
In the Matter of the Compensation of
NATHANIEL D. HARDY, Claimant
WCB Case No. 10-03972
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) upheld the self-insured employer's denial of his injury claim for multiple conditions; and (2) did not assess a penalty or attorney fee for the employer's allegedly unreasonable denial. On review, the issues are compensability, penalties, and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

On June 23, 2010, claimant, a laborer, was working as part of a crew remodeling a retail store. Near the end of claimant's shift, a bin full of tiles needed to be taken to the dumpster with a forklift, a "Gradall," which was a larger one used for construction jobs. (Tr. 34).¹ Claimant used the forklift to pick up a bin of tiles and brought it to the dumpster. (Tr. 16-17). As he tipped the bin into the dumpster, it slid off the forks and into the dumpster. Another forklift driver who was working with claimant (Burnett) came to help, but claimant was able to retrieve the bin. (Tr. 17-20). Because the pin on the bin was broken, they wrapped a chain around it to hold it. (Tr. 20). Burnett offered to drive the forklift back to the store and claimant agreed. (*Id.*)

At that time, there was daylight with good visibility and the conditions were clear and dry. (Ex. 18-42, -53). Claimant was wearing a light-colored shirt. (Ex. 18-41, -53). Burnett testified that there were no potholes or bumps in the parking lot and believed it had recently been repaved. (Tr. 77).

Claimant began walking back to the job site and Burnett drove the forklift in the same direction. Claimant testified that the forklift caught the back of his heel, causing him to fall. Burnett testified that claimant "lunged" in front of the forklift. After the forklift ran over him, claimant was transported by ambulance to the hospital, where he was treated for multiple severe injuries. (Ex. 13).

¹ Citations to the transcript refer to the December 9, 2010 transcript, unless otherwise noted.

The employer obtained a statement from claimant on June 29, 2010. (Ex. 17). The Oregon Occupational Safety and Health Division (OR-OSHA) conducted an investigation, interviewing claimant; Burnett; McDaniel, a security guard; Perez, a security guard; Morrison, a store manager; Meuler, the employer's safety specialist; and Fitzgerald, a foreman. (Ex. 18). OR-OSHA found no mechanical fault with the forklift. (Ex. 18-20). The OR-OSHA report concluded that there was not enough information available to determine exactly what happened to cause contact between the forklift and claimant. (Ex. 18-20).

OR-OSHA assessed a penalty against the employer because Burnett had not been certified to operate the forklift. (Ex. 18-9, -10, -15). However, OR-OSHA concluded that, based on Burnett's years of experience, an on-the-job evaluation of his forklift operator abilities and performance by his foreman, and safe work habits observed by witnesses, the lack of forklift certification was not a contributing factor in the accident. (Ex. 18-21).

The employer denied claimant's injury claim on the ground that it did not occur in the course and scope of employment. (Ex. 20). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

At the hearing, the parties agreed that the only issue was legal causation; specifically, whether claimant intentionally injured himself within the meaning of ORS 656.156(1). (Tr. 4, 5). In upholding the employer's denial, the ALJ questioned how the forklift could have gotten so close to claimant as to strike him without him hearing it. The ALJ reasoned that it was most likely that claimant consciously contributed to his injuries. The ALJ then concluded that the employer had met its burden of proving that claimant's injuries resulted from his own willful intention.

On review, claimant argues that the employer did not rebut the presumption in ORS 656.310(1) that his injury was not occasioned by the willful intention to commit self-injury. The employer responds that claimant consciously and intentionally stepped in front of the forklift and that he knew that doing so would injure him. The employer relies on Burnett's testimony, as well as circumstantial evidence from which it argues it can be inferred that claimant intended to cause injury to himself. For the following reasons, we conclude that the employer did not rebut the presumption against intentional injury in ORS 656.310(1)(b).

Claimant bears the burden of proving that his injuries were accidental and arose out of and in the course of employment. ORS 656.005(7)(a); ORS 656.266(1). Pursuant to ORS 656.156(1), an injury is not compensable if it results “from the deliberate intention of the worker to produce such injury[.]” There is a “rebuttable presumption” that an “injury was not occasioned by the willful intention of the injured worker to commit self-injury[.]” ORS 656.310(1)(b); *Wayne Szymanski*, 58 Van Natta 738, 739 (2006). The employer acknowledges that it has the burden to rebut that presumption.

ORS 656.156(1) does not apply where the claimant’s injuries result from negligence, carelessness or recklessness. *Jean R. Louis*, 50 Van Natta 2044, 2047 (1998); see *Youngren v. Weyerhaeuser*, 41 Or App 333 (1979) (where the claimant intended only to vent frustration, not injure himself, ORS 656.156(1) did not apply). The test for determining whether claimant’s injury was intentional is: (1) whether claimant’s condition was the result of his or her own conscious, volitional act; and (2) whether claimant had knowledge of the consequences of the act. *James G. Wesley*, 40 Van Natta 1841, 1844 (1988).

The ALJ did not make express credibility findings regarding the testimony of witnesses. We, therefore, evaluate the credibility of witnesses based on an objective review of the substance of the record, including relevant testimony. *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987).

Burnett and claimant were the only witnesses to the incident. Their testimony differed significantly. Burnett’s testimony was generally consistent with his June 23, 2010 statement and his OR-OSHA statement. (See Ex. 18-34, -35, -54, -55).

Burnett testified that, when he got in the forklift, he asked claimant to stand clear. (Tr. 72). He testified that he made eye contact with claimant, and that claimant backed up. (Tr. 72, 73, 75, 83). The forklift was pointed straight to go back to the store, so there was no need to turn the wheels. (Tr. 73, 79). When Burnett saw claimant step back, he started forward with the forklift. (Tr. 75). Burnett went forward about seven to eight feet at a slow speed, when he saw claimant “lunge” towards the tire. (Tr. 75, 76, 78). He said that claimant came at an angle and lunged towards the forklift in two to three steps. (Tr. 84). After the lunging motion, Burnett did not see claimant, so he stopped and went to look, finding claimant on the ground. (Tr. 78). Burnett explained that claimant asked “Why did you turn into me?” Burnett testified that he told claimant he had been going straight and that claimant had turned into him. (Tr. 79).

Burnett testified that he had no reason to want to hit claimant and did not try to drive into him. (Tr. 80, 83). He explained that, earlier, Fitzgerald, the foreman, told him that claimant had alleged that he had made a racial slur to him. Burnett denied doing so, but was told not to discuss the situation with claimant until he talked to a manager. (*Id.*) Burnett testified that claimant told him he was angry because he had not been given a pay raise. He explained that claimant told him: “If I ever had a chance, * * * I’d get Workmen’s Comp in a heartbeat. It’s an easy way to go. * * * I’d sue anybody I could.” (Tr. 81). Burnett also testified that claimant told him that evening that the employer was sending him out of town the next day and he did not want to go out of town because of a situation involving his girlfriend. (*Id.*)

Claimant denied that he intentionally moved into the path of the forklift and tried to get injured. (Tr. 49, 51, 54, 116, 118, 120). He had experience with forklifts and was aware of the danger. (Tr. 118). He also explained that hurting himself was not retaliating against the employer. (Tr. 46). Claimant testified that he worked hard to stay healthy. (Tr. 120). Claimant denied hearing a warning from Burnett or having eye contact with him before Burnett started driving the forklift back to the store. (Exs. 18-43, -44; Tr. 37, 47, 114, 119). He also denied telling any coworker that a lawsuit or a workers’ compensation claim was a good way to collect money from the employer. (Tr. 28, 115-117). He explained that he needed his full wages and that his job was important to him. (*Id.*)

Having reviewed the only direct evidence regarding the circumstances surrounding the forklift incident, we are not persuaded that it is sufficient for us to conclude that claimant’s injury resulted from a “deliberate intention.” ORS 656.156(1). Moreover, the various investigations into the incident were unable to draw any definite conclusions as to how the incident occurred. OR-OSHA conducted a thorough investigation and concluded that there was not enough information available to determine exactly what happened to cause contact between the forklift and claimant. (Ex. 18-20). Mueller, the employer’s own safety specialist, did an accident reconstruction and stated that it was “possible” that Mr. Burnett had visual contact with claimant based on his position, but it “definitely is an obstructed view.” (Tr. 101, 107). Mueller did not reach a final conclusion from the investigation. (Tr. 104-05).

McDaniel testified that he had no reason to believe that either claimant or Burnett had caused the accident intentionally. (Tr. 65-66). Fitzgerald indicated that it was possible that the injury happened by accident or one of them did it on purpose. (Tr. 96).

We acknowledge that claimant's descriptions of the specific details surrounding the injury have not been entirely consistent. However, his statement to the employer was given on June 29, 2010, only six days after the accident and three days after he was discharged from the hospital. (Exs. 16, 17). Claimant testified he vaguely remembered giving the statement to the employer because it was right after he got out of the hospital and he was under medication. (Tr. 35). He was also on medication when he gave his statement to OR-OSHA in early July 2010. (Ex. 18; Tr. 39). After evaluating claimant's testimony within the context of the record as a whole, with respect to inconsistencies with his testimony, we do not find them sufficient to defeat his claim. See *Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Crystal R. Emig*, 60 Van Natta 198, 199 (2008) (inconsistencies in the record did not lead to conclusion that the claimant's testimony was not credible).

The employer cites several cases in support of its position that claimant intentionally injured himself. We find them distinguishable.

In *Szymanski*, a claimant shot himself with a nail gun. The claimant had a long history of malingering and feigning disability. He had also demonstrated a willingness to inflict suffering on himself in pursuit of disability. A physician concluded that the claimant's injury was intentional. Considering the circumstances surrounding the injury, in light of the claimant's history of malingering and staging disability in prior workers' compensation claims, we found that the alleged injury was intentionally self-inflicted, not accidental. Thus, we determined that the "rebuttable presumption" under ORS 656.310(1)(b) had been overcome. We cited *Wheeler v. Marathon Printing, Inc.*, 157 Or App 290, 303 (1998) ("proof of motivation is rarely direct and often, necessarily, circumstantial and inferential"). 58 Van Natta at 740.

This case differs significantly from *Szymanski*. Here, there is no medical evidence that claimant's injury was intentional. Claimant does not have a history of malingering and feigning disability.² While we recognize that proof of motivation is rarely direct, unlike in *Szymanski*, we find insufficient evidence here of an intentional injury.

² The employer likens claimant to the one in *Szymanski* because of his history of several prior workers' compensation claims, two of which involved forklift injuries. However, nothing in those claims suggests that they were fabricated or that any injury was intentionally inflicted. (Exs. 1-4, 7,-8, 9).

In *Frankie J. Voth*, 42 Van Natta 1570 (1990), we found that the claimant intentionally injured himself when he deliberately thrust his hand through the juke box glass and cut his hand. The circumstances of the claimant's injury persuaded us that he consciously and of his own volition thrust his right hand through the juke box glass. We inferred that the claimant recognized the consequences of taking such an action. In other words, he knew that by thrusting his hand through the glass it was likely that he would cut his right hand. Consequently, we found that the claimant intentionally caused injury to himself, and was therefore not entitled to workers' compensation benefits. *Id.*

In contrast to *Voth*, where there was a clear act of intentional injury, here, there is no such similar act. We recognize that Burnett testified that claimant "lunged" in front of the forklift. However, claimant directly disputed Burnett's testimony. Multiple investigations, including one by the employer's safety specialist, were unable to conclude that claimant intentionally injured himself. Similarly, we are unable to infer from Burnett's observation that claimant acted with a deliberate intention to injure himself.

In *Brian J. Brown*, 42 Van Natta 261 (1990), the claimant was working as a cook for the employer. One morning, the claimant slipped on some bacon grease and fell to the floor of the kitchen, injuring himself. The fall was witnessed. The claimant was angry at the employer on that morning and told a fellow employee that he intended to slip in some bacon grease and fall while somebody was watching. The floor of the kitchen had been cleaned the night before. The bacon grease appeared to have been placed on the floor in a solid form, rather than spilled while still in a hot liquid form. We concluded that the claimant deliberately caused the fall and injury. In doing so, we agreed with the ALJ (then Referee) that the testimony that the claimant deliberately caused the slip and fall on the bacon grease was more persuasive than the claimant's testimony to the contrary.

In this case, there is no testimony that claimant told anyone that he intentionally planned to cause an injury to himself. While there is evidence that, like the claimant in *Brown*, claimant here was upset with the employer, and Burnett testified that claimant expressed a desire to file a workers' compensation claim, we do not find that the evidence rises to the level that it did in *Brown* so as to establish that claimant intentionally injured himself.

In conclusion, we find that a preponderance of evidence does not support the employer's position that claimant's injury was the result of his own conscious, volitional act. See *Gary Jones*, 52 Van Natta 2216, 2217 (2000), *aff'd without*

opinion, 180 Or App 612 (2002) (record did not support the conclusion that the claimant acted with specific intent to cause his depression); *Louis*, 50 Van Natta at 2047 (ORS 656.156(1) did not apply where there was no evidence that the claimant's injuries resulted from a conscious volitional act on his part to injure himself); *cf. Szymanski*, 58 Van Natta at 740 (injury was determined to be intentionally self-inflicted, based on a medical opinion that the injury was intentional and the claimant's history of malingering and staging disability in prior claims). Therefore, we find that the employer has not rebutted the presumption that claimant's "injury was not occasioned by the willful intention of the injured worker to commit self-injury[.]" ORS 656.310(1)(b). Consequently, we reverse.³

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at hearing and on review is \$9,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, and his counsel's uncontested attorney fee affidavit), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

We turn to the penalty issue. At hearing, claimant requested a penalty for the employer's allegedly unreasonable denial. The ALJ did not address the issue in light of his conclusion that the injury was intentional.

Claimant is entitled to a penalty if the employer "unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim." ORS 656.262(11)(a). In determining whether a carrier's conduct is unreasonable, the question is whether the carrier had a legitimate doubt regarding its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991); *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988). "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available at the time of the conduct. *Brown*, 93 Or App at 591.

³ The parties agreed that if the injury was not intentional, it was a compensable claim. (Tr. 5).

Here, in light of Mr. Burnett's June 23, 2010 statement that he believed claimant had caused the injury on purpose (Ex. 18-34, -35), we find that the employer had a legitimate doubt regarding its liability when it issued the denial. Consequently, claimant is not entitled to a penalty or attorney fee under ORS 656.262(11)(a).

ORDER

The ALJ's order dated January 14, 2011 is reversed in part and affirmed in part. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. The remainder of the ALJ's order is affirmed. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$9,000, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on October 11, 2011