

In the Matter of the Compensation of
ANTHONY A. LONG, Claimant

WCB Case No. 09-05474

ORDER ON REVIEW

Kryger et al, Claimant Attorneys

Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Spangler's order that found that claimant had good cause under ORS 656.265(4)(c) for the untimely filing of his injury claim. On review, the issue is timeliness of claim filing.

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

Claimant testified that sometime in March 2009, he sought treatment with Dr. Grube, his treating physician, for a cold. At that time, claimant reports that he mentioned his right shoulder pain to Dr. Grube, and the doctor told him that it "wasn't that bad * * *." (Tr. 17). This testimony is unrebutted.¹ In that regard, we disagree with SAIF that Dr. Grube's statement in his July 20, 2009 chart note that claimant "has not really been in since November 2008," contradicts claimant's testimony. (See Ex. 1). When read in context, Dr. Grube's July 2009 statement was made in relation to claimant's diabetes treatment, and we decline to interpret such as indicating that Dr. Grube had not treated claimant for any other condition after November 2008.

Based on this record, we conclude that Dr. Grube's March 2009 statement that claimant's condition was not "bad" reinforces claimant's subjective belief that his right shoulder injury would get better. See *Anderson v. Publishers Paper Co.*, 93 Or App 516 (1988) (a claimant's subjective belief as to the non-compensability of his claim, based on his reliance on physician's statement to that effect, could constitute good cause, as long as subsequent evidence originating before expiration of the statutory time limitations did not reveal that the claimant knew or should have known his condition was work-related); *Patricia E. Lee*, 44 Van Natta 1048 n 1 (1992) (reliance by a claimant on her physician could, in some circumstances, constitute "good cause").

¹ The ALJ found claimant to be a credible witness based on his demeanor in testifying, a determination with which SAIF does not take issue. We normally defer to an ALJ's demeanor-based credibility finding. See *Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991). We find no reason to deviate from that practice here.

Accordingly, we agree with the ALJ's conclusion that claimant has established "good cause" for not giving timely notice of his injury to his employer. ORS 656.265(4)(c). Consequently, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 on review is \$3,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

Finally, 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 SAIF. *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).

ORDER

The ALJ's corrected order dated February 23, 2010 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, to be paid by SAIF. 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 SAIF.

Entered at Salem, Oregon on October 13, 2010