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In the Matter of the Compensation of  
**KIM M. SEARS, Claimant**  
WCB Case No. 09-01525  
ORDER ON REVIEW  
Jodie Phillips Polich, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that: (1) found that her injury claim for a low back condition was untimely filed; (2) upheld the self-insured employer's denial of her low back condition; and (3) declined to assess penalties/attorney fees for the employer's allegedly unreasonable claim processing. On review, the issues are timeliness of claim filing and, potentially, compensability, and penalties/attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and "Findings of Ultimate Fact," with the following summary and supplementation.

On September 8, 2008, claimant, while working as a price changer for the employer, carried two bundles of coupons up some stairs. (Ex. 17; Tr. 9-10). Approximately 10 to 15 minutes later, she began experiencing low back pain. (Tr. 11). Claimant finished her shift that day. (Ex. 17A; Tr. 11).

On September 9, 2008, claimant returned to work, but was unable to complete her shift. (Ex. 17A). She told a supervisor that she had hurt her back and needed to leave work. (Ex. 17A; Tr. 14). Claimant did not tell her supervisor that she had hurt her back at work. (Tr. 15-17).

That day, claimant sought treatment from Dr. Nakamura, her gynecologist, for right flank and hip pain, which she thought was due to a urinary tract infection and physical straining. Dr. Nakamura diagnosed a possible muscle spasm from hip strain and advised seeking an orthopedic consultation if her symptoms did not resolve within a week. He offered no opinion regarding causation. (Exs. 5, 22, 23).

Claimant testified that Dr. Nakamura gave her an off-work slip, which she gave to her supervisor.<sup>1</sup> (Tr. 16-17). She did not tell her supervisor that she hurt her back at work. (*Id.*)

On October 24, 2008, claimant called Dr. Nakamura's office, requesting a prescription for medication due to back pain. (Ex. 5). She did not seek further treatment until December 2008. (Tr. 22).

On December 11, 2008, claimant sought treatment from Dr. Liang for increased back pain, with radiation of pain into her legs. (Ex. 6). Thereafter, she sought chiropractic treatment. (Exs. 7 through 12, 14, 16). Neither Dr. Nakamura's report, Dr. Liang's reports, nor the chiropractor's reports documented a September 2008 work injury. (Exs. 5 through 14, 16). A February 2009 MRI revealed an L4-5 disc protrusion with facet degeneration and mild impingement, and an L5-S1 disc bulge with impingement. (Ex. 15).

On February 27, 2009, claimant filed a claim for the September 2008 injury. (Ex. 17). On March 12, 2009, the employer denied claimant's injury claim, based primarily on the grounds that the claim was untimely filed. (Ex. 19). Claimant requested a hearing.

On March 13, 2009, claimant sought treatment from Dr. Rosenbaum, and reported that she injured her back at work on September 8, 2008. (Ex. 19A). Dr. Rosenbaum performed a lumbar microdiscectomy. (Ex. 19B). Dr. Rosenbaum opined that the 2008 work injury was the major contributing cause of the L5-S1 disc herniation. (Ex. 21).

### CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant's injury claim was untimely filed, reasoning that claimant did not give notice of the injury to her employer within 90 days after the accident. ORS 656.265(1). The ALJ also found that the employer did not have knowledge of the injury during that 90-day period, and that claimant did not establish "good cause" for her failure to give notice in a timely manner. ORS 656.265(4)(a), (c).

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<sup>1</sup> Dr. Nakamura's alleged off-work slip is not in the evidentiary record.

On review, claimant argues that the employer had knowledge of her injury because she told her supervisor that she had hurt her back and needed treatment. She also contends that, even if the employer did not have knowledge of the work injury, she had “good cause” for her failure to give timely notice because she thought she could work through the injury, and because she feared harassment and retaliation from coworkers for jeopardizing a monetary incentive bonus by reporting a work injury. For the following reasons, we disagree with claimant’s contentions.

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). Failure to give notice within that time frame bars a claim unless the notice is given within one year of the accident and the employer had knowledge of the injury within the 90-day period. ORS 656.265(4)(a); *Keller v. SAIF*, 175 Or App 75, 82 (2001), *rev den*, 333 Or 260 (2002) (knowledge of the injury or death must be acquired within the initial 90-day notice period). Failure to give notice within the 90-day time frame also bars a claim unless the notice is given within one year of the accident and the worker establishes that he or she had “good cause” for failure to give notice within the 90-day period. ORS 656.265(4)(c).

Here, the parties do not dispute that notice was given within one year after the September 8, 2008 accident. ORS 656.265(4). Therefore, the timeliness of claimant’s injury claim turns on whether the employer had “knowledge” of the injury within 90 days of the September 8, 2008 accident, or whether claimant has established “good cause” for failure to give timely notice. ORS 656.265(4)(a), (c).

The employer’s “knowledge” of the injury should include enough facts so 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; *Conley Hollan*, 61 Van Natta 1659, 1660-61 (2009).

We adopt the ALJ’s reasoning that the employer did not have “knowledge” of a September 2008 work-related injury. ORS 656.265(4)(a). Thus, we determine whether claimant established that she had “good cause” for her failure to give notice within 90 days after the September 8, 2008 accident. ORS 656.265(4)(c).

Claimant contends that, because she thought she could work through the pain, she did not report the injury to her employer. Therefore, she asserts that her intention to “work through it” constitutes “good cause” for her failure to timely notify her employer within the requisite 90-day time period. Even assuming that “working through it” can equate to “good cause,” the record does not support a conclusion that claimant intended to “work through it.” We reason as follows.

Claimant sought treatment from Dr. Nakamura on September 9, 2008, the day after her September 8 accident, complaining of pain from “physical straining.” (Ex. 5). Claimant testified that she told Dr. Nakamura of the work injury, and that he gave her an off-work slip, which she delivered to her supervisor. (Tr. 14-17). She also called Dr. Nakamura’s office on October 24, 2008, for prescription medication to treat her back pain. (Ex. 5). According to claimant, she thought that she had a muscle issue and she would take care of it through her personal health insurance. (Ex. 17A; Tr. 17-18).

Because claimant sought medical treatment on the day after the work incident, complained of pain, and delivered an off-work slip to her supervisor, we are not persuaded that she did not report the injury because she intended to “work through it.” Therefore, we do not find that claimant established “good cause” on this basis. ORS 656.265(4)(c).

Claimant also argues that she did not notify her employer of the September 8, 2008 injury because she feared pressure, harassment, retaliation, and animosity from coworkers for jeopardizing the employer’s incentive bonus for having accident-free work days. (Ex. 17A; Tr. 17, 35). Even assuming that fear of retaliation from coworkers *may* constitute “good cause” for failure to give timely notice of a work-related injury, we are not persuaded on this record that claimant failed to provide timely notice because of fear of retaliation. We reason as follows.

Here, claimant testified that, because she told her supervisor at work that she had hurt her back and needed to leave, and gave him a copy of Dr. Nakamura’s off-work slip, she believed that she “gave him some kind of a notice” of a work injury. (Tr. 17). Claimant also testified that, when she returned to work in September 2008 after Dr. Nakamura’s work release, she told a coworker about her work injury. (Tr. 49-51). Such actions by claimant contradict her assertion that she had a fear of retaliation from coworkers. Thus, we are not persuaded that claimant established “good cause” for her failure to give timely notice of her injury on this basis.

Based on the aforementioned reasoning, claimant has not established that she had “good cause” for failure to give notice within 90 days after the September 8, 2008 accident. ORS 656.265(4)(c). Consequently, we affirm.

ORDER

The ALJ’s order dated August 13, 2009 is affirmed.

Entered at Salem, Oregon on March 24, 2010