
In the Matter of the Compensation of
JASON R. GRIM, Claimant
WCB Case No. 02-02903
ORDER ON REVIEW
Dennis O'Malley, Claimant Attorneys
Gilroy Law Firm, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Brazeau's order that found that claimant's low back injury claim had been untimely filed under ORS 656.265(1) and (4)(a). On review, the issue is the timeliness of claim filing.

We adopt and affirm the ALJ's order with the following supplementation.¹

Based on the testimony of the three witnesses claimant allegedly told about his injury, the ALJ found that claimant had not filed his claim in a timely manner pursuant to ORS 656.265(1) and (4)(a). Accordingly, the ALJ dismissed claimant's request for hearing because his claim was not timely filed.

Claimant contends that his claim was timely filed and that the ALJ erred in relying on the testimony of the three witnesses in deciding otherwise because they were not credible.

Pursuant to ORS 656.265(1), notice of an accident resulting in an injury must be given to the employer by the worker within 90 days of the accident. Failure to give notice within that time frame bars a claim unless the notice is given within a year of the accident and the employer had knowledge of the injury within the 90-day period referred to in subsection (1). ORS 656.265(4)(a); *Keller v. SAIF*, 175 Or App 75, 80 (2001), *rev den* 333 Or 260 (2000). Furthermore, 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. *See Argonaut Ins. v. Mock*, 95 Or App 1, 5 (1989); *Barry L. Roley*, 54 Van Natta 580, 586 (2002).

¹ We do not adopt that portion of the ALJ's order that alternatively addresses the merits of claimant's low back injury claim.

First, claimant did not submit a written claim for compensation until January 30, 2002, or more than 90 days after the alleged work injury on September 24, 2001. Therefore, the claim was not timely filed under ORS 656.265(1).

Second, claimant did not provide the employer with enough facts regarding his alleged low back injury within 90 days for it to conclude that workers' compensation liability was a possibility. Claimant alleges that he told three supervisors about his work injury. However, while the supervisors admitted that they were aware claimant was having back pain, there is nothing in the record showing that they had "knowledge" that the cause of claimant's back pain was work-related as required by ORS 656.265(4).

Claimant attacks the credibility of Mr. Schupp, claimant's immediate supervisor, and Mr. Charlesworth, the general foreman. According to claimant, the testimony of these witnesses contained false statements, inconsistencies, and selective recall. However, these charges are speculative because any so-called inconsistencies in the witnesses' testimony or suspicions of claimant regarding their truthfulness do not lead to the conclusion that claimant communicated to them that his back pain was related to a work injury.

Claimant also attacks the credibility of Mr. Erickson, another supervisor. While we acknowledge that Mr. Erickson's testimony contains inconsistencies, this does not mean that claimant told Mr. Erickson that he injured his back at work. The only fact that we can accurately extract from any communication between Mr. Erickson and claimant is that claimant wanted a back brace.

Furthermore, claimant did not report the incident as work related when he sought medical treatment in January 2002. Claimant's explanation for this omission was that he was reluctant to report a work injury for fear of a lay-off. As the ALJ noted, if claimant had already talked to the three supervisors before January 2002 about having a work-related injury, it is not readily apparent why he would be "reluctant" to classify the injury as such when he sought medical treatment.

Under such circumstances, a preponderance of the evidence does not establish that the employer had "knowledge" of a work-related injury as required by ORS 656.265(4).

In conclusion, although claimant gave notice of the claim to the employer

within one year, his claim is nevertheless time-barred under ORS 656.265 because the employer did not have knowledge of the accident within 90 days. Accordingly, that portion of the ALJ's order that found claimant's injury claim to be untimely filed is affirmed.

ORDER

The ALJ's order dated August 8, 2002 is affirmed.

Entered at Salem, Oregon on March 21, 2003