

FILED: June 19, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Charles J. Baker, Claimant.

CHARLES J. BAKER,
Petitioner,

v.

LIBERTY NORTHWEST INSURANCE CORPORATION,
FRAHLER ELECTRIC,
SAIF CORPORATION,
and EC COMPANY.
Respondents.

Workers' Compensation Board
0701646, 0701564

A140572

Argued and submitted on January 25, 2011; reassigned April 3, 2013

Edward J. Hill argued the cause and filed the briefs for petitioner.

David O. Wilson argued the cause and filed the brief for respondents Liberty Northwest Insurance Corporation and Frahler Electric.

David L. Runner argued the cause for respondents SAIF Corporation and EC Company. On the brief was Julene M. Quinn.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Affirmed.

WOLLHEIM, J., dissenting.

1 SCHUMAN, P. J.

2 Claimant seeks review of an order of the Workers' Compensation Board
3 determining that his occupational disease claim for a left shoulder condition was untimely
4 under ORS 656.807(1). We affirm.

5 Claimant is a journeyman electrician who has worked for multiple
6 employers since 1997. He worked for Frahler Electric, Liberty Northwest's insured, for a
7 period of approximately seven and one-half months in 2002. In the spring of 2002, while
8 working for Frahler, claimant began to experience left shoulder pain. After an MRI, Dr.
9 Sedgewick diagnosed left shoulder posterior subluxation and glenohumeral degenerative
10 joint disease. In January 2003, Sedgewick performed a left shoulder surgery.
11 Sedgewick's post-surgical reports noted that claimant's left shoulder was "pretty dog gone
12 worn out * * * from his activities as an electrician." Sedgewick informed claimant that
13 his work was the cause of his shoulder disease. Claimant did not file a claim for workers'
14 compensation benefits at that time because he was concerned about the stigma associated
15 with filing a claim.

16 Claimant returned to regular work activities as a journeyman electrician for
17 a different employer in June 2003, performing his regular job duties without limitations
18 and experiencing only occasional, insignificant soreness in his left shoulder. Beginning
19 in July 2005, claimant worked for EC Company, SAIF Corporation's insured. In
20 September 2005, he began to experience increased symptoms in his left shoulder,
21 including pain and grinding. Claimant received chiropractic treatment for left shoulder

1 symptoms from October 2005 through April 2006, and reported to the chiropractor that
2 increased overhead work was causing his shoulder pain/soreness. Claimant had an MRI
3 in December 2006, and Dr. Huebert diagnosed a partial tear of the supraspinatus tendon,
4 a long tear of the glenoid labrum, a large defect in the articular cartilage of the glenoid,
5 and moderate to severe glenohumeral degenerative joint disease.

6 In January 2007, claimant saw Dr. Irvine, an orthopedic surgeon, who
7 diagnosed post-traumatic left shoulder osteoarthritis "as a result of an occupational
8 disease and repetitive overuse in a 47-year-old electrician." Irvine believed that
9 claimant's work activities were the major contributing cause of his left shoulder condition
10 and recommended conservative treatment and a change of occupation. He also discussed
11 the possible future need for a left shoulder "arthroplasty," or shoulder replacement. In
12 January 2007, claimant filed a claim for an occupational disease against both Liberty
13 Northwest's insured Frahler Electric, and SAIF's insured, EC Company.

14 On SAIF's behalf, claimant was examined by Dr. Bald, who diagnosed
15 moderately severe degenerative osteoarthritis. Bald opined that claimant's work activities
16 were a "very definite contribution," but could not say whether work was the major
17 contributing cause of the condition, because claimant had little or no osteoarthritis in his
18 dominant right shoulder. Sedgewick concurred in Bald's opinion. Both SAIF and
19 Liberty Northwest denied compensability and responsibility for claimant's occupational
20 disease claim for a left shoulder condition, and claimant requested a hearing.

21 In the meantime, Irvine performed an elective left shoulder replacement. In

1 contrast to Sedgewick and Bald, Irvine opined that the major contributing cause of
2 claimant's shoulder condition was his work as an electrician. Irvine opined that, because
3 claimant equally used both arms in an overhead position, it was expected that the
4 dominant shoulder would serve a protective function, and it was therefore not surprising
5 that claimant would have more damage to the nondominant, left shoulder.

6 An administrative law judge (ALJ) found that Irvine's opinion was more
7 persuasive and determined that claimant had established the compensability of his
8 condition under the substantive rule of liability aspect of the last injurious exposure rule,
9 by proving that the left shoulder condition resulted from employment in general. As for
10 which insurer was responsible, the ALJ determined that, although Liberty Northwest's
11 insured, Frahler Electric, was presumptively responsible because claimant first sought
12 and received medical treatment while at that employment, *see Agricom Ins. v. Tapp*, 169
13 Or App 208, 212-13, 7 P3d 764, *rev den*, 331 Or 244 (2000), Liberty Northwest had
14 succeeded in establishing that responsibility should shift forward to SAIF, as the insurer
15 for the last employment that actually contributed to a worsening of claimant's left
16 shoulder condition, *see Oregon Boiler Works v. Lott*, 115 Or App 70, 74, 836 P2d 756
17 (1992). Accordingly, the ALJ assigned responsibility for claimant's condition to SAIF
18 and set aside SAIF's denial of the claim and affirmed Liberty Northwest's denial of the
19 claim.

20 At the hearing, both Liberty Northwest and SAIF had asserted that the
21 occupational disease claims were void because each claim was untimely. The ALJ

1 concluded that the issue of timeliness was moot as to Liberty Northwest, because Liberty
2 Northwest was not responsible for the claim. As to SAIF, the ALJ concluded that SAIF
3 had essentially abandoned the untimeliness defense in written closing arguments. Thus,
4 the ALJ did not rule on whether claimant had timely filed his occupational disease
5 claims.

6 SAIF appealed to the board. The board did not reach the merits of the
7 claim. Instead, with one member dissenting, the board determined that the occupational
8 disease claim, filed with SAIF in 2007, was untimely under ORS 656.807(1), because the
9 claim had not been filed within one year of the date claimant was informed by Sedgewick
10 in 2003 that he was suffering from an occupational disease. The board rejected
11 claimant's contention that the claim was timely under this court's opinions in *Ahlberg v.*
12 *SAIF*, 199 Or App 271, 111 P3d 778 (2005), and *Kepford v. Weyerhaeuser Co.*, 77 Or
13 App 363, 713 P2d 625, *rev den*, 300 Or 722 (1986), reinstated SAIF's denial, and
14 reversed the ALJ's order. The board also upheld Liberty Northwest's denial. One board
15 member dissented, reasoning that claimant's work exposure after his 2003 diagnosis had
16 contributed to claimant's left shoulder condition to the extent that the current claim was a
17 new occupational disease--distinct from the condition that existed in 2003--and therefore
18 not barred by ORS 656.807.

19 Claimant seeks judicial review of the board's order, arguing that the board's
20 interpretation of the occupational disease statutes was incorrect. We review the board's
21 statutory interpretation for errors of law. ORS 183.482(8)(a)(B).

1 ORS 656.807(1) provides:

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

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

8 "(b) One year from the date the claimant becomes disabled or is
9 informed by a physician that the claimant is suffering from an occupational
10 disease."

11 The statute lists four possible dates that trigger the running of the limitation period and
12 requires that a claim for an occupational disease be filed within one year of the latest of
13 those. *Bohemia, Inc. v. McKillop*, 112 Or App 261, 828 P2d 1041 (1992). The start of
14 the limitation period is suspended until the last of the events occurs. *Interstate Metal v.*
15 *Gibler*, 228 Or App 180, 184-85, 206 P3d 1151 (2009); *see also Freightliner LLC v.*
16 *Holman*, 195 Or App 716, 721-22, 98 P3d 1165 (2004).

17 It is undisputed that claimant knew in 2003, when Sedgewick diagnosed the
18 left shoulder condition and performed surgery, that claimant was suffering from a
19 degenerative left shoulder condition that was related to his work as an electrician.
20 Claimant does not dispute that in 2003, he was disabled as a result of his left shoulder
21 condition. Substantial evidence supports the board's determination that claimant was
22 informed by a physician that his left shoulder condition was due to his work activities as
23 an electrician. Any claim that claimant might have had for an occupational disease
24 against Liberty Northwest's insured--his employer in 2003--is barred by ORS 656.807(1).

1 The question presented here is whether an occupational disease claim is
2 also barred against his subsequent employer, SAIF's insured. Claimant asserts,
3 essentially, that a new limitation period should begin with each subsequent period of
4 employment, which here began in July 2005. Additionally, claimant argues, in light of
5 claimant's subsequent exposure at his employment with SAIF's insured, which caused a
6 worsening of his condition, claimant is not barred from bringing an occupational disease
7 claim against SAIF for his current shoulder condition. Claimant essentially argues the
8 position of the dissenting board member. Finally, claimant argues, because of the
9 employment exposure subsequent to 2003, which could not have been considered in
10 Sedgewick's original diagnosis, and the extent to which claimant's shoulder condition has
11 worsened as a result of the contribution of his employment with SAIF's insured, the
12 current left shoulder condition is, for purposes of the limitation period set forth in ORS
13 656.807(1), a new occupational disease.

14 In claimant's view, our opinions in *Ahlberg* and *Kepford* support his
15 contention. In *Ahlberg*, the claimant had been diagnosed with bilateral hearing loss in
16 1984 and that same year filed an occupational disease claim for hearing loss, which was
17 denied because test results at that time indicated that the claimant's hearing loss was due
18 to his age and not the exposure to loud noise at work. The claimant's hearing deteriorated
19 in the next 17 years, and, in January 2002, he filed a second occupational disease claim,
20 asserting that he suffered from deafness as a result of working around loud machinery for
21 42 years. SAIF denied the claim, contending that the second claim was barred by the

1 earlier, unappealed, denial. The board upheld the denial because, as a result of the
2 claimant's failure to challenge the earlier denial, the claimant was precluded from seeking
3 compensation for the predenial exposure, which, accordingly, had to be treated as a
4 preexisting noncompensable condition. The board concluded, further, that the claim was
5 not compensable because the post-denial exposure was not the major contributing cause
6 of the hearing loss.

7 This court reversed the board's order. Addressing SAIF's contention that
8 the claimant's claim for hearing loss was barred by claim preclusion, this court held that,
9 although a claimant is ordinarily precluded by the doctrine of claim preclusion from
10 relitigating the compensability of hearing loss in a subsequent claim, there is an exception
11 if the claimant's condition has worsened and the claim is supported by new facts that
12 could not have been presented earlier. We noted in *Ahlberg* that in *Kepford*, this court
13 had held that a worsening of a denied condition is a change in the condition that will
14 support the relitigation of a previously denied claim. *Ahlberg*, 199 Or App at 275 (citing
15 *Kepford*, 77 Or App at 367). We further reasoned that, assuming without deciding that
16 the board was correct that the claimant's predenial hearing loss had to be treated as a
17 preexisting condition, the claimant's predenial work exposure could nonetheless be
18 considered in determining whether employment conditions were the major contributing
19 cause of the worsening of the preexisting condition. We noted that ORS 656.802(2)(b)
20 sets forth the proof necessary to establish the worsening of a preexisting disease and
21 provides:

1 "If the occupational disease claim is based on the worsening of a
2 preexisting disease or condition pursuant to ORS 656.005(7), the worker
3 must prove that employment conditions were the major contributing cause
4 of the combined condition and pathological worsening of the disease."

5 We explained that the statute makes no distinction between employment conditions
6 before or after the existence of the preexisting condition and only requires the claimant to
7 prove that "any and all" working conditions were the major contributing cause of the
8 current condition and a worsening of a preexisting condition. *Id.* at 276. Thus, we
9 concluded, the claimant could establish the compensability of a second occupational
10 disease claim based on a worsening of a preexisting condition that was not itself
11 compensable, as long as the claimant's total work exposure (including exposure predating
12 the preexisting condition) was the major contributing cause of the worsening of the
13 preexisting condition. In essence, we reasoned, the second hearing loss claim based on
14 new exposure was a new claim that could not have been litigated in the prior proceeding.

15 Claimant contends that, by analogy to *Ahlberg*, his current left shoulder
16 claim against SAIF's insured is not barred by the limitation period that bars his claim
17 against Liberty Northwest's insured. The reasoning underlying the contention is that, as a
18 result of subsequent exposure at a different employment that worsened his left shoulder
19 condition, claimant suffers from a new occupational disease, separate from any
20 occupational disease for which a claim might have been filed in 2003, at the time of
21 Sedgewick's first diagnosis. Just as the claimant's second hearing loss claim in *Ahlberg*
22 was not barred by claim preclusion because subsequent work exposure had resulted in a
23 worsening of the hearing loss, claimant asserts that here, his current left shoulder

1 occupational disease claim should not be barred by ORS 656.807(1), because his
2 condition has worsened since his diagnosis in 2003 as a result of subsequent work
3 exposure, and this current occupational disease is different from the occupational disease
4 that was diagnosed in 2003.

5 If claimant's theory of compensability was that claimant's current left
6 shoulder condition is a worsening of a preexisting condition, ORS 656.802(2)(b), we
7 might be persuaded by claimant's attempted analogy to *Ahlberg* and *Kepford*, even
8 though those cases were not about the limitation period of ORS 656.807(1). Both of
9 those cases involved previously denied claims and occupational disease claims based on
10 the worsening of a preexisting condition. *Ahlberg*, 199 Or App at 275; *Kepford*, 77 Or
11 App at 365-66. The upshot of those cases is that, for purposes of claim preclusion,
12 claims seeking compensation for a *worsening* of a preexisting condition are separate and
13 distinct from claims seeking to establish the compensability of a condition as an
14 occupational disease in the first instance. The problem for claimant is that his
15 occupational disease claim against SAIF's insured is not based on a theory of a worsening
16 of a preexisting condition. Rather, claimant concedes that no argument was either made
17 or preserved under ORS 656.802(2)(b) regarding the worsening of a preexisting
18 condition, and that this is a claim for a new occupational disease pursuant to ORS
19 656.802(2)(a). Nonetheless, claimant argues, this claim is different from anything for
20 which claimant could have sought compensation in 2003; indeed, no claim could have
21 been filed against SAIF's insured in 2003, as claimant had not worked for EC Company,

1 SAIF's insured, at that time.

2 SAIF does not directly respond to claimant's argument. Instead, SAIF
3 argues that it makes no difference that claimant had not yet worked for SAIF's insured at
4 the time of his original diagnosis in 2003 and, therefore, claimant could not have brought
5 a claim against SAIF at that time. In SAIF's view, ORS 656.807(1) bars this claim
6 because it bars any claim for the same occupational disease of which claimant became
7 aware in 2003. According to SAIF, it matters not that claimant's condition became worse
8 under SAIF's insured. In SAIF's view, that would be true even if this claim were for a
9 "worsening" of the condition under ORS 656.802(2)(b), because the circumstances
10 existed in 2003 for the triggering of the one-year limitation period.

11 We do not need to consider in this case whether, if claimant's theory of the
12 case had been that he experienced a worsening of a preexisting condition, the case would
13 be analogous to *Ahlberg* or *Kepford* because, as noted, that is not how the case was
14 presented. As ORS 656.807(1) provides, a claim for an occupational disease must be
15 filed against the insurer or self-insured employer within one year of the later of the four
16 circumstances set forth in ORS 656.807. The statute provides that *all* occupational
17 disease claims "shall be void" if not filed within that one-year time period. The limitation
18 period set forth in ORS 656.807(1) is triggered by circumstances relating to the particular
19 occupational disease--not the particular period of employment--and must be filed with the
20 insurer or self-insured employer by the latest of four possible dates set forth in the statute,
21 as related to that occupational disease. There is no plausible interpretation of ORS

1 656.807(1) that supports the dissent's view that the four possible dates for triggering the
2 limitation period for an occupational disease must be satisfied with each new period of
3 employment.

4 It is undisputed that claimant was informed in 2003 that he had a
5 degenerative left shoulder condition and that it was work related. Claimant had one year
6 from the date that he received that information from his physician within which to file an
7 occupational disease claim for that left shoulder condition. As noted, we conclude that
8 substantial evidence supports the board's determination that the current claim is for the
9 same condition diagnosed in 2003, albeit in a more advanced state. We conclude that the
10 board did not err in determining that claimant's claim is barred by ORS 656.807(1).

11 Affirmed.

1 work and began working for a different employer.

2 In July 2005, claimant began working for SAIF's insured, EC Company.

3 Due to increased left shoulder symptoms, claimant sought medical treatment. Dr. Irvine

4 became claimant's attending physician. In 2007, Irvine recommended left shoulder

5 replacement surgery. In addition, Irvine informed claimant that the left shoulder

6 condition was due to claimant's work as an electrician.

7 In January 2007, claimant filed occupational disease claims for his left

8 shoulder with both Liberty Northwest and SAIF. Each insurer denied both

9 compensability and responsibility, and claimant requested a hearing on both denials. In

10 addition, both insurers argued the claim was void because it was untimely filed. At a

11 hearing, the administrative law judge (ALJ) did not expressly address the insurers'

12 untimely filing defense. The ALJ decided that SAIF had abandoned that defense and

13 decided that Liberty Northwest's defense was moot because the ALJ had affirmed Liberty

14 Northwest's denial. In addition, the ALJ set aside SAIF's denial. SAIF requested board

15 review.

16 THE BOARD'S ANALYSIS

17 The board did not determine whether claimant's left shoulder occupational

18 disease claims were compensable. Instead, the board determined that SAIF had not

19 abandoned its timeliness defense. The board held that claimant did not file his

20 occupational disease claim until January 2007, well over the maximum one-year time

21 period in ORS 656.807(1). The board relied on the text of ORS 656.807, which requires

1 all occupational disease claims to be filed within one year from the date the claimant is
2 informed by a physician that the claimant is suffering from an occupational disease.
3 Claimant was so informed by Sedgewick in 2003. In addition, the board noted that the
4 record did not establish that the 2007 claim was for a different condition from the 2003
5 condition.

6 THE OCCUPATIONAL DISEASE STATUTES

7 This court's task is to determine what the legislature intended when it
8 enacted ORS 656.807. To do that requires an examination of the text and context of the
9 statute. *State v. Gaines*, 346 Or 160, 171, 206 P2d 1042 (2009). The court may also
10 consider legislative history without determining that the text of the statute is ambiguous.
11 *Id.* at 171-72. The court must determine the correct statutory interpretation and cannot be
12 limited to the parties' arguments. *Miller v. Water Wonderland Improvement District*, 326
13 Or 306, 309 n 3, 951 P3d 720 (1998); *Stull v. Hoke*, 326 Or 72, 77, 948 P3d 722 (1997).
14 The relevant statutes are ORS 656.807, which defines the time limit for filing an
15 occupational disease claim and ORS 656.802, which defines an occupational disease
16 claim.

17 ORS 656.807 provides:

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

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

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

4 (2) If the occupational disease results in death, a claim may be filed
5 within one year from the date that the worker's beneficiary first discovered,
6 or in the exercise of reasonable care should have discovered, that the cause
7 of the worker's death was due to an occupational disease.

8 (3) The procedure for processing occupational disease claims shall
9 be the same as provided for accidental injuries under this chapter."

10 ORS 656.802, in part, provides:

11
12 (1)(a) As used in this chapter, 'occupational disease' means any
13 disease or infection arising out of and in the course of employment caused
14 by substances or activities to which an employee is not ordinarily subjected
15 or exposed other than during a period of regular actual employment therein,
16 and which requires medical services or results in disability or death,
17 including:

18 "* * * * *

19 (2)(a) The worker must prove that employment conditions were the
20 major contributing cause of the disease.

21 (b) If the occupational disease claim is based on the worsening of a
22 preexisting disease or condition pursuant to ORS 656.005(7), the worker
23 must prove that employment conditions were the major contributing cause
24 of the combined condition and pathological worsening of the disease.

25 (c) Occupational diseases shall be subject to all of the same
26 limitations and exclusions as accidental injuries under ORS 656.005(7).

27 "* * * * *

28 (e) Preexisting conditions shall be deemed causes in determining
29 major contributing cause under this section."

30 The majority opinion's analysis relies exclusively on portions of ORS
31 656.807(1). To paraphrase, *all occupational disease claims shall be void* unless a claim is

1 *filed within one year from* when the claimant is *informed by a physician* that the claimant
2 is suffering from an occupational disease. Because claimant was so informed in 2003
3 and his occupational disease claims were filed more than one year later, the claim filed
4 against SAIF is void.

5 The problem is that the majority opinion ignores portions of ORS 656.807
6 and ignores the context of the Workers' Compensation Act, which requires a relationship
7 between the employer and the worker. The claim must be filed with the insurer or self-
8 insured employer. A self-insured employer is an employer who directly assumes the
9 responsibility for providing compensation to subject workers and who meets certain
10 statutory requirement. ORS 656.005(25); ORS 656.403(1); ORS 656.430. An employer
11 is defined as including an entity that contracts to pay money for, and secures the right to
12 direct and control, the person providing the services. ORS 656.005(13)(a). In turn, a
13 worker means any person who provides services for money and is subject to the direction
14 and control of an employer. ORS 656.005(30). That context establishes that there must
15 be an existing employer and worker relationship before any occupational disease claim
16 can be filed by the worker with the employer.

17 The language of ORS 656.802, as context, supports the conclusion that
18 there must be an existing employer and worker relationship. ORS 656.802(1)(a) provides
19 that the occupational disease must arise out of, and in the course of, employment and the
20 occupational disease must be based on activities to which the employee is not ordinarily
21 subjected to other than during a period of regular actual employment. The worker must

1 prove that employment conditions are the major contributing cause of the occupational
2 disease. ORS 656.802(2)(a). Again as context, an occupational disease claim for the
3 worsening of a preexisting condition requires the worker to establish that employment
4 conditions were the major contributing cause of the pathologically worsening of the
5 preexisting condition. ORS 656.802(2)(b). The language is based on an employment
6 relationship between the employer and the worker.

7 The court should construe the Workers' Compensation Act so that the
8 statutes are consistent with and in harmony with each other. *Davis v. Wasco IED*, 286 Or
9 261, 272, 593 P2d 1152 (1979). To construe ORS 656.807(1) as prohibiting claimant
10 from having his occupational disease claim decided on the merits because he worked for
11 multiple employers after 2003, is not construing the Workers' Compensation Act as
12 consistent with the basic premise of the act, that is, that there is an existing employment
13 relationship between the employer and the worker.

14 Claimant had no claim to assert against SAIF's insured until such time as
15 there was an employment relationship between SAIF's insured and claimant. Claimant
16 need not be able to determine what employers he will work for in the future and file
17 prospective claims against such future employers in case, years later, claimant decides to
18 file an occupational disease claim against a future employer.

19 For those reasons, I respectfully dissent.