

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of,
GARY D. SATHER, Claimant.

GARY D. SATHER,

Petitioner,
Petitioner on Review,

v.

SAIF CORPORATION and POLK
COUNTY FARMERS-AG WEST
SUPPLY,

Respondents,
Respondent on Review.

Supreme Court No. S062466

Court of Appeals No. A149547

Workers' Compensation Board
No. 10-01494

**BRIEF ON THE MERTIS OF *AMICUS CURIAE*
OREGON TRIAL LAWYERS ASSOCIATION**

On Petition for Review of the Decision of the Court of Appeals
On Judicial Review of an Order of the Workers' Compensation Board

Greig Lowell, Board Member
Margaret F. Weddell, Board Member

Opinion filed: May 7, 2014

Author of Opinion: Judge Rex Armstrong

Before: Judges Rex Armstrong, Erika Hadlock and James Egan

Dissent: Judge James Egan

Sara Ghafouri, OSB 111021
Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, Oregon 97201
(503) 225-0777
sghafouri@hk-law.com

Donald M. Hooton, OSB 874155
Hooton Wold & Okrent, LLP
P.O. Box 569
Beaverton, Oregon 97075
(503) 644-8686
dhooton@hwolaw.com

Jodie Phillips Polich, OSB 935585
Law Offices of Jodie Phillips Polich
P.O. Box 220119
Milwaukie, OR 97269
(503) 654-1388
jodie@phillipspolich.com

Attorneys for Petitioner
Gary D. Sather

Attorneys for *Amicus Curiae*
Oregon Trial Lawyers Association

Holly C. O'Dell, OSB 064560
SAIF Corporation
Legal Department
400 High Street SE
Salem, Oregon 97312-1000
(503) 373-8671
holode@saif.com

Attorneys for Respondents
SAIF Corp. and Polk County
Farmers-AG West Supply

TABLE OF CONTENTS

INTRODUCTION	1
QUESTIONS PRESENTED AND PROPOSED RULE OF LAW	2
Questions Presented	2
Proposed Rule of Law	2
ARGUMENT	2
I. ORS 656.218(5) Provides Authority for the Deceased Worker's Estate to Pursue a Claim to Receive Disability Benefits	2
II. ORS 656.218(5) Treats Workers Who Die Without Statutory Dependents Equally With Workers Who Die With Them.....	11
CONCLUSION.....	13

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Edwards v. Cherry City Elec., Inc.</i> , 141 Or App 578, 919 P2d 501 (1996)	5
<i>Fertig v. State Comp. Dep't</i> , 254 Or 136, 458 P2d 444 (1969)	9
<i>Lane Cnty. v. Land Conservation & Dev. Comm'n</i> , 325 Or 569, 942 P2d 278 (1997)	8
<i>Sather v. SAIF Corp.</i> , 262 Or App 597, 325 P3d 819 (2014)	<i>passim</i>
<i>Trice v. Tektronix, Inc.</i> , 104 Or App 461, 801 P.2d 896 (1990)	9

Statutes

Or Laws 1917, ch 288, § 21	9
Or Laws 2009, ch 171, § 2	4
ORS 174.010	10
ORS 656.012	11
ORS 656.204	<i>passim</i>
ORS 656.210	11
ORS 656.212	11
ORS 656.214	11
ORS 656.218	2, 3, 5, 7, 8
ORS 656.218(1)	8, 9, 10
ORS 656.218(3)	2, 4, 5
ORS 656.218(5)	<i>passim</i>

ORS 656.790.....	6
------------------	---

Legislative History

Testimony, Senate Committee on Commerce and Workforce Development, SB 110, January 28, 2009, Ex 5	<i>passim</i>
--	---------------

***AMICUS CURIAE BRIEF
OF OTLA***

INTRODUCTION

The Court of Appeals decision in *Sather v. SAIF Corp.*, 262 Or App 597, 325 P3d 819 (2014), granted SAIF's motion to dismiss the petition for judicial review of the September 2, 2011, Order by the Workers' Compensation Board (the board) and denied the personal representative's motion to be substituted for a petitioner on appeal, because the court determined “the personal representative” is not a "person" entitled to maintain a cause of action under ORS 656.218(5). The Court of Appeals examined the legislature's 2009 amendments to ORS 656.218(5) and concluded that, although the injured worker's estate has the right to collect unpaid benefits, the estate does not have independent authority to pursue a claim that has not yet been determined.

The Oregon Trial Lawyers Association (OTLA) urges this court to reverse the Court of Appeals holding in *Sather* and hold that the personal representative of the worker's estate is entitled to continue the worker's claim for compensation. The purpose of the 2009 amendment to ORS 656.218(5) was to equalize treatment between workers who died without statutory dependents and those who died with statutory dependents. As a result, the Court should determine that ORS 656.218(5) then creates a right for the estate

to receive disability benefit payments while, at the same time, allowing a means for the estate to pursue that right.

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

Questions Presented

Is the deceased worker's personal representative within the group of "persons" who are entitled to be substituted as a real party in interest and to continue worker's compensation claim, if a worker dies during the pendency of the judicial review of a denied claim, from causes unrelated to that work-related injury, without a spouse or any statutory dependents?

Proposed Rule of Law

The personal representative of the estate of a deceased worker is entitled to be substituted as a real party in interest and to continue the deceased's compensation claim.

ARGUMENT

I. ORS 656.218(5) Provides Authority for the Deceased Worker's Estate to Pursue a Claim to Receive Disability Benefits.

Several of the Workers' Compensation Laws set out who is entitled to pursue payments for disability benefits after an injured worker's death.

Relevant to this case is ORS 656.218, which relates to receipt of permanent partial disability benefit payments after the death of a worker for causes unrelated to the work-related injury. ORS 656.218(3) explains that when a

worker dies before the final disposition of his or her compensation claim, "persons described in subsection (5) of this section shall be entitled to pursue" a disability benefit claim to final determination. For the reasons explained below, both the legislative history and context of ORS 656.218(5) compel this Court to hold that the phrase "persons described in subsection (5)" includes the personal representatives of the worker's estate.

If a worker dies from causes unrelated to the work-related injury, ORS 656.218 addresses who is authorized to pursue claims and who is entitled to receive permanent partial disability benefits. ORS 656.218 states in relevant part:

“(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.

* * * * *

(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.

* * * * *

(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."

(Emphasis added.) Claimant had already requested a hearing at the time of his death.

ORS 656.218(3) states that when a worker dies after the worker has requested a hearing but before final disposition of the request, "the *persons* described in subsection (5)" are entitled to pursue the matter to final determination. (Emphasis added.) ORS 656.218(5) provides that a worker's permanent partial disability benefit payments continue to be made "to the persons who would have been entitled to receive death benefits if the injury causing the disability had been fatal" under ORS 656.204 and, in absence of such persons, the unpaid balance of the award goes to the worker's estate.

Before the legislature's 2009 amendments, ORS 656.218(5) (1999), *amended by* Or Laws 2009, ch 171, § 2, provided for a burial allowance:

"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, a burial allowance may be paid not to exceed the lesser of either the unpaid award or the amount payable by ORS 656.204."

(Emphasis added.) Under the previous version of the statute, the second sentence authorizing a burial allowance was discretionary and, consequently,

the Court of Appeals determined that "there is no need to give the personal representative the right to pursue claims under ORS 656.218." *Edwards v. Cherry City Elec., Inc.*, 141 Or App 578, 584, 919 P2d 501 (1996). As a result, only the persons entitled to receive death benefits under ORS 656.204, which at the time did not include the deceased worker's estate, could pursue claims for an award of permanent partial disability.

The Court of Appeals below determined that under the 2009 version of ORS 656.218, the "persons" entitled to pursue claims under ORS 656.218(3), as defined under subsection (5), do not include the deceased worker's estate or personal representative. 262 Or App at 605. The majority determined that the second sentence of ORS 656.218(5) "is applicable when the deceased worker's eligibility for benefits or the amount of benefits has been determined—when there has been an award[]" and "does not provide independent authority for the estate to pursue a claim that has not yet been determined." *Id.* As the dissent noted, the majority's interpretation of ORS 656.218 leads to an incongruous result by requiring certain permanent partial disability benefits to be paid to the estate without providing the estate an ability to pursue those benefits. *Id.* at 609 (Egan, J., dissenting).

There are two significant problems with the majority's interpretation of ORS 656.218(5). First, the majority's analysis fails to appreciate the reasons

why ORS 656.218(5) was amended by the legislature. The 2009 amendments were part of Senate Bill (SB) 110 (2009), which was based on recommendations from the Management Labor Advisory Committee (MLAC) Death Benefits Study. Testimony, Senate Committee on Commerce and Workforce Development, SB 110, January 28, 2009, Ex 5 (Senate Bill 835 (2007) Death Benefit Study Report). *See* ORS 656.790. MLAC's study was conducted to evaluate the adequacy of the death benefits in the workers' compensation system and to make recommendations to improve and enhance death benefits. *Id.*

One of the MLAC's recommendations, incorporated in SB 110, was to amend ORS 656.204 (2007), a statute that authorized benefits when the worker's accidental injury was fatal. In accordance with the previous version of ORS 656.204, the following types of benefits would be paid to certain persons: (1) a "burial" benefit; (2) surviving spouse's benefit; (3) a child's benefit; and (4) a benefit for related dependents.¹ With respect to the cost of "burial," MLAC recommended that insurers (or self-insured employers) no longer should be required to pay the cost of "burial," but instead pay for the cost of "final disposition of the body and funeral expenses." Testimony, Senate Committee on Commerce and Workforce Development, SB 110, January 28,

¹ ORS 656.204 identifies beneficiaries who are entitled to receive death benefits. For purposes of this argument, the class of beneficiaries described in ORS 656.204 is referred to as "statutory dependents."

2009, Ex 5 (Senate Bill 835 (2007) Death Benefit Study Report). According to MLAC's study, the purpose of the amendment was to allow "for flexibility in paying immediate expenses and other financial obligations" that a family must take care of after the worker's death. *Id.*

In response to public testimony requesting creation of a new class of beneficiaries for workers who die without a spouse or any statutory dependents, MLAC further recommended that the legislature amend ORS 656.204(1) to add a provision stating that "[i]f any part of the benefit that remains unpaid 60 days after claim acceptance, the insurer or self-insured employer shall pay *the unpaid amount to the estate* of the worker." *Id.* (emphasis added).

To make the other statutes consistent with the statutory changes in ORS 656.204, MLAC made additional recommendations which the legislature adopted in ORS 656.218. Under the previous version of ORS 656.218(5), "In the absence of persons so entitled, a burial allowance may be paid not to exceed the lesser of either the unpaid award or the amount payable by ORS 656.204." Based on its recommendation to eliminate the "burial allowance" and to require any unpaid amount to be paid to the estate under ORS 656.204(1), MLAC determined that ORS 656.218(5) also should be amended:

“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.”

(Boldface and emphasis in original.) It follows that when the legislature adopted MLAC's recommendations for SB 110, and amended *both* ORS 656.204 and ORS 656.218, the legislature created a new beneficiary — the worker's estate — who is entitled to the full amount of the remaining disability award owed to the deceased worker.

Second, the majority's reading of ORS 656.218(5) is inconsistent with the statute's context. The context of a statute allows the reviewing court to "construe each part [of the statute] with the other parts in an attempt to produce a harmonious whole." *Lane Cnty. v. Land Conservation & Dev. Comm'n*, 325 Or 569, 578, 942 P2d 278, 283 (1997). ORS 656.218(1) provides that "[i]n 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." (Emphasis added.) Before 1973, and as originally adopted, ORS 656.218(1) was limited to a worker "receiving monthly payments on account of permanent partial disability." *Fertig v. State Comp. Dep't*, 254 Or 136, 144, 458 P2d 444, 444 (1969) (quoting Or Laws 1917, ch 288, § 21).

The 1973 amendments deleted the reference to the phrase "receiving monthly payment" and, instead, directed payments to be made if the deceased worker was "entitled to compensation," regardless of whether the eligibility or amounts have been determined before the worker's death. *Trice v. Tektronix, Inc.*, 104 Or App 461, 464, 801 P.2d 896, 897 (1990) ("The amended statute provides that a surviving spouse and others who are eligible to receive death benefits pursuant to ORS 656.204 are also entitled to all permanent disability benefits, even if the benefits were undetermined at the time of death."). The current version of ORS 656.218(1) has retained the "entitled to compensation" language. Accordingly, ORS 656.218(1) creates the authority for "persons described under subsection (5)" who are eligible to receive disability benefits to pursue a claim for those benefits, even if the eligibility of that benefit has not been determined.

In contrast, the majority's opinion allows benefits to be paid to the estate only when the permanent partial disability benefits and their amounts have been already determined. *Id.* at 605. To accept the majority opinion's construction

would be to effectively rewrite ORS 656.218(1) which states that "payments shall be made" "in a case of the death of a worker entitled to compensation" regardless whether the eligibility has been determined. This analysis is contrary to this Court's approach in legislative construction which is to give effect to all parts of the statute whenever possible. *See* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."). This Court should read the second sentence of ORS 656.218(5) in a manner that gives effect to both ORS 656.218(1) and (5). Thus, the correct interpretation of ORS 656.218(5) is that the estate is entitled to receive a benefit of the "unpaid balance of the award" and entitled to pursue a claim for that award.

That statutory interpretation of ORS 656.218(5) is consistent with the legislative history of the statute. As noted earlier, the legislature amended ORS 656.204(1) to treat the estate as a statutory beneficiary who is entitled to any unpaid benefits established under ORS 656.204(1)(a) ("The cost of final disposition of the body and funeral expenses, * * * shall be paid, not to exceed 20 times the average weekly wage in any case). Moreover, the legislature amended ORS 656.218(5) to treat workers who die without statutory dependents equally with those who die with statutory dependents. Thus, taken together, the legislative history and the context, lead to the conclusion that the

deceased-worker's estate, through its personal representative, is a "person" "who would have been entitled to receive death benefits if the injury" had been fatal under ORS 656.204. Therefore, the personal representative is also a person, under ORS 656.218(5), entitled to pursue a claim to final determination.

Accordingly, this Court should reverse the majority opinion's holding below and hold that the personal representative of the worker's estate is entitled to continue the deceased worker's compensation claim.

II. ORS 656.218(5) Treats Workers Who Die Without Statutory Dependents Equally With Workers Who Die With Them.

To hold that the personal representative cannot pursue a claim on behalf of the estate would be odds with the policies behind Oregon's Workers' Compensation Laws. Workers' compensation provides medical care and wage replacement to injured workers, and in some cases permanent partial disability benefits. *See generally* ORS 656.012, 656.210, 656.212 and 656.214. Those permanent partial disability benefits are to be paid by the insurer even after the death of the injured worker to help the deceased worker's family, which depends on those benefits to compensate for the income lost due to the worker's death, and to help the estate pay for any outstanding debts or costs.

The deceased worker's family often faces many costs associated with the

death of the worker beyond just burial expenses. As the MLAC's Death Study acknowledged, "[T]here are many details that the *family or estate* must take care of aside from the immediate funeral expenses, such as final payment of the worker's outstanding bills." Testimony, Senate Committee on Commerce and Workforce Development, SB 110, January 28, 2009, Ex 5 (Senate Bill 835 (2007) Death Benefit Study Report) (emphasis added). If the worker dies without any statutory dependents who are entitled to monthly payments, then the "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." *Id.* The worker's family is left with all the outstanding debts, costs and bills as a result of the worker's death.

The purpose behind the legislature's 2009 amendments was to equalize treatment between workers who died with statutory dependents and workers who died without them. But the majority's opinion below treats workers without statutory dependents in a manner that puts them at a disadvantage. "Where the worker dies without statutory dependents during the pendency" of a claim for permanent partial disability, "the insurer may now avoid making payment on an award." *Sather*, 262 Or App at 609 (Egan, J., dissenting). The ultimate effect of the majority opinion is that the worker's estate must assume the obligation to pay outstanding debts or costs of the injury when those costs of

the injury should have been paid by the insurer which collected premiums for such coverage for the worker and the worker's beneficiaries. Such a windfall to the insurer, resulting hardship on the worker's estate, could not have been intended by the legislature when it amended ORS 656.218(5).

As a result, the better interpretation, and the one most consistent with the legislative history of ORS 656.218, is that the personal representative is entitled to pursue a disability benefits claim on behalf of the estate.

CONCLUSION

This Court should reverse the Court of Appeals holding and hold that the deceased worker's estate and personal representative are entitled to be substituted as a real party in interest and to continue the worker's compensation claim that has not yet finally been determined. To affirm the Court of Appeals holding would unnecessarily place an undue burden on the deceased worker's estate.

DATED this 6th day of November, 2014.

Respectfully submitted,

/s/ Sara Ghafouri

Sara Ghafouri, OSB 111021

Jodie Phillips Polich, OSB 935585

Of Attorneys for *Amicus Curiae*

Oregon Trial Lawyers Association

CERTIFICATE OF COMPLIANCE

Brief length:

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(ii) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,940 words.

Type size:

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(d)(ii).

/s/ Sara Ghafouri

Sara Ghafouri, OSB 111021

Jodie Phillips Polich, OSB 935585

Of Attorneys for *Amicus Curiae*

Oregon Trial Lawyers Association

CERTIFICATE OF SERVICE AND FILING

I certify that on this 6th day of November, 2014, I served a true copy of the foregoing *AMICUS CURIAE* BRIEF on the following:

Donald M. Hooton, OSB 874155
Hooton Wold & Okrent, LLP
P.O. Box 569
Beaverton, Oregon 97075
(503) 644-8686
dhooton@hwolaw.com

Attorneys for Petitioner
Gary D. Sather

by electronic service through the eFiling system

Holly C. O'Dell, OSB 064560
SAIF Corporation
Legal Department
400 High Street SE
Salem, Oregon 97312-1000
(503) 373-8671
holode@saif.com

Attorneys for Respondents
SAIF Corp. and Polk County
Farmers-AG West Supply

Jodie Phillips Polich, OSB 935585
Law Offices of Jodie Phillips
Polich
P.O. Box 220119
Milwaukie, OR 97269
(503) 654-1388
jodie@phillipspolich.com

Attorneys for *Amicus Curiae*
Oregon Trial Lawyers Association

by email and regular U.S. mail with postage prepaid.

On this same date I electronically filed an original of the brief through the eFiling system.

/s/ Sara Ghafouri
Sara Ghafouri, OSB 111021
Of Attorneys for *Amicus Curiae*