



Stare In-Decisis?

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What do you do if the Oregon Supreme Court construes a statute in a way you don't like? Settled Oregon law seems to say that you should pause, take a deep breath and learn to live with it. But a trend of Supreme Court decisions since *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) raises the possibility that even Supreme Court constructions of Oregon statutes are open to review. Practitioners should be mindful of opportunities to revisit statutory construction, not to mention professional pitfalls in failing to do so.

In *PGE v. BOLI*, the Oregon Supreme Court set out what is now Oregon's familiar methodology for construing statutes. At the first level of analysis, the court examines the text and context of the statute in order to discern legislative intent. If the meaning of the statute is clear at that stage, then further inquiry is unnecessary. But if the statute's clear meaning is not discernible from its text and context, the court will turn to legislative history. If that does not resolve remaining uncertainty, the court must resort to general maxims of statutory construction to resolve the remaining uncertainty. *PGE v. BOLI*, 317 Or at 612-13.

To say that *PGE v. BOLI* has become a guiding principle of Oregon law would be an understatement. In the nearly thirteen years since the opinion was published, the case has been cited no less than 1392 times by the Oregon Appellate Courts, Tax Court and Workers Compensation Board.

The methodology described in the opinion is something all Oregon attorneys must be aware of and to which we all must pay heed.

But what about a statutory construction that pre-dates *PGE v. BOLI*? Or even Supreme Court pronouncements of legislative intent after the case was decided: does statutory interpretation remain settled, or is it subject to challenge?

Until recently the answers to these questions seemed pretty well settled: "When [the Supreme Court] interprets a statute, the interpretation becomes part of the statute, subject only to a revision by the legislature." *State v. King*, 316 Or 437, 445, 852 P2d 190 (1993) (citing *State v. White*, 312 Or 147, 817 P2d 292 (1987)). In other words, absent a substantive legislative change, a Supreme Court decision interpreting legislative intent is



the final word.

In the years following *PGE v. BOLI*, this once clear edict of statutory construction has, at a minimum, shifted and is now open to question. To be sure, the Court of Appeals still cites *State v. King* and follows the so-called "prior interpretation"

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rule. It seems likely that an argument to re-construe a statute that has already been glossed by the Supreme Court will fail with the Court of Appeals. *E.g. North Marion School Dist. # 15 ex rel Trejo v. Acstar Ins. Co.*, 206 Or App 593, 600, 138 P3d 876 (2006) (stating that the Supreme Court's interpretation becomes part of the statute as if it were written into it at the time of enactment). And for at least a few years after *PGE v. BOLI*, the Supreme Court concurred. See *In the Matter of the Compensation of Mathel*, 319 Or 235, 239, 875 P2d 455 (1994) (applying prior interpretation rule); *Holcomb v. Sunderland*, 321 Or. 99, 106, 894 P2d 457 (1995) (same); *State v. Wilson*, 323 Or 498, 512 n.9, 911 P2d 320 (1996) (same).

But beginning in about 1997 the Court started shifting the way it dealt with its own prior statutory interpretations. That year the Court decided numerous cases involving prior statutory construction. In at least one, applying *PGE v. BOLI*, it described the examination of prior Supreme Court case law interpreting the same statutory terms as part of its analysis of the text of a statute. *E.g. Bird v. Norpac Foods, Inc.*, 325 Or 55, 60, 934 P2d 382 (1997) (stating that text of statute, including prior Supreme Court interpretations, is best evidence of legislative intent).

At the same time, in other opinions, the Court began to describe its prior pronouncements on legislative intent as part

of the "first level" of statutory analysis required in *PGE v. BOLI*, without explaining whether they were part of the text of the statute, or merely context helpful in determining the legislative intent of the law: "Text and context includes prior case law from this court interpreting the same statute." *In the Matter of Compensation of Hayes*, 325 Or 592, 596, 943 P2d 197 (1997) (citing *State v. King*). See also *Redman Industries, Inc. v. Lang*, 326 Or 32, 36, 943 P2d 208 (1997), (citing *State v. King*).

This watered-down version of the prior interpretation rule only held sway for the next year or two before the Court began to decide, at least occa-

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sionally, that prior statutory construction was relevant only as context under *PGE v. BOLI*'s first level of analysis. *In re Marriage of Sleeper*, 328 Or 504, 509, 982 P2d 1126 (1999); *Fresk v. Kraemer*, 337 Or 513, 520, 99 P3d 282 (2004).¹

Finally, late last year, the Court seemed to entirely dispose of any vestige of conclusive authority to its prior interpretations of statute, at least as to pre-*PGE v. BOLI* statutory constructions. Tucked away in a workers' compensation opinion from December 2005 is the following passage:

The Court of Appeals cited correctly this court's statement in [*Buddenberg v. South Coast Lumber*, 316 Or 180, 850 P2d 360 (1993)] in rejecting claimant's argument. However, in *Buddenberg* this court did not analyze ORS 656.325(5)(b) under the now-familiar methodology for construing statutes that this court summarized in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). This case presents the opportunity to do so.

Morales v. SAIF Corporation, 339 Or 574, 578-79, 124 P3d 1233 (2005).

And that is just what the Supreme Court did. The Court re-analyzed ORS 656.325(5)(b) without considering its prior interpretation of that provision as conclusive, as text of the statute, or even as context for its analysis. The Court applied the *PGE v. BOLI* methodology looking only at the text written by the legislature and the context of the statute in the overall scheme of the workers'

compensation law.

Still, after eschewing the *Buddenberg* construction of ORS 656.325(5)(b), the court referred back to a prior opinion construing ORS 656.325(5) as relevant to its *contextual* analysis. In the end, the Court reached the same conclusion it had reached in *Buddenberg*. So, perhaps the decision has no meaning.

But if methodology is important—and if *PGE v. BOLI* teaches us anything it is that methodology is important—then all practitioners must keep the *Morales* methodology in mind. *Morales* may be the end point, or a step along the path, of a paradigm shift toward statutory construction where the book is never quite closed. This issue is now squarely before the court and, perhaps, will soon be resolved. *Bergerson v. Salem-Kaiser School Dist.*, 194 Or App 301, 95 P3d 215 review allowed 337 Or 616 (2004). For at least the moment, though, it is important to realize that judicial pronouncements of legislative intent we take for granted might just be open to debate. ☺

Endnotes

1 According to Westlaw, the last time the Oregon Supreme Court cited *State v. King* after 1997 was in a 2002 concurrence by Justice Durham, criticizing the prior interpretation rule and concluding that it does not accurately reflect Oregon law. *League of Oregon Cities v. State*, 334 Or 645, 688, 56 P3d 892 (2002). In 2000, however, without citing *State v. King*, the Court held that its first interpretation of a statute (as opposed to a later, contrary interpretation) controlled under principles of stare decisis. *Fulmer v. Timber Inn Restaurant*, 330 Or 413, 419-20, 9 P3d 710 (2000).