656.012 Findings and policy. (1) The Legislative Assembly finds that:
   (a) The performance of various industrial enterprises necessary to the enrichment and economic well-being of all the citizens of this state will inevitably involve injury to some of the workers employed in those enterprises;
   (b) The method provided by the common law for compensating injured workers involves long and costly litigation, without commensurate benefit to either the injured workers or the employers, and often requires the taxpayer to provide expensive care and support for the injured workers and their dependents; and
   (c) An exclusive, statutory system of compensation will provide the best societal measure of those injuries that bear a sufficient relationship to employment to merit incorporation of their costs into the stream of commerce.

(2) In consequence of these findings, the objectives of the Workers’ Compensation Law are declared to be as follows:
   (a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents;
   (b) To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable;
   (c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable;
   (d) To encourage maximum employer implementation of accident study, analysis and prevention programs to reduce the economic loss and human suffering caused by industrial accidents; and
   (e) To provide the sole and exclusive source and means by which subject workers, their beneficiaries and anyone otherwise entitled to receive benefits on account of injuries or diseases arising out of and in the course of employment shall seek and qualify for remedies for such conditions.

(3) In recognition that the goals and objectives of this Workers’ Compensation Law are intended to benefit all citizens, it is declared that the provisions of this law shall be interpreted in an impartial and balanced manner.

656.005 Definitions. (1) “Average weekly wage” means the Oregon average weekly wage in covered employment, as determined by the Employment Department, for the last quarter of the calendar year preceding the fiscal year in which the injury occurred.

(2) “Beneficiary” means an injured worker, and the husband, wife, child or dependent of a worker, who is entitled to receive payments under this chapter. “Beneficiary” does not include:
   (a) A spouse of an injured worker living in a state of abandonment for more than one year at the time of the injury or subsequently. A spouse who has lived separate and apart from the worker for a period of
two years and who has not during that time received or attempted by process of law to collect funds for support or maintenance is considered living in a state of abandonment.

(b) A person who intentionally causes the compensable injury to or death of an injured worker.

(3) “Board” means the Workers’ Compensation Board.

(4) “Carrier-insured employer” means an employer who provides workers’ compensation coverage with the State Accident Insurance Fund Corporation or an insurer authorized under ORS chapter 731 to transact workers’ compensation insurance in this state.

(6) “Claim” means a written request for compensation from a subject worker or someone on the worker’s behalf, or any compensable injury of which a subject employer has notice or knowledge.

(7)(a) A “compensable injury” is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means, if it is established by medical evidence supported by objective findings, subject to the following limitations:

(A) No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition.

(B) If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.

(b) “Compensable injury” does not include:

(A) Injury to any active participant in assaults or combats which are not connected to the job assignment and which amount to a deviation from customary duties;

(B) Injury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities primarily for the worker’s personal pleasure; or

(C) Injury the major contributing cause of which is demonstrated to be by a preponderance of the evidence the injured worker’s consumption of alcoholic beverages or the unlawful consumption of any controlled substance, unless the employer permitted, encouraged or had actual knowledge of such consumption.

(c) A “disabling compensable injury” is an injury which entitles the worker to compensation for disability or death. An injury is not disabling if no temporary benefits are due and payable, unless there is a reasonable expectation that permanent disability will result from the injury.

(d) A “nondisabling compensable injury” is any injury which requires medical services only.

(8) “Compensation” includes all benefits, including medical services, provided for a compensable injury to a subject worker or the worker’s beneficiaries by an insurer or self-insured employer pursuant to this chapter.

(9) “Department” means the Department of Consumer and Business Services.

(11) “Director” means the Director of the Department of Consumer and Business Services.

(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.

(b) Notwithstanding paragraph (a) of this subsection, for purposes of this chapter, the client of a temporary service provider is not the employer of temporary workers provided by the temporary service provider.
(c) As used in paragraph (b) of this subsection, “temporary service provider” has the meaning for that term provided in ORS 656.850.

(14) “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.

(15) “Consumer and Business Services Fund” means the fund created by ORS 705.145.

(16) “Invalid” means one who is physically or mentally incapacitated from earning a livelihood.

(17) “Medically stationary” means that no further material improvement would reasonably be expected from medical treatment, or the passage of time.

(18) “Noncomplying employer” means a subject employer who has failed to comply with ORS 656.017.

(21) “Party” means a claimant for compensation, the employer of the injured worker at the time of injury and the insurer, if any, of such employer.

(22) “Payroll” means a record of wages payable to workers for their services and includes commissions, value of exchange labor and the reasonable value of board, rent, housing, lodging or similar advantage received from the employer. However, “payroll” does not include overtime pay, vacation pay, bonus pay, tips, amounts payable under profit-sharing agreements or bonus payments to reward workers for safe working practices. Bonus pay is limited to payments which are not anticipated under the contract of employment and which are paid at the sole discretion of the employer. The exclusion from payroll of bonus payments to reward workers for safe working practices is only for the purpose of calculations based on payroll to determine premium for workers’ compensation insurance, and does not affect any other calculation or determination based on payroll for the purposes of this chapter.

(23) “Person” includes partnership, joint venture, association, limited liability company and corporation.

(24)(a) “Preexisting condition” means, for all industrial injury claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment, provided that:

(A) Except for claims in which a preexisting condition is arthritis or an arthritic condition, the worker has been diagnosed with such condition, or has obtained medical services for the symptoms of the condition regardless of diagnosis; and

(B)(i) In claims for an initial injury or omitted condition, the diagnosis or treatment precedes the initial injury;

(ii) In claims for a new medical condition, the diagnosis or treatment precedes the onset of the new medical condition; or

(iii) In claims for a worsening pursuant to ORS 656.273 or 656.278, the diagnosis or treatment precedes the onset of the worsened condition.

(b) “Preexisting condition” means, for all occupational disease claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment and that precedes the onset of the claimed occupational disease, or precedes a claim for worsening in such claims pursuant to ORS 656.273 or 656.278.

(c) For the purposes of industrial injury claims, a condition does not contribute to disability or need for treatment if the condition merely renders the worker more susceptible to the injury.

(25) “Self-insured employer” means an employer or group of employers certified under ORS 656.430 as meeting the qualifications set out by ORS 656.407.
(26) “State Accident Insurance Fund Corporation” and “corporation” mean the State Accident Insurance Fund Corporation created under ORS 656.752.

(27) “Subject employer” means an employer who is subject to this chapter as provided by ORS 656.023.

(28) “Subject worker” means a worker who is subject to this chapter as provided by ORS 656.027.

(29) “Wages” means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and includes the amount of tips required to be reported by the employer pursuant to section 6053 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto, or the amount of actual tips reported, whichever amount is greater. The State Accident Insurance Fund Corporation may establish assumed minimum and maximum wages, in conformity with recognized insurance principles, at which any worker shall be carried upon the payroll of the employer for the purpose of determining the premium of the employer.

(30) “Worker” means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an inmate or ward of a state institution or as part of the eligibility requirements for a general or public assistance grant. For the purpose of determining entitlement to temporary disability benefits or permanent total disability benefits under this chapter, “worker” does not include a person who has withdrawn from the workforce during the period for which such benefits are sought.

(31) “Independent contractor” has the meaning for that term provided in ORS 670.600.

656.017 Employer required to pay compensation and perform other duties; state not authorized to be direct responsibility employer. (1) Every employer subject to this chapter shall maintain assurance with the Director of the Department of Consumer and Business Services that subject workers of the employer and their beneficiaries will receive compensation for compensable injuries as provided by this chapter and that the employer will perform all duties and pay other obligations required under this chapter, by qualifying:
   (a) As a carrier-insured employer; or
   (b) As a self-insured employer as provided by ORS 656.407.

(2) Notwithstanding ORS chapter 278, this state shall provide compensation insurance for its employees through the State Accident Insurance Fund Corporation.

(3) Any employer required by the statutes of this state other than this chapter or by the rules, regulations, contracts or procedures of any agency of the federal government, this state or a political subdivision of this state to provide or agree to provide workers’ compensation coverage, either directly or through bond requirements, may provide such coverage by any method provided in this section. [1975 c.556 §21 (enacted in lieu of 656.016); 1977 c.659 §1; 1979 c.815 §1; 1981 c.854 §3; 1985 c.731 §30]

656.018 Effect of providing coverage; exclusive remedy. (1)(a) The liability of every employer who satisfies the duty required by ORS 656.017 (1) is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers’ beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting
therefrom, specifically including claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such conditions, except as specifically provided otherwise in this chapter.

(b) This subsection shall not apply to claims for indemnity or contribution asserted by a railroad, as defined in ORS 824.020, or by a corporation, individual or association of individuals which is subject to regulation pursuant to ORS chapter 757 or 759.

(c) Except as provided in paragraph (b) of this subsection, all agreements or warranties contrary to the provisions of paragraph (a) of this subsection entered into after July 19, 1977, are void.

(2) The rights given to a subject worker and the beneficiaries of the subject worker under this chapter for injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment are in lieu of any remedies they might otherwise have for such injuries, diseases, symptom complexes or similar conditions against the worker’s employer under ORS 654.305 to 654.336 or other laws, common law or statute, except to the extent the worker is expressly given the right under this chapter to bring suit against the employer of the worker for an injury, disease, symptom complex or similar condition.

(3) The exemption from liability given an employer under this section is also extended to the employer’s insurer, the self-insured employer’s claims administrator, the Department of Consumer and Business Services, and to the contracted agents, employees, partners, limited liability company members, general partners, limited liability partners, limited partners, officers and directors of the employer, the employer’s insurer, the self-insured employer’s claims administrator and the department, except that the exemption from liability shall not apply:

(a) If the willful and unprovoked aggression by a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition;

(b) If the worker and the person otherwise exempt under this subsection are not engaged in the furtherance of a common enterprise or the accomplishment of the same or related objectives;

(c) If the failure of the employer to comply with a notice posted pursuant to ORS 654.082 is a substantial factor in causing the injury, disease, symptom complex or similar condition; or

(d) If the negligence of a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition and the negligence occurs outside of the capacity that qualifies the person for exemption under this section.

(4) The exemption from liability given an employer under this section applies to a worker leasing company and the client to whom workers are provided when the worker leasing company and the client comply with ORS 656.850 (3).

(5)(a) The exemption from liability given an employer under this section applies to a temporary service provider, as that term is used in ORS 656.850, and also extends to the client to whom workers are provided when the temporary service provider complies with ORS 656.017.

(b) The exemption from liability given a client under paragraph (a) of this subsection is also extended to the client’s insurer, the self-insured client’s claims administrator, the department, and the contracted agents, employees, officers and directors of the client, the client’s insurer, the self-insured client’s claims administrator and the department, except that the exemption from liability shall not apply:

(A) If the willful and unprovoked aggression by a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition;

(B) If the worker and the person otherwise exempt under this subsection are not engaged in the furtherance of a common enterprise or the accomplishment of the same or related objectives;
(C) If the failure of the client to comply with a notice posted pursuant to ORS 654.082 is a substantial factor in causing the injury, disease, symptom complex or similar condition; or

(D) If the negligence of a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition and the negligence occurs outside of the capacity that qualifies the person for exemption under this subsection.

(6) Nothing in this chapter shall prohibit payment, voluntarily or otherwise, to injured workers or their beneficiaries in excess of the compensation required to be paid under this chapter.

(7) The 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.

Note: See notes under 656.202.

656.019 Civil negligence action for claim denied on basis of failure to meet major contributing cause standard; statute of limitations. (1)(a) An 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.

(b) Nothing in this subsection grants a right for a person to pursue a civil negligence action that does not otherwise exist in law.

(2)(a) Notwithstanding any other statute of limitation provided in law, a civil negligence action against an employer that arises because a workers’ compensation claim 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 must be commenced within the later of two years from the date of injury or 180 days from the date the order affirming that the claim is not compensable on such grounds becomes final.

(b) Notwithstanding paragraph (a) of this subsection, a person may not commence 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, if the period within which such action may be commenced has expired prior to the filing of a timely workers’ compensation claim for the work-related injury. [2001 c.865 §15]

656.020 Damage actions by workers against noncomplying employers; defenses outlawed. Actions for damages may be brought by an injured worker or the legal representative of the injured worker against any employer who has failed to comply with ORS 656.017 or is in default under ORS 656.560. Except for the provisions of ORS 656.578 to 656.593 and this section, such noncomplying employer is liable as the noncomplying employer would have been if this chapter had never been enacted. In such actions, it is no defense for the employer to show that:

(1) The injury was caused in whole or in part by the negligence of a fellow-servant of the injured worker.
(2) The negligence of the injured worker, other than a willful act committed for the purpose of sustaining the injury, contributed to the accident.

(3) The injured worker had knowledge of the danger or assumed the risk that resulted in the injury.

[1965 c.285 §7]

656.023 Who are subject employers. Every employer employing one or more subject workers in the state is subject to this chapter. [1965 c.285 e8]

656.027 Who are subject workers. All workers are subject to this chapter except those nonssubject workers described in the following subsections:

(1) A worker employed as a domestic servant in or about a private home. For the purposes of this subsection "domestic servant" means any worker engaged in household domestic service by private employment contract, including, but not limited to, home health workers.

(2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker.

(3)(a) A worker whose employment is casual and either:

(A) The employment is not in the course of the trade, business or profession of the employer; or

(B) The employment is in the course of the trade, business or profession of a nonssubject employer.

(b) For the purpose of this subsection, "casual" refers only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than $500.

(4) A person for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States.

(5) A worker engaged in the transportation in interstate commerce of goods, persons or property for hire by rail, water, aircraft or motor vehicle, and whose employer has no fixed place of business in this state.

(6) Firefighter and police employees of any city having a population of more than 200,000 that provides a disability and retirement system by ordinance or charter. [Ed Note: This provision is effective June 12, 2001.]

(7)(a) Sole proprietors, except those described in paragraph (b) of this subsection. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

(b) Sole proprietors actively licensed under ORS 671.525 or ORS 701.035. When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005(30), the sole proprietor must qualify as an independent contractor. Any sole proprietor licensed under ORS 671.525 or 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.
(8) Except as provided in subsection (23) of this section, partners who are not engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto. When labor or services are performed under contract, the partnership must qualify as an independent contractor.

(9) Except as provided in subsection (25) of this section, members, including members who are managers, of limited liability companies, regardless of the nature of the work performed. However, members, including members who are managers, of limited liability companies with more than one member, while engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto, are subject workers. When labor or services are performed under contract, the limited liability company must qualify as an independent contractor.

(10) Except as provided in subsection (24) of this section, corporate officers who are directors of the corporation and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed by such officers, subject to the following limitations:

(a) If the activities of the corporation are conducted on land that receives farm use tax assessment pursuant to chapter 308A, corporate officer includes all individuals identified as directors in the corporate bylaws, regardless of ownership interest, and who are members of the same family, whether related by blood, marriage or adoption.

(b) If the activities of the corporation involve the commercial harvest of timber and all officers of the corporation are members of the same family and are parents, daughters or sons, daughters-in-law or sons-in-law or grandchildren, then all such officers may elect to be nonsubject workers. For all other corporations involving the commercial harvest of timber, the maximum number of exempt corporate officers for the corporation shall be whichever is the greater of the following:

(A) Two corporate officers; or

(B) One corporate officer for each 10 corporate employees.

(c) When labor or services are performed under contract, the corporation must qualify as an independent contractor.

(11) A person performing services primarily for board and lodging received from any religious, charitable or relief organization.

(12) A newspaper carrier utilized in compliance with the provisions of ORS 656.070 and 656.075.

(13) A person who has been declared an amateur athlete under the rules of the United States Olympic Committee or the Canadian Olympic Committee and who receives no remuneration for performance of services as an athlete other than board, room, rent, housing, lodging or other reasonable incidental subsistence allowance, or any amateur sports official who is certified by a recognized Oregon or national certifying authority, which requires or provides liability and accident insurance for such officials. A roster of recognized Oregon and national certifying authorities will be maintained by the Department of
Consumer and Business Services, from lists of certifying organizations submitted by the Oregon School Activities Association and the Oregon Park and Recreation Society.

(14) Volunteer personnel participating in the ACTION programs, organized under the Domestic Volunteer Service Act of 1973, P.L. 93-113, known as the Foster Grandparent Program and the Senior Companion Program, whether or not the volunteers receive a stipend or nominal reimbursement for time and travel expenses.

(15) A person who has an ownership or leasehold interest in equipment and who furnishes, maintains and operates the equipment. As used in this subsection "equipment" means:

(a) A motor vehicle used in the transportation of logs, poles or piling.

(b) A motor vehicle used in the transportation of rocks, gravel, sand, dirt or asphalt concrete.

(c) A motor vehicle used in the transportation of property by a for-hire motor carrier that is required under ORS 825.100 or 825.104 to possess a certificate or permit or to be registered.

(16) A person engaged in the transportation of the public for recreational down-river boating activities on the waters of this state pursuant to a federal permit when the person furnishes the equipment necessary for the activity. As used in this subsection, "recreational down-river boating activities" means those boating activities for the purpose of recreational fishing, swimming or sightseeing utilizing a float craft with oars or paddles as the primary source of power.

(17) A person who performs volunteer ski patrol activities who receives no wage other than noncash remuneration.

(18) A person 19 years of age or older who contracts with a newspaper publishing company or independent newspaper dealer or contractor to distribute newspapers to the general public and perform or undertake any necessary or attendant functions related thereto.

(19) A person performing foster parent or adult foster care duties pursuant to ORS chapter 411, 418, 430 or 443.

(20) A person performing services on a volunteer basis for a nonprofit, religious, charitable or relief organization, whether or not such person receives meals or lodging or nominal reimbursements or vouchers for meals, lodging or expenses.

(21) A person performing services under a property tax work-off program established under ORS 310.800.

(22) A person who performs service as a caddy at a golf course in an established program for the training and supervision of caddies under the direction of a person who is an employee of the golf course.
(23)(a) Partners who are actively licensed under ORS 671.525 or 701.035 and who have a substantial ownership interest in a partnership. If all partners are members of the same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such partners may elect to be nonsubject workers. For all other partnerships licensed under ORS 671.510 to 671.710 or ORS chapter licensed under ORS 701, the maximum number of exempt partners shall be whichever is the greater of the following:

(A) Two partners; or

(B) One partner for each 10 partnership employees.

(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005(30), the partnership qualifies as an independent contractor. Any partnership licensed under ORS 671.525 or 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(24)(a) Corporate officers who are directors of a corporation actively licensed under ORS 671.525 or licensed under ORS 701.035 and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed. If all officers of the corporation are members of the same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such officers may elect to be nonsubject workers. For all other corporations licensed under ORS 671.510 to 671.710 or ORS chapter 701, the maximum number of exempt corporate officers shall be whichever is the greater of the following:

(A) Two corporate officers; or

(B) One corporate officer for each 10 corporate employees.

(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005(30), the corporation qualifies as an independent contractor. Any corporation licensed under ORS 671.525 or 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(25)(a) Limited liability company members who are members of a company actively licensed under ORS 671.525 or 701.035 and who have a substantial ownership interest in the company, regardless of the nature of the work performed. If all members of the company are members of the same family and are parents, spouses, sister, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such members may elect to be nonsubject workers. For all other companies licensed under ORS 671.510 to 671.710 or ORS chapter 701, the maximum number of exempt company members shall be whichever is the greater of the following:

(A) Two company members; or

(B) One company member for each 10 company employees.
(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005(30), the company qualifies as an independent contractor. Any company licensed under ORS 671.525 or 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(26) A person serving as a referee or assistant referee in a youth or adult recreational soccer match whose services are retained on a match-by-match basis.

(27) A person performing language translator or interpreter services that are provided for others through an agent or broker.

(28) A person who operates, and who has an ownership or leasehold interest in, a passenger motor vehicle that is operated as a taxicab or for nonemergency medical transportation. As used in this subsection:

(a) “Lease” means a contract under which the lessor provides a vehicle to a lessee for consideration.

(b) “Leasehold” includes, but is not limited to, a lease for a shift or a longer period.

(c) “Passenger motor vehicle that is operated as a taxicab” means a vehicle that:

(A) Has a passenger seating capacity that does not exceed seven persons;

(B) Is transporting persons, property or both on a route that begins or ends in Oregon; and

(C)(i) Carries passengers for hire when the destination and route traveled may be controlled by a passenger and the fare is calculated on the basis of any combination of an initial fee, distance traveled or waiting time; or

(ii) Is in use under a contract to provide specific service to a third party to transport designated passengers or to provide errand services to locations selected by the third party.

(d) “Passenger motor vehicle that is operated for nonemergency medical transportation” means a vehicle that:

(A) Has a passenger seating capacity that does not exceed seven persons;

(B) Is transporting persons, property or both on a route that begins or ends in Oregon; and

(C) Provides medical transportation services under contract with or on behalf of a mass transit or transportation district. [1965 c.285 e9; 1971 c.386 e1; 1977 c.683 e1; 1977 c.817 e2; 1977 c.835 e7; 1979 c.821 e1; 1981 c.225 e1; 1981 c.444 e1; 1981 c.535 e3; 1981 c.839 e1; 1983 c.341 e1; 1983 c.541 e1; 1983 c.579 e3; 1985 c.431 e1; 1985 c.706 e2; 1987 c.94 e168; 1987 c.414 e161; 1987 c.800 e2; 1989 c.762 e4; 1990 c.2 e4; 1991 c.469 e1; 1991 c.707 e1; 1993 c.18 e138a; 1993 c.494 e2; 1993 c.777 e10; 1995 c.93 e32; 1995 c.216 §52.3, 3a; 1995 c.332 e6; 1997 c.337 e1; 1999 c.402 e8; 1999 c.314 e91; 2001 c.765 e4; 2001 c.363 e1; 2003 c.677 §1; 2005 c.167 §1; 2007 c.541 §9; 2007 c.465 §6; 2007 c.721 §1]

[Note: the amendments to ORS 656.027 by Or. Laws 2007, c.836 §49 become operative on July 1, 2010, and are not reflected in the text above.]
656.029 Obligation of person letting contract to provide coverage for workers under contract; exceptions; effect of failure to provide coverage. (1) If a person awards a contract involving the performance of labor where such labor is a normal and customary part or process of the person's trade or business, the person awarding the contract is responsible for providing workers' compensation insurance coverage for all individuals, other than those exempt under ORS 656.027, who perform labor under the contract unless the person to whom the contract is awarded provides such coverage for those individuals before labor under the contract commences. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person who is charged with the responsibility for providing such coverage before labor under the contract commences, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.

(2) If a person to whom the contract is awarded is exempt from coverage under ORS 656.027, and that person engages individuals who are not exempt under ORS 656.027 in the performance of the contract, that person shall provide workers' compensation insurance coverage for all such individuals. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person to whom the contract is awarded, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.

(3) As used in this section:

(a) "Person" includes partnerships, joint ventures, associations, corporations, limited liability companies, governmental agencies and sole proprietorships.

(b) "Sole proprietorship" means a business entity or individual who performs labor without the assistance of others. [1979 c.864 e2; 1981 c.725 e1; 1981 c.854 e4; 1983 c.397 e1; 1983 c.579 e2a; 1985 c.706 e1; 1989 c.762 e5; 1995 c.93 e34; 1995 c.332 e6a]

656.030 [Repealed by 1959 c.448 e14]

656.802 "Occupational disease" defined. (1)(a) As used in this chapter, "occupational disease" means any disease or infection arising out of and in the course of employment caused by substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein, and which requires medical services or results in disability or death, including:

(A) Any disease or infection caused by ingestion of, absorption of, inhalation of or contact with dust, fumes, vapors, gases, radiation or other substances.

(B) Any mental disorder, whether sudden or gradual in onset, which requires medical services or results in physical or mental disability or death.
(C) Any series of traumatic events or occurrences which requires medical services or results in physical
disability or death.

(b) As used in this chapter, "mental disorder" includes any physical disorder caused or worsened by
mental stress.

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

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

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

(d) Existence of an occupational disease or worsening of a preexisting disease must be established by
medical evidence supported by objective findings.

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

(3) Notwithstanding any other provision of this chapter, a mental disorder is not compensable under this
chapter unless the worker establishes all of the following:

(a) The employment conditions producing the mental disorder exist in a real and objective sense.

(b) The employment conditions producing the mental disorder are conditions other than conditions
generally inherent in every working situation or reasonable disciplinary, corrective or job performance
evaluation actions by the employer, or cessation of employment or employment decisions attendant
upon ordinary business or financial cycles.

(c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical
or psychological community.

(d) There is clear and convincing evidence that the mental disorder arose out of and in the course of
employment.

656.804 Occupational disease as an injury under Workers' Compensation Law. Subject to ORS
656.005 (24) and 656.266 (2), an occupational disease, as defined in ORS 656.802, is considered an
injury for employees of employers who have come under this chapter, except as otherwise provided in
ORS 656.802 to 656.807. [Amended by 1965 c.285 e87; 1973 c.543 e2; 2001 c.865 e4] [Digest, Rules, Claims Policy, Legal Administrative Policy,
Cross References, Miscellaneous]
656.807 Time for filing of claims for occupational disease; procedure. (1) 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.

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

(3) The procedure for processing occupational disease claims shall be the same as provided for accidental injuries under this chapter. [Amended by 1953 c.440 e2; 1959 c.351 e2; 1965 c.285 e87a; 1973 c.543 e3; 1981 c.535 e47; 1981 c.854 e55; 1985 c.212 e10; 1987 c.713 e6] [Digest, Rules, Claims Policy, Legal Administrative Policy, Cross References, Miscellaneous]

656.266 Burden upon worker to prove compensability and nature and extent of disability. (1) The burden of proving that an injury or occupational disease is compensable and of proving the nature and extent of any disability resulting therefrom is upon the worker. The worker cannot carry the burden of proving that an injury or occupational disease is compensable merely by disproving other possible explanations of how the injury or disease occurred.

(2) Notwithstanding subsection (1) of this section, for the purpose of combined condition injury claims under ORS 656.005(7)(a)(B) only:

(a) Once the worker establishes an otherwise compensable injury, the employer shall bear the burden of proof to establish the otherwise compensable injury is not, or is no longer, the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.

(b) Notwithstanding ORS 656.804, paragraph (a) of this subsection does not apply to any occupational disease claim. [1987 c.713 e2; 2001 c.865 e2]

656.156 Intentional injuries. (1) If injury or death results to a worker from the deliberate intention of the worker to produce such injury or death, neither the worker nor the widow, widower, child or dependent of the worker shall receive any payment whatsoever under this chapter.

(2) If injury or death results to a worker from the deliberate intention of the employer of the worker to produce such injury or death, the worker, the widow, widower, child or dependent of the worker may take under this chapter, and also have cause for action against the employer, as if such statutes had not been passed, for damages over the amount payable under those statutes. [Amended by 1965 c.285 e20]

656.273 Aggravation for worsened conditions; procedure; limitations; additional compensation. (1) After the last award or arrangement of compensation, an injured worker is entitled to
additional compensation for worsened conditions resulting from the original injury. A worsened condition resulting from the original injury is established by medical evidence of an actual worsening of the compensable condition supported by objective findings. However, if the major contributing cause of the worsened condition is an injury not occurring within the course and scope of employment, the worsening is not compensable. A worsened condition is not established by either or both of the following:

(a) The worker's absence from work for any given amount of time as a result of the worker's condition from the original injury; or

(b) Inpatient treatment of the worker at a hospital for the worker's condition from the original injury.

(2) To obtain additional medical services or disability compensation, the injured worker must file a claim for aggravation with the insurer or self-insured employer. In the event the insurer or self-insured employer cannot be located, is unknown, or has ceased to exist, the claim shall be filed with the Director of the Department of Consumer and Business Services.

(3) A claim for aggravation must be in writing in a form and format prescribed by the director and signed by the worker or the worker's representative and the worker’s attending physician. When an insurer or self-insured employer receives a completed aggravation form, the insurer or self-insured employer shall process the claim.

656.308 Responsibility for payment of claims; effect of new injury; denial of responsibility; procedure for joining employers and insurers; attorney fees; limitation on filing claims subject to settlement agreement. (1) When a worker sustains a compensable injury, the responsible employer shall remain responsible for future compensable medical services and disability relating to the compensable condition unless the worker sustains a new compensable injury involving the same condition. If a new compensable injury occurs, all further compensable medical services and disability involving the same condition shall be processed as a new injury claim by the subsequent employer. The standards for determining the compensability of a combined condition under ORS 656.005(7) shall also be used to determine the occurrence of a new compensable injury or disease under this section.

(2)(a) Any insurer or self-insured employer who disputes responsibility for a claim shall so indicate in or as part of a denial otherwise meeting the requirements of ORS 656.262 issued in the 60 days allowed for processing of the claim. The denial shall advise the worker to file separate, timely claims against other potentially responsible insurers or self-insured employers, including other insurers for the same employer, in order to protect the right to obtain benefits on the claim. The denial may list the names and addresses of other insurers or self-insured employers. Such denials shall be final unless the worker files a timely request for hearing pursuant to ORS 656.319. All such requests for hearing shall be consolidated into one proceeding.

656.245 Medical services to be provided; limitations; use of generic drugs; services by providers not members of managed care organizations; authorizing temporary disability compensation and making finding of impairment for disability rating purposes by certain providers; review of disputed claims for medical service. (1)(a) For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by
the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005 (7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.

(b) Compensable medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. A pharmacist or dispensing physician shall dispense generic drugs to the worker in accordance with ORS 689.515. The duty to provide such medical services continues for the life of the worker.

656.010 Treatment by spiritual means. Nothing in this chapter shall be construed to require a worker who in good faith relies on or is treated by prayer or spiritual means by a duly accredited practitioner of a well-recognized church to undergo any medical or surgical treatment nor shall such worker or the dependents of the worker be deprived of any compensation payments to which the worker would have been entitled if medical or surgical treatment were employed, and the employer or insurance carrier may pay for treatment by prayer or spiritual means. [1965 c.285 e41c]

656.262 Processing of claims and payment of compensation; payment by employer; acceptance and denial of claim; reporting claims; penalty for unreasonable payment delay; cooperation by worker and attorney in claim investigation. (1) Processing of claims and providing compensation for a worker shall be the responsibility of the insurer or self-insured employer. All employers shall assist their insurers in processing claims as required in this chapter.

(2) The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of a claim, except where the right to compensation is denied by the insurer or self-insured employer.

(3)(a) Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. The report shall include:

(A) The date, time, cause and nature of the accident and injuries.

(B) Whether the accident arose out of and in the course of employment.

(C) Whether the employer recommends or opposes acceptance of the claim, and the reasons therefor.

(D) The name and address of any health insurance provider for the injured worker.

(E) Any other details the insurer may require.

(b) Failure to so report subjects the offending employer to a charge for reimbursing the insurer for any penalty the insurer is required to pay under subsection (11) of this section because of such failure. As used in this subsection, 'health insurance' has the meaning for that term provided in ORS 731.162.
656.268 Procedure for determining awards; claim closure; termination of temporary total disability benefits; reconsideration required before hearing; procedure, penalty and attorney fee on reconsideration; medical arbiter to make findings of impairment for reconsideration; credit or offset for fraudulently obtained or overpaid benefits.

(1) One purpose of this chapter is to restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker. The insurer or self-insured employer shall close the worker's claim, as prescribed by the Director of the Department of Consumer and Business Services, and determine the extent of the worker's permanent disability, provided the worker is not enrolled and actively engaged in training according to rules adopted by the director pursuant to ORS 656.340 and 656.726, when:

(a) The worker has become medically stationary and there is sufficient information to determine permanent disability;

(b) The accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions pursuant to ORS 656.005 (7). When the claim is closed because the accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions, and there is sufficient information to determine permanent disability, the likely permanent disability that would have been due to the current accepted condition shall be estimated; or

(c) Without the approval of the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245, the worker fails to seek medical treatment for a period of 30 days or the worker fails to attend a closing examination, unless the worker affirmatively establishes that such failure is attributable to reasons beyond the worker's control.

656.210 Temporary total disability; payment during medical treatment. (1) When the total disability is only temporary, the worker shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, but not more than 133 percent of the average weekly wage nor less than the amount of 90 percent of wages a week or the amount of $50 a week, whichever amount is less. Notwithstanding the limitation imposed by this subsection, an injured worker who is not otherwise eligible to receive an increase in benefits for the fiscal year in which compensation is paid shall have the benefits increased each fiscal year by the percentage which the applicable average weekly wage has increased since the previous fiscal year.

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

(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.

656.212 Temporary partial disability. When the disability is or becomes partial only and is temporary in character:

(1) No disability payment is recoverable for temporary disability suffered during the first three calendar days after the worker leaves work or loses wages as a result of the compensable injury. If the worker leaves work or loses wages on the day of the injury due to the injury, that day shall be considered the first day of the three-day period.

(2) The payment of temporary total disability pursuant to ORS 656.210 shall cease and the worker shall receive that proportion of the payments provided for temporary total disability which the loss of wages bears to the wage used to calculate temporary total disability pursuant to ORS 656.210. [Amended by 1953 c.672 §2; 1995 c.332 §16; 1999 c.538 §1]

656.214 Permanent partial disability. (1) As used in this section:

(a) “Impairment” means the loss of use or function of a body part or system due to the compensable industrial injury or occupational disease determined in accordance with the standards provided under ORS 656.726, expressed as a percentage of the whole person.

(b) “Loss” includes permanent and complete or partial loss of use.

(c) “Permanent partial disability” means:

(A) Permanent impairment resulting from the compensable industrial injury or occupational disease; or

(B) Permanent impairment and work disability resulting from the compensable industrial injury or occupational disease.

(d) “Regular work” means the job the worker held at injury.

(e) “Work disability” means impairment modified by age, education and adaptability to perform a given job.

(2) When permanent partial disability results from a compensable injury or occupational disease, benefits shall be awarded as follows:
(a) If the worker has been released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 or has returned to regular work at the job held at the time of injury, the award shall be for impairment only. Impairment shall be determined in accordance with the standards provided by the Director of the Department of Consumer and Business Services pursuant to ORS 656.726 (4). Impairment benefits are determined by multiplying the impairment value times 100 times the average weekly wage as defined by ORS 656.005.

(b) If the worker has not been released to regular work by the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 or has not returned to regular work at the job held at the time of injury, the award shall be for impairment and work disability. Work disability shall be determined in accordance with the standards provided by the director pursuant to ORS 656.726 (4). Impairment shall be determined as provided in paragraph (a) of this subsection. Work disability benefits shall be determined by multiplying the impairment value, as modified by the factors of age, education and adaptability to perform a given job, times 150 times the worker’s weekly wage for the job at injury as calculated under ORS 656.210 (2). The factor for the worker’s weekly wage used for the determination of the work disability may be no more than 133 percent or no less than 50 percent of the average weekly wage as defined in ORS 656.005.

656.206 Permanent total disability. (1) As used in this section:

(a) “Essential functions” means the primary tasks associated with the job.

(b) “Materially improved medically” means an actual change for the better in the worker’s medical condition that is supported by objective findings.

(c) “Materially improved vocationally” means an actual change for the better in the:

(A) Worker’s vocational capability; or

(B) Likelihood that the worker can return to work in a gainful and suitable occupation.

(d) “Permanent total disability” means, notwithstanding ORS 656.225, the loss, including preexisting disability, of use or function of any portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation.

(e) “Regularly performing work” means the ability of the worker to discharge the essential functions of the job.

(f) “Suitable occupation” means one that the worker has the ability and the training or experience to perform, or an occupation that the worker is able to perform after rehabilitation.

(g) “Wages” means wages as determined under ORS 656.210.

(2) When permanent total disability results from the injury, the worker shall receive during the period of that disability compensation benefits equal to 66-2/3 percent of wages not to exceed 100 percent of the
average weekly wage nor less than the amount of 90 percent of wages a week or the amount of $50, whichever amount is lesser.

(3) The worker has the burden of proving permanent total disability status and must establish that the worker is willing to seek regular gainful employment and that the worker has made reasonable efforts to obtain such employment.

656.154 Injury due to negligence or wrong of a person not in the same employ as injured worker; remedy against such person. If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker, or if death results from the injury, the spouse, children or other dependents, as the case may be, may elect to seek a remedy against such third person.

[Amended by 1959 c.504 e1; 1975 c.152 e1; 1985 c.212 e4]

656.204 Death. If death results from the accidental injury, payments shall be made as follows:

(1) (a) The cost of final disposition of the body and funeral expenses, including but not limited to transportation of the body, shall be paid, not to exceed 20 times the average weekly wage in any case.

(b) The insurer or self-insured employer shall pay bills submitted for disposition and funeral expenses up to the benefit limit established in paragraph (a) of this subsection. If any part of the benefit remains unpaid 60 days after claim acceptance, the insurer or self-insured employer shall pay the unpaid amount to the estate of the worker.

(2) (a) If the worker is survived by a spouse, monthly benefits shall be paid in an amount equal to 4.35 times 66-2/3 percent of the average weekly wage to the surviving spouse until remarriage. The payment shall cease at the end of the month in which the remarriage occurs.

(b) If the worker is survived by a spouse, monthly benefits also shall be paid in an amount equal to 4.35 times 10 percent of the average weekly wage for each child of the deceased who is substantially dependent on the spouse for support, until such child becomes 18 years of age.

(c) If the worker is survived by a spouse, monthly benefits also shall be paid in an amount equal to 4.35 times 25 percent of the average weekly wage for each child of the deceased who is not substantially dependent on the spouse for support, until such child becomes 18 years of age.

(d) If a surviving spouse receiving monthly payments dies, leaving a child who is entitled to compensation on account of the death of the worker, a monthly benefit equal to 4.35 times 25 percent of the average weekly wage shall be paid to each such child until the child becomes 18 years of age or the child's entitlement to benefits under subsection (8) of this section ceases, whichever is later.

(e) If a child who has become 18 years of age is a full-time high school student, benefits shall be paid as provided in subsection (8) of this section.
(f) In no event shall the total monthly benefits provided for in this subsection exceed 4.35 times 133-1/3 percent of the average weekly wage. If the sum of the individual benefits exceeds this maximum, the benefit for each child will be reduced proportionally.

(3)(a) Upon remarriage, a surviving spouse shall be paid 36 times the monthly benefit in a lump sum as final payment of the claim, but the monthly payments for each child shall continue as before.

(b) If, after the date of the subject worker's death, the surviving spouse cohabits with another person for an aggregate period of more than one year and a child has resulted from the relationship, the surviving spouse shall be paid 36 times the monthly benefit in a lump sum as final payment of the claim, but the monthly payment for any child who is entitled to compensation on account of the death of the worker shall continue as before.

(4)(a) If the worker leaves neither wife nor husband, but a child under 18 years of age, a monthly benefit equal to 4.35 times 25 percent of the average weekly wage shall be paid to each such child until the child becomes 18 years of age.

(b) If a child who has become 18 years of age is a full-time high school student, benefits shall be paid as provided in subsection (8) of this section.

(c) In no event shall the total benefits provided for in this subsection exceed 4.35 times 133-1/3 percent of the average weekly wage. If the sum of the individual benefits exceeds this maximum, the benefit for each child will be reduced proportionally.

(5)(a) If the worker leaves a dependent other than a surviving spouse or a child, a monthly payment shall be made to each dependent equal to 50 percent of the average monthly support actually received by such dependent from the worker during the 12 months next preceding the occurrence of the accidental injury. If a dependent is under the age of 18 years at the time of the accidental injury, the payment to the dependent shall cease when such dependent becomes 18 years of age. The payment to any dependent shall cease under the same circumstances that would have terminated the dependency had the injury not happened.

(b) If the dependent who has become 18 years of age is a full-time high school student, benefits shall be paid as provided in subsection (8) of this section.

(c) In no event shall the total benefits provided for in this subsection exceed 4.35 times 10 percent of the average weekly wage. If the sum of the individual benefits exceeds this maximum, the benefit for each dependent will be reduced proportionally.

(6) If a child is an invalid at the time the child otherwise becomes ineligible for benefits under this section, the payment to the child shall continue while the child remains an invalid. If a person is entitled to payment because the person is an invalid, payment shall terminate when the person ceases to be an invalid.

(7) If, at the time of the death of a worker, the child of the worker or dependent has become 17 years of age but is under 18 years of age, the child or dependent shall receive the payment provided in this
section for a period of one year from the date of the death. However, if after such period the child is a full-time high school student, benefits shall be paid as provided in subsection (8) of this section.

(8)(a) Benefits under this section which are to be paid as provided in this subsection shall be paid for the child or dependent until the child or dependent becomes 19 years of age. If, however, the child or dependent is attending higher education or begins attending higher education within six months of the date the child or dependent leaves high school, benefits shall be paid until the child or dependent becomes 23 years of age, ceases attending higher education or graduates from an approved institute or program, whichever is earlier.

(b) If a child or dependent who is eligible for benefits under this subsection has no surviving parent, the child or dependent shall receive 4.35 times 66-2/3 percent of the average weekly wage until the child or dependent becomes 23 years of age, ceases attending higher education or graduates from an approved institute or program, whichever is earlier.

(c) As used in this subsection, "attending higher education" means regularly attending community college, college or university, or regularly attending a course of vocational or technical training designed to prepare the participant for gainful employment. A child or dependent enrolled in an educational course load of less than one-half of that determined by the educational facility to constitute "full-time" enrollment is not "attending higher education."

(9) As used in this section, "average weekly wage" has the meaning for that term provided in ORS 656.211.

656.208 Death during permanent total disability. (1) If the injured worker dies during the period of permanent total disability, whatever the cause of death, leaving a spouse or any dependents listed in ORS 656.204, payment shall be made in the same manner and in the same amounts as provided in ORS 656.204.

(2) If any surviving spouse to whom the provisions of this section apply remarries, the payments on account of a child or children shall continue to be made to the child or children the same as before the remarriage. [Amended by 1957 c.453 e2; 1959 c.450 e2; 1965 c.285 e22b; 1969 c.521 e2; 1971 c.415 e2; 1973 c.497 e3; 1975 c.497 e2; 1985 c.108 e2]

656.218 Continuance of permanent partial disability payments to survivors; effect of death prior to final claim disposition; burial allowance. (1) In case of the death of a worker entitled to compensation, whether eligibility therefor or the amount thereof have been determined, payments shall be made for the period during which the worker, if surviving, would have been entitled thereto.

(2) If the worker's death occurs prior to issuance of a notice of closure under ORS 656.268, the insurer or the self-insured employer shall determine compensation for permanent partial disability, if any.

(3) If the worker has filed a request for a hearing pursuant to ORS 656.283 and death occurs prior to the final disposition of the request, the persons described in subsection (5) of this section shall be entitled to pursue the matter to final determination of all issues presented by the request for hearing.
(4) If the worker dies before filing a request for hearing, the persons described in subsection (5) of this section shall be entitled to file a request for hearing and to pursue the matter to final determination as to all issues presented by the request for hearing.

(5) The payments provided in this section shall be made to the persons who would have been entitled to receive death benefits if the injury causing the disability had been fatal. In the absence of persons so entitled, the unpaid balance of the award shall be paid to the worker’s estate.

(6) This section does not entitle any person to double payments on account of the death of a worker and a continuation of payments for permanent partial disability, or to a greater sum in the aggregate than if the injury had been fatal. [Amended by 1959 c.450 §3; 1973 c.355 §1; 1975 c.497 §3; 1981 c.854 §11; 1987 c.884 §16; 1999 c.313 §4; 2009 c.171 §2]

656.226 Cohabitants and children entitled to compensation. In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation, the surviving cohabitant and the children are entitled to compensation under this chapter the same as if the man and woman had been legally married. [Amended by 1983 c.816 §4]

656.591 Election not to bring action operates as assignment of cause of action. (1) An election made pursuant to ORS 656.578 not to proceed against the employer or third person operates as an assignment to the paying agency of the cause of action, if any, of the worker, the beneficiaries or legal representative of the deceased worker, against the employer or third person, and the paying agency may bring action against such employer or third person in the name of the injured worker or other beneficiaries.

(2) Any sum recovered by the paying agency in excess of the expenses incurred in making such recovery and the amount expended by the paying agency for compensation, first aid or other medical, surgical or hospital service, together with the present worth of the monthly payments of compensation to which such worker or other beneficiaries may be entitled under this chapter, shall be paid such worker or other beneficiaries. [Formerly 656.320]

656.593 Procedure when worker elects to bring action. (1) If the worker or the beneficiaries of the worker elect to recover damages from the employer or third person, notice of such election shall be given the paying agency by personal service or by registered or certified mail. The paying agency likewise shall be given notice of the name of the court in which such action is brought, and a return showing service of such notice on the paying agency shall be filed with the clerk of the court but shall not be a part of the record except to give notice to the defendant of the lien of the paying agency, as provided in this section. The proceeds of any damages recovered from an employer or third person by the worker or beneficiaries shall be subject to a lien of the paying agency for its share of the proceeds as set forth in this section. When the proceeds are paid in a series of payments, each payment shall be distributed proportionately to each recipient according to the formula provided in this section, unless otherwise agreed by the parties. The total proceeds shall be distributed as follows:

(a) Costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the advisory schedule of fees established by the Workers’ Compensation Board for such actions.
(b) The worker or the beneficiaries of the worker shall receive at least 33-1/3 percent of the balance of such recovery.

(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under this chapter. Such other costs include expenditures of the department from the Consumer and Business Services Fund, the Self-Insured Employer Adjustment Reserve and the Workers' Benefit Fund in reimbursement of the costs of the paying agency. Such other costs also include assessments for the Workers' Benefit Fund, and include any compensation which may become payable under ORS 656.273 or 656.278.

(d) The balance of the recovery shall be paid to the worker or the beneficiaries of the worker forthwith. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the board.

(2) The amount retained by the worker or the beneficiaries of the worker shall be in addition to the compensation or other benefits to which such worker or beneficiaries are entitled under this chapter.

(3) A claimant may settle any third party case with the approval of the paying agency, in which event the paying agency is authorized to accept such a share of the proceeds as may be just and proper and the worker or the beneficiaries of the worker shall receive the amount to which the worker would be entitled for a recovery under subsections (1) and (2) of this section. Any conflict as to what may be a just and proper distribution shall be resolved by the board.

(4) As used in this section, "paying agency" includes the Department of Consumer and Business Services with respect to its expenditures from the Workers' Benefit Fund in reimbursement of the costs of another paying agency for vocational assistance and the costs of claims of noncomplying employers.

(5) The department shall be repaid for its expenditures from the proceeds recovered by the paying agency in an amount proportional to the amount of the department's reimbursement of the paying agency's costs. All moneys received by the department under this section shall be deposited in the same fund from which the paying agency's costs originally had been reimbursed.

(6) Prior to and instead of the distribution of proceeds as described in subsection (1) of this section, when the worker or the beneficiaries of the worker are entitled to receive payment pursuant to a judgment or a settlement in the third party action in the amount of $1 million or more, the worker or the beneficiaries of the worker may elect to release the paying agency from all further liability on the workers' compensation claim, thereby canceling the lien of the paying agency as to the present value of its reasonably expected future expenditures for workers' compensation and other costs of the worker's claim, if all of the following conditions are met as part of the claim release:

(a) The worker or the beneficiaries of the worker are represented by an attorney.

(b) The release of the claim is presented in writing and is filed with the Workers' Compensation Board, with a copy served on the paying agency, including the Department of Consumer and Business Services
with respect to its expenditures from the Workers' Benefit Fund, the Consumer and Business Services Fund and the Self-Insured Employer Adjustment Reserve.

(c) The claim release specifies that the worker or the beneficiaries of the worker understand that the claim release means that no further benefits of any nature whatsoever shall be paid to the worker or the beneficiaries of the worker.

(d) The release of the claim is accompanied by a settlement stipulation with the paying agency, outlining terms of reimbursement to the paying agency, covering its incurred expenditures for compensation, first aid or other medical, surgical or hospital service and for expenditures from the Workers' Benefit Fund, the Consumer and Business Services Fund and the Self-Insured Employer Adjustment Reserve, to the date the release becomes final or the order of the board becomes final. If the payment of such incurred expenditures is in dispute, the release of the claim shall be accompanied by a written submission of the dispute by the worker or the beneficiaries of the worker to the board for resolution of the dispute by order of the board under procedures allowing for board resolution under ORS 656.587, in which case the release of the claim shall not be final until such time as the order of the board becomes final. In such a case, the only issue to be decided by the board is the amount of incurred expenses by the paying agent.

(e) If a service, item or benefit has been provided but a bill for that service, item or benefit has not been received by the paying agency before the release or order becomes final, the reimbursement payment shall cover the bill pursuant to the following process:

(A) The paying agency may maintain a contingency fund in an amount reasonably sufficient to cover reimbursement for the billing.

(B) If a dispute arises as to reimbursement for any bill first received by the paying agency not later than 180 days after the date the release or order became final, the dispute shall be resolved by order of the board.

(C) Any amount remaining in the contingency fund after the 180-day period shall be paid to the worker or the beneficiaries of the worker.

(D) Any billing for a service, item or benefit that is first received by the paying agency more than 180 days after the date the release or order became final is unenforceable by the person who issued the bill.

(f) The settlement or judgment proceeds are available for payment or actually have been paid out and are available in a trust fund or similar account, or are available through a legally enforceable structured settlement agreement if sufficient funds are available to make payment to the paying agency.

(g) The agreed-upon payment to the paying agency, or the payment to the paying agency ordered by the board, is made within 30 days of the filing of the withdrawal of the claim with the board or within 30 days after the board has entered a final order resolving any dispute with the paying agency.

(7) When a release of further liability on a claim, as provided in subsection (6) of this section, has been filed, and when payment to the paying agency has been made, the effect of the release is that the worker or beneficiaries of the worker shall have no further right to seek benefits pursuant to the original claim,
or any independent workers' compensation claim regarding the same circumstances, and the claim shall not be reasserted, refiled or reestablished through any legal proceeding. [Formerly 656.322; 1977 c.804 e16; 1979 c.839 e12; 1981 c.540 c1; 1985 c.600 e12; 1987 c.373 c35b; 1993 c.445 e1; 1995 c.332 e17; 1995 c.641 e8; 1997 c.639 e4]

NOTE: Section 6, Chapter 639, Oregon Laws 1997 provides: "Notwithstanding any other provision of law, the amendments to ORS 656.593 by section 4 of this Act apply to all claims or causes of action existing on or arising on or after the effective date of this Act, regardless of the date of injury or the date a claim is presented, and the amendments to ORS 656.593 by section 4 of this Act are intended to be fully retroactive."

656.595 Precedence of cause of action; compensation paid or payable not to be an issue. (1) Any action brought against a third party or employer, as provided in this chapter, shall have precedence over all other civil cases.

(2) In any third party action brought pursuant to this chapter, the fact that the injured worker or the beneficiaries of the injured worker are entitled to or have received benefits under this chapter shall not be pleaded or admissible in evidence.

(3) A challenge of the right to bring such third party action shall be made by supplemental pleadings only and such challenge shall be determined by the court as a matter of law. [Formerly 656.324]

656.596 Damage recovery as offset against compensation; recovery procedure; notice to paying agent. (1) If no workers' compensation claim has been filed or accepted at the time a worker or the beneficiaries of a worker recover damages from a third person or noncomplying employer pursuant to ORS 656.576 to 656.596, the amount of the damages shall constitute an offset against compensation due the worker or beneficiaries of the worker for the injuries for which the recovery is made to the extent of any lien that would have been authorized by ORS 656.576 to 656.596 if a workers' compensation claim had been filed and accepted at the time of recovery of damages.

(2) The offset created by subsection (1) of this section shall be recoverable from compensation payable to the worker, the worker's beneficiaries and the worker's attorney. No compensation payments shall be made to the worker, the worker's beneficiaries or the worker's attorney until the offset has been fully recovered.

(3) The worker or the beneficiaries of the worker shall notify the paying agency or potential paying agency of the amount of any damages recovered from a third person or noncomplying employer at the time of recovery or when the worker or the beneficiaries of a worker file a workers' compensation claim that is subject to ORS 656.576 to 656.596. [1993 c.644 e2; 1995 c.332 e48]

62 Van Natta 2682 (2010) 2682
In the Matter of the Compensation of
RONNIE L. NIELSON, DCD., Claimant
ORDER ON RECONSIDERATION
Law Offices of Karl G Anuta PC, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys
Andersen & Nyburg, Defense Attorneys
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. 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.

1 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.2

2 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 “workrelated 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 “workrelated 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.” Nielsion 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 Nielsion 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 2322.3

3 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 workrelated 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 656.390.4 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.
4 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 nondeterminative 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.

**Week 2 – August 29, 2016**

233 Or. 166
Supreme Court of Oregon, Department 2.

Walter WHITLOCK, Appellant,

v.

STATE INDUSTRIAL ACCIDENT COMMISSION of Oregon, Respondent.


Workmen’s compensation proceeding. From an adverse judgment of the Circuit Court, Clackamas County, Howard J. Blanding, J., the claimant appealed. The Supreme Court, Rossman, J., held that member of an organization which contracted to paint a building for property owners, who supervised the painting and paid the sum to the organization, was an ‘employee’ of the owners and he was entitled to benefits under the Workmen’s Compensation Act for lead poisoning sustained while painting the house.

Judgment reversed with instructions.

Lusk, J., dissented.

**Attorneys and Law Firms**

**148*166** James O. Goodwin, Oregon City, **167** for appellant. On the brief were Jack, Goodwin & Anicker, Oregon City.


Before McALLISTER, C. J., and ROSSMAN, O’CONNELL, LUSK and DENECKE, JJ.

**Opinion**

ROSSMAN, Justice.
This is an appeal by the plaintiff, Walter Whitlock, from a judgment which the circuit court entered in favor of the defendant, State Industrial Accident Commission, after sustaining a motion of the defendant for the entry of judgment in its favor as permitted by ORS 18.140 notwithstanding the jury’s return of a verdict in the plaintiff’s favor. The action was instituted by the plaintiff upon averments that while he was in the employ of Isham and Albertine West, contributors to the Workmen’s Compensation Fund, he sustained an injury and was entitled to an award of compensation, but that the defendant rejected his claim. The jury’s verdict found that the plaintiff, at the time of his injury, was an employee of the Wests who concededly were contributors to the fund, and the judgment that was entered upon the verdict referred the claim to the commission for allowance. That judgment was vacated by the one upon which this appeal is based.

The Wests, who the plaintiff alleges were his employers, owned an establishment located on the Mt. Hood Loop Highway known as Summit House. It is patronized by skiers.

During the summer of 1961 the Wests decided that Summit House should be painted and inquired of Mr. Carl Stauffer, a teacher in Sandy High School and also the supervisor of the school’s chapter of Future Farmers of America, if his organization, hereafter called the chapter, would be interested in painting the house for $125. Mr. Stauffer, after consulting the boys of the chapter, deemed that painting the house would be a suitable fund raising activity and accepted the Wests’ offer. Upon completion of the work $125 was paid to the chapter. While participating in the work of painting the house the plaintiff sustained lead poisoning and, through the institution of this proceeding, sought compensation for the disability that he thereby suffered.

The question presented by this appeal is whether the plaintiff qualifies as an employee under the Workmen’s Compensation Act and is thus entitled to benefits thereunder.

ORS 656.002(16) provides:

“Workman’ means any person who engages to furnish his services for a remuneration, subject to the direction and control of an employer * * *.’

It is thus seen that two conditions must be met before an individual may be deemed a ‘workman’ under the statute. First, he must be subject to the control of an employer, and second, he must obtain some form of remuneration for his efforts. It follows that if he is to prevail under the facts before us the plaintiff must show that the Wests were his employers and that he was under their supervision and control when the injury occurred.

ORS 656.002(5) states:

“Employer’ means any person * * * who contracts to pay a remuneration for and secures the right to direct and control the services of any person.’

It is undisputed that the Wests contracted with Mr. Stauffer to pay remuneration for the services which were rendered by the chapter. A reading of the record reveals that the Wests had the right to direct and control the manner in which the services were rendered. The Wests were therefore ‘an employer’ under the statutory definition which we quoted.

In discussing the element of control and supervision, Landberg v. State Industrial Accident Commission, 107 Or. 498, 502, 215 P. 594, 596 (1923), says:

‘* * * The services which the servant contracts to perform are personal services, and the master must have the right to direct and control the details of the work and the manner and mode of its performance. * * *’

It is not necessary that the person having the right to control exercise that right in every particular of the project at hand. It is sufficient that he possess the right. Regarding her supervision of the work, Mrs. West testified as follows:

‘Q Was it substantially correct, that he [Mr. Stauffer] supervised the activities of the boys while they were on the job?

‘A I helped supervise while they were on the job, too, I will assure you.’

It appears from the record that Mrs. West in no way relinquished her right to supervise and control the details of the work. Her emphatic testimony that she was there while the work was in progress, and that she supervised the activities
is undisputed. The considerable freedom which she allowed the boys in their choice of jobs and in the amount of time they spent on the job does not refute this testimony. It appears from the foregoing that the plaintiff was subject to the supervision and control of the Wests at the time the accidental injury occurred.

It remains to be seen whether the plaintiff’s services were performed for remuneration. 1 Larson, Workmen’s Compensation Law, Sec. 47.43(a), p. 702, states that ‘the payment need not necessarily be made to be employee.’ In the case of Sister Odelia v. Church of St. Andrew, 195 Minn 357, 263 NW 111 (1935) a nun who was a teacher in a parochial school could receive no wages because she had taken a vow of poverty. The Church of St. Andrew, which operated the school in which she taught, paid consideration for her services directly to her religious order. She was injured during her employment. In holding that Sister Odelia was an employee, the court said:

‘* * * It is true that she turned over the surplus of her earnings to her own order, but that fact is of no consequence as a defense. She might have assigned all her earnings without effect on her relationship to the church. She is in a position much like that of an unemancipated minor whose parent puts him out for hire and is entitled to his wages. Certainly he and not the parent is the employe. * * * Wages were paid directly for her services, not to her but to her order, to which she in effect had assigned them.’

That reasoning applies to the case at bar. Plaintiff performed a part of the work for which the Wests had contracted. His labor was paid for by the Wests who were, for the purposes of this activity, his employers. *171 The fact that the money for which he worked was not paid to him directly but to an organization of which he was a member does not alter this relationship. It was his prerogative to assign his share of the proceeds to whomever he wished. The fact is that money was paid for his services. This places him squarely within the definition of a ‘workman’ which is set forth in ORS 656.002(16).

Defendants urge that the case of Smith v. State Industrial Accident Commission, 144 Or. 480, 23 P.2d 904, controls the disposition of the case before us. The clearest distinction between that case and the one at bar is that in the former remuneration was neither expected nor given for the plaintiff’s services. Since that statutory condition was absent, the plaintiff was clearly outside the purview of the Workmen’s Compensation Act. We have shown that this condition was met in the case before us.

We conclude that the plaintiff was an employee of the Wests at the time of the accidental injury and that he therefore is entitled to benefits under the Workmen’s Compensation Act. The judgment of the circuit court is reversed with instructions to reinstate the verdict and enter judgment thereon.

LUSK, J., dissents.
Harold E. WOODY, Respondent,
v.
Bert R. WAIBEL, Petitioner.


In an action for damages arising out of defendant’s logging operation, plaintiff prevailed in the Circuit Court, Clackamas County, Winston L. Bradshaw, J., and the Court of Appeals affirmed, 24 Or.App. 341, 545 P.2d 889. The Supreme Court granted review. The Supreme Court, O’Connell, J., held that under the Workmen’s Compensation Act, control is an essential ingredient in the test for determining who is an ‘employee’ rather than an independent contractor, but where it could not be determined from factors traditionally employed for test of control whether the degree of defendant’s right to control established a master-servant relationship, it was necessary to consider factors making up the ‘nature of work’ test. Under evidence, plaintiff who owned a log truck and was hired by defendant, who conducted a logging operation, to haul logs from a loading area to a log dump, was an ‘employee’ for purposes of workmen’s compensation.

Judgment of Court of Appeals reversed.

Attorneys and Law Firms

*190 **493 Merle A. Long, of Long, Bodtker & Post, Albany, argued the cause and filed briefs for petitioner.

Bryan L. Peterson, of Peterson, Susak & Peterson, P.C., Portland, argued the cause and filed a brief for respondent.

Opinion

*191 O’CONNELL, Justice.

This is an action for damages arising out of defendant’s logging operation. Plaintiff, who owned a log truck, was hired by defendant to haul logs from a loading area in the forest to a log dump in Oregon City. During the course of the operation plaintiff was injured when one of defendant’s employees caused a tree to fall on plaintiff’s truck. Plaintiff filed a tort action in circuit court, whereupon defendant and Workmen’s Compensation Board of Oregon, as intervenor, contended that plaintiff’s remedy was limited to Workmen’s Compensation. Pursuant to ORS 656.384(2), a hearing was held and the trial court determined that plaintiff was, therefore, entitled to maintain an action for damages. Defendant appealed and the Court of Appeals affirmed. Woody v. Waibel, 24 Or.App. 341, 545 P.2d 889 (1976). We granted review in order to re-examine the employee-independent contractor distinction.

The Court of Appeals applied the traditional ‘control’ test to the trial court’s findings of fact, and after *192 noting that some of the circumstances suggested employee status while others suggested contractor **494 status, concluded that plaintiff was an ‘independent contractor.’

The Workmen’s Compensation Act, which is applicable only to the relationship of master and servant, is predicated upon the assumption that it is possible in every case for the courts to distinguish between a servant and an independent contractor. An examination of the cases, both in the workmen’s compensation field and in the area of vicarious liability, reveals that in many instances it is impossible through the employment of any rational process to determine into which of the two categories the employed person falls. Because this is so, it
has been urged, by one commentator in a careful and thorough re-appraisal of the independent contractor rule, that the distinction be *193 abolished in the cases involving vicarious liability, thus imposing liability upon both the employer and the person employed. However, attractive this proposal may be in the area of vicarious liability, the adoption of it in the workmen’s compensation cases is not appropriate. In the first place the legislature has, as we have already mentioned, assumed that a workable distinction can be made between independent contractor and servants and therefore we must draw the line as best we can, even if in a particular case the choice may be more intuitive than logical. Secondly, there are criteria in the workmen’s compensation area which provide a foundation in a greater number of cases for deciding whether workmen’s compensation should or should not be recognized, thus justifying the continued recognition of the distinction, whatever might be said in favor of abolishing the distinction in cases involving vicarious liability.

The criteria in the workmen’s compensation cases are keyed to the purpose of the workmen’s compensation laws. That this purpose is relevant in determining coverage in workmen’s compensation cases was recognized by this court in **495 Bowser v. State Ind. Acc. Comm., 182 Or. 42, 185 P.2d 891 (1947). The idea that the *194 statutory purpose rather than the common law test of right to control should be the basis for defining the term ‘employee’ was first developed in National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). See also, United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947). It has been recommended that the determination of whether a person is a servant or an independent contractor under workmen’s compensation laws should not rest upon the common law test based upon the degree of the employer’s right of control, but should focus instead upon factors which are relevant to the purpose of the workmen’s compensation system. This purposive approach is fully developed in 1A Larson’s Workmen’s Compensation Law s 43.40 et seq. Starting *195 with the premise that compensation legislation is based upon the theory that the cost of industrial accidents should be borne by the consumer as a part of the cost of the product, Larson says that

** * * It follows that any worker whose services from a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection. ** * * 1A Larson’s Workmen’s Compensation Law s 43.51 (1973).

He describes the test as ‘the relative nature of the work test’ consisting of the following ingredients:

** * * (T)he character of the claimant’s work or business—how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on—and its relation to the employer’s business, that is, how much it is a regular part of the employer’s regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from **496 contracting for the completion of a particular job.”

The acceptance of this analysis as a controlling test for determining the distinction between an independent contractor and a servant would make it unnecessary to find a right to control in the employer. Our statutes *196 defining an ‘employer’ and an ‘employee’ in the Workmen’s Compensation Act preclude us from going this far. ORS 656.005 defines ‘workman’ as follows:

‘(28) ‘Workman’ means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish his services for a remuneration, subject to the direction and control of an employer and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an inmate or ward of a state institution.’

An ‘employer’ is defined as

‘(14) ‘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.’

Thus it is clear that by express provisions of the statute control is an essential ingredient in the test for determining who is a servant within the meaning of the Workmen’s Compensation Act. The statutes do not, however, preclude a consideration of the factors germane to the relative nature of the work test in deciding whether there was sufficient control to denominate the relationship as one of master and servant; in fact, to give meaning to our recognition in Bowser that the statute must be interpreted in light of the purposes of the Compensation Act, it is essential that we consider the factors which make up the ‘nature of work’ test.

The relationship between defendant and plaintiff in the present case is one in which defendant has the right to control over plaintiff’s performance in some respects but not in others. Whether the degree of defendant’s right to control in the present case is sufficient to classify the relationship of master and servant cannot be decided by turning to the factors traditionally employed for the test of control. It is permissible, then, to turn to the factors relevant to the purpose of the Workmen’s Compensation Act in deciding whether the control retained by defendant makes the relationship one of master and servant. The application of the factors of the relative nature of the work test to the facts of the present case can be made by adopting the following excerpt from 1A Larson’s Workmen’s Compensation Law:

* * * (I)f I regularly, year in and year out, engage an individual trucker to transport logs from my woods to my lumber mill, which is an integral part of my lumbering operation, paying him by the load, and reserving no right of control over the details of his work, it is quite possible that this man is as appropriate a subject for compensation protection as any worker that could be found. He is taking a regular and continuous part in the manufacture of my product; his work is hazardous; his rate of pay is such that he and his family cannot be expected to bear the cost of industrial accident; and his place in the industrial process is not such that he could distribute the risk of injury through channels of his own. In every respect he is the kind of worker for whose benefit the compensation act was thought necessary.’

Larson notes that

‘The hauling and loading of logs, ties, and the like have usually been classified as part of the employer’s business, so as to bring within the act trucker-owners who are paid by quantity and who are free to hire their own assistants and, in some cases, to work on their own time. (T)his is particularly true when the activities of the truckers must be integrated and coordinated with the employer’s over-all production pattern.’

1A Larson’s Workmen’s Compensation Law s 45.22.

[3] Applying these factors here, we note that the transportation of timber formed an essential and regular part of defendant’s marketing enterprise. Certain aspects of the job such as loading required close cooperation between plaintiff and employees of the defendant. Plaintiff was hired on a continuing basis and the extent of hauling and the corresponding degree of risk to him depended upon defendant’s output. Moreover, defendant can more effectively distribute the cost of injuries to plaintiff resulting from the hazards of log hauling. Plaintiff must, therefore, be considered an employee for purposes of workmen’s compensation. This comports with our holding in Bowser v. State, Ind. Acc. Comm., supra.

Plaintiff contends that unlike Bowser, the trial court found that ‘plaintiff was classified as an independent contractor by P.U.C. and carried his own insurance’; that ‘plaintiff claims he considered himself an independent contractor and further claims, without contradiction, that defendant had previously stated to him that he was not covered by Workmen’s Compensation and to get his own insurance.’

[4] The fact that either or both of the parties mistakenly considered their relationship to be that of employer-independent contractor cannot, of course, be controlling in applying the definition sections of the Workmen’s Compensation Act. Moreover, plaintiff neither pleaded nor proved facts sufficient to constitute an estoppel by defendant.
The judgment of the Court of Appeals is reversed.

Parallel Citations

554 P.2d 492

Footnotes

1 The findings of fact were as follows:
‘(a) Plaintiff and defendant had agreed that plaintiff would haul timber from defendant’s logging operation to a destination designated by defendant.
‘(b) That defendant would pay to plaintiff for such hauling so much per thousand based upon the distance of the haul and the grade of the timber. The parties discussed these factors and agreed upon the price to be paid. The plaintiff would be paid every two weeks and would be paid up to 10 days prior to the date of pay.
‘(c) Either party could terminate the agreement to haul timber at any time.
‘(d) The loader was an employee and under the direction of defendant in loading the truck; however, plaintiff had a right to object and have corrected an improper loading.
‘(e) Plaintiff was not restricted to haul only for defendant and in fact on several instances hauled at other places in slack periods or when defendant’s ‘show’ was being moved.
‘(f) Plaintiff provided and was responsible for the operating and all expenses of his own truck and had the right to employ other drivers for the truck.
‘(g) Defendant claims plaintiff was an employee, however, he made no deductions from payment to plaintiff for Workmen’s Compensation, Social Security or Income Tax.
‘(h) Plaintiff had the entire responsibility, after being loaded, for the delivery to the appointed destination and had the duty to rectify any condition that occurred affecting the ability to deliver.
‘(i) Plaintiff was classified as an independent contractor by the P.U.C., and carried his own insurance. Plaintiff claims he considered himself an independent contractor and further claims, without contradiction, that defendant had previously stated to him that he was not covered by Workmen’s Compensation and had to get his own insurance.’

2 Circumstances cited as evidence of an employment relationship were: (1) the right of either party to terminate the agreement without liability; (2) the extent of defendant’s control over plaintiff’s work schedule; and (3) the fact that the parties did not contract for the performance of a ‘specific piece’ of work. Circumstances cited as supportive of the conclusion that plaintiff is an independent contractor were: (1) plaintiff was paid on the basis of the amount of timber hauled rather than an established wage; (2) plaintiff furnished and maintained his own equipment; (3) plaintiff was allowed to and at times did both employ assistants and work for other logging companies.

3 Chief Judge Schwab’s concurrence to the Court of Appeals opinion in this case stated that ‘whether plaintiff is an employee or an independent contractor is for the trier of fact to decide.’ There appears to be Oregon authority supporting this proposition. See, Butts v. State Ind. Acc. Com., 193 Or. 417, 239 P.2d 238 (1951); and Wallowa Valley Stages v. The Oregonian Pub. Co., 235 Or. 594, 386 P.2d 430 (1963) (vicarious liability). It is true that there may be questions concerning facts surrounding the arrangement between the parties which would be relevant in determining control. In this sense, the question is one for the trier of fact. However, where there is no dispute as to what the arrangement is, the question of employee or independent contractor status is one of law for the court. To the extent that the Butts and Oregonian cases can be interpreted as recognizing a contrary principle, they must be repudiated.


6 ‘As an integrated system of social welfare legislation, workmen’s compensation embodies two principal and unique social policy purposes. These can be characterized as the social bargain and social insurance purposes. The first of these is related to the immediate impetus for the adoption of this legislation. The impetus, of course, was to alleviate the plight of injured workers who often suffered without remedy under the common law. This purpose has been characterized as ‘a socially-enforced bargain which compels an employee to give up his valuable right to sue in the courts for full recovery of damages * * * in return for a certain, but
limited, award. It compels the employer to give up his right to assert common-law defenses in return for assurance that the amount of recovery by the employee will be limited.’ (Quoting from Van Horn v. IAC, 219 Cal.App.2d 457, 467, 33 Cal.Rptr. 169, 174 (1963)). An important corollary to the social bargain thus struck was that its terms are to be construed liberally with a view toward extending its benefits.

‘The second principal social policy purpose was the social insurance form through which workmen’s compensation was to operate. (Fn. omitted) This would be its risk distribution aspect. The fact that modern industrial life will inevitably generate work-related injuries and possibly death is one of the major premises underlying workmen’s compensation. * * * Therefore, the cost of these injuries and fatalities is to be distributed throughout society and viewed as a cost of doing business.’ Note, Employee or Independent Contractor: The Need For a Reassessment of the Standard Used Under California Workmen’s Compensation, 10 U.San.Fran.L.Rev. 133, 136-37 (1975).

See also, Note, 37 Or.L.Rev. 88, 89 (1957): ‘Too frequently it appears that the courts, in attempting to determine whether the employer did or did not have the ‘right to control,’ have failed to take account of the societal considerations which call for the differentiation between a servant and an independent contractor, and have made the search for ‘right to control’ the sole consideration. This is another example of mechanical jurisprudence.’

7 1A Larson Workmen’s Compensation Law s 43.52. See also, Judge Conford’s dissent in Marcus v. Eastern Agricultural Ass’n., Inc., 58 N.J.Super. 584, 596, 157 A.2d 3, 13 (Super.Ct.App.Div.1959): ‘The test in the type of case before us here must, therefore, be essentially an economic and functional one * * *. (T)he extent of economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business.’ On appeal, Judge Conford’s dissent was adopted by the New Jersey Supreme Court in 32 N.J. 460, 161 A.2d 247 (1960).

See also Justice Smith’s dissenting opinion in Powell v. Appeal Board of Michigan Emp. Sec’n., 345 Mich. 455, 75 N.W.2d 875, 886 (1956): ‘The test employed is one of economic reality. It looks at the task performed, whether or not it is a part of a larger common task, “a contribution to the accomplishment of a common objective.” Rutherford Food Corp. v. McComb, 331 U.S. 722, 725, 67 S.Ct. 1473, 1475, 91 L.Ed. 1772, quoting, Walling v. Rutherford Food Corp., 10 Cir., 156 F.2d 513, 516-517. The test is far from the common-law test of control, since “the Act concerns itself with the correction of economic evils through remedies which were unknown at common law.” * * * The test * * * looks at the workmen, to see whether or not their work can be characterized ‘as a part of the integrated unit of production’, * * * and whether ‘the work done, in its essence, follows the usual path of an employee.’ * * * In applying such test, control is only one of many factors to be considered. The ultimate question is whether or not the relationship is of the type to be protected.’

8 Cf., Note, 10 U. of San.Fran.L.Rev. 133, 153 (1975). But see, 1A Larson’s Workmen’s Compensation Law s 43.41, discussing the influence of ‘the relative nature of work’ test upon the weight accorded the various factors of the common-law test in a particular case.

9 Larson shows how courts in other states purporting to be applying the control test have, in fact, injected sub silentio, the ‘nature of the work’ test to effectuate the purposes of the Compensation Act. 1A Larson’s Workmen’s Compensation Law s 43.54.


11 We are concerned here only with the relationship between parties where the employer is carrying on a business which is within the coverage of the Workmen’s Compensation Act; we do not purport to consider the tests to be applied where one not engaged in such a business (e.g., a house owner) employs someone to perform work on his premises.
IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARC BOVET,
JAYCE BOVET,
and DEPARTMENT OF CONSUMER AND BUSINESS SERVICES,

Petitioners,

v.

GERRITT T. LAW,

Respondent.

04-04262; A128373

Judicial Review from Department of Consumer and Business Services.

Argued and submitted July 13, 2006.

Benjamin M. Bloom argued the cause for petitioners Marc and Jayce Bovet. With him on the briefs was Hornecker, Cowling, Hassen & Heysell, L.L.P.

Judy C. Lucas, Assistant Attorney General, argued the cause for petitioner Department of Consumer and Business Services. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Richard D. Adams argued the cause for respondent. With him on the brief was David, Adams, Freudenberg, Day & Galli.

Before Landau, Presiding Judge, and Schuman* and Ortega, Judges.

ORTEGA, J.

Reversed.

*Schuman, J., vice Ceniceros, S. J.

ORTEGA, J.

Marc Bovet and Jayce Bovet (the Bovets) and the Department of Consumer and Business Services (DCBS) petition for judicial review of a final order that set aside a nonsubjectivity determination of the Workers’ Compensation Division (WCD) based on a finding by an
administrative law judge (ALJ) that claimant is a subject worker entitled to workers' compensation coverage for an injury sustained while performing work for the Bovets. We review the pertinent factual findings for substantial evidence and the legal conclusions for errors of law, *Oregon Drywall Systems v. Natl. Council on Comp. Ins.*, 153 Or App 662, 666, 958 P2d 195 (1998).

Claimant bears the burden of establishing the existence of an employment relationship subject to the Workers' Compensation Law. 186 Or App 273, 277, 62 P3d 870 (2003). We conclude that, under the Supreme Court's interpretation of the applicable statute, which is part of the statute as though written into it at the time of enactment, *Walther v. SAIF*, 312 Or 147, 149, 817 P2d 292 (1991), the ALJ erred, as a matter of law. We therefore reverse.

The following facts are undisputed. The Bovets purchased a 77-acre parcel of land in Josephine County on which they were building a home. That home construction project was the context for the work that claimant performed. Although in the past Mr. Bovet has earned income from selling real property holdings that he has improved, he testified that he is a search and rescue coordinator and an artist, and that he has independent means of support and lives primarily off personal and family investments. He does not consider himself to be a real estate developer and has not made a business out of buying, fixing up, and selling homes for a profit.

The Bovets hired various independent contractors to work on the Josephine County home, where, according to Mr. Bovet, the family planned to live for the foreseeable future. In November 2003, claimant, then age 18, met with the Bovets while he was on the property working for a contractor whom they had hired to do bulldozer work. Following that meeting, the Bovets hired claimant to install shelves in the new barn and later to help one of the contractors build a culvert. After that, claimant proposed a written "Forest Cleanup Contract" to the Bovets under which he would "provide hard work" and the necessary tools to do forest cleanup on the property for $10 an hour. The Bovets agreed, and claimant began work.

Claimant set his own hours and did not check in or out. He presented his hours to Mr. Bovet once a week and was paid in cash. Generally Mr. Bovet told claimant where to work and what to do, and claimant worked at several locations around the property. One afternoon, a contractor asked Mr. Bovet if claimant could work near him clearing brush for the proposed garage site, and he agreed. The next day a snag fell off a burn pile where claimant was working, and he suffered a scalp laceration and fractured his spine in two places.

Claimant filed a workers' compensation claim for his injuries, and the WCD concluded that claimant was not a worker subject to the Workers' Compensation Law. When claimant challenged that determination, however, the ALJ set it aside. The ALJ explained that, even though the evidence was inconclusive regarding whether the Bovets had a right to control claimant's work so as to bring him within the definition of a worker under ORS 656.005(30), the nature of claimant's work brought him within that definition. The ALJ also rejected the
Bovets' contention that claimant was a nonsubject worker under the householder exemption of ORS 656.027(2).

On judicial review, both the Bovets and DCBS challenge the ALJ's determinations that (a) claimant was a worker under ORS 656.005(30), and (b) claimant did not fit within the householder exemption in ORS 656.027(2). The question whether claimant is subject to the Workers' Compensation Law first requires a determination of whether he was a worker under ORS 656.005(30). If he was not, the inquiry ends there. A determination that he was a worker triggers analysis of whether he was a nonsubject worker under ORS 656.027 (providing that all workers are subject to ORS chapter 656 except those nonsubject workers described therein, including those fitting the householder exemption addressed by the ALJ in this case). Because we agree that claimant did not meet the definition of a worker under ORS 656.005(30), we reverse without reaching petitioners' challenge to the ALJ's determination regarding application of the householder exemption under ORS 656.027(2).

ORS 656.005(30) defines a "[w]orker" as "any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *." In determining whether a claimant meets that definition, the Supreme Court has held that we must analyze the degree to which the employer exercises a right to control the claimant's work (the "right to control" test) and also the nature of the claimant's work for the employer (the "nature of the work" test). Rubalcaba v. Nagaki Farms, Inc., 333 Or 614, 619-27, 43 P3d 1106 (2002). The two tests are to be applied together: "[I]n situations in which there is some evidence suggesting that an employer retained the right to control the method and details of a claimant's work, a conclusion about the claimant's status depends on the analytical factors relevant to both tests." Id. at 627.

We agree with the ALJ that analysis of the Bovets' right to control claimant's work here is inconclusive. On the one hand, claimant provided his own tools, set his own work hours, and performed the work in accordance with a contract that he proposed, all factors that we have considered to be indicative of a nonemployment relationship. See Oregon Drywall Systems, 153 Or App at 667-68. On the other hand, claimant was paid hourly (which suggests a right to control), and the ALJ found, and the parties do not dispute, that the Bovets retained the right to terminate claimant's employment without any contractual limitation and monitored the means, manner, and method by which claimant completed his work by telling him where to work and what to do on particular days. See id.

Control, the Supreme Court has noted, is the essential ingredient in determining who is a "worker" for purposes of the Worker's Compensation Act. Woody v. Waibel, 276 Or 189, 196, 554 P2d 492 (1976). However, where, as here, an employer has the right to control a claimant's performance in some respects but not others, it is appropriate to consider whether the "relative nature of the work" brings claimant's work within the purposes of the act--that is, we apply what has come to be known as the "nature of the work" test. See Rubalcaba, 333 Or at 627; Woody, 276 Or at 196-97. The Supreme Court has described the basis for that analysis:
"Starting with the premise that compensation legislation is based upon the theory that the cost of industrial accidents should be borne by the consumer as part of the cost of the product, * * *

"* * * [i]t follows that any worker whose services form a regular and continuing part of the cost of [a] product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the presumptive area of intended protection. * * * 1A Larson's Workmen's Compensation Law § 43.51 (1973)."

*Woody*, 276 Or at 194-95. The nature of the work test, then, is directly linked to the underlying policy of distributing the costs of doing business to society.

The ALJ applied the nature of the work test without recognizing that the very premise of the test--proper distribution of the costs of doing business--does not exist here, where the Bovets were not engaged in a business. As the Supreme Court explained in *Woody*:

"We are concerned here only with the relationship between parties where the employer is carrying on a business which is within the coverage of the Work[ers'] Compensation Act; we do not purport to consider the tests to be applied where one not engaged in such business (e.g., a house owner) employs someone to perform work on his premises."

*Id.* at 197 n 11.

Although the ALJ acknowledged that the Bovets "do not have a business per se," he emphasized that they have earned a profit from improving and selling their real property in the past. However, there is no evidence that they intended to do so here and, without such evidence, there is no basis for applying the nature of the work test. Accordingly, the ALJ erred in concluding that the nature of the work test "tips the balance towards the conclusion that claimant was a worker for the Bovets under ORS 656.005(30)." Rather, because the evidence is inconclusive under the right to control test and the nature of the work test is inapplicable to this situation, claimant failed to carry his burden of establishing that he is a worker within the meaning of the statute.

Reversed.

1. DCBS seeks judicial review of its own order pursuant to ORS 656.740(5), which provides, in part:

"Notwithstanding ORS 183.315(1), the issuance of nonsubjectivity determinations, orders declaring a person to be a noncomplying employer or the assessment of civil penalties pursuant to this chapter, the conduct of hearings and the judicial review thereof shall be as provided in ORS chapter 183, except that:
"(a) The order of an Administrative Law Judge in a contested case shall be deemed to be a final order of the director.

"(b) The director shall have the same right to judicial review of the order of an Administrative Law Judge as any person who is adversely affected or aggrieved by such final order."

2. ORS 656.027(2) provides:

"A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker."

3. ORS 656.005(30) was renumbered from ORS 656.005(28) in 1995. Or Laws 1995, ch 332, § 1. The relevant text was not altered. Some of the cases discussed in this opinion address the prior version of the statute.

4. That test requires consideration, first, of "the character of the [claimant's] work or business--its skill, status as a separate enterprise, and the extent to which it may be expected to carry the burden of its accidents itself[,]" and, second, of "the relation of a [claimant's] work to the employer's business--how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether it is of sufficient duration to be the hiring of continuing services rather than contracting for a particular job." Stamp v. DCBS, 169 Or App 354, 358-59, 9 P3d 729 (2000). In concluding that the nature of the work "tip[ped] the balance" in favor of claimant, the ALJ emphasized that "[i]t is hard to expect an unskilled laborer, an unemployed teenager no less, to carry the burden of work accidents * * *."
This workmen's compensation appeal involves three questions: (1) Was respondent an employer subject to the Act? ORS 656.002(14) and 656.023. (2) Was claimant a subject workman? ORS 656.002(22) and 656.027. (3) Was claimant an employe at the time of her injury?

Claimant was injured when she was stepped on by a horse at Kennedy's Riding Academy on July 2, 1972. Mr. Kennedy has operated this business for a number of years and has usually been assisted by various teenage girls who do chores for him. Claimant was one of those girls.

Mr. Kennedy testified that he did not consider these girls to be employes. However, he paid at least one of them (often a different girl each day) $2 at the end of the day and also provided free lunch for all the girls who assisted that day. The girls who assisted were also allowed to ride the horses for free (customers were charged $1.50 per hour). Often more than one girl would work, even though only one girl ordinarily received payment for that day. On July 1 claimant performed services for Mr. Kennedy and received $2 in pay, in addition to lunch and free rides. The following day, July 2, claimant again was present at Kennedy's for work, but was not paid. On this day claimant was injured.

The hearing officer found that Mr. Kennedy was a noncomplying employer, ORS 656.002(16), i.e., that he was a subject employer under ORS 656.023, but that he had not complied with the provisions of the Workmen's Compensation Act. The hearing officer also found that claimant was employed by Mr. Kennedy and that she suffered a compensable injury while so employed. The Workmen's Compensation Board affirmed the hearing officer as to Mr. Kennedy's status as a noncomplying employer. However, the Board reversed the order granting claimant's benefits, ruling that claimant was not employed on the day she was injured.
Claimant appealed to the circuit court from that portion of the Board's order which held that she was not an employe on the day of her injury. There was no cross-appeal by Mr. Kennedy as to that portion of the order which held that he was a noncomplying employer. The circuit court found that claimant was an employe at the time of her injury and therefore reinstated the order of the hearing officer.

Mr. Kennedy's notice of appeal to this court states only that he "will urge the points that the Circuit Court erred in finding that claimant was an employee of Kennedy's Riding Academy at the time of her injury; and further, the Circuit Court's finding that the claimant did at such time suffer a compensable injury * * *." However, Mr. Kennedy, in his brief and on oral argument before this court, now argues also that the hearing officer and the Board were in error in finding that Kennedy was a noncomplying employer *452 and that we should reverse because Kennedy is not a subject employer.

ORS 656.740 sets forth the procedures for challenging an order declaring an employer to be a noncomplying employer. Subsection (4) provides that, notwithstanding ORS 183.315, judicial review of such an order shall be as provided in ORS 183.310 to 183.500. In this case, the alleged employer, Kennedy's Riding Academy, did not seek judicial review of the Board's order declaring him to be a noncomplying employer within the statutory time limit prescribed in ORS 183.480. Therefore, Mr. Kennedy is precluded from raising this issue in the present appeal. Cf., City of Idanha v. Consumers Power, 13 Or. App. 431, 434, 509 P.2d 1226, Sup.Ct. review denied (1973); Holmes v. Morgan, 10 Or. App. 242, 248, 498 P.2d 830, Sup.Ct. review denied (1972).

An employer is

"* * * any person * * * who contracts to pay a remuneration for and secures the right to direct and control the services of any person." ORS 656.002(14).

Any employer who employs one or more "subject workmen" in this state is a subject employer, ORS 656.023, and must therefore comply with the provisions of the Workmen's Compensation Act.

A workman is

"* * * any person, including a minor whether lawfully or unlawfully employed, who engages to furnish his services for remuneration, subject to the direction and control of an employer * * *." ORS 656.002(22).

Mr. Kennedy argues that the teenage girls who do chores for him are not "subject workmen," ORS 656.027, because the work they do is casual labor in that his total labor costs in a 30-day period do not exceed $100. ORS 656.027(3). Therefore, he argues claimant was not an employe.
ORS 656.027 provides that all workmen are subject to the Act except for certain described nonsubject workmen, including:

"* * *
(3) A workman whose employment is casual and either: "(a) The employment is not in the course of the trade, business or profession of his employer; or "(b) The employment is in the course of the trade, business or profession of a nonsubject employer. For the purpose of this subsection, 'casual' refers only to employments where the work in any 30-day period, without regard to the number of workmen employed, involves a total labor cost of less than $100. "* * *"[1]

The record reveals that the girls who did chores for Mr. Kennedy worked in and around the stable with the horses and with customers who came to ride the horses. This work is clearly within the course of Mr. Kennedy's business of providing horses to ride for a fee. ORS 656.027(3)(a). Thus the girls are subject workmen, regardless of whether Kennedy's total labor costs are less than $100 in a given 30-day period. See, Bauer v. Richardson, 3 Or. App. 578, 475 P.2d 995 (1970).

Mr. Kennedy further argues that the girls are not employes because he has no contract of hire with any of them. He defines the arrangement with the girls as more in the nature of a gratuitous relationship, based on the contention that he allows the girls to ride his horses and buys them lunch in return for a minimal amount of work.

This argument breaks down upon an examination of the facts. The girls clearly agreed to furnish their services to Mr. Kennedy and he in turn accepted those services. The girls received their lunches, free use of the horses for riding and an occasional payment of a couple of dollars. This is sufficient as remuneration. ORS 656.002(21); 1A Larson, Workmen's Compensation Law, § 47.43 (1973). It is also apparent that the girls were subject to the direction and control of Mr. Kennedy over the performance of their services and further that he regularly exercised that right.

The above is ample evidence that the relationship between Mr. Kennedy and the girls is that of employer-employe. ORS 656.002(14) and (22); Bauer v. Richardson, supra; see, Oremus v. Ore. Pub. Co./Leibrand, 11 Or. App. 444, 503 P.2d 722 (1972), Sup.Ct. review denied (1973).

Whether claimant was an employe is a mixed question of law and fact. As the circuit court pointed out, Mr. Kennedy regarded claimant as an employe on the Workmen's Compensation Board Form 801, Report of Occupational Injury or Disease, which he filled out concerning claimant's injury. However he stated that claimant was not employed on the day she was injured. The day before her injury claimant had worked for Mr. Kennedy and had been paid $2 plus lunch and transportation. It is thus clear that claimant was an employe.

Finally, was claimant employed on the day she was injured? The testimony concerning this question is conflicting as to whether claimant was asked to work or was granted permission
to work, or was even working. She was, however, on the premises and did perform some of the chores normally done by the girls when they worked.

The determination of this question largely depends upon the credibility of the witnesses. In such a situation, the opinion of the hearing officer, who had the opportunity to observe and hear the witnesses, though not binding, is entitled to considerable weight. Fredrickson v. Grandma Cookie Co., 13 Or. App. 334, 509 P.2d 1213 (1973); Etchison v. SAIF, 8 Or. App. 395, 494 P.2d 455 (1972). In this regard we agree with the circuit court which stated in its opinion and decision:

"* * * If that evidence offered on behalf of claimant is believed, it is sufficient to support her contention that she was an employee. The Hearing Officer had the benefit of actually hearing and observing the witnesses' testimony. His opinion expressly indicates he disbelieved some of the employer's testimony. The Court finds no reason for substituting either the Board's or its own evaluation of the testimony for that of the Hearing Officer who originally heard it."

We therefore find that claimant was an employe of the Kennedy Riding Academy and that she suffered a compensable injury while so employed.

Affirmed.

NOTES

[1] ORS 656.027(3)(b) is not applicable since Mr. Kennedy did not previously seek review of the order declaring him to be a noncomplying, hence subject, employer. See, ORS 656.740.

Redman Industries, Inc. v. Lang

921 P.2d 992 (1996)

142 Or. App. 404

In the Matter of the Compensation of Perry A. Lang, Claimant. REDMAN INDUSTRIES, INC., and Aig Claim Services, Petitioners, v. Perry A. LANG, Respondent.

94-11757; CA A89422.

Court of Appeals of Oregon.

Argued and Submitted January 17, 1996.

Decided July 31, 1996.
Employer seeks review of an order of the Workers' Compensation Board (Board) holding that claimant suffered a compensable injury when he was struck by a coworker who was angered by claimant's derogatory racial remarks. ORS 656.005(7)(a). We reverse.

We take the facts as found by the Administrative Law Judge (ALJ), which were adopted by the Board and are supported by substantial evidence. ORS 183.482(8)(c). Claimant, a Caucasian male, worked at employer's plant with Frazier, an African-American, male coworker. Claimant installed windows on manufactured homes, and Frazier installed doors. On August 3 or 4, 1994, claimant jokingly called Frazier a "watermelon," which angered Frazier. On August 4, referring to that or a similar remark, Frazier told claimant "don't be playing with me like that." The next morning, claimant referred to Frazier as "watermelon" and, less than an hour later, as "buckwheat," "Kentucky Fried Chicken," and "watermelon eatin' fool." Although Frazier knew claimant was trying to joke with him, Frazier became angry and called claimant "cracker" and another name, possibly "honkey."

Frazier remained very upset by claimant's remarks. Within a few minutes, another worker called Frazier a Spanish name that Frazier believed was a racial slur. Frazier struck that worker. Moments later Frazier saw claimant talking with an inspector. Assuming he would lose his job for striking the other employee, Frazier struck claimant at least twice. Frazier asked claimant, "Who's a Toby now?"

Claimant received emergency medical treatment and filed a workers' compensation claim, which employer denied. Claimant requested a hearing, and the ALJ ruled that claimant's injury "arose out of" his employment and was compensable. The Board adopted and affirmed the ALJ's order. The central issue on review is whether claimant's injury "arose out of" his employment.

Claimant has the burden of proving his injury is compensable. ORS 656.266.

"A compensable injury' is an accidental injury ** arising out of and in the course of employment requiring medical services or resulting in disability or death[.]" ORS 656.005(7)(a) (emphasis supplied).

In determining whether an injury is compensable under ORS 656.005(7)(a), the Oregon Supreme Court has adopted a "unitary approach," in which "arising out of" and "in the course of" are two elements of a single inquiry, i.e. "whether the relationship between the

"'[I]n the course of employment' concerns the time, place, and circumstances of the injury." Norpac, 318 Or. at 366, 867 P.2d 1373, citing Clark v. U.S. Plywood, 288 Or. 255, 260, 605 P.2d 265 (1980). Employer concedes that claimant's injury occurred "in the course of employment" because it happened on employer's premises, during work hours and on paid time. We accept that concession, and confine our analysis to whether the injury "arose out of" claimant's employment.

An injury "arises out of employment" when there is a causal connection between the injury and the employment. Norpac, 318 Or. at 368, 867 P.2d 1373.

"An employer * * * is not liable for any and all injuries to its employes irrespective of their cause, and the fact that an employe is injured on the premises during working hours does not of itself establish a compensable injury. The employe must show a causal link between the occurrence of the injury and a risk connected with his or her employment." Phil A. Livesley Co. v. Russ, 296 Or. 25, 29, 672 P.2d 337 (1983). (Emphasis supplied).

Under the risk factor, we must determine "whether the injury had its origin in a risk connected with the employment[.]" 296 Or. at 32, 672 P.2d 337. The question here is whether the risk of being assaulted by a co-worker for using racially derogatory remarks is sufficiently connected with claimant's employment. For the following reasons, we hold that it is not.

In Barkley v. Corrections Div., 111 Or. App. 48, 825 P.2d 291 (1992), the plaintiff employee,[1] a convenience store cashier working alone at night, was sexually assaulted by a prison inmate on leave. Id. at 50, 825 P.2d *995 291. We held that the plaintiff's injury arose out of her employment under ORS 656.005(7)(a) because there "was a sufficient relationship between the assault and a risk connected with plaintiff's employment[.]" Id. at 53, 825 P.2d 291.

"Plaintiff's position as a cashier subjected her to unavoidable and indiscriminate contact with the general public. Behavior of store customers was a hazard of her employment. Her work environment increased her exposure to people who might commit violent crimes, and especially to those who have a history of attacking convenience store clerks." Id. at 52-53, 825 P.2d 291.

In Carr v. U.S. West Direct Co., 98 Or. App. 30, 779 P.2d 154, rev. den. 308 Or. 608, 784 P.2d 1101 (1989), we held that injuries suffered by an employee plaintiff[2] who was sexually harassed, assaulted and eventually raped by her supervisor did not arise out of her employment, because there was nothing about the nature of her job, or her job environment,
that "created or enhanced" the risk of assault. Moreover, the attack was not provoked by anything related to her employment. Id. at 32, 35, 779 P.2d 154.

Here, as in Carr, and unlike Barkley, there was nothing about the nature of claimant's job as a window-installer that "created or enhanced" the risk of assault by a co-worker. Furthermore, although an injury may arise out of employment when it stems from a work-related dispute, Youngren v. Weyerhaeuser, 41 Or.App. 333, 597 P.2d 1302 (1979), the dispute here was not work-related.

In Youngren, the claimant's co-worker boarded up a work exit, making the claimant's job more difficult, and seemed prepared to use physical violence if claimant tried to remove the barrier. 41 Or.App. at 336, 597 P.2d 1302. In lieu of striking his co-worker, the frustrated claimant struck a metal drum several times, breaking a bone in his hand. Id. at 335, 597 P.2d 1302. In holding the injury compensable, we agreed with the Board, which stated:

"'[T]he fact that claimant's employment required him to work with this co-employee and that such employment * * * [might give] rise to circumstances * * * resulting in a dispute between claimant and his co-employee over a work-related matter occurring on the employer's premises would satisfy the test that the injury 'arose out of' the claimant's employment.'" Id. at 336, 597 P.2d 1302 (emphasis supplied).

See also SAIF v. Barajas, 107 Or.App. 73, 76-77, 810 P.2d 1316 (1991) (implying that injury from co-worker stabbing arose out of claimant's employment where dispute stemmed from assailant's distress over demotion and the fact that he was no longer claimant's supervisor).

Although day-to-day friction may provide the causal connection between a claimant's employment and a co-worker's assault, disputes resulting from that friction must arise from a work-related matter.[3] In Youngren, the quarrel was based on the claimant's use of a work exit and in Barajas it centered on the assailant's recent demotion. Here, the dispute arose from claimant's use of racially derogatory remarks in an attempt to "joke" with a co-worker. The resulting assault was therefore not "work-related" but pertained instead to claimant's personal relationship with that co-worker. See Felts v. Robinson, 23 Or.App. 126, 133, 541 P.2d 506 (1975) (on-the-job assault of employee stemming from her from personal relationship with attacker was not connected with her employment). Claimant's injuries therefore did not "arise out of" his employment.[4]

Reversed and remanded.

NOTES

[1] Although Barkley was a civil action, we were nonetheless required to determine whether the plaintiff's injury was compensable under the Workers' Compensation Act, ORS 656.005(7)(a), and therefore whether her action was barred by ORS 30.265(3)(a). 111 Or.App. at 51, 825 P.2d 291.
[2] As in Barkley, we were required in Carr to determine whether plaintiff's injury was compensable under ORS 656.005(7)(a), and therefore whether her civil action was barred by ORS 656.018. 98 Or.App. at 34, 779 P.2d 154.

[3] Claimant nonetheless urges us to hold an injury compensable where the injured worker and the assailant co-worker are brought together solely through their employment, "even if the subject of the dispute is unrelated to the work." However, "[t]he fact that the employment placed plaintiff and [her assailant] together is not, in itself, enough" to establish a work-connection. Carr, 98 Or.App. at 35, 779 P.2d 154.

[4] In holding otherwise, the Board erroneously relied on McLeod v. Tecorp International, Ltd., 318 Or. 208, 865 P.2d 1283 (1993). The Supreme Court there construed the term "arising out of * * * employment" as used in an insurance policy. Responding to our conclusion that "the independent actions of an individual co-worker * * * do not necessarily 'arise' out of employment," the Supreme Court stated "[t]hat may be true as concerns the individual co-worker, but as to the victimized employee, the injury arises out of the employment." Id. at 217 n. 6, 865 P.2d 1283. However, the court specifically rejected the notion that that language had the same meaning as in ORS 656.005(7)(a). McLeod therefore does not apply.

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Week 5 – September 26, 2016

**Jordan v. Western Electric Co.**

463 P.2d 598 (1970)


Court of Appeals of Oregon, In Banc.

Argued and Submitted November 18, 1969.


*599 Robert A. Bennett, Portland, argued the cause for appellant. With him on the briefs were Willner, Bennett & Leonard, Portland.

Howard M. Feuerstein, Portland, argued the cause for respondent. With him on the brief were Davies, Biggs, Strayer, Stoel & Boley, Portland.

LANGTRY, Judge.
This appeal presents a first-impression question under the Oregon Workmen's Compensation Law: whether an employe who is injured off the employer's premises during a paid coffee break has suffered an injury "arising out of and in the course of employment." ORS 656.002(6).

Claimant is employed by Western Electric Co., Inc., as a telephone installer. On the day he was injured he had been transferred from day to night shift, but he had, on previous occasions, been on the night shift. The applicable union contract provides for two paid 15-minute relief periods during each shift. During day shifts, employes used a company-operated restaurant for these relief periods, but during the night shift the restaurant was closed. Coin operated canteen facilities, including coffee, were available on the premises, but most of the night employes and their supervisor customarily went for coffee to the closest restaurant, which was located about two and one-half blocks away.

The claimant, at the supervisor's suggestion, accompanied his superior and all the other night employes, except one, to this restaurant for the coffee break. During the return claimant slipped on a curb and was injured.

The claim was filed under the Workmen's Compensation Law and denied by the hearing officer, the Workmen's Compensation Board, and the circuit court, successively.

"Generally, injuries sustained by employees when going to or coming from their regular place of work are not deemed to arise out of and in the course of their employment. Philpott v. State Ind. Acc. Com., 234 Or. 37, 379 P.2d 1010 * * *." White v. State Industrial Accident Comm., 236 Or. 444, 447, 389 P.2d 310 (1964).

But in Kowcun v. Bybee, 182 Or. 271, at Page 279, 186 P.2d 790 at Page 794 (1947), the same court said:

"* * * [W]e do not believe that the Workmen's Compensation Law selects the threshold of the factory as the dividing line which decides whether or not an injury happened 'out of and in the course of' an employment * * * courts consider the nature, conditions, obligations and incidents of employment * * *"

In Workmen Compensation Practice in Oregon 64-65, § 7.4 (published by the Oregon State Bar Committee on Continuing Legal Education 1968), it is said:

"No satisfactory formula has been devised to determine whether the injury-producing activity arises out of and in the course of employment. The following *600 factors, however, have been considered: "a) Whether the activity was for the benefit of the employer, Ramseth v. Maycock and SIAC, 209 Or. 66, 75-77, 304 P.2d 415 (1956); "b) Whether the activity was contemplated by the employer and employee either at the time of hiring or later, Ramseth v. Maycock and SIAC, supra; "c) Whether the activity was an ordinary risk of, and incidental to, the employment, Stuhr v. SIAC, 186 Or 629, 636-637, 208 P.2d 450 (1949) and Brazeale v. SIAC, 190 Or 565, 577, 227 P.2d 804 (1951); "d) Whether the employee
was paid for the activity, Adams v. SCD, 86 Or Adv Sh 597, ___ Or ___, 439 P.2d 628 (1968); "e) Whether the activity was on the employer's premises, Adams v. SCD, supra; "f) Whether the activity was directed by or acquiesced in by the employer, Munson v. SIAC, 142 Or 252, 260, 20 P.2d 229 (1933); In re Jimmy E. Lynch, WCB No. 515 (1967); and Brazeale, supra; "g) Whether the employee was on a personal mission of his own, Holland v. Hartwig, 145 Or 6, 24 P.2d 1023 (1933)."

The hearing officer, the Workmen's Compensation Board, which split 2 to 1 in its decision, and the circuit court each recognized that good reason, besides precedents from other states, would sustain a decision either way. We agree that it is a borderline case. We have the benefit of excellent briefing of the case, and the opinions of the lower tribunals reflect the same briefing.

As noted, cases from other jurisdictions support different results,[1] and the reasoning in them is the basis for comments on the applicable rules found in 1 Larson's Workmen's Compensation Law 245-49, § 15.54 (1968):

"Now that the coffee break has become a fixture of many kinds of employment, close questions continue to arise on the compensability of injuries occurring off the premises during rest periods or coffee breaks of various durations and subject to various conditions. It is clear that one cannot announce an all-purpose `coffee break rule,' since there are too many variables that could affect the result. ** Variables may involve the question whether the interval *601 is a right fixed by the employment contract, whether it is a paid interval, and whether there are restrictions on where the employee can go during the break. "The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval, can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment **. ** "If the employees during the coffee break are expected to go to a particular off-premises place, the element of continued control is adequately supplied. In Sweet v. Kolosky [259 Minn 253, 106 NW 2d 908 (1960)], the claimant fell on a public sidewalk between the place of employment and the drugstore where all employees were permitted, by their employment agreement, to go for a coffee break because of lack of facilities on the premises. Compensation was awarded."

Although the facts are not analagous, we are persuaded by the principles enunciated by Mr. Justice Burke in Cardoza, cited in Footnote 1, supra, recently decided by the California Supreme Court. There, the workman claimant on a hot day during a paid coffee break went swimming in an off-premises canal and was injured. The injury was held by the Board to have arisen out of and in the course of employment because: (1) it was on paid time; (2) the foreman knew about it, and implied it should be kept quiet but did not forbid it; (3) other employees had been in this canal on employer time before and it was impliedly consented to, and (4) it was a benefit to the employer because it refreshed the employee and made him more useful on the job. Mr. Justice Burke's opinion affirmed the Board, saying the holding was:
"* * * in accord with the 'personal comfort' doctrine, under which the course of employment is not consider broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient performance by the employee. On the other hand, acts which are found to be departures effecting a temporary abandonment of employment are not protected. (Comment, Workmen's Compensation: The Personal Comfort Doctrine (1960) Wis.L.Rev. 91 * * *." 67 Cal.2d at 928, 64 Cal. Rptr. at 325, 434 P.2d at 621.

The court then said:

"* * * [I]n the light of the established principle of liberal construction in favor of the employee [citing cases] the award * * * should not be disturbed." 67 Cal.2d at 928, 64 Cal. Rptr. at 325, 434 P.2d at 621.

Livingston v. State Ind. Acc. Comm., 200 Or. 468, 472-73, 266 P.2d 684 (1954), was a case in which the claimant's decedent was killed while en route to his job site. The court emphasized that the injury occurred during paid time, and held that compensation must be awarded, saying:

"This court has uniformly held that the provisions of the Workmen's Compensation Law should be interpreted liberally in favor of the workmen, and particularly should this be so when we are confronted with a 'borderline case'. In the interests of justice, and to carry out the humane purposes of the Compensation Law, all reasonable doubts should be resolved in favor of the workman. "* * * "We hold that if an employer pays for the employe's time during his travel from the job site to his home, the relationship of the employer and employe continues * * *.""

Applying the rules and tests reviewed above to the case at bar, we consider the claimant's activity when he was injured was for the benefit of the employer as well as himself; it was contemplated by the employer and claimant under the contract of employment; it was acquiesced in by the employer; there was an element of *602 employer control exercised because the supervisor accompanied the employes; and the claimant was paid for the time involved. The claimant was not on a personal mission. These facts taken together outweigh the presence of canteen facilities on the premises and the fact of claimant's being off the premises and not performing the regular function of his job.

Reversed and remanded for further proceedings in accordance with this opinion.

NOTES

Cases which disallow recovery where the employee was doing a personal errand on paid coffee-break time, include Balsam v. New York State Division of Employment, 24 A.D.2d 802, 263 N.Y.S.2d 849 (1965); Glens Falls Ins. Co. of Glens Falls, N.Y. v. Anderson, 280 Ala. 626, 197 So.2d 276 (1967); Kunce v. Junge Baking Company, 432 S.W.2d 602 (Mo. Ct. App. 1968). Among other cases which disallow claims are: Greenfield v. Mfrs. Cas. Co., 198 Tenn. 452, 281 S.W.2d 47 (1955) (employe had evening meal paid for because she was to return for evening work, but she was not paid for her time taken during the meal break); Schwab v. Department of ILHR, 40 Wis.2d 686, 162 N.W.2d 548 (1968) (employe attended an evening social function arranged and paid for by employer. No business was transacted and employe's time was not paid for.) Bronson v. Joyner's Silver & Electroplating, Inc., 268 Minn. 1, 127 N.W.2d 678 (1964) ("* * * they could eat on the premises or * * * eat elsewhere. The employer exercised no supervision or control * * * and they were not paid for their time * * * "). 268 Minn. at 2, 127 N.W.2d at 679.

Week 6 – October 3, 2016

MARSHALL v. BOB KIMMEL TRUCKING WCB 88-15509; CA A65603.
817 P.2d 1346 (1991)
109 Or.App. 101


Court of Appeals of Oregon.
Decided October 2, 1991.

Karsten H. Rasmussen, Eugene, argued the cause for petitioner. With him on the brief was Rasmussen & Henry, Eugene.
Adam T. Stamper, Medford, argued the cause for respondents. With him on the brief was Cowling & Heysell, Medford.
Before RICHARDSON, P.J., JOSEPH, C.J., and DEITS, J.

RICHARDSON, Presiding Judge.

Claimant petitions for review of an order of the Workers' Compensation Board that denied compensation for injuries received in a truck accident during the course of his employment. The Board adopted the referee's opinion. We reverse.

Claimant was injured in a single vehicle accident when the log truck that he was driving ran off the road and overturned. He recalls nothing between the time when he passed a scaling station and the time when he woke up in the wreckage of his truck one and one-half miles down the highway. He suffered a broken left hand, knee injuries and a concussion. At the hospital, claimant speculated that he had fainted due to a new medication that he was taking
for hypertension and headaches. A number of tests were conducted to determine whether claimant had indeed fainted and, if so, what might have been the cause. The tests were inconclusive.

The referee found that the cause of the accident is "unknown." That finding is supported by substantial evidence in the record. The referee denied compensation, concluding that claimant had not satisfied his burden of proving by a preponderance of the evidence that his injuries were work-connected, because he had not been able to rule out all possible idiopathic causes of the accident.1

Employer argued, and the referee apparently agreed, that previous cases involving injuries sustained in unexplained falls at workplaces were controlling. The cases cited in the referee's opinion all involved claimants who were injured when they fell, for unexplained reasons, from a standing position on the unobstructed floor of their workplace. The injuries sustained were caused solely by the impact of the claimant with the floor. See, e.g., Phil A. Livesley Co. v. Russ, 296 Or. 25, 27, 672 P.2d 337 (1983); McAdams v. SAIF, 66 Or.App. 415, 674 P.2d 80, rev. den. 296 Or. 638, 678 P.2d 739 (1984).

Larson distinguishes unexplained fall cases from cases in which, due to idiopathic causes, a claimant was injured while in a moving vehicle. He says:

"Awards are uniformly made when the employee's idiopathic loss of his faculties took place while he was in a moving vehicle * * *. It seems obvious that the obligations of their employment had put these employees in a position where the consequences of blacking out were markedly more dangerous than if they had not been so employed." 1 Larson, Workmen's Compensation Law 3-356, § 12.12 (1990). (Footnotes omitted.)

That distinction makes sense. Claimant's injuries are not the results of a fall but, rather, of the impact of his log truck with the side of a mountain. The risk of serious injury from any loss of consciousness, of idiopathic origin or not, was greatly increased by the fact that claimant was driving a log truck for his employer's benefit. We conclude that the injuries arose out of and in the course of his employment and are compensable.

Reversed and remanded for reconsideration.

FootNotes

1. An "idiopathic" cause is a pre-existing physical weakness or disease of the claimant which contributes to the accident. The rule that a claimant must eliminate idiopathic causes before injuries due to an unexplained fall will be compensable was explained in , (1983). In that case, the claimant broke his hip when he fell as he walked down a hallway at work. The employer conceded that the cause of the fall was not idiopathic. On review, the court held that, if the cause of a claimant's on-the-job injury is "unexplained," it is compensable, provided that the claimant "eliminates" idiopathic causes. Compensation was allowed. 296 Or. at 27,
In this workers' compensation case, employer instructed claimant to avoid heavy lifting on the job. Claimant was injured when he fell (or slipped) while carrying a heavy piece of equipment at a job site. The Workers' Compensation Board denied compensability, concluding that claimant's violation of his employer's instructions placed his injury outside the course and scope of claimant's employment. The Court of Appeals affirmed that decision, and claimant petitioned for review by this court. We allowed the petition to decide whether and when an employee's failure to follow an employer's instructions may bar...
compensation of an ensuing injury. We hold that such instructions did not create a per se bar to recovery here.

Claimant had a history of employment-related back injuries. He first injured his back in 1983, while employed by Tektronix, Inc. He received workers' compensation benefits for that injury. That claim was closed in 1986. Claimant reopened the claim on two separate occasions, claiming aggravation of the original injury.

In May 1992, claimant's present employer, Associated Plumbing, hired him to purchase and pick up equipment and other supplies, deliver parts to job sites, and to act as a plumber's assistant. In October 1992, he told his supervisor about his prior back injuries and his concerns that his back problems ultimately might pose a threat to his job. His supervisor told him at that time that lifting was not an essential part of his job and that he should not engage in heavy lifting in the future. The supervisor also instructed Associated Plumbing's main supplier that, when claimant came to pick up supplies, the supplier, rather than claimant, should load them onto Associated Plumbing's truck.

In March 1993, claimant was dispatched to a newly constructed restaurant to deliver some parts to a coworker who was installing plumbing there. When claimant arrived, his coworker was away at lunch. While claimant waited his coworker's return, an employee of a coffee company approached him and asked if he would assist in carrying a 200-pound espresso machine into the restaurant. Claimant agreed and, as indicated, suffered an injury to his back while engaged in that task.

SAIF, Associated Plumbing's insurer, denied responsibility for, and the compensability of, the injury. Shortly thereafter, Tektronix, apparently responding to the possibility that the injury might be deemed another *975 aggravation of claimant's 1983 injury at Tektronix, also issued a denial.

Claimant sought a hearing before a workers' compensation referee. After hearing the evidence, the referee concluded that, under the totality of the circumstances, claimant's back injury arose out of and in the course of his employment with Associated Plumbing and was, therefore, compensable. The referee stated in part:

"While the claimant's employer in this case would not have condoned the specific activity claimant was engaged in on the day of injury, it is clear from the testimony of claimant, Mr. Scovil and claimant's employer that it is a practice and custom among the trades to voluntarily assist each other when loading and unloading. Claimant was expected to receive help when he delivered heavy hot water heaters to the job sites and Mr. Scovil testified that he expected others to help him when he was delivering heavy equipment. "* * * * * "Given the testimony at hearing regarding the custom and practice of assisting noncoworkers, I conclude that the activity was an ordinary risk of claimant's employment[.]"
The referee also concluded that claimant's 1992 injury was distinct and separate from the 1983 Tektronix injury and, therefore, that Associated Plumbing, rather than Tektronix, was responsible.

On SAIF's request for review, the Workers' Compensation Board reversed. The Board first stated that Associated Plumbing had prohibited claimant from lifting heavy equipment and that claimant had violated that restriction by helping to carry the espresso machine. The Board then identified the following test, which is drawn from Professor Larson's treatise on workers' compensation law, as the appropriate rule for determining when an injury that results from an employee's failure to follow the employer's instructions is compensable:

"When misconduct involves a prohibited overstepping of the boundaries defining the ultimate work to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to the method of accomplishing that ultimate work, the act remains within the course of employment."

Arthur Larson, 1A Workmen's Compensation Law § 31.00, 6-10 (1995) (emphasis in original).

Applying that rule to its finding that claimant had violated his employer's no heavy lifting instruction, the Board concluded that claimant's injury occurred outside the course and scope of his employment and was, consequently, noncompensable:

"Here, * * *, the employer's prohibition against heavy lifting actually established the boundaries of claimant's ultimate work duties. That is, it contemplated that claimant would perform his usual duties with the exception of those activities that involved heavy lifting. On this record, we conclude that claimant's violation of the employer's heavy lifting rule involved a prohibited overstepping of the boundaries defining his ultimate work. Therefore, we conclude that claimant's injuries occurred outside the course and scope of his employment."

Claimant sought judicial review of that conclusion, as well as the analysis that supported it, in the Court of Appeals. That court affirmed without opinion. Andrews v. Tektronix, 134 Or.App. 628, 894 P.2d 1268 (1995). Claimant now renews his challenges to the Board's reasoning and conclusions here.

It is unfortunate, we think, that the parties in this case, along with the Board and even the legal scholar whose summary of the law the Board relied on, have insisted on referring to the issue presented here in terms of employee "misconduct," a word that carries with it a connotation of blameworthiness or fault. Fault is an idea that has no place in our workers' compensation scheme: Indeed, if our workers' compensation laws stand for anything, it is that fault is irrelevant in determining a worker's entitlement to compensation. See, e.g., Ore-Ida Foods v. Indian Head Cattle Company, 290 Or. 909, 918, 627 P.2d 469 (1981) (under Oregon Workers' Compensation Law, employer is liable for compensation "[w]hether the cause be the *976 fault of the employer, the fault of the worker, the fault of a third person,
or the fault of no one”); McDonough v. National Hosp. Ass'n, 134 Or. 451, 460, 294 P. 351 (1930) (right to compensation "is not dependent upon any negligence or wrongful act of the employer but is based wholly upon the fact of employment").

It would be foolish, of course, to dismiss an otherwise legitimate analytical rule purely on the basis of the terminology that it employs. If, despite that terminology, the rule actually carried out the intention of the legislature with respect to entitlement to workers' compensation, we could not say that the Board was wrong in embracing it. If, on the other hand, the rule served to import into the workers' compensation scheme a concept fault that the legislature has rejected as irrelevant to that scheme, or was otherwise incompatible with the legislature's intent with regard to compensability, we could not allow it, or any decision that relied on it, to stand.

The essential legislative statement regarding entitlement to workers' compensation is found at ORS 656.005(7)(a).[1] To be entitled to workers' compensation under that provision, an injured worker need only establish that his or her injury arose "out of and in the course of employment." See also Clark v. U.S. Plywood, 288 Or. 255, 259, 605 P.2d 265 (1980) ("All that a claimant must prove is that the injury arose 'out of and in the course of employment'.").

We previously have described ORS 656.005(7)(a) as setting out "two elements of a single inquiry.["] Norpac Foods, Inc. v. Gilmore, 318 Or. 363, 366, 867 P.2d 1373 (1994). One element, the requirement that the injury occur "in the course of employment," concerns the time, place, and circumstances of the injury. Id. The other requirement, that the injury "arise out of" the worker's employment, examines the causal connection between the injury and the employment. *977 Id. Although both elements must be evaluated, neither is dispositive: Ultimately, they merely serve as analytical tools for determining whether, "in light of the policy for which [that] determination is to be made[,]" the connection between the injury and the employment is sufficient to warrant compensation. Rogers v. SAIF, 289 Or. 633, 642, 616 P.2d 485 (1980).[2]

In particular factual circumstances, various tests may prove helpful in measuring and conceptualizing the strength of the connection between the claimant's injury and employment. Still, the ultimate test is the same: Considering all the pertinent circumstances, are the temporal, spatial, circumstantial, and causal connections between the claimant's injury and employment sufficient to justify compensation, when sufficiency is evaluated in the light of the Act's policy of providing financial protection to workers who are injured in the course of employment, regardless of fault? Thus, when confronted with a test that purports to determine whether an injury sustained under a particular set of factual circumstances is compensable, we must ask, "Is the test compatible with that formulation?"

SAIF contends that the "misconduct" rule at issue in this case is compatible with that formulation. In so arguing, SAIF acknowledges the basic principle inherent in the statutory test, viz., that compensability is purely a function of the claimant's status as a worker. SAIF asserts, however, that that status is, in turn, a function of the employer's right to "direct and
control" the claimant's activities: "When a worker's activities are such that the worker can no longer be said to act subject to the employer's right of direction and control, then the employee's status as a subject worker has been interrupted."

From that standpoint, SAIF argues, it should be evident that a claimant's violation of a work rule may render an ensuing injury noncompensable, not because the violation demonstrates that the injury was the claimant's fault or is otherwise blameworthy, but because it demonstrates a rejection by the claimant of the employer's right of direction and control and, consequently, of the claimant's status as a worker.

Because we disagree with the basic contention underlying SAIF's argument, we do not accept the conclusion that SAIF draws from that argument. Although it is true that, for general purposes, the Workers' Compensation Act defines the term "worker" in terms of the employer's "direction and control,"[3] it is also clear that, for purposes of determining whether a claimant's injury is compensable, his or her status as a worker does not depend on demonstrable submission to the employer's right of direction and control at the precise moment in time that the injury was sustained. This court's opinions on the issue of at-work "horseplay" are a case in point: Employees who engage in on-the-job horseplay can hardly be said to be subject to the direction and control of their employers for the period of time that they are so engaged, yet injuries sustained in the course of horseplay may nevertheless be deemed to "arise out of and in the course of employment." See, e.g., Stark v. State Industrial Acc. Com., 103 Or. 80, 98, 204 P. 151 (1922) (shipbuilder injured while participating in scuffle with fellow workman using air hoses arose out of and in the course of employment).

From the foregoing, we think that it is inescapable that a general rule denying compensation for injuries sustained as the result of a worker's failure to follow an employer's instructions is not compatible with the Worker's Compensation Act. However, we still must consider the validity of Professor Larson's rule, which is far more limited. *978 That rule purports to deny compensability only when a certain type of prohibitiona "prohibited overstepping of the boundaries defining the [claimant's] ultimate work"is involved. Larson, 1A Workmen's Compensation Law § 31.00 at 6-10 (emphasis in original).

We cannot say that the quoted rule is inconsistent with the work-connectedness test that has informed our previous decisions. An employee who is injured while engaged in a prohibited activity that is outside the boundaries defining his or her ultimate work cannot prevail on a claim that the injury is work connected. But neither can we say that that rule adds anything of value to the analysis. It merely states what we already know: that, regardless whether it is forbidden or condoned, an activity that is outside the boundaries of a claimant's job is not part of the claimant's job. Ultimately, then, Professor Larson's rule, as adopted by the Board, does little, if anything, to alter the basic work-connectedness test of compensability that our workers' compensation statute requires.

Although we conclude that Professor Larson's rule is consistent with the statutory standard for compensability, we cannot say the same for the Board's particular gloss on that rule. In
that regard, we note that the Board did not attempt to determine, in the first instance, whether the conduct that occasioned claimant's injury occurred while claimant was engaged in a job-related activity. Instead, the Board treated its determination that claimant had disobeyed his employer's instruction as a complete substitute for an analysis of work-connectedness. Thus, under the Board's version of the "misconduct" rule, work-connectedness and, consequently, compensability, may be decided entirely on the basis of a single fact—the worker's obedience to the employer's instructions at least insofar as those instructions purport to define the boundaries of the claimant's ultimate work.[4]

We see at least two problems with the Board's approach. First, it assumes that an act loses its work-connectedness solely by virtue of an employer's instruction not to perform it. That assumption is unduly simplistic and unjustified: Even when a worker is injured while engaged in a task that the employer appears to have removed from the worker's job description, the injury still may bear a sufficient connection to the worker's assigned tasks to warrant a conclusion that the injury is compensable.

In addition, because the Board's approach makes compensability turn entirely on a factor that is loaded with implications of blameworthiness, it suggests that compensability is, or at least can be, a function of fault. As previously indicated, that suggestion long has been rejected by the legislature.

In view of those problems, we are not prepared to say that the simple fact of disobedience to an employer's orders is of such overarching significance that it, alone, can render an ensuing injury noncompensable. Even when an order purports to set the boundaries of the claimant's ultimate work, a worker's disobedience is not necessarily determinative.

That is not to say that an employer's delineation of what does and does not constitute an employee's job is inconsequential. The Workers' Compensation Act does not purport to apportion liability for a worker's injuries on the basis of a mere nominal relationship between the worker and employer. But the facts that an employer has instructed a worker to avoid certain work, and that the worker's injury occurred when he or she disregarded that instruction, are only two of many factors that must be considered in the overall calculation of work-connectedness. Among the additional factors are the degree of connection between what the worker is authorized to do and is forbidden to do, the degree of judgment and latitude normally given the worker, workplace customs and practices, the relative risk to the worker when compared to the benefit to the employer, and the like. Moreover, when a worker's failure to follow a work-defining instruction is taken into consideration, the manner in which the instruction was conveyed, and the worker's consequent perception of the instruction's purpose and scope, also must be considered.

To conclude otherwise would be to approve a scheme whereby employers could insulate themselves from workers' compensation liability simply by providing the narrowest possible job descriptions to their employees, and instructing them to avoid any work that is not in either scope or manner precisely within the tasks thus assigned. Such an arrangement would be inconsistent with the previously recognized policy underlying the Workers'
Compensation Act, viz., the protection of workers from the financial consequences of the injuries that are a common byproduct of production, regardless of fault.

We conclude, then, that, regardless of the type of rule involved, an employee's violation of an employment rule does not render his or her claim per se noncompensable. The Board's contrary conclusion was error. The Board should have decided the question of compensability by deciding, in the first instance, whether claimant was engaged in an activity that was within the boundaries of his ultimate work. That determination is made, of course, by evaluating all the factors that are pertinent to the question of work-connectedness, and weighing those factors in the light of the policy underlying the Workers' Compensation Act. Rogers, 289 Or at 643, 616 P.2d 485.

The Board's order does not address the question of work-connectedness, as we have explained it. Although the workers' compensation referee concluded that claimant's act of assisting in carrying the espresso machine was the practice or custom on such job sites, made findings that support that conclusion, and then concluded that claimant's injury was work connected, the Board chose to ignore that issue and focused, instead, on claimant's failure to comply with his employer's instructions. Because we have no way of knowing whether the Board would have agreed with the referee's ultimate findings and conclusions with regard to the issue of work-connectedness, including the issue of custom and practice in the trade, we remand to the Board to address that question.

The decision of the Court of Appeals is reversed. The case is remanded to the Workers' Compensation Board for further proceedings.

NOTES

[**] Graber, J., did not participate in this decision.


ORS 656.005(7)(a) provides:

"A `compensable injury' is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means, if it is established by medical evidence supported by objective findings, subject to the following limitations:

"(A) No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition."
"(B) If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition."

Claimant advances one argument that treats ORS 656.005(7)(b), rather than ORS 656.005(7)(a), as the essential legislative statement regarding compensability. ORS 656.005(7)(b) provides:

"'Compensable injury' does not include:

"(A) Injury to any active participant in assaults or combats which are not connected to the job assignment and which amount to a deviation from customary duties;

"(B) Injury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities primarily for the worker's personal pleasure; or

"(C) Injury the major contributing cause of which is demonstrated to be by a preponderance of the evidence the injured worker's consumption of alcoholic beverages or the unlawful consumption of any controlled substance, unless the employer permitted, encouraged or had actual knowledge of such consumption."

(Emphasis added.) Claimant argues, in particular, that ORS 656.005(7)(b) expresses a complete and exclusive legislative policy regarding the effect of an employee's conduct on the compensability of a workers' compensation claim: The three circumstances described therein, and only those circumstances, provide grounds for concluding that an at-work injury is noncompensable. Consequently (claimant argues), noncompliance with an employer's instructions, which is not one of the three types of conduct described at ORS 656.005(7)(b), cannot render an injury noncompensable.

Claimant's theory fails to account for the legislature's definition of "compensable injury" at ORS 656.005(7)(a). Paragraph (7)(a) is the primary definition of compensability. Paragraph (7)(b) states grounds for exclusion that are additional to those that are inherent in the primary definition found in paragraph (7)(a).

[2] Rogers describes that policy as `"the financial protection of the worker and his/her family from poverty due to injury incurred in production, regardless of fault, as an inherent cost of the product to the consumer."' 289 Or. at 643, 616 P.2d 485 (quoting Allen v. SAIF, 29 Or.App. 631, 633, 564 P.2d 1086 (1977)).

[3] ORS 656.005(30) defines "worker" as "any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *." The definition of "employer" at ORS 656.005(13) is complementary: it defines "employer" as "any person
who contracts to pay a remuneration for and secures the right to direct and control the services of any person."

[4] In the Board's view, the employer's instruction to avoid heavy lifting "established the boundaries of [his] ultimate work duties" because it effectively removed heavy lifting from claimant's job description: It "contemplated that claimant would perform his usual duties with the exception of those activities that involved heavy lifting." (Emphasis deleted.) By disobeying that instruction, claimant "overstepp[ed] the boundaries defining his ultimate work," thus rendering the ensuing injury noncompensable.

**O'NEAL v. Sisters of Providence**

537 P.2d 580 (1975)

In the matter of the Compensation of Margaret O'NEAL, Claimant. Margaret O'Neal, Respondent, v. SISTERS OF PROVIDENCE, Appellant.

**Court of Appeals of Oregon.**

Argued and Submitted May 19, 1975.

Decided July 8, 1975.

Mark H. Wagner, Portland, argued the cause for appellant. With him on the brief were Michael D. Hoffman and Souther, Spaulding, Kinsey, Williamson & Schwabe, Portland.

Peter C. Davis, Portland, argued the cause for respondent. With him on the brief were Merten & Saltveit, Portland.

Before SCHWAB, C.J., and LANGTRY and FOLEY, JJ.

FOLEY, Judge.

The Sisters of Providence, operators of St. Vincent Hospital (employer), appeal from a circuit court order affirming a Workmen's Compensation Board order. The Board reversed a hearings referee and held that claimant was entitled to compensation for leg muscle problems which were attributed in part to her employment.

The essence of employer's position is that claimant's claim is not compensable because it is not work-related or because it represented the continuation of a condition for which a claim was accepted and closed by a determination order, dated June 7, 1972, which did not award any permanent disability and which was not appealed.
At the time of the hearing, claimant was 51 years old and had worked as a maid at St. Vincent Hospital since December 1970. Her job required that she push a maid's cart over carpeted halls. The cart was four feet high and four feet long and was loaded with various cleaning materials, a garbage sack, mops and a bucket. There is no exact evidence as to the total weight of the cart; claimant testified that bucket and mop weighed nearly 50 pounds, and that the remainder of the cart weighed at least 581 pounds. The cart had 10-inch casters to make it roll easily.

Claimant began having difficulty with her legs in March 1971. A medical examination on July 30, 1971, revealed varicose veins, some phlebitis, and strain in the muscles of both legs. Claimant filed a workman's compensation claim on September 21, 1971, which stated that pushing and pulling the maid's cart over carpeting for the previous six months caused strain in her knees and legs.

On November 24, 1971, the employer notified claimant that its investigation revealed that she suffered "from two separate ailments, namely varicose veins and a leg muscle strain. * * *" The employer denied responsibility on the varicose vein problem but accepted the claim on the muscle strain. (It appears that the references in the medical reports to muscle "strain" and muscle "spasms" are references to the same general condition.)

Claimant returned to work after her initial 1971 period of disability. She had surgery for her varicose veins in July 1972, and again returned to work.

A determination order issued June 7, 1972, awarded claimant temporary total disability, but no permanent partial disability, for her leg strain disability of 1971. Claimant did not appeal either the denial of responsibility for the varicose veins or the determination order.

Although the pain in her legs persisted, claimant continued working. By November of 1973, however, she began having to take rest breaks, during which she raised her legs to relieve her pain. On February 7 or 8, 1974, Dr. Robert E. Rinehart, claimant's treating physician, ordered her to stop working. It is his opinion that her work conditions are a material cause of her leg muscle spasms. On June 28, 1974, claimant filed her second claim for spasms of her leg muscles. The employer denied the claim, leading to the current litigation.

The hearings referee denied claimant compensation for both the leg varicose vein problems and the leg muscle spasms, finding that she had not established "* * * a new injury or occupational disease claim. * * *" The Board affirmed the referee regarding claimant's varicose veins but reversed the referee in regard to the muscle spasms, finding that their presence in 1974 constituted a "new claim." The Board ordered the employer "to accept claimant's occupational disease claim for muscle strains in both her legs as a new injury February, 1974."

Some confusion exists in this case because of a failure, on the part of claimant, employer, and the hearings referee, to clearly distinguish between a "compensable injury" and an "occupational disease." Claimant testified that her leg problems had been continuing for four
years and that the condition which bothered her in 1974 was the same as that of 1971. The employer points to this testimony, and claimant's testimony in which she describes her 1971 symptoms and 1974 symptoms in similar terms, contending that claimant suffered no "new injury or occupational disease" in 1974, and was precluded from relitigating the 1972 determination order on the initial claim because time limitations for appeal had passed.

Claimant at the hearing expressly abandoned any claim for aggravation under ORS 656.273. Thus her claim is compensable only if it fulfills the requirements of a compensable injury or an occupational disease.

Since claimant's symptoms by her own testimony were the same from 1971 to 1974, we agree with the employer's contention that if her 1974 condition is an injury, it would not constitute a "new" injury and would not be compensable. Our ultimate decision as to compensability therefore turns on whether claimant's condition more properly falls into an occupational disease category.

*582 ORS 656.802(1)(a) defines "occupational disease"[1] as:

"Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein."

ORS 656.002(7)(a) provides:

"A `compensable injury' is an accidental injury * * * arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means."

The Supreme Court has discussed the distinction between occupational diseases and injuries in reference to earlier statutory schemes (repealed, Oregon Laws 1973, ch. 543, § 4) which provided different procedures for processing occupational disease claims:

"One who claims that he is afflicted with an occupational disease has undergone experiences substantially different from those of another workman who is the victim of an industrial accident. An occupational disease is stealthy and steals upon its victim when he is unaware of its presence and approach. Accordingly, he cannot later tell the day, month or possibly even the year when the insidious disease made its intrusion into his body. Although his weakened condition may manifest ill health its cause may be uncertain and puzzle even the most skillful of physicians. Upon the other hand, the victim of an industrial accident virtually always can tell the day and even the hour when the purported injury befell him. He does not attribute his present condition to something that crept in upon him unobserved but to an accident which he and possibly many others observed. * * *" White v. State Ind. Acc. Com., 227 Or. 306, 322, 362 P.2d 302, 309 (1961).

Legislative amendments to the Occupational Disease Law (Oregon Laws 1973, ch. 543) have brought occupational disease claims fully within the Workmen's Compensation Law
and, as ORS 656.802 to 656.824 reveal, in general, treat occupational disease claims in the same manner as injury claims. In addition, the definitions of "occupational disease" and "compensable injury" are similar in several respects. Both relate to a condition arising out of and in the scope or course of employment. Further, ORS 656.804 provides:

"An occupational disease * * * is considered an injury for employes of *583 employers who have come under * * * [the Workmen's Compensation Law]."

Finally, the procedure for processing occupational disease claims is the same as that for accidental injuries. ORS 656.807(4).

Larson points out that with the expansion of occupational disease legislation (as has occurred in Oregon)[2] the "contrast between accident and occupational disease is gradually losing its importance * * *." 1A Larson, Workmen's Compensation Law § 41.31 (1973).

Yet in Oregon an occupational disease continues to be distinguished from a compensable injury in that the former must be a "disease or infection," ORS 656.802(1)(a), whereas the latter must constitute an "accidental injury." ORS 656.002(7)(a). The statutory treatment of times for filing a claim continues to reflect this distinction: One suffering from an occupational disease has as long as five years "after the last exposure" to file a claim whereas one suffering from a compensable injury must generally file a claim (notice) within 30 days, or under certain circumstances within one year, from the date of the accident.[3]

It thus appears that the distinction between an occupational disease and an accidental injury has become less significant because of changes made by the 1973 legislature, but, as this case and the different time limitations for filing an occupational disease claim indicate, the distinction has some continued importance.

Larson synthesizes the occupational disease-accidental injury dichotomy when he notes that there are "two crucial points of distinction" between accidental injuries and occupational diseases: the elements of "unexpectedness" and "time-definiteness." He explains these distinctions as follows:

"* * * What set[s] occupational diseases apart from accidental injuries [is] both the fact that they can[not] honestly be said to be unexpected, since they [are] recognized as an inherent hazard of continued exposure to conditions of the particular employment, and the fact that they [are] gradual rather than sudden in onset. * * *" (Footnotes omitted.) Larson, supra.

The same concepts are reflected in White v. State Ind. Acc. Com., supra. See also Mathis v. SAIF, 10 Or. App. 139, 499 P.2d 1331 (1972).

Applying these distinctions to the present case, the evidence establishes that claimant's muscle spasms arose out of her work activity. It could not honestly be said that it is unexpected that leg muscle spasms might develop from extensive pushing and pulling of a large maid's cart. It also is clear that the muscle problems were *584 gradual in onset. We
therefore conclude that claimant's disability resulted from an occupational disease rather than an accidental injury.

Further, we note that what is important here is not whether claimant's occupational disease is characterized as "new" or "old." The compensability of an occupational disease turns upon whether it leads to disability, Beaudry v. Winchester Plywood Co., 255 Or. 503, 512, 469 P.2d 25 (1970), and disability is the key factor regarding the timing of the filing of this claim. ORS 656.807(1).

Claimant's occupational disease has existed over a span of four years. In 1971 it became disabling. Claimant was compensated for the period of that disability and was able to fully return to work. Her condition was stable. In these circumstances she had no reason to appeal the determination order on her first claim. When claimant again became disabled in 1974, she was entitled to again seek compensation for her disability.

The Board and circuit court found that claimant's muscle spasms constituted an occupational disease for which a compensable claim was filed in 1974. We agree.

Affirmed.

NOTES

[1] The employer has not contended that claimant suffers from an ordinary disease of life as opposed to an occupational disease. We note in any event that claimant's disability, if categorized as a disease rather than an injury, would be categorized as an occupational disease rather than a nonoccupational disease. This is true even though claimant's conditions of employment merely represented more extensive exposure than usual to conditions existing in everyday life. As Larson has stated:

"Just as chills and temperature changes are features of everyday life, so are bumps, jars, jolts, and strains within limits. But repeated strains associated with the employment may supply the distinctive element necessary to make a back injury occupational. Tenosynovitis suffered by an employee whose work consisted of lifting and moving boxes and using a hammer and drill, causing her to twist her shoulder and move her arm back and forth, has been held to be an occupational disease, even though a housewife might contract the disease in the course of certain household duties. And bursitis of the shoulder from pushing a lever 500 to 700 times a day has been held covered under a statute defining occupational diseases as including those "due to causes and conditions ... characteristic of or peculiar to the employment."' (Footnotes omitted.) 1A Larson, Workmen's Compensation Law § 41.33 (1973).

In Beaudry v. Winchester Plywood Co., 255 Or. 503, 469 P.2d 25 (1970), our Supreme Court took a similar approach, finding that a claimant who stood upon a vibrating base as part of his employment was entitled to compensation for an occupational disease consisting of aggravation of his pre-existing bursitis, even though the physical activity of walking,
standing, and going up and down stairs could also aggravate claimant's condition. The essential factor was that the employment conditions were found to be the main cause of aggravation.


A useful discussion of some of the developments in Oregon up to 1962 in this regard is contained in Lafky, Compensability of Occupational Disease Under Oregon Workmen's Compensation Law, 2 Will.L.J. 16 (1962).

[3] ORS 656.807 provides:

"(1) Except as otherwise limited for silicosis, all occupational disease claims shall be void unless a claim is filed with the State Accident Insurance Fund or direct responsibility employer within five years after the last exposure in employment subject to the Workmen's Compensation Law and within 180 days from the date the claimant becomes disabled or is informed by a physician that he is suffering from an occupational disease whichever is later.

"(2) If the occupational disease results in death, a claim may be filed within 180 days after the date of the death; and the provisions of subsection (1) of this section do not limit the filing of a claim in fatal cases to less than 180 days from the date of death.

"* * *

The general filing provisions of the Workmen's Compensation Law contain narrower time limitations. A claim is "any compensable injury of which a subject employer has notice or knowledge." ORS 656.002(6). A claim is barred, with certain limited exceptions, unless an employer has knowledge of the injury or is given notice of the accident within 30 days after the accident (or within one year after the accident if good cause is established for failure to give notice within 30 days). ORS 656.265.
Claimant appeals an order of the Workers' Compensation Board reversing the referee's order that the State Accident Insurance Fund accept his low back injury claim. The sole issue in this case is whether claimant suffered a compensable on-the-job injury or merely has non-compensable symptoms of an occupational disease. On de novo review, ORS 656.298(6), we find claimant sustained a compensable injury and reverse the Board's order.

Claimant has a long history of low back problems. He underwent surgery in 1956 and 1961 and was treated again in 1974 after lifting an oil barrel while on the job. Since the 1974 incident and until the present claim arose, claimant had no problems with his back. In 1976 he began working as a county corrections officer. The job entailed physical exertion on occasion, especially in restraining prisoners. His co-workers testified that he carried out his duties without complaint, and claimant stated that he had no problems resulting from this work. He also was active in recreational activities, with no back problems.

On June 21, 1980, claimant drove the jail van from Grants Pass to Portland to pick up a prisoner and transport him to Grants Pass. During the return trip, claimant began to experience sharp low back pains which radiated into his right leg. Driving the jail van was not part of his usual job duties, but was an extra duty that the county employees could voluntarily perform. A week before June 21, claimant had accompanied another employee to Salem on a similar mission and had had no resulting problems. He did little or none of the driving on that trip. However, he was alone on the trip to Portland and did all of the driving, stopping only for short breaks. Because of the pain, claimant was unable to return to his job. He promptly reported the incident, sought medical treatment and filed a claim with SAIF.

Claimant was examined by Dr. Kendall on June 30, 1980. His report stated: "IMPRESSION: Exacerbation of chronic low back pain (work-related)." SAIF denied the claim on July 24, 1980, finding no evidence of an on-the-job accident or incident that could have produced the
condition. Dr. Campagna examined claimant on July 28, 1980. His report stated: "IMPRESSION: Severe nerve root compression L5 right, secondary to herniated nucleus pulposus as a result of industrial accident of 6-21-80."

The issue is whether claimant sustained an on-the-job injury, which is compensable, or merely suffers from increased symptoms of a preexisting condition, which is not compensable. The Workers' Compensation Board considered the claim to be the latter, and it reversed the referee's order to SAIF to accept the claim.

SAIF concedes that if the exertion of driving from Grants Pass to Portland is deemed an injurious event, the claim is compensable, but it argues that the onset of claimant's pain was gradual and the driving incident produced only symptoms of claimant's underlying back problem. The critical inquiry is whether the driving incident occasioned an injury.


"* * * What set[s] occupational diseases apart from accidental injuries [is] both the fact that they can [not] honestly be said to be unexpected, since they [are] recognized as an inherent hazard of continued exposure to conditions of the particular employment, and the fact that they [are] gradual rather than sudden in onset. * * *"
22 Or. App. at 16, 537 P.2d 580 (quoting 1A Larson, Workmen's Compensation Law, § 41.31 (1973)).

The court in James illustrated the distinction by discussing Olson v. State Ind. Acc. Com., 222 Or. 407, 352 P.2d 1096 (1960), in which a worker died from a heart attack that occurred while he was performing no more than the usual exertion on his job. The court observed: "If the heart condition in Olson had been an occupational disease rather than an injury, it would not have been compensable." 290 Or. at 350, 624 P.2d 565. The court concluded that Olson was correct in determining that claimant's heart condition was the result of a compensable injury.

In the present case claimant was subjected to the ordinary stress of his job but, because of his susceptibility to back problems, the stress of the long drive resulted in injury. The injury was unexpected, as claimant had been free of low back trouble since 1974. The injury was sudden, in that it affected claimant in only a matter of hours. The evidence pointed to no instantaneous event that caused his pinched nerve. The distinction between disease and injury, described in James v. SAIF, supra, is based in part on whether there is a sudden onset of the condition as opposed to a gradual one. We do not equate "sudden in onset" with instantaneous. It is clear that the injury from the physical stress of driving the van occurred during a discrete period, as compared to the onset of an occupational disease over a long period of time. Both examining physicians linked claimant's condition to work activity. We are satisfied that claimant's drive to Portland on June 21, 1980, was an injurious event. Cf.

Reversed and remanded with instructions to reinstate the order of the referee.

Week 9 – October 24, 2016

Weller v. Union Carbide Corp.

SUPREME COURT OF OREGON

November 6, 1979

WELLER, PETITIONER, AETNA LIFE & CASUALTY COMPANY,
RESPONDENT,

v.

UNION CARBIDE CORPORATION, RESPONDENT

On review from the Court of Appeals.*fn* No. A7708-12042, CA No. 10478.

Raymond Conboy, Portland, argued the cause for petitioner. On the brief was Keith E. Tichenor and Pozzi, Wilson, Atchison, Kahn & O'Leary, Portland.

Noreen K. Saltveit, of Merten & Saltveit, Portland, argued the cause and filed briefs for respondent Union Carbide Corporation.

Ridgway K. Foley, Jr., Portland, argued the cause for respondent Aetna Life & Casualty Co. With him on the briefs were Roger A. Luedtke and Souther, Spaulding, Kinsey, Williamson & Schwabe, Portland.

Evohl F. Malagon and Steven C. Yates, Eugene, filed a brief amicus curiae for the Oregon Trial Lawyers Association.


Lent

[288 Or Page 29]
This is a contested claim for workers' compensation benefits for occupational disease, ORS 656.802 to 656.824. The following issue is posed: Does a worker have a compensable claim where: (1) he has an underlying disease which is symptomatic; (2) his work results in a worsening of his symptoms not produced by a concomitant worsening of the underlying disease process; and (3) the worsening requires either medical services or results in disability or both? We answer in the negative.

The employer timely denied the claim. The referee and the Workers' Compensation Board upon review affirmed the denial. The circuit court reversed. Upon appeal the Court of Appeals reversed the circuit court, thus affirming the Board, 35 Or App 355, 582 P2d 8 (1978). We allowed review, ORS 2.520, 285 Or 195 (1979), along with Stupfel v. Edward Hines Lumber Co., 35 Or App 457, 581 P2d 961 (1978), Hutcheson v. Weyerhaeuser, 36 Or App 497, 584 P2d 371 (1978), and Gibson v. SAIF, 37 Or App 375, 587 P2d 116 (1978), to consider problems seemingly common to these cases of the effect of work activity and conditions on an underlying pathological condition in the worker's body. We affirm the Court of Appeals.

In Sahnow v. Fireman's Fund Ins. Co., 260 Or 564, 491 P2d 997 (1971), we decided not to undertake de novo review of workers' compensation cases. This was a result of our construction of former ORS 2.520(5). There is nothing in the subsequent amendment of ORS 2.520 to indicate that the legislature intended us to do differently. We continue, therefore, to consider ourselves bound by the Court of Appeals' resolution of conflicts in the evidence.

[288 Or Page 30]

The Court of Appeals found:

"** Claimant began working as a crane operator in 1952. He injured his low back in a nonindustrial accident in 1968. He continued in the same employment, but had recurrent episodes of low back and leg pain. Claimant quit working in 1975. Several doctors made a variety of diagnoses -- all generally indicating degenerative changes in the bone structure of the lumbosacral area of claimant's spine, which caused nerve root irritation, which caused the pain claimant experienced. Subsequent surgery provided partial relief. [35 Or App at 357]

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"We agree with all prior factfinders -- claimant's work did not cause or aggravate his underlying disease, but claimant's work did cause pain, i.e., a symptom of his disease."*fn2 (35 Or App at 358)

Inherent in the Court of Appeals decision is the assumption that it is the worsened pain which required claimant to leave his work and undergo surgery. Otherwise there would have
been no reason to reach that court's holding in order to dispose of the case (35 Or App at 360):

"We now hold that a worsening (purposely avoiding the term of art 'aggravation') of symptoms is not compensable. Only the onset or significant worsening of injury or disease arising out of, i.e., caused by, employment can be compensable. A worsening of symptoms is only significant to the extent that it supports an inference that employment caused a worsening of the underlying injury or disease. * * *."

If neither medical services were required nor disability resulted from the worsening of pain caused by

[288 Or Page 31]

the employment, there would be, by definition, no compensable claim. ORS 656.005(8) provides:

"(a) A 'compensable injury' is an accidental injury * * * arising out of and in the course of employment requiring medical services or resulting in disability * * *

"(b) A 'disabling compensable injury' is an injury which entitles the worker to compensation for disability * * *

"(c) A 'nondisabling compensable injury' is any injury which requires medical services only."

ORS 656.005(9) provides:

"'Compensation' includes all benefits, including medical services, provided for a compensable injury to a subject worker * * *."

For the purposes of this case an occupational disease is to be considered an injury under the Workers' Compensation Law (ORS 656.001 to 656.794). ORS 656.804.

The foregoing establishes the validity of the issue posed at the outset of this opinion. We now proceed to apply the law to the facts of this case. The discussion must commence with the statute. ORS 656.802(1)(a) defines "occupational disease" as follows:

"Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein."

At first blush it would appear that the disease itself must arise out of the employment, but we have interpreted the statute otherwise. In Beaudry v. Winchester Plywood Co., 255 Or 503, 469 P2d 25 (1970), we squarely held that a disability resulting from worsening of a
preexisting bursitis by the claimant's work activities and conditions was compensable under the Occupational Disease Law.

Relying upon Beaudry, claimant urges that this claim is compensable because in Beaudry we held

[288 Or Page 32]

compensable the claim of a workman (quoting from claimant's petition for review):

"* * * who had pre-existing nonindustrial bursitis in his hip which became aggravated * * *." (our emphasis added)

The emphasized pronoun "which" refers to "bursitis"; it does not refer to any other noun.

Amicus Curiae, "The Oregon Trial Lawyers Association," quotes to us our own language from Beaudry and our "adopt[ion]" of "the rule" from 1A Larson, Workmen's Compensation Law, Section 21.63 (1973):

"* * * It is clear that under the accidental injury portion of the law a compensable injury occurs when an accidental injury accelerates or aggravates a preexisting disease, causing disability or death, * * *." (255 Or at 512) (Amicus' emphasis)

The quoted matter simply says that "disability" is compensable if it results from acceleration or aggravation of the preexisting disease. It says nothing about the compensability of "disability" resulting from an aggravation of symptomatology not produced by a concomitant aggravation of the preexisting disease.

We did quote (255 Or at 513) from Larson, as Amicus says, as follows:

"* * * [T]he line between occupational disease and aggravation of preexisting disease or weakness has become blurred. The ultimate working rule that seems to emerge is simply that a disability which would be held to arise out of the employment under the tests of increased risk and aggravation of a preexisting condition will be treated as an occupational disease.' (Footnotes omitted)" (Amicus' emphasis)

Larson says no more than that a disability will be treated as an occupational disease if that disability results from aggravation of a preexisting condition. The whole passage which we quoted from Larson discloses that the author in using the word "condition" referred to the disease itself.

[288 Or Page 33]

Amicus argues that "[t]he symptoms of disease are the disease." Amicus may well believe that. There may well be medical authorities who believe it. No qualified witness so testified
in this case, however, and there is accordingly no basis in the evidence for the factfinder to reach that same belief. Cf. footnote 2, supra.*fn3

Some language we used in Beaudry may be misleading. We said (255 Or at 515):

"** * * It is our opinion that there was sufficient evidence for the hearing officer to find that
claimant's condition, which prevented him from working, was the result of a situation to
which he was not ordinarily subjected other than in the course of his regular actual
employment." (emphasis added)

The use of the word "condition" may not have been as precise as the choice of words in the
rest of the opinion. It is obvious from the context, however, that our attention in that
sentence was focused upon the matter of exposure rather than a distinction between disease
and symptoms. Moreover, in Beaudry we had just finished a discussion resulting in our
holding that the claimant's "condition" was a result of the worsening of his bursitis itself by
the vibrations to which his work subjected him. If our use of the word "condition" in the
above quotation could be considered to refer to Beaudry's symptoms alone, as distinguished
from worsening of his pathology, that was unintended and is here renounced.

A line of decisions of this court discusses the compensability of pain under the
732 (1948), by way of dictum, the court somewhat cryptically announced:

"The statute provides no compensation for physical pain or discomfort. It is limited to the
loss of

[288 Or Page 34]

earning ability. The loss of capacity to earn is the basis upon which compensation should be
based. [citing cases from other jurisdictions] * * *."*

In Wilson v. State Ind. Acc. Comm., 189 Or 114, 219 P2d 138 (1950), the claimant had
suffered an injury to his eye. He sought compensation for loss of the sight of the eye, a
"scheduled disability" under then Section 102-1760, O.C.L.A., and further compensation
under the same code section for "unscheduled disability" for chronic pain and nervousness
allegedly resulting from his eye injury. In the circuit court claimant had obtained jury
awards for both kinds of disability. On appeal, with respect to the unscheduled disability,
this court quoted the dictum of Lindeman and concluded (189 Or at 124):

"It is not the intention of the law to compensate for pain, suffering or nervousness in and of
themselves, but the disabling effects of such may be considered in determining the disabling
effect of any particular injury."

The court reversed the award of compensation for unscheduled disability, but the opinion
does not tell us the reason. We assume that it must be that the record contained no evidence
that the claimant's pain and nervousness had any disabling effect. See Or Const., Art VII (Amended), § 3.

In Walker v. Compensation Department, 248 Or 195, 432 P2d 1018 (1967), the claimant had injured his back and in the circuit court obtained an award of compensation for the unscheduled permanent partial disability in his back and a further award for a scheduled disability in his leg for "radiation pain" from his back down into his thigh. The opinion of this court noted Lindeman and Wilson and affirmed the circuit court award of compensation for disability in the leg on the basis that there was evidence in the record that the pain in the leg was disabling.

The foregoing cases dealing with pain were decided when the court was exercising appellate jurisdiction under ORS 19.010 and its forerunner. In Surratt v.

[288 Or Page 35]

Gunderson Bros., 259 Or 65, 485 P2d 410 (1971), the court exercised appellate jurisdiction then conferred in ORS chapter 656 "to examine the record de novo as triers of fact." There the claimant contended that as a result of his back injury he had scheduled disability in his legs as well as unscheduled disability in his back. This court acknowledged that the rule of Walker authorizes an award for such a scheduled disability if the pain causes loss of function in the scheduled member. Upon de novo review, however, this court found that the evidence was insufficient "to tell whether the claimed pain in his thighs is sufficient" to support an award for disability in the legs.

It is urged that this line of cases stands for the proposition that disability caused by pain which is, in turn, caused by work activity and conditions is compensable. We do not agree. In Wilson, Walker and Surratt we dealt with claims for compensation for disability caused by pain resulting from injury, which was, in turn, caused by work activity. In each of those cases a work-induced, pathological change was established, and the court dealt with a claim that pain resulting therefrom had caused the asserted disability. There is nothing before us to require qualification of what we said in those cases, but we find them of no avail to this claimant.

Considering this claim in light of those cases, of ORS 656.802(1)(a) and of Beaudry v. Winchester Plywood Co., supra, we believe that in order to prevail claimant would have to prove by a preponderance of evidence that (1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services. The

[288 Or Page 36]

Court of Appeals found the evidence insufficient to establish element (2), a worsening of the underlying disease. It follows that claimant has failed to establish compensability of this claim.
Although it is not absolutely necessary to the disposition of this particular case, we find it advisable to comment upon particular sentences in the Court of Appeals' opinion. (35 Or App at 360):

"Only the onset or significant worsening of injury or disease arising out of, i.e., caused by, employment can be compensable."

Concern has been expressed that the word "significant" adds a new hurdle to the establishment of a compensable claim. We assume that the Court of Appeals used the word simply to mean that something more than a fleeting or de minimis worsening is required for compensability. The statutes, ORS 656.005(8), 656.802(1)(a) and 656.804, make an injury or disease, or worsening thereof, compensable if it either requires medical services or results in disability. The courts cannot require more.

The other sentence is (35 Or App at 359, 582 P2d at 10):

"To have a compensable occupational disease, claimant must establish that his work as a crane operator originally caused or materially and permanently worsened his spine condition." (emphasis added)

The use of the emphasized words is subject to the same kind of concern we have expressed with respect to use of "significant" in the preceding paragraph. In addition the use of the word "permanently" is error. If a temporary worsening of the underlying disease requires medical services or results in temporary disability, that is compensable. Cf., Stupfel v. Edward Hines Lumber Co., 288 Or 39, 602 P2d 264 (1979).

Other issues with respect to the timeliness of this claim and the respective responsibilities of certain insurance carriers need not be resolved in light of determination of the want of compensability of the claim.

Affirmed.

Disposition

Affirmed.
This is an action under the former Workmen's Compensation Law. After the jury returned a verdict for the plaintiff the court entered judgment n.o.v. for the defendant. Plaintiff appeals.

*422 The sole question is whether there was sufficient evidence of causal relation between the occurrence testified to by the plaintiff and his injury to carry the case to the jury.

The facts are as follows: On September 6, 1963, plaintiff, then a student at Portland State College, was employed at Reed College moving books from the old to the new library. His job required him to load the books on a three-tiered cart with very small wheels and, after transporting them to the new library, to put them on the shelves there. On the third day of this work the following occurred, according to the plaintiff's testimony:
"Well, the carts, having small wheels and being balanced with a heavy load of books, tended to easily shift their weight, and they could topple over. When I had a large number of books and moved them down to a lower tier, shelf, well, at that time out of the corner of my eye I saw that the cart was starting to go, and I reached out to, you know, push it straight, to push the books straight, worrying about the books falling over; and at that time I felt a relatively sharp pain, a pretty sharp pain in my back."

Plaintiff testified that he reported the incident to Miss Pollock, the librarian, and she sent him to the infirmary where he saw Dr. Gregg Wood, who looked at his back and said he could not determine the nature or extent of his injury and advised him not to do any more heavy work such as book moving, and to sleep on a mattress with a board under it. Plaintiff was then given a night watchman's job at Reed College which continued until September 24, when he resumed his studies at Portland State College. Ever since the accident plaintiff has experienced back pain from time to time in greater or less degree, especially when he is tired. In June 1964 plaintiff and his wife moved from their apartment to a house. In using a bamboo rake to clean up the back yard he was "pretty exhausted" after an hour's work and would be in "quite a good deal of pain." The pain ranged from the small of his back, but particularly it went down his right leg on the inside of it. In March, 1964, he consulted Dr. Charles M. Grossman about another ailment not related in any way to his back injury and he did not at that time mention any difficulty about his back. The first time that he did so after seeing Dr. Wood was on August 13, 1964, when he told Dr. Grossman, as the latter testified, "that he had injured his back in September of 1963 while working at Reed College." Dr. Grossman testified that he examined the plaintiff's back and found "some increase of his lumbar lordosis" (the normal curve of the lumbar spine). Dr. Grossman testified that the plaintiff did not give him a history of how he was injured and he did not know whether he had any subsequent data on that subject. Plaintiff went to Dr. Grossman about his back on November 12, 1964, November 17 and December 8, but the next time he saw the doctor, on December 24, although his back was bothering him, he had other difficulties which required surgery. X rays were taken at this time, but none which would disclose whether plaintiff had a back injury. Dr. Grossman's diagnosis of the back injury was as follows:

"* * * I feel he had a chronic lumbo sacral strain, and that there was a distinct, there were evidences of root irritation and that we had to be on the lookout for a disc. There wasn't sufficient information to make a positive diagnosis of a disc then or up to now at this point."

*424 In response to a hypothetical question, which the defendant contends was insufficient, Dr. Grossman testified that "the accident" was probably responsible for plaintiff's back difficulty.

Plaintiff testified that he suffered during childhood from a back ailment referred to as rheumatoid arthritis, but that he recovered from it completely before he reached the age of 13 or 14 years. The evidence justifies a finding that this condition was not connected with the injury of which plaintiff complains.
The defendant introduced no evidence, but rested and moved for a directed verdict at the conclusion of plaintiff's case on the ground of insufficiency of the evidence of causation. In denying the motion the judge stated that if the jury returned a verdict for the plaintiff he would set it aside. Specifically, it is the defendant's contention that medical testimony was essential to establish causation and that Dr. Grossman's testimony as to the cause of plaintiff's injury lacks probative value because it was based upon a hypothetical question which did not include a statement of the occurrence which plaintiff claims caused the injury.

1, 2. It is, of course, the settled rule that

"* * * where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science and must necessarily be determined by testimony of skilled, professional persons. * * *"

Spivey v. Atteberry, 205 Okla 493, 494, 238 P2d 814, 27 ALR2d 1259, quoted with approval in Larson v. SIAC, 209 Or 389, 399, 307 P2d 314. As we said in Ritter v. Sivils, 206 Or 410, 413, 293 P2d 211: "If the *425 issue turns upon some fact beyond the ken of laymen, expert testimony must be produced * * *.

The rule was held applicable in the Larson case on the question whether the plaintiff had suffered an injury to his back. He claimed that such an injury was one of the results of his leg being broken below the knee. We held that medical testimony was necessary for this purpose. There was no such apparent connection between the accident in which the claimant's leg was broken and his back injury that a layman could say that the back injury was caused by the accident. In the recent case of Howerton v. Pfaff, 246 Or 341, 425 P2d 533, the question was whether medical testimony was needed to prove that an inguinal hernia sustained by the plaintiff was caused by a collision between two automobiles, one of which was driven by the plaintiff. We held such evidence was needed because no indication of the presence of the hernia appeared until about three weeks after the accident and the only evidence of injury at the time of the accident was that he was "shook up" and his neck hurt. In other words, there was no trauma or strain in the region of the body where the hernia later appeared.

But in hernia cases a different result may be reached in "a simple situation * * * where, in point of time, the relationship between sudden strain at work, the first symptoms and the hernia was so close and immediate, and where, on the undisputed facts, a layman could clearly reasonably infer, without medical testimony, that the strain caused the hernia": Lovely's Case, 336 Mass 512, 515, 146 NE2d 488. See, also, Valeri v. Village of Hibbing, 169 Minn 241, 211 NW 8, 60 ALR 1296. Cf. Crowley's Case, 287 Mass 367, 191 NE 668, and Casey's Case, 348 Mass 572, 204 NE2d 710.

*426 Similarly, in a case of low back strain claimed to have been sustained by an automobile repairman while using a long wrench, the petitioner's testimony as to the accident and its consequences was held sufficient to make a prima facie case on the question
Another case of low back strain in which the court held that medical testimony was not essential for proof of causation is Marley Construction Co. v. Westbrook, 234 Miss 710, 720, 107 S2d 104, 108. See, also, Nash-Kelvinator Corp. v. Industrial Comm., 253 Wis 618, 34 NW2d 821; DiFiori v. U.S. Rubber Co., 78 RI 124, 79 A2d 925; Jarka Corporation of Philadelphia v. Norton, 56 F2d 287; Larson's Workmen's Compensation Law § 79.51.

Orr v. SIAC, 217 Or 249, 342 P2d 136, cited by the defendant, is not in point. Causation was not involved. The question was as to the extent of the impairment of plaintiff’s vision, a matter, as we said, "capable of almost exact scientific measurement" (217 Or at 252) and which a jury would be incapable of correctly determining.

In the compensation cases holding medical testimony unnecessary to make a prima facie case of causation, the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his superior and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury: DiFiori v. U.S. Rubber Co., supra.

*427 3, 4. Here the plaintiff, who had had no trouble with his back since he was 13 or 14 years of age, reached out to prevent a truckload of books from toppling over and as he did so felt a sharp pain in his back. Plaintiff was, of course, a competent witness as to the pain he suffered and his impaired ability to perform physical labor: Wilson v. SIAC, 162 Or 588, 599, 94 P2d 129. He reported the incident to his employer and went immediately to a doctor, who found a back injury of undisclosed character and extent. From that time forward he felt the effect of the injury and ultimately, when the pain became worse, he consulted a doctor, who diagnosed the condition as chronic lumbosacral (low back) strain. There is nothing very complicated about such an injury and its cause. Neither was it beyond the competence of a jury of laymen to infer from the entire testimony that the sudden movement to which the plaintiff testified caused the pain he felt at that moment and the condition from which he suffered thereafter.

In view of this conclusion, it is unnecessary to pass upon the question of the sufficiency of the hypothetical question.

5. Defendant seeks to support its position by pointing to plaintiff's delay of nearly a year before consulting a physician (other than Dr. Wood) about his back and before filing a claim with the Accident Commission. Plaintiff testified to his reasons for the delay. The contention goes to the credibility of the plaintiff and the weight of his evidence and raised a question for the jury, which evidently resolved it in favor of the plaintiff.

We are of the opinion that there was sufficient evidence to take the case to the jury and the court erred in entering judgment n.o.v. for the defendant.
The judgment is reversed and the cause is remanded with directions to reinstate the judgment entered upon the verdict of the jury.

ON PETITION FOR ALLOWANCE OF ATTORNEY'S FEE

Peterson, Chaivoe & Londer and Sanford Kowitt, Portland, for the motion.

Robert Y. Thornton, Attorney General, and Quintin B. Estell, Assistant Attorney General, Salem, contra.

Before PERRY, Chief Justice, and SLOAN, GOODWIN and LUSK, Justices.

MOTION DENIED.

*429 PER CURIAM.

Plaintiff has moved for allowance of an attorney's fee for the services of his attorney in this court.

6, 7. Authority to make such allowance does not exist unless it is found in the statute: Adair v. McAtee, 236 Or 391, 396, 385 P2d 621, 388 P2d 748; Gorman et ux v. Jones et ux, 232 Or 416, 420, 375 P2d 821. There are two sections of the Workmen's Compensation Law providing for the allowance of an attorney's fee by the courts. ORS 656.386 (1), formerly 656.588 (1), authorizes the circuit court to allow a reasonable attorney's fee where a claimant prevails in an appeal to the circuit court from a Board order (formerly a Commission order). ORS 656.301 (2), formerly ORS 656.292 (2), provides that on appeal by the Department (formerly by the Commission) or an employer from an adverse decision of the circuit court, if the judgment of the circuit court is affirmed, the claimant shall be allowed an attorney's fee to be fixed by the court. At no time has there been a statute authorizing the court to allow an attorney's fee where the claimant appeals to this court from an adverse judgment of the circuit court and is successful.

It follows that, whether the former or present statute be applicable, the motion cannot be allowed.

On remand to the circuit court the plaintiff will be entitled to the award of an attorney's fee for services of his attorney in that court.

The motion is denied.

NOTES

[*] Succeeded the State Industrial Accident Commission of the State of Oregon during the pendency of this proceeding: Oregon Laws 1965, ch 285, § 55.
Claimant incurred a back injury on April 4, 1972 while driving heavy construction equipment for Hughes & Ladd Construction Company and received compensation therefor until June 9, 1972 when his condition was considered medically stable and benefits ceased. He continued work. Shortly thereafter he got another job in similar work but on smoother roads. Also, for several months he was off work with a broken leg incurred in a nonwork accident. On May 22, 1973 his back became worse on the job again when a truck he was driving for a new employer, Ray Kizer Construction Company, went over a bump made by a heap of crushed rock. This happened at about 9 a.m. and he worked until noon. He has not worked since that day and is in need of spinal surgery, subject to reducing his pronounced obesity.

He made claims to the insurance carriers for Hughes & Ladd and Kizer respectively for the second back injury and each rejected his claim.

He requested a hearing, the two claims were consolidated for hearing and thereafter the referee found Hughes & Ladd responsible and affirmed Kizer's rejection of the claim made
against it. A remand to the referee was made and after considering more evidence the referee was still of the same opinion. On appeal to the Workmen's Compensation Board and the circuit court, the referee's findings were affirmed. In Hughes & Ladd's appeal to this court, Kizer has moved for dismissal of the part of the appeal which makes it a respondent. It contends that each case was separate; that, when claimant took no appeal from the referee's finding in its case, that ended the matter as far as Kizer was concerned; and that Hughes & Ladd was no party to Kizer's case and, hence, could not appeal it.

ORS 656.307(1) provides:

"Where there is an issue regarding: "* * * "(c) Responsibility between two or more employers or their insurers involving payment * * * for two or more accidental injuries * * * * * * the board shall, by order, designate who shall pay the claim, if the claim is otherwise compensable. * * *"

Copies of letters in the record show that on July 9, 1973 Kizer's carrier denied the claim against it, saying:

"* * * "We do not feel that the claim is compensable and, therefore, are denying the claim. Our reason is as follows: "1] In view of the fact that your back never really healed from an injury with your prior employer we feel that the claim should be exerted against the previous employer * * *. "* * *"

and that on September 11, 1973 Hughes & Ladd's carrier denied the claim against it, saying:

"* * * "* * * [T]he trauma * * * received in May of this year was a new incident * * * a new claim under his employer coverage, with whom he was employed at that time, and not an aggravation [of the injury of April 4, 1972]. "* * *."

From these rejections it is clear that neither employer denied claimant was suffering injury. Each simply was saying any injury he had should be compensated by the other, and for that reason the claim against it was being denied. This appears to be a situation which ORS 656.307(1), from which we have quoted above, was intended to cover. Otherwise, situations could arise where an injured workman entitled to benefits could let appeal time run out against one of two findings like there are here, lose out on the appeal taken on the other, and be left with nothing. The motion made by Kizer to dismiss the appeal is denied.

We think the order on appeal made by the Workmen's Compensation Board adequately covers its responsibilities under ORS 656.307(1).

*154 On the merits of both claims, we have reviewed the evidence. It shows to our satisfaction that claimant had not recovered from his April 1972 injury. He was having much difficulty preceding the incident of May 1973, and it appears that that incident merely precipitated what was going to happen in a very short time anyway. The combination of the prior injury and claimant's obesity appears to have assured that. 3 Larson, Workmen's Compensation Law § 95.12 (1970), in this context, says:
"The Massachusetts-Michigan rule in successive-injury cases is to place full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. "If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. In this class would fall most of the cases discussed in the section on range of consequences in which a second injury occurred as the direct result of the first, as when claimant falls because of crutches which his first injury requires him to use. This group also includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion." (Footnotes omitted.)[1]

The line of distinction between which of the employers is responsible is admittedly a very fine one, but we agree with the findings of the referee, the Board and the circuit judge in this respect.

Affirmed.

NOTES


Smith v. Ed's Pancake House

556 P.2d 158 (1976)

27 Or.App. 361


Court of Appeals of Oregon.

Argued and Submitted September 24, 1976.

Decided November 15, 1976.

*159 G. Howard Cliff, Portland, argued the cause for appellants. With him on the brief was Frank V. Langfitt III, Portland.

Larry A. Brown, Eugene, argued the cause for respondent Janet Gayle Smith. With him on the brief were Flinn, Lake & Brown and William E. Flinn, Eugene.
THORNTON, Judge.

Claimant was involved in two successive industrial accidents. The issue in this appeal is which of two compensation carriers must bear the cost of claimant's workmen's compensation claim. The Workmen's Compensation Board held that the State Accident Insurance Fund (SAIF), which was the insurer at the time of the second accident, was primarily liable for claimant's coverage. The circuit court reversed, holding that Industrial Indemnity Company, the insurer at the time of the first accident, was solely liable. Industrial Indemnity appeals to this court.

Claimant sustained a compensable injury on May 18, 1973, while employed as a fry cook for Ed's Pancake House, whose compensation carrier was Industrial Indemnity Company. Claimant's testimony was that her upper back was her primary complaint following the 1973 injury. Her treating physician's reports indicate problems in the mid-thoracic region but a primary pain in the lumbar region. No sciatic pains were evident following the 1973 accident. In July of 1973 claimant was declared medically stationary. She continued to work at Ed's, however, until March 1974. Claimant testified that she left work at Ed's because of personal problems and that she did not have significant physical impairment at that time. Her physician contemporaneously reported mid-thoracic and low back problems with no sciatic tenderness.

Following her departure from Ed's Pancake House, claimant went to work for Deb's Downtown Restaurant, whose carrier was SAIF. On April 17, 1974, claimant slipped and fell while working at Deb's. Both claimant and fellow workers testified that the fall had a significant impact on claimant's ability to work, and that her primary complaint after the fall was low back or lumbar pain. The chart notes by Dr. Schroeder, claimant's physician, indicate no significant change and the incident was not mentioned when, in May of 1974, Dr. Schroeder next examined the claimant. Dr. Schroeder later indicated that he recalled claimant's having mentioned the fall at Deb's but that it was not specifically noted on the chart. Claimant testified that she left her job at Deb's on May 11, 1974, when she could no longer perform her duties. Dr. Schroeder next examined claimant in late October of 1974 and noted increasing low back pain and severe sciatic pain extending down the left leg.

The dispute in this case is referable to two apparent inconsistencies in the record: (1) During testimony before the referee the claimant denied that she had low back pain following her first injury. Medical records indicate a diagnosis of acute lumbar strain. (2) Medical records following a consultation with Dr. Schroeder on May 7, 1974, three weeks after claimant's fall at Deb's, do not indicate a change in her condition and do not mention the fall, although Dr. Schroeder later recalled that claimant did mention her fall during the
consultation. The referee resolved the problem by finding that claimant did have low back pain prior to the fall but found, on the basis of co-workers' testimony and Dr. Schroeder's subsequent diagnosis of increased low back pain and sciatic pain, that the evidence indicated more severe low back problems after the April 1974 fall. His conclusion was that the April 1974 incident was a material contributing cause of claimant's present condition and that SAIF was, therefore, the responsible insurer. We agree.

In Cutright v. Amer. Ship Dismantler, 6 Or. App. 62, 486 P.2d 591 (1971), we tacitly accepted the Massachusetts-Michigan rule in cases involving successive injuries and successive insurance carriers. As stated in 4 Larson, Workmen's Compensation Law 17-71 17-78, § 95.12 (1976):

"The `last injurious exposure' rule in successive-injury cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. "If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. In this class would fall most of the cases discussed in the section on range of consequences in which a second injury occurred as the direct result of the first, as when claimant falls because of crutches which his first injury requires him to use. This group also includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion. "On the other hand, if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. This is consistent with the general principle of the compensability of the aggravation of a preexisting condition."


In this case the bulk of the evidence supports the conclusion that claimant's condition was relatively stable until the April 1974 fall and that the fall precipitated increased lumbar pain and severe sciatic pain. We therefore conclude that the second insurer, SAIF, is the responsible insurer.

Reversed.