
In the Matter of the Compensation of
JUAN ESTRADA, Claimant
WCB Case No. 11-06447
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that: (1) found that he did not establish good cause under ORS 656.265(4)(c) for the untimely filing of his injury claim for a left hernia condition; and (2) upheld the self-insured employer's denial of that injury claim. On review, the issues are timeliness of claim filing and compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following change and supplementation. On page 1, we replace the last sentence with the following: "Following the April 2011 injury, a bulge developed and became noticeable by the end of July or August 2011."

We provide the following summary of the pertinent facts.

Claimant has been a pick-up driver for the employer for five years. His duties required picking up items at commercial locations, loading them into the truck, and then offloading them at the end of the day. (Tr. 5-6; Ex. 7-4). The items varied in size and weight, and could weigh up to 150 pounds. (Tr. 6).

On April 27, 2011, claimant loaded heavy equipment for a commercial customer. (Tr. 7-8). He felt a "weird pull" in the left testicle area while loading a heavy item into the truck. (Tr. 8-9). He did not experience this pain before the incident. (Ex. 7-3, -5). Claimant did not report the incident because he thought it was just soreness from extra work and was not aware that he was injured. (Tr. 9, 17). He kept working and was able to complete his job duties. (Tr. 13, 17).

Between April 27, 2011 and September 2011, claimant noticed increased soreness and pain, "just randomly," especially when he did certain moves, such as lifting or pushing heavier items. (Tr. 9; Ex. 7-5). He did not have swelling in the left testicle area before the April 27, 2011 incident. (Tr.10-11). Claimant noticed swelling in the left testicle area by the end of July or August 2011. (Tr. 10, 14).

When claimant saw the swelling, he became more concerned and sought treatment. (Tr. 10). Before that time, he thought it was just the soreness from working harder during that period. (Tr. 10). He sought medical treatment from his primary care physician in September 2011. (Tr. 9, 10; Ex. 7-7). Claimant was concerned not only with the soreness, but the noticeable size change, and he raised those issues with his doctor. (Tr. 10).

Claimant first reported the injury to the employer in October 2011. (Tr. 13; Ex. 7-6). After the employer denied the claim, claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

At hearing, claimant argued that his left hernia condition was compensably related to an April 27, 2011 work injury and that he had good cause for his failure to give timely notice of his injury. The employer contended that the injury claim was untimely and that it was not compensable on the merits.

The ALJ determined that claimant was aware of a specific incident on April 27, 2011, which caused pain and continued to worsen. Under such circumstances, the ALJ reasoned that claimant did not establish good cause for his failure to give timely notice of his injury. Thus, the ALJ concluded that the injury claim was time-barred.

On review, claimant argues that he has established good cause for his failure to give notice of his April 27, 2011 injury within 90 days because he did not know he had sustained a substantial injury. The employer responds that claimant did not establish “good cause” because his symptoms were constant since the injury. The employer also contends that, because claimant did not seek medical treatment within the 90-day period, he could not have formed a reasonable belief based on information from medical providers that his injury was not significant.

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). 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 the failure to give notice. ORS 656.265(4)(c).

Here, the timeliness of claimant's injury claim turns on whether he has established "good cause" for his failure to give timely notice within the 90-day period after the April 27, 2011 injury (*i.e.*, by July 26, 2011). ORS 656.265(4)(c). For the following reasons, we find that claimant has established "good cause."

Claimant argues that this case is similar to *Corey A. Otterson*, 63 Van Natta 156 (2011), whereas the employer contends that *Otterson* is distinguishable. For the following reasons, we agree with claimant.

In *Otterson*, the claimant was injured at work and sought medical treatment four days later. He was assessed with "abdominal pain" of unclear etiology. Tests were performed to assess his bladder function and diabetes condition, but the claimant was not released from work or urged to seek any follow-up treatment. The claimant explained that the medical providers could not find any problems and that he returned to work on the following work day. The claimant did not take any time off work and his condition improved until several months later, when he again sought treatment. We concluded that the claimant's lack of knowledge that he had incurred a significant injury provided him with good cause for his failure to provide the employer with notice of an accident within the applicable 90-day period. *Id.* at 157.

In *John S. Smith*, 64 Van Natta 340 (2012), we found the circumstances similar to *Otterson*. In *Smith*, the claimant had been treating for back symptoms related to two prior motor vehicle accidents (MVAs) when he fell on his left knee at work. He did not believe that the fall was significant at the time. Instead, the claimant thought that his knee hurt because he "wasn't walking right for a long time" after the two MVAs. The claimant did not seek treatment for his knee until the pain worsened and became unbearable, about 5 weeks after the work injury. He explained that he did not discuss the work injury with medical professionals (because he thought his knee problems were due to the MVAs, not the work injury) until a physician asked him about injuries three months after the fall at work. The claimant explained that he did not file a claim or notify the employer about his fall at work until the physician advised him to do so. We concluded that the claimant had reason to believe that his knee condition was not work-related until the physician suggested otherwise. We determined that the circumstances were similar to those in *Otterson* and concluded that the claimant established "good cause" for his untimely notice of his injury to the employer. *Id.* at 342.

We reached the opposite conclusion in *Michael D. Chilcote*, 64 Van Natta 766 (2012). Unlike *Otterson*, the claimant did not seek medical treatment for the work incident until more than six months later. Unlike *Smith*, the claimant did not confuse his new back symptoms with a prior injury. We explained that, in contrast to *Otterson* and *Smith*, the record provided no medical opinion providing a reasonable basis for the claimant's failure to provide timely notice of the injury to the employer. We reasoned that, although in *Otterson*, the claimant was initially assessed with abdominal pain of unclear etiology, the claimant in *Chilcote* knew all along that his symptoms resulted from a work-related injury. We concluded that the record established that the claimant was well aware that he had sustained an injury within 90 days of the work incident, even though he did not seek professional medical treatment and did not miss any work.¹ We explained that the claimant self-treated and the record indicated that his symptoms were severe enough for him to stay in bed all weekend, "week after week." Under those circumstances, we concluded that the claimant's choice to "work through" the injury did not establish good cause for his failure to give timely notice of the injury. *Id.* at 769.

Here, we find the circumstances most similar to those in *Otterson*. Unlike this case, the claimant in *Otterson* sought medical treatment four days after the work injury. Nevertheless, as in *Otterson*, claimant's lack of knowledge that he had incurred a work-related injury provided him with good cause for his failure to provide the employer with notice of an accident within the applicable 90-day period. We base this conclusion on the following findings.

Claimant felt a "weird pull" in his left testicle area while loading a heavy item into a truck on April 27, 2011. (Tr. 8-9). He did not report the incident because he thought it was just soreness from extra work and he was not aware that he was injured. (Tr. 9, 17). Moreover, he kept working and was able to complete his job duties. (Tr. 13, 17). Finally, there is no indication that claimant either sought medical treatment, missed any time from work attributable to the incident, endured any weekend limitations, or received any assistance while performing his work duties during the approximately five months between the April 2011 work incident and his September 2011 medical treatment.

¹ In *Chilcote*, we stated that ORS 656.265(1) does not require a claimant to give notice of an accident only if it is "significant" or "severe."

In contrast to the present case, in *Chilcote*, the claimant self-treated and his symptoms were severe enough for him to be bedridden all weekend “week after week.” Here, however, there is no evidence that claimant was self-treating for his symptoms or experienced limitations concerning his weekend activities.

The employer argues that this case is distinguishable from *Otterson* because claimant’s symptoms were “constant” since the injury. We disagree.

After the incident, claimant noticed increased soreness and pain, “just randomly,” when he did certain moves, such as lifting or pushing heavier items. (Tr. 9; Ex. 7-5). However, the swelling in the left testicle area did not become physically visible until the end of July or August 2011. (Tr. 10, 14). The record does not support the conclusion that the swelling was visible before July 26, 2011. Claimant did not have swelling in that area before April 27, 2011. (Tr.10-11). When he saw the swelling, he became more concerned and sought medical treatment. (Tr. 10). Before that time, he thought it was just the soreness from working harder during that period. (*Id.*)

The timeliness of claimant’s injury claim turns on whether he has established “good cause” for his failure to give timely notice *within* the 90-day period after the April 27, 2011 injury (*i.e.*, by July 26, 2011). ORS 656.265(4)(c). We find that, like *Otterson*, claimant’s lack of knowledge that he had incurred an injury provided him with good cause for his failure to provide the employer with notice of an accident within the applicable 90-day period. *See* ORS 656.265(4)(c); *Otterson*, 63 Van Natta at 157. Accordingly, claimant’s April 27, 2011 injury claim is not time-barred.

We turn to the merits of the claim. We first address the employer’s argument that Dr. Masson’s history of claimant having hernia problems for the prior four years is more reliable than the “later changed” testimony.

The ALJ did not make any demeanor-based credibility findings. When the issue of credibility concerns the substance of a witness’s testimony, we are equally qualified to make our own determination of credibility. *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987). Inconsistencies with medical records do not automatically diminish the probative value of a witness’s testimony. We do not necessarily rely on such records if we find other evidence, such as the witness’s testimony, more persuasive. *See William J. Cook*, 58 Van Natta 625, 626 (2006).

On October 4, 2011, Dr. Masson, urologist, reported that claimant had longstanding nocturia² and explained that he “states that for the last 4 years he has noticed an increasing size of the left hemiscrotum.” (Ex. 3).

At hearing, claimant was asked about Dr. Masson’s history. He testified that he told Dr. Masson that he had a three to four year history of waking up several times at night to urinate. Claimant explained that in addition to seeking treatment for the hernia, he asked Dr. Masson about his urinary frequency to see if he had any suggestions. (Tr. 11-12). Claimant testified that he had only noticed swelling in the left testicle area after the work injury. (Tr. 10-12). Based on claimant’s testimony, we find that Dr. Masson had an inaccurate understanding of a four-year history of noticing an increasing size of the left hemiscrotum. *See Rejeania L. Heide*, 63 Van Natta 2526 (2011) (finding the claimant’s testimony more persuasive than the contemporaneous medical record); *Cook*, 58 Van Natta at 626 (same). After considering the employer’s arguments and reviewing the record, we find that claimant was a credible witness.

Claimant has the burden of proving that his April 27, 2011 injury was a material contributing cause of his disability/need for treatment for the hernia condition. ORS 656.005(7)(a); ORS 656.266(1). Based on the following reasoning, we conclude that he has satisfied his burden of proof.

Claimant relies on the opinion of Dr. Jan to establish compensability of his hernia condition. Dr. Jan performed claimant’s left inguinal hernia surgery. (Ex. 9). He concluded that the April 27, 2011 injury was a material contributing cause of his disability/need for treatment for the left inguinal hernia. (Exs. 16, 20).

The employer contends that Dr. Jan’s opinion is not persuasive because he did not refer to a work injury in his initial report. Dr. Jan initially reported that claimant had a several month history of left groin/scrotal bulge and discomfort, which was “exacerbated by work/lifting.” (Ex. 6). Although Dr. Jan did not refer to a work injury, he was aware that the symptoms were exacerbated by work and lifting. Moreover, Dr. Jan subsequently agreed that claimant’s left inguinal hernia was caused by an April 27, 2011 work-related injury. (Ex. 20). We find that Dr. Jan’s history was sufficiently complete. *See Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003) (a history is “complete” if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible).

² “Nocturia” is defined as “[p]urposeful urination at night, after waking from sleep[.]” *Stedman’s Electronic Medical Dictionary*, Version 7.0 (2007).

Dr. Masson opined that it was impossible to determine if claimant's hernia was congenital or a product of activity. (Ex. 21). As discussed above, Dr. Masson had an inaccurate understanding that claimant had noticed increasing size of left hemiscrotum over the past four years. (Ex. 3). Because Dr. Masson had an inaccurate history, his opinion is entitled to little weight. *See Miller v. Granite Construction Co.*, 28 Or App 473 (1977).

Dr. Brant performed a records review on behalf of the employer. He relied on Dr. Masson's report that claimant had an enlarged left hemiscrotum over the past four years and concluded that the hernia had existed for four years. (Exs. 21A-1, -3, -5, 22-1, 23-7, -8). Nevertheless, he opined that claimant's April 27, 2011 work incident probably contributed to his left inguinal hernia to some degree. (Ex. 22-2). In a deposition, Dr. Brant agreed that the April 27, 2011 incident may have played a role in worsening the hernia condition. (Ex. 23-8).

Like Dr. Masson, Dr. Brant had an inaccurate history of an enlarged left hemiscrotum over the past four years. Nevertheless, Dr. Brant provides support for the conclusion that claimant's April 27, 2011 injury was at least a material contributing cause of the disability or need for treatment for the hernia condition. *See Van Blokland v. Oregon Health Sciences Univ.*, 87 Or App 694, 698 (1987); *Summit v. Weyerhaeuser Co.*, 25 Or App 851, 856 (1976) ("material contributing cause" means something more than a minimal cause; it need not be the sole or primary cause, but only the precipitating factor).

Based on Dr. Jan's opinion, we conclude that claimant's April 27, 2011 injury was a material contributing cause of the disability or need for treatment for the left inguinal hernia. The employer did not assert a "combined condition" under ORS 656.005(7)(a)(B) at hearing or on review. In any event, the record does not establish the existence of a statutory "preexisting" condition. We conclude that claimant has established compensability of his April 27, 2011 injury claim. Therefore, we reverse.

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 issues (as represented by the record and claimant's appellate briefs), the complexity of the issues, the value of the interest involved, and the risk that counsel may go uncompensated.

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 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).

ORDER

The ALJ's order dated August 31, 2012 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$9,000, payable 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 March 21, 2013