

In the Matter of the Compensation of  
**ROBERT MAJORS, Claimant**

WCB Case No. 12-02412

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys  
Wallace Klor & Mann PC, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Mills's order that: (1) found that claimant's January 5, 2012 right shoulder injury claim was timely filed; and (2) set aside its *de facto* denial of that claim. On review, the issues are claim filing and compensability. We reverse.

FINDINGS OF FACT

Claimant has worked for the employer for about four years delivering soft drink products. On September 16, 2011, he strained his right shoulder pulling a stuck door lever on his work truck. Claimant did not immediately report the incident to the employer, seek treatment, or file a claim, because he expected that his subsequent occasional discomfort would resolve.

On January 5, 2012, claimant slipped on ice next to his truck and grabbed the truck door with his right arm to keep from falling, which caused right shoulder pain. The same day, he reported his shoulder injury to the secretary/office manager and left a note for Ms. Spriet, his supervisor. Claimant testified that the note did not specifically reference either date of injury, but it said that he had injured his shoulder and needed to get help. (Tr. 7).

On February 27 or 28, 2012, claimant and Ms. Spriet completed a workers' compensation injury report that lists only a September 16, 2011 date of injury. (Ex. 1). The report also indicates "01/15/11" as the "Date Employer Notified." (*Id.*)

Claimant sought treatment for his right shoulder on March 26, 2012, from Dr. Anderson, an orthopedic surgeon. Dr. Anderson recommended arthroscopic repair of a suspected labral tear. He opined (among other things) that the January 5, 2012 work incident was the major contributing cause of claimant's disability and need for treatment for his right shoulder. (Ex. 10; *see* Ex. 7).

Claimant filed a claim for the September 2011 injury, which the employer denied on timeliness grounds. The ALJ upheld the denial, finding that the claim was not timely filed. *See* ORS 656.265(1), (4). Claimant does not contest that decision.

Claimant also raised the issue of a *de facto* denial of an injury claim for the January 5, 2012 work incident. The employer raised a timeliness defense, contending that it did not have timely notice of this injury.

Claimant testified that he believed that he told Ms. Spriet about both injuries when he turned in the injury report form. (Tr. 8-9). Ms. Spriet testified that claimant did not say anything to her about the January 2012 injury when they completed the form together in February 2012. (Tr. 14, 16).

Based on claimant's demeanor and manner while testifying, the ALJ found claimant to be a credible witness. Based on Ms. Spriet's demeanor and manner while testifying, the ALJ "found no reason to doubt her credibility either." (Opinion and Order, p. 4).

#### CONCLUSIONS OF LAW AND OPINION

Based on an inference that Ms. Spriet entered "January 5, 2011" [*sic*] in the "Date Employer Notified" section of the injury report form, the ALJ concluded that the employer had knowledge of the second injury on January 5, 2012 and therefore the second injury claim was timely filed. The ALJ also found the claim compensable, based on the medical evidence. We reverse, reasoning as follows.

A claimant is required to give the employer notice of an accident resulting in an injury within 90 days after the accident. ORS 656.265(1). A claim is generally barred unless notice is given within 90 days. ORS 656.265(1), (4). However, a claim is not barred by ORS 656.265(4) if notice is given within one year and the employer had knowledge of the injury within 90 days of the accident, or the worker establishes that he or she had good cause for failure to give notice within 90 days after the accident. ORS 656.265(4)(a), (c); *see also Keller v. SAIF*, 175 Or App 78, 82, *rev den*, 333 Or 260 (2002) (knowledge of the injury or death must be acquired within the initial 90-day notice period).

ORS 656.310(1)(a) provides that in any proceeding for the enforcement of a claim for compensation under this chapter, there is a rebuttable presumption that "[s]ufficient notice of injury was given and timely filed[.]" Thus, before a claim

can be barred for late filing, the carrier must overcome the presumption that sufficient notice of injury was given and timely filed. *Nat'l Farmers' Union Ins. v. Scofield*, 57 Or App 23, 25, *rev den*, 293 Or 373 (1982); *Bob J. Traweek*, 61 Van Natta 2180, 2181 (2009), *aff'd without opinion*, 238 Or App 580 (2010).

Here, because there was no written record of the January 2012 work injury, the timeliness of this claim turns on whether the employer had “knowledge” of the injury within 90 days of its January 5, 2012 occurrence. ORS 656.265(4)(a). Such “knowledge” of the injury should include enough facts as to lead a reasonable employer to conclude that workers’ compensation liability is a possibility and that further investigation is appropriate. *Argonaut Ins. v. Mock*, 95 Or App 1, 5, *rev den*, 308 Or 79 (1989). Thus, the employer must have knowledge of not merely an injury, but also of the injury’s possible relationship to the employment. *Keller*, 175 Or App at 83.

We begin with the presumption that claimant has satisfied the notice requirements of ORS 656.265. *See Robert A. Lienhard*, 63 Van Natta 313, 316 (2011).

As a preliminary matter, we note that the secretary/office manager’s knowledge of the 2012 injury (on the day of the injury) is not imputed to the employer, because the record establishes that this person did not have supervisory authority over claimant and claimant knew that he was supposed to report an injury to the warehouse manager or his “boss.” *See Safeway Stores, Inc. v. Angus*, 200 Or App 94 (2005) (a supervisor’s knowledge of an injury may be imputed to the employer); *David J. Stout, Jr.*, 63 Van Natta 620 (2011) (employee’s knowledge of injury not imputed to employer when that person was neither the claimant’s supervisor, nor acting as such). Our reasoning follows.

Claimant testified that he believed that the office manager was the appropriate person to tell about a “comp claim.” (Tr. 8). However, he also acknowledged that he knew that he was supposed to report injuries to his warehouse supervisor, Mr. Campbell, or his “boss,” Ms. Spriet (with whom he eventually completed the February 2012 injury report form). (*See* Tr. 9-10).

Under these circumstances, the record indicates that supervisory authority was formalized in the employer’s organization and the office manager had no such authority over claimant. Consequently, we conclude that the office manager’s knowledge of the January 2012 injury is not imputed to the employer. *See Colvin v. Indus. Indem.*, 301 Or 743, 747 (1986) (reasonableness of the claimant’s reliance on a particular person as a conduit for knowledge or notice to the employer should

be appraised in light of the knowledge and instructions available to the claimant, rather than on legalistic consideration of the recipient's actual authority); *Barry Roley*, 54 Van Natta 580 (2002) (where supervisory authority was formalized and the claimant knew that he was supposed to report injuries to his "supervisor," a co-worker's knowledge of the claimant's injury not imputed to the employer because the co-worker had no supervisory authority over the claimant).

We also find that the injury report form (which described a September 16, 2011 work injury and listed "01/05/11" [*sic*] as the date that the employer was notified of the injury) and the supervisor's testimony (that claimant did not notify her of a January 5, 2012 work injury) contradict claimant's testimony that he believed that he told Ms. Spriet about the January 2012 injury when they completed the injury report form together on February 27, 2012. (*See Ex. 1; Tr. 8-9, 14, 16*). Under these circumstances, the "01/05/11" [*sic*] reference on the injury report form does not cause us to infer that claimant notified Ms. Spriet of the January 2012 injury when the form was completed. Rather, the record indicates that it is more likely that the "01/05/11" [*sic*] reference documents the date that claimant notified the office manager of the September 2011 work injury.<sup>1</sup>

Moreover, because the form reports only a September 2011 injury (and claimant's recollection about reporting a January 2012 work injury is otherwise unsupported), we find this evidence (and Ms. Spriet's testimony) sufficient to rebut the statutory presumption that the employer had timely knowledge of that injury. *See Traweek*, 61 Van Natta at 2186 (finding that the employer provided sufficient evidence to rebut the presumption under ORS 656.310(1)(a) by way of testimonial evidence that rebutted the claimant's testimony); *cf. Robert A. Lienhard*, 63 Van Natta 313, 316 (2011) (presumption of timely knowledge not overcome where the claimant credibly testified that he had informed a supervisor about his work injury and the employer called no witnesses and provided no evidence rebutting the claimant's assertion).

Instead, we find that the February 27, 2012 injury report form (signed by Ms. Spriet on February 28, 2012) reflects that the employer only had knowledge of the September 2011 injury at that time. Thus, because the employer did not have notice or knowledge of the claimed January 5, 2012 injury within 90 days, the claim was untimely and barred under ORS 656.265(4). Consequently, we reverse.

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<sup>1</sup> As previously noted, notice to the office manager is not imputed to the employer.

ORDER

The ALJ's order dated August 30, 2012 is reversed in part and affirmed in part. The self-insured employer's *de facto* denial is reinstated and upheld. The ALJ's \$6,500 attorney fee and cost awards are reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on February 25, 2013