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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of)
Gary D. Sather, Claimant.)

Agency No. 10-01494

GARY D. SATHER,)
Petitioner, Petitioner on Review)

CA A149547

RECEIVED
STATE COURT ADMINISTRATOR

v.)

NOV 07 2014

SAIF CORPORATION and POLK)
COUNTY FARMERS-AG WEST SUPPLY)
Respondents, Respondents on Review)

SC N004628

— SUPREME COURT
— COURT OF APPEALS
— DEPUTY — FILED

BRIEF ON THE MERITS

From the Decision of the Court of Appeals
Filed May 7, 2014

Armstrong P.J.
Hadlock J.
Egan J. Dissenting

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November 6, 2014

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BRIEF ON THE MERITS

CONCISE STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW AND THE RULE OF LAW PETITIONER PROPOSES BE ESTABLISHED

Is it appropriate to conclude that, by changing the nature of the benefit under ORS 656.218(5) to the estate of a deceased worker from a discretionary payment to one which is mandatory, the legislature also intended to confer a right to enforce that entitlement, consistent with the rights and powers granted to the personal representative of an estate in ORS 114.305(19) & (20), and that the personal representative of the estate of the deceased worker is entitled to pursue that payment before the Workers' Compensation Board (Board) and the court, if necessary, in the absence of a surviving spouse or other qualifying dependents?

Claimant asks the court to adopt as a rule of law that by converting the payments to the estate of a deceased worker from a discretionary payment to one that is mandatory the legislature created an entitlement to the benefit of the estate, effectively making the estate a beneficiary under ORS 656.204(1) and 656.218(5), which the estate, through its personal representative, is entitled to pursue before the Board and, if necessary, the court.

THE NATURE OF THE PROCEEDING AND THE RELIEF SOUGHT.

This is a workers' compensation case which, before the Board involved the ongoing compensability of a combined condition claim following a denial issued

by SAIF Corporation under ORS 656.262(6)(c) and 656.262(7)(c). The Board affirmed the denial and the injured worker sought judicial review. Following briefing and oral argument, but before a final order could issue from the Court of Appeals, the worker died of causes unrelated to the injury. The worker's surviving adult son, Aaron Sather Nelson, was duly appointed as personal representative of the estate. SAIF moved to dismiss the action at the Court of Appeals and the personal representative opposed the motion and sought to be substituted for the deceased worker as the real party in interest. The court, holding that the personal representative of the estate does not have standing under ORS 656.218(3) to pursue the claim to a final determination because the personal representative is not one of the "persons" described in 656.218(5), denied the motion to substitute the personal representative and dismissed the appeal.

STATEMENT OF MATERIAL FACTS

The facts relevant to this dispute are set forth in the opening paragraphs of the decision of the Court of Appeals and Petitioner on Review does not dispute the Court's statement of facts. The Court's statement of facts is as follows:

In this workers' compensation case, claimant, now deceased, sought benefits for a work-related injury. SAIF, the employer's workers' compensation insurance carrier, accepted a claim for a lumbar strain. Claimant subsequently sought acceptance of a combined condition, which SAIF accepted but then denied on the ground that the accepted injury was no longer the major contributing

cause of the combined condition. The Workers' Compensation Board upheld SAIF's denial, and claimant sought judicial review.

Although claimant conceded that the accepted lumbar strain was no longer the cause of his combined condition, he contended that, in assessing the compensability of his combined condition claim, the board made the wrong inquiry – whether the *accepted condition* continues to be the major contributing cause of his disability or need for treatment. In claimant's view, the proper inquiry was whether the *accidental injury* continues to be the major contributing cause of his combined condition. *See Brown v. SAIF*, [262 Or App 640, 325 P3d 834] (May 7, 2014) (so holding). Claimant contended that there is no evidence that the “accidental injury” is no longer the major contributing cause of his disability or need for treatment.

SAIF has notified us that, while the petition for judicial review was under advisement, claimant died of causes unrelated to his claim, without a surviving spouse or other statutory beneficiaries. *See* ORS 656.204. SAIF asserts that the petition therefore should be dismissed, because there is no one entitled to pursue it. Claimant's personal representative, on behalf of claimant's estate, opposes the motion to dismiss and seeks to be substituted as claimant and to pursue the petition. SAIF opposes the personal representative's request to be substituted, contending that an estate is not a “person” entitled to pursue a claim under ORS 656.218(3). We agree with SAIF and dismiss the petition.

Sather v. SAIF Corp., 262 Or App 597, 599, 325 P3d 819 (2014) (including footnote 1) (emphasis in the original).

SUMMARY OF THE ARGUMENT

ORS 656.204 and 656.218(5) were amended in 2009 to provide an increased benefit explicitly payable to the estate of the injured worker, in the absence of statutory beneficiaries. The majority opinion argues that the legislative history supports its conclusion that the legislature did not intend to alter the prior

judicial construction of ORS 656.218(5) preventing the personal representative from continuing a hearing when the worker died prior to a final determination. The dissent argued that the change in ORS 656.204(1) which created an entitlement for the estate of the injured worker, whether or not he was survived by qualified beneficiaries, and modified the benefit provided in 656.218(5) to make it mandatory, and in addition to the benefit provided by 656.204(1) when the injury resulted in the death of the worker, provided a sufficient basis to infer that the legislature intended also to provide a procedure for the personal representative of the estate to seek enforcement of that entitlement. The dissent also argued that the legislative history did not provide clear support for either the majority or the dissenting opinion.

The legislative history of this change includes the legislature's directive to the Management-Labor Advisory Committee, by the 2007 legislature in Senate Bill 835 to study and make recommendations regarding Oregon's death benefit. The Committee's 2009 report and recommendations were essentially adopted by the legislature and do demonstrate an intent to provide a benefit to the estate under ORS 656.204(1) and 656.218(5) and that the benefit, and the right to receive it, were not intended to be contingent upon the survivorship of qualified dependents. Therefore it is reasonable to infer a legislative intent to allow a reasonable means of enforcement when the worker is not survived by qualified dependents.

STANDARD OF REVIEW

The issue presented in this case is whether the reference in ORS 656.218(3) to “the persons described in subsection (5) of this section” includes the estate of the injured based on the estate’s entitlement to certain benefits described in ORS 656.218(5). The question requires construction and application of one or more statutory provisions and is, therefore, an issue of law. This court reviews for legal error under a *de novo* standard of review. ORS 656.298(6) and 183.482(8)(a)(A). *Erck v. Brown Oldsmobile*, 311 Or 519, 815 P2d 1251 (1991), and *Garcia v. Boise Cascade Corp.*, 309 Or 297, 787 P2d 884 (1990).

ARGUMENT

The Workers’ Compensation Law is purely a statutory creation and extends no further than the specific provision enacted by the legislature. However, in construing the statute to determine the intent of the legislature the court should not ignore the underlying supporting theory that the law is intended to implement. In the case of the Workers’ Compensation Law, the legislature has set forth the basic principle of the underlying theory in ORS 656.012(1) as the creation of a system of compensation that incorporates the cost of work-related injuries into the stream of commerce rather than requiring those costs to be borne exclusively by the worker or by the taxpayers of the State.

ORS 656.012(2)(e) provides that one of the objectives of the Workers' Compensation Law is:

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. (Emphasis added).

From the time of its adoption, The Workers' Compensation Law contemplated the possibility that entities other than the worker and the worker's beneficiaries may be entitled to receive compensation. The most obvious of this class are medical clinics, hospitals and individual physicians who provided the necessary medical services to treat the injury or disease. Under ORS 656.204(1) this class could also include businesses involved in the final disposition of the body, when an injury or disease is fatal. Prior to 2009, however, the estate of the injured worker was not included in that class. That is not to say that the estate may not have actually received money from a workers' compensation insurance carrier when the carrier elected to provide reimbursements for funeral expenses already paid, or for prescription medication expenses incurred prior to death, but in the absence of a statutory beneficiary those payments were made at the discretion of the insurer, and not as a direct entitlement. *See Edwards v. Cherry City Electric, Inc.*, 141 Or App 578, 919 P2d 501 (1996).

In 2007 the legislature considered and adopted Senate Bill 835 which mandated a study of the adequacy of workers' compensation death benefits provided under ORS 656.204 and 656.208 by the Management-Labor Advisory Committee, (hereinafter MLAC). MLAC was required to consider the adequacy of the burial benefit provided by ORS 656.204(1), the adequacy of survivor benefits payable directly to statutory beneficiaries, as well as the categories of beneficiaries entitled to receive benefits. MLAC was also required to prepare a report and recommendations for the legislature prior to January 31, 2009. MLAC completed its study and made recommendations which were adopted by the legislature in Senate Bill 110 (2009), and ultimately incorporated into the Workers' Compensation Law in Or. Laws 2009, ch. 171.

A review of the Death Benefit Study Report (2009), which can be found at http://www.oregon.gov/DCBS/MLAC/docs/support_docs/death_benefit_report_2_23_12.pdf, and a comparison of the recommendations of the committee with the 2009 legislative changes to the Workers' Compensation Law demonstrates that the recommendations made by MLAC were essentially adopted without alteration. Minimal changes were recommended to the benefits structure. The committee did recommend, and the legislature adopted, an increase in the benefit payable to a surviving child 18 to 23 years of age and attending school with no surviving parent to provide assistance. See "Death Benefit Study Report" (2009), page 7;

ORS 656.204(8)(b). That benefit was increased to the full amount of the spousal benefit. The remaining significant recommendation involved the changes to ORS 656.204(1) and 656.218(5) that renamed and increased the benefit for final disposition of the body and mandated the full payment of any award to the estate of the injured worker when the worker dies, without statutory beneficiaries, prior to final determination of the claim. *See* “Death Benefit Study Report” (2009), page 5 and 9.

In support of the recommended changes to ORS 656.204(1) and 656.218(5) the committee specifically addressed the issue of the worker who dies without statutory beneficiaries.

MLAC received public testimony from several families of workers killed on the job. At least one family pointed out that burial and funeral services are not the only expenses associated with tying up loose ends of the worker’s estate. As with any unexpected death, there are many details that the family or estate must take care of aside from the immediate funeral expenses, such as final payment of a worker’s outstanding bills. In the case of a worker who has no statutory beneficiaries eligible for monthly benefits, this burden can be difficult for remaining family members who do not qualify for the benefits that compensate for income lost due to the worker’s death.

“Death Benefit Study Report” (2009), page 4.

MLAC recommends expanding this particular benefit [ORS 656.204(1)] based on public input about the situation of the single worker without statutory beneficiaries eligible for ongoing benefits. The benefit is a set amount and allows flexibility in paying immediate expenses and other financial obligations. In cases where the worker’s death is clearly work related, families would be able to consider the

benefits when planning a funeral. In cases where insurers need to use the full statutory time frame to determine if the death was work related, the worker's estate ultimately receives the benefit to offset the costs already incurred. (Emphasis added).

* * *

Recommendation: Allow the family, employer, or other parties to submit burial and funeral bills to the insurer for 60 days after the claim is accepted. At that point, the insurer would send the unused amount of the benefit to the worker's estate to address remaining expenses. (Emphasis in the original).

“Death Benefit Study Report” (2009), page 5.

These portions of the committee report support the assertion by the dissent that the legislature intended to expand the class of beneficiaries to include the estate and to provide a benefit to the estate regardless of whether there are qualifying dependents. However, the committee report does not fully resolve the ambiguity noted by the dissent. The committee's report does not discuss what occurs when the family, employer or other parties disagree with the insurer's conclusion that a claim is not compensable. Nor does the committee report address who is entitled to seek payment of the ORS 656.204(1) benefit when the insurer either delays or fails to make payment at all.

When a worker dies but is survived by qualifying dependents, ORS 656.218(4) unquestionably permits the qualifying dependents to file a request for hearing and to seek a final determination on compensability and/or entitlement to

any benefits. However, the recommendation for the modification of the benefit was intended to apply equally to a worker who dies without qualifying dependents. The committee apparently either believed that the insurer never made errors in the determination of compensability, or concluded that some remedy existed for the estate to challenge a denial of benefits.

The same is true for the recommendations that resulted in changes to ORS 656.218(5).

During the review process, MLAC looked at all of the laws related to workers who die while in the workers' compensation system. Because of that review, MLAC determined that one other statute needs clarification to make the intent clear and consistent with the other recommendations contained in this report.

ORS 656.218 states what happens if a worker dies before his or her permanent partial disability award is paid in full. If a worker has a spouse or dependent children, the insurer pays the full remainder of the award to them. However, the law also states that if the worker does not have a spouse or dependent children, the insurer only pays the statutory burial amount or the remaining permanent partial disability award, whichever is less.

MLAC thinks the insurer should be obligated to pay the full remaining award whether or not the worker has a spouse or children.

Recommendation: Clarify ORS 656.218 to state when a worker without statutory dependents dies before his or her permanent partial disability award is paid in full, the insurer must pay the full amount of the remaining award to the worker's estate. (Emphasis in the original).

“Death Benefit Study Report” (2009), page 9.

There are two initial errors in the committee's discussion and recommendations. First, in the absence of qualifying dependents, the insurer was previously not required to make any payment at all. The payment was entirely discretionary; and the fact that it was discretionary provided support for the conclusion of the court in *Edwards v. Cherry City Electric, Inc.*, 141 Or App 578, 919 P2d 501 (1996) that the personal representative had no standing. The 2009 amendments altered not only the amount of the benefit, but also its discretionary nature.

Second, even prior to 2009 ORS 656.218(5) did not address permanent partial disability. The statute required payment of "the award." The award, now accomplished through a Notice of Closure, includes a determination of both permanent partial disability and the worker's substantive entitlement to temporary disability compensation. Consequently, the award must include any unpaid temporary disability compensation as well as the remaining balance of any permanent partial disability award.

Again, however, the committee failed to fully address the procedure necessary to accomplish its intent. ORS 656.218(2) requires the insurer to issue a Notice of Closure when the worker dies prior to the issuance of a Notice of Closure. But what happens if the insurer fails to issue that notice, or the compensability of the injury remains undetermined? ORS 656.218(1) makes it

clear that the remainder of that section applies regardless of whether the eligibility for benefits or the amount of the benefits due have been determined. If the worker dies with qualifying dependents, those dependents are entitled to establish compensability and the amount of any compensation due. If the intent, consistent with the remainder of the recommended changes and the direct statements of the committee, was to place the worker who dies without qualifying dependents on the same footing as those who do, then the committee must have felt that some mechanism was available to accomplish that end.

Importantly, the committee found no basis on which to differentiate the interests and entitlements of worker's who die with statutory beneficiaries from those who die without them, with respect to the payment of the funeral and disposition benefit or the compensation to which the worker would have been entitled if he had survived. If the statute is construed to deprive the worker who dies without qualifying dependents of a procedural means of enforcing the benefit provided, the benefit itself becomes meaningless. And since the committee could find no rational basis for distinguishing between the two classes, and indeed found that they should be treated the same, the absence of a procedure for enforcement would appear to violate principles of equal protection.

If the legislature had intended to restrict the ability to request hearings or to complete litigation already begun to qualifying dependents it could have used the

term “beneficiary” which is defined at ORS 656.005(2) as “an injured worker, and the husband, wife, child or dependent of a worker who is entitled to receive payments under this chapter.” Instead, the legislature chose to use the term “person” which certainly includes natural persons but also includes a variety of economic entities as defined in the Workers’ Compensation Law. *See* ORS 656.005(23). The estate of an injured worker is an economic entity in many ways consistent with the specifically named entities in the statute with the exception that the estate must conduct its business through a personal representative, who is also a natural person who stands in the shoes of the now deceased worker.

If the court finds that the personal representative of the estate is entitled to request a hearing to establish the entitlement to the benefit under ORS 656.204(1) or to require its payment when entitlement is clear but payment has not been forthcoming, there is no apparent basis for excluding the personal representative from establishing the entitlement to benefits under ORS 656.218(5).

If the court finds that the personal representative does have standing to pursue the benefit provided by ORS 656.204(1) and 656.218(5) when the worker dies without qualifying dependents, the logical extension of the finding is that the personal representative also has standing to establish the entitlement to those benefits by completing the litigation previously begun in this case. In a similar, though admittedly not identical situation, the court has held that the right to pursue

benefits includes the right to establish any fact or circumstance on which the entitlement to those benefits depends. *See Mikolich v. State Indus. Acc. Commission*, 212 Or 36, 316 P2d 812 (1957) (holding that the right of a widow to benefits following the death of a worker while permanently totally disabled did not depend on an order establishing permanent total disability. The widow was entitled to establish in the first instance that the worker was totally disabled at the time of his death.)

Counsel is mindful of the fact that both ORS 656.218(3) and 656.218(4) identify the persons able to bring or continue a hearing as the “persons described in subsection (5) of this section”, and that subsection (5) describes, in its first sentence, persons “entitled to receive death benefits if the injury causing the disability had been fatal.” The majority opinion puts great weight on the opening phrase of the second sentence which begins “[i]n the absence of persons so entitled.” That language remains unchanged between the former and current versions of the statute and lends support to the majority’s analysis. The resolution offered in the Petition for Review and this brief produces significant tension between a conclusion that the personal representative is entitled to pursue an action, and the opening phrase of that second sentence which the undersigned has been unable to fully resolve. Nevertheless, a construction of the statute that prevents the personal representative from continuing the action to a final

determination presents an even greater tension, and indeed, nullifies the legislative changes mandating benefits since it would prescribe a remedy and then deny the procedural wherewithal to enforce it. That outcome would essentially mean that payments required by ORS 656.218(5) would remain discretionary, even though the obvious legislative intent was to make those payments mandatory.

CONCLUSION

The decision of the Court of Appeals filed May 7, 2014 should be reversed and the court should find that with the 2009 amendments. The legislature created a separate and distinct death benefit payable to the estate, and in so doing brought the personal representative of the estate within the ambit of persons entitled to initiate or maintain an action for receipt of those benefits under the Workers' Compensation Law and to establish any facts, including compensability of the worker's injuries, that may be a prerequisite to receipt of those benefits.

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the word-count limitation for a Brief on the Merits in the Supreme Court ORAP 5.05(2)(b)(i) and that the word-count of this brief is 3,618 words as counted by Microsoft Office Word 2010.

I further certify that the size of the type in this brief is not smaller than 14 point, Times New Roman, for both the text of the brief and footnotes as required by ORAP 5.05(4)(f)

DATED this 6th day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 12 copies of the Brief on the Merits by placing them in a sealed container, postage paid, and delivering it to the Post Office in Portland, Oregon, on November 6, 2014, addressed as follows:

State Court Administrator
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I further certify that I served two certified true copies of the original of the foregoing Brief on the Merits on Holly C. O'Dell by placing them in a sealed envelope, postage paid, and delivering it to the Post Office in Portland, Oregon, on November 6, 2014, addressed as follows:

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