

In the Matter of the Compensation of  
**PATRICIA K. REESE, Claimant**

WCB Case No. 16-05240

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys  
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Reviewing Panel: Members Curey and Ousey.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fisher's order that: (1) found that claimant's occupational disease claim for a bilateral thumb condition was timely filed under ORS 656.807(1); and (2) set aside the employer's denial of the aforementioned claim. On review, the issues are timeliness and compensability.

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

The ALJ determined that claimant's 2016 occupational disease claim for a bilateral thumb condition was timely filed, and that the opinion of claimant's treating physician, Dr. Kim, persuasively established that her work activities for the employer were the major contributing cause of her claimed disease.

On review, the employer contends that claimant's 2016 occupational disease claim was untimely filed because she "required surgery" and had a "reasonable expectation" of permanent impairment from her condition as early as 2004 and, therefore, she was "disabled" at that time. Thus, the employer asserts that claimant's disability occurred more than a year before she filed her occupational disease claim, such that the claim is void under ORS 656.807(1). Based on the following reasoning, we disagree with the employer's contention.

ORS 656.807(1) provides that:

"All occupational disease claims shall be void unless a claim is filed with the insurer or self-insured employer by whichever is the later of the following dates:

"(a) One year from the date the worker first discovered, or in the exercise of reasonable care should have discovered, the occupational disease; or

“(b) One year from the date the claimant becomes disabled or is informed by a physician that the claimant is suffering from an occupational disease.”

In *Freightliner LLC v. Holman*, 195 Or App 716 (2004), the court clarified that “the claim must be filed by one year from the latest of four specified events. Nothing in the language of the statute indicates that the specified event must already have transpired at the time of claim filing.” 195 Or App at 721; *see Charles R. Beem*, 63 Van Natta 166, 167 (2011) (on reconsideration). Thus, the one-year period to file an occupational disease claim does not begin until *all* four events (the date the claimant discovered the occupational disease, the date they should have discovered it, the date they were disabled, and the date they were informed by a physician that they were suffering from an occupational disease) have transpired.

Here, claimant was informed, and she knew, in 2003, that her right thumb condition was related to work. (Tr. 30-31). By 2008, she was also diagnosed with bilateral first carpometacarpal joint osteoarthritis, which Dr. Goldenburg agreed was related to her work. (Ex. 20; Tr. 32-33). Such circumstances satisfied both elements of subsection (1)(a) of ORS 656.807, and one element of subsection (1)(b).

However, based on the following reasoning, this record does not establish that claimant was disabled by either her right or left thumb conditions before she filed her occupational disease claim in September 2016. (Exs. 33, 34). *See Sherrel R. Hawkins*, 58 Van Natta 1841 (2006) (because the claimant was not disabled at the time she filed her occupational disease claim, one of the statutory circumstances described in subsection (1)(b) had not occurred when the claim was filed, and, thus, it was not untimely filed for purposes of ORS 656.807(1)).

A work-related injury or occupational disease is considered “non disabling” if it only requires medical services and there is no reasonable expectation of permanent impairment. *See* ORS 656.005(7)(c), (d); *Interstate Metal v. Gibler*, 228 Or App 180, 184-85 (2009) (applying ORS 656.005(7)(d) in evaluating the timeliness of an occupational disease claim). Thus, if claimant was not entitled to temporary disability benefits and permanent impairment was not reasonably expected more than a year before the time of her claim filing, claimant was never “disabled” and her occupational disease claim was not untimely filed under ORS 656.807(1).

The employer argues that claimant was disabled as early as 2004, and “certainly” as early as 2008, more than one year before the September 2016 claim filing. Citing *Kathleen C. Gibler*, 59 Van Natta 2471 (2007), *aff’d Gibler*, 228 Or App at 182, the employer reasons that a claimant is considered disabled as of the date that surgery is recommended because that date establishes a reasonable expectation of permanent impairment. Further, the employer contends, based on the opinions of Drs. Nye, Goldenberg, Goel, and Thompson, as well as physician’s assistant (PA-C) Giles, that claimant was disabled. (Exs. 14, 17, 23, 24, 32). We disagree with the employer’s assertions.

In *Gibler*, we noted that the medical record established that the claim was filed within one year of when the claimant was scheduled for surgery, and before an insurer-requested medical examiner opined that the claimant required surgery. *Gibler*, 59 Van Natta at 2473. Accordingly, we considered the claim to be timely filed. *Id.* The court affirmed our conclusion that the claimant timely filed her claim within one year of becoming “disabled,” reasoning that a condition that only required medical services was “non disabling” under the definition prescribed in ORS 656.005(7)(d). *See Gibler*, 228 Or App at 185 (2009).

Here, the employer contends that a surgery “recommendation” establishes that claimant was disabled because she had a reasonable expectation of permanent impairment. After reviewing the medical records regarding claimant’s treatment, we are not persuaded that she was “disabled” prior to the filing of her claim in September 2016.

Dr. Nye reportedly “want[ed] to do surgery” in 2005, but claimant elected to wait until she was able to take leave from work, and she attempted to control her pain symptoms with medications. (Ex. 17). Dr. Goldenberg, a primary care provider, “strongly encouraged” claimant to have the surgery when she could afford to do so, but provided medications to control her symptoms. (*Id.*)

In 2008, claimant was evaluated by a rheumatologist, Dr. Davies, who provided a cortisone injection. (Ex. 20-3). Dr. Davies noted that if claimant did not have “significant improvement with conservative management,” it would be appropriate for her to have further discussion with Dr. Nye about pursuing surgery. (*Id.*)

In 2009, claimant was evaluated by another rheumatologist, Dr. Goel. (Ex. 23). Dr. Goel recommended medication adjustments, and commented that “it certainly seem[ed]” that claimant “needs to consider surgical intervention.” (Ex. 23-2). Dr. Goel noted that claimant would schedule an appointment for further evaluation with Dr. Layman. (*Id.*)

In January 2012, claimant was evaluated by another rheumatologist, Dr. Thompson. (Ex. 24). Dr. Thompson noted that claimant had been evaluated by Dr. Goel in 2009, but that she did not pursue further evaluation for surgery because she could not get time off from work. (Ex. 24-1). Dr. Thompson provided cortisone injections, and noted that claimant would seek consultation with a hand surgeon. (Ex. 24-2). Dr. Thompson noted that the injections could be repeated every four months on an as needed basis. (*Id.*)

In November 2012, Dr. Thompson reported that, following the January 2012 cortisone injections, claimant had not experienced increasing symptoms until four weeks before the examination. (Ex. 25-1). Dr. Thompson administered additional injections, noting that claimant could return as needed after four months. (Ex. 25-2).

In August 2013, Dr. Thompson administered another set of injections. (Ex. 26-2).

In November 2014, Dr. Thompson injected claimant's thumbs again, noting that she provided information regarding consultation with a hand surgeon. (Ex. 28-2). Dr. Thompson reported that claimant could return as needed for further injections. (*Id.*)

In December 2015, Dr. Kim, a hand surgeon, reviewed updated x-rays, and recommended a steroid injection and thumb splints. (Ex. 30-2). Dr. Kim noted that he discussed surgery with claimant, but that he did not feel that it was necessary "at this time." (*Id.*) Dr. Kim's physician assistant, PA-C Giles, stated that claimant understood that surgery "may be necessary at some point," but that she wished to avoid it for as long as possible. (Ex. 31-2).

In July 2016, claimant was evaluated by PA-C Giles, who provided repeat injections. (Ex. 32-2). He noted that claimant would file a workers' compensation claim. (*Id.*) The claim was filed in September 2016. (Exs. 33, 34).

The employer does not assert that claimant missed any work, or received any work restrictions due to her bilateral thumb condition before filing her claim. Notably, on September 1, 2016, claimant's 827 form indicated that her "work ability status" was regular work, and that whether the illness had caused permanent impairment was "unknown." (Ex. 33). In other words, before claimant filed her claim, her claimed condition required only medical services and was, therefore, nondisabling. *See Gibler*, 228 Or App at 184-85.

Under such circumstances, we are persuaded that claimant was not disabled before one year prior to her claim filing. Importantly, she did not miss any work, and did not have any work restrictions from her medical providers. Furthermore, at the time of claim filing, claimant's physician considered the existence of any permanent impairment to be "unknown." (Ex. 33). These facts are not consistent with a conclusion that claimant had a reasonable expectation of permanent impairment more than a year before filing her claim or was otherwise "disabled."

We consider claimant's circumstances to be similar to that of the claimant's in *Gibler*, because surgery was not scheduled or required before 2016 when she filed her claim. *See Gibler*, 59 Van Natta at 2473. While we acknowledge that multiple providers told claimant that she should consider surgery, or that they "recommended" surgery, she was able to continue her regular work activities without undergoing the surgical procedure. (Exs. 17, 23, 28). Moreover, even though Dr. Nye reportedly "want[ed]" to do surgery," claimant was not required to do so and was able to maintain her regular work activities despite Dr. Nye's recommendation. (Ex. 17). Finally, as late as December 2015, Dr. Kim did not consider surgery "necessary at this time," and claimant continued in her regular work activities. (Ex. 30-2). Given similar facts in *Gibler* (*i.e.* when physicians indicated that surgery was "required," but the claimant had not undergone the procedure), we did not consider claimant to be disabled for purposes of ORS 656.807(1). *Id.* at 2473, *aff'd Gibler*, 228 Or App at 185.

Therefore, based on the aforementioned reasoning, we conclude that claimant's September 2016 occupational disease claim for bilateral thumb conditions was timely filed under ORS 656.807(1). Accordingly, we affirm.

Claimant's counsel 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 \$3,750, payable by the employer. 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, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, 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 the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated February 27, 2017 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,750, payable by the employer. 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 the employer.

Entered at Salem, Oregon on August 8, 2017