurer under ORS 656.262(1)); *Anfilofieff v. SAIF*, 52 Or App 127 (1981) (penalties for an unreasonable denial assessed where the employer’s misconduct and misinformation contributed to the insurer’s denial); *see also Peggy J. Baker*, 49 Van Natta 40 (1997) (when “the employer provides incorrect information to the carrier which leads to a resistance to the payment of compensation, that resistance is unreasonable and claimant is entitled to penalties under ORS 656.262(11)”); *Gavino Chavez*, 43 Van Natta 2300 (1991) (“employer’s knowledge of the claimant’s work hours is imputed to the carrier”).

employment through her assignment coordinators within 30 days of her claim. As in *Lovre*, we find such knowledge imputable to the insurer. Accordingly, on this record, we conclude that the insurer had notice of claimant's secondary employment within 30 days after it had received claimant's claim for benefits. As we reasoned in *Lovre*, the employer's failure to provide timely, correct, and complete information to the insurer did not insulate the insurer from its processing responsibilities. *See* 56 Van Natta at 601.

ComPro asserts that under the current statutory and regulatory scheme, timely notice to the insurer must come directly from the claimant; *i.e.*, that the legislature intended to place the burden on the worker to ensure that timely notice was provided to the insurer. In support of that proposition, ComPro cites to legislative history from 2001 Senate Bill 485, which created the supplemental disability benefits. Or Laws 2001, ch 865, § 3. Specifically, it refers to testimony from Mr. Keene during a legislative work session, wherein he stated that “* * * [workers] do bear the responsibility to get [the fact that they work two jobs and verifiable documentation of that] to the insurer in a timely manner.”

However, we do not find consideration of such legislative history useful. When interpreting a statute, we first examine its text and context because “there is no more persuasive evidence of the intent of the legislature than ‘the words by which the legislature undertook to give expression to its wishes.’” *State v. Gaines*, 346 Or 160, 171 (2009); *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 610–11 (1993) (the text of the statute itself is the starting point for interpretation and is the best evidence of the legislature's intent). After examining text and context, any pertinent legislative history may be considered “where that legislative history appears useful to the court's analysis.” *Gaines*, 346 Or at 172. However, “the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine.”⁵ *Id.* As noted in *Gaines*, “whether the court will conclude that the *particular* legislative history on which a party relies is of assistance in determining legislative intent will depend on the substance and probative quality of the legislative history itself.”⁶ *Id.* (emphasis in original).

⁵ If the legislature's intent remains unclear after examining text, context, and legislative history, the court may reach the final step of interpretation, which relies on general maxims of statutory construction to aid in resolving the remaining uncertainty. *Id.*

⁶ *Gaines* cautioned, “When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests--or even confirms--that legislators intended something different.” *Id.* at 173.

With these principles in mind, we do not find the legislative history proffered by ComPro to be particularly helpful in determining whether the principles of imputed knowledge are applicable. To the extent ComPro is correct that the legislature intended that claimant is responsible for providing the required information, that requirement has been met. Claimant *did* provide the information, albeit to the employer. The issue of whether that information should be imputed from the employer to the insurer is a matter distinct from the express statutory language.⁷

Similarly, to the extent OAR 436-060-0035(6)(b)⁸ requires claimant to provide the required notification, that requirement has likewise been satisfied because she provided notification to the employer, which is notice to the insurer by virtue of the employer's knowledge being imputed.⁹

Again, we recognize that the employer (unless it is self-insured) has no express statutory obligation to pass information/knowledge to its insurer or statutory administrator, and no responsibilities under the Director's rules for processing supplemental disability claims. Notwithstanding this absence of contractual or regulatory responsibility, ORS 656.210(2)(b)(A) is focused on the "notice" of a supplemental disability claim (and its components), not on "payment" of benefits for such a claim. Thus, we conclude that the "notice" requirement of ORS 656.210(2)(b)(A) has been met when the employer receives information regarding secondary employment. To do otherwise would allow an employer to nullify a supplemental disability claim by simply refraining from forwarding otherwise timely received supplemental disability information to its insurer. We decline to interpret the statutory scheme in such a manner.

⁷ To the extent ComPro relies on *Valencia v. GEP BTL, LLC*, 247 Or App 115 (2011), we do not find that case instructive. In that case, there was no dispute that the carrier had received notice that the claimant was employed by more than one employer at the time of injury and the court was not required to address an issue regarding the initial notice of secondary employment. Rather, the claimant challenged our determination that neither the statute nor the applicable administrative rule imposed a duty on the carrier to solicit or procure "verifiable documentation" or to investigate the information it received. See *Chris A. Valencia*, 61 Van Natta 2503, 2511 (2009). Thus, the dispute pertained to the "verifiable documentation of wages" provision of ORS 656.210(2)(b)(B).

⁸ Pursuant to that rule, a worker is eligible to receive supplemental disability if, among other things, "[t]he worker provides notification of a secondary job to the insurer within 30 days of the insurer's receipt of the initial claim."

⁹ The validity of OAR 436-060-0035(6) and its consistency with ORS 656.210(2)(b)(A) is not before us.

Under these circumstances, we agree with the ALJ's conclusion that claimant is eligible for supplemental disability benefits. Accordingly, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$3,000, payable by ComPro. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by ComPro. See ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008).

ORDER

The ALJ's order dated September 19, 2011 is affirmed. For services on review, claimant's counsel is awarded a \$3,000 attorney fee, to be paid by ComPro.

Entered at Salem, Oregon on September 10, 2012

Member Langer dissenting.

Because I disagree with the majority that the employer's awareness of claimant's secondary employment should be imputed to the insurer in this case, I must respectfully dissent. I reason as follows.

In *Nada Lovre*, 56 Van Natta 598 (2004), the claimant gave her employer a signed and amended 801 Form indicating that she had more than one employer. The form was retained by the employer but was not received by the insurer until after 30 days from the date on which the claim was initiated. The insurer argued that it was not obligated to provide supplemental temporary disability benefits under ORS 656.210(2)(b) (2001),¹⁰ because it did not receive timely a Form 801

¹⁰ ORS 656.210(2)(b) (2001) provided:

“Notwithstanding paragraph (a)(B) of this section, the weekly wage calculated under paragraph (a)(A) of this subsection shall be used for workers employed in more than one job at the time of injury unless,

disclosing that claimant had secondary employment. 56 Van Natta at 598-99. Rejecting that argument and relying on cases in which the employer's knowledge of relevant facts was imputed to the insurer, we explained that processing of claims is the responsibility of the insurer, ORS 656.262(1), and notice provided by a claimant to an insured employer may be imputed to the insurer.¹¹ Reasoning that the employer's failure to provide timely, correct, and complete information to the insurer did not insulate the insurer from its processing responsibilities, we determined that the insurer had notice of the claimant's secondary employment, directly or through its insured, when the employer received the second 801 Form that reported that the claimant had more than one employer. *Id.* at 600-01.

After *Lovre* was decided, the 2009 legislature amended ORS 656.210(2)(b), effective January 1, 2010. Or Laws 2009, ch 313, § 1; *see* ORS 171.022 (unless otherwise provided, Acts of the legislature become effective on January 1 of the year after passage). Claimant was compensably injured on April 10, 2010.

ORS 656.210(2) now provides, in part:

“(a) For the purpose of this section, the weekly wage of workers shall be ascertained:

within 30 days of receipt of the initial claim, the insurer, self-insured employer or assigned claims agent for a noncomplying employer receives notice that the worker was employed in more than one job with a subject employer at the time of injury and receives verifiable documentation of wages from such additional employment.”

¹¹ *See Nix v. SAIF*, 80 Or App 656, 660, *rev den*, 302 Or 158 (1986) (because the employer's failure to timely report the claimant's accident to its insurer was unreasonable and legally attributable to its insurer, the claimant was entitled to a penalty and a penalty-related attorney fee under *former* ORS 656.262(10)); *Anfilofieff v. SAIF*, 52 Or App 127, 134-35 (1981) (assessing a penalty under *former* ORS 656.262(8) against the insurer of a noncomplying employer based on the employer's unreasonable conduct in not truthfully describing the cause of the claimant's injury or his relationship to the claimant); *Linda K. O'Hallaran*, 52 Van Natta 1387 (2000) (affirming a penalty under *former* ORS 656.268(4)(g) for an increased permanent disability award on reconsideration because the employer's knowledge of the claimant's modified work was imputed to the insurer and did not constitute “new” information); *Nozario N. Solis*, 52 Van Natta 335 (2000) (affirming a penalty-related attorney fee for the insurer's unreasonable denial because the employer's knowledge of the work-relatedness of the injury and its conduct in attempting to unilaterally secure a void agreement was legally imputable to its insurer); *Ralph E. Murphy*, 45 Van Natta 725 (1993) (because the insurer knew at the time of acceptance, either directly or through its insured, the circumstances of the claimant's injury, the insurer's “back-up” denial was not based on evidence obtained after its acceptance).

“(A) For workers employed in one job at the time of injury, by multiplying the daily wage the worker was receiving by the number of days per week that the worker was regularly employed; or

“(B) For workers employed in more than one job at the time of injury, by adding all earnings the worker was receiving from all subject employment.

“(b) Notwithstanding paragraph (a)(B) of this subsection, the weekly wage calculated under paragraph (a)(A) of this subsection shall be used for workers employed in more than one job at the time of injury unless the insurer, self-insured employer or assigned claims agent for a noncomplying employer receives:

“(A) Within 30 days of receipt of the initial claim, notice that the worker was employed in more than one job with a subject employer at the time of injury; and

“(B) Within 60 days of the date of mailing a request for verification, verifiable documentation of wages from such additional employment.”

Recently, the Court of Appeals interpreted ORS 656.210(2) in *Valencia v. GEP BTL, LLC*, 247 Or App 115 (2011). There, the claimant challenged our determination that neither the statute nor the applicable administrative rule imposed a duty on a carrier to solicit or procure “verifiable documentation” or to investigate the information it received. *See Chris A. Valencia*, 61 Van Natta 2503, 2511 (2009). The court affirmed our order, holding that:

“The simple answer, as the board held, is that the statutes and administrative rule imposed no such investigative obligation on ComPro. ORS 656.210(2)(b) makes clear that, as a prerequisite to eligibility for supplemental disability, it is the claimant’s obligation to provide verifiable documentation of secondary employment.” *Valencia*, 247 Or App at 125.

Although the court addressed primarily the “verifiable documentation” provision of ORS 656.210(2)(b)(B), its holding is instructive in this case. The operative provision of ORS 656.210(2)(b) (“unless the insurer, self-insured employer or assigned claims agent for a noncomplying employer receives”) equally applies to the “notice” and “verifiable documentation” provisions of ORS 656.210(2)(b)(A) and (B). Consistent with the court’s interpretation of the statute, I conclude that, as a prerequisite to eligibility for supplemental disability, it is the claimant’s obligation to provide notice of secondary employment to the insurer. *See id.* at 118 (“To be entitled to supplemental disability benefits, within 30 days of receipt of an initial claim, *the worker* must notify the insurer that he or she was employment by more than one employer at the time of the injury. ORS 656.210(2)(b)(A).”) (emphasis supplied).

I disagree with the *Lovre* “imputed notice” reasoning to the extent it was based on the insurer’s responsibility to process claims under ORS 656.262(1). In *Valencia*, the court noted the claimant’s reliance on *Lovre* and its holding that the processing of a claim for supplemental benefits is the responsibility of the insurer, but rejected that argument and contrasted the claimant’s obligations under ORS 656.210(2) to the insurer’s responsibility pursuant to ORS 656.262(1) to process claims and provide compensation. *Id.* at 124-25. Consequently, in my view, case law decided under ORS 656.262 (see footnote 11) does not justify the “imputed notice” reasoning in this case.

Additionally, even if *Lovre* remained viable, I would find it factually distinguishable. Unlike in *Lovre*, here, claimant did not provide any information reasonably calculated to reach the insurer indicating that supplemental disability benefits may be at issue. Although the employer’s scheduling coordinators had been aware of claimant’s other jobs, claimant provided no formal or informal “notice” of secondary employment in connection with her injury claim. To the contrary, she left the boxes concerning secondary employment on the claim processing forms unchecked, thus indicating that she did not have other jobs. The insurer had no duty to investigate whether that information was accurate. *See Valencia*, 247 Or App at 125.

Furthermore, in *Lovre*, we did not analyze ORS 656.210(2)(b) (2001) based on the statutory analysis set forth in *State v. Gaines*, 346 Or 160 (2009), or *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). I take this opportunity to examine the amended statute using that analysis. In interpreting statutes, the first step in determining the legislature’s intent is to examine the statutory text and context. *Gaines*, 346 Or at 171; *PGE*, 317 Or at 610-12. We may also consider

any applicable legislative history. *Gaines*, 346 Or at 171-72, 177-78. The objective of statutory interpretation is to “pursue the intention of the legislature if possible.” *Id.* at 165; *see* ORS 174.020.

To receive supplemental disability benefits pursuant to ORS 656.210(2)(b), the first requirement is that the “insurer, self-insured employer or assigned claims agent for a noncomplying employer receives” notice of the secondary employment within 30 days of receipt of the initial claim.

Here, because there was no “assigned claims agent for a noncomplying employer” and the employer was not “self-insured,” ORS 656.210(2)(b) requires that the “insurer” receive notice of the secondary employment within 30 days of receipt of the initial claim. *See* ORS 656.005(14) (an “insurer” means “the State Accident Insurance Fund Corporation or an insurer authorized under ORS chapter 731 to transact workers’ compensation insurance in this state or an assigned claims agent selected by the director under ORS 656.054”); *see* OAR 436-060-0005(11) (WCD Order 09-057; eff. January 1, 2010) (defining “insurer” as “the State Accident Insurance Fund Corporation; an insurer authorized under ORS Chapter 731 to transact workers’ compensation insurance in Oregon; or, an employer or employer group which has been certified under ORS 656.430 that it meets the qualifications of a self-insured employer under ORS 656.407”).

The text of ORS 656.210(2)(b) does *not* require that the “employer” receive notice of the secondary employment within 30 days of receipt of the initial claim. *See* ORS 656.005(13)(a) (“employer” means “any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal corporations, school districts and other public corporations or political subdivisions, who contracts to pay a remuneration for and secures the right to direct and control the services of any person”).

ORS 656.210(5)(a) refers to the “insurer of the employer at injury or the self-insured employer at injury” and provides that either “may elect to be responsible for payment of supplemental temporary disability benefits to a worker employed in more than one job at the time of injury.” ORS 656.210(5)(b) provides that if the “insurer or self-insured employer elects not to pay the supplemental temporary disability benefits for a worker employed in more than one job at the time of injury, the director shall either administer and pay the supplemental benefits directly or shall assign responsibility to administer and process the payment to a paying agent selected by the director.”

I find nothing in the text or context of ORS 656.210 to indicate that the legislature intended to define “insurer,” “self-insured employer,” or “employer” differently than as provided in ORS 656.005. Furthermore, I find no textual or contextual support for claimant’s argument that the legislature used the terms “employer” and “insurer” interchangeably. Based on the text and context of ORS 656.210(2)(b), I conclude that *claimant* was responsible for providing the *insurer* with notice of her secondary employment within 30 days of the receipt of the initial claim.¹²

The parties do not challenge the ALJ’s findings that claimant filed a claim for the April 10, 2010 injury on May 5, 2010, and that the insurer received the initial claim on May 11, 2010. ORS 656.210(2)(b) requires the *insurer* to receive notice of secondary employment “[w]ithin 30 days of receipt of the initial claim[.]”

At hearing, the parties agreed that if claimant had to give notice of secondary employment directly to the insurer, she would not be entitled to supplemental disability benefits. (O & O at 4). Claimant did not communicate to the insurer that she had secondary employment within 30 days after the insurer received the claim. (Tr. 11, 14). She did not check the boxes on the 801 and 827 forms indicating that she had more than one employer. (Exs. 1, 2, 3, 4, 5). Instead, by letter dated February 15, 2011, claimant’s attorney notified the insurer that claimant should be receiving supplemental disability benefits. The insurer’s date stamp indicates that it received that letter on February 18, 2011. (Ex. 6). Thus, the record indicates that the insurer did not have notice of claimant’s secondary employment until February 18, 2011, more than 30 days after claimant filed the 801 form and the insurer received notice of the initial claim.¹³

Because the insurer was not notified of claimant’s secondary employment within 30 days of receipt of the initial claim, she is not entitled to supplemental disability benefits pursuant to ORS 656.210(2)(b). Because the majority concludes otherwise, I dissent.

¹² With its brief, ComPro has submitted legislative history materials from 2001 Senate Bill 485, which created the supplemental disability benefits for workers employed in more than one job at the time of injury. Or Laws 2001, ch 865, § 3. As with the majority, I have considered the legislative history, but do not find it particularly helpful. See ORS 174.020(1)(b), (3) (permitting parties to offer legislative history to aid courts in construing statute, and directing courts to give weight they deem appropriate to that history); *Gaines*, 346 Or at 172 (“a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute’s text, where that legislative history appears useful to the court’s analysis”; footnote omitted).

¹³ For purposes of deciding this case, we need not decide whether the 30-day period is triggered upon the insurer’s receipt of the initial claim or the employer’s receipt of the initial claim because, in either situation, this claimant is not eligible for supplemental temporary disability benefits.