
In the Matter of the Compensation of
ERIC M. SCHWARTZ, Claimant
WCB Case No. 13-04660, 13-04659
ORDER ON REVIEW
Guinn & Dalton, Claimant Attorneys
SAIF Legal, Salem, Defense Attorneys

Reviewing Panel: Members Curey, Lanning, and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Marshall's order that found his injury claims untimely under ORS 656.265. On review, the issue is timeliness of filing of claims. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Facts."

CONCLUSIONS OF LAW AND OPINION

At the time of his work injuries, claimant was a sole proprietor. (Tr. 19-20). He applied for workers' compensation coverage with SAIF, which was accepted. ORS 656.128(1), (3). As such, he "is subject to the provisions and entitled to the benefits of [Chapter 656]." *Id.*

Claimant asserts that he sustained work-related finger injuries in November 2012 (left little finger) and March 2013 (right middle finger). In July and August 2013, respectively, he filed injury claims for his finger injuries, which he signed as both the worker and the employer. SAIF denied his claims as untimely under ORS 656.265(3). (Exs. 10, 11). Claimant requested a hearing.

In upholding SAIF's denials, the ALJ reasoned that neither claim was filed within 90 days of the injurious event so the claims were untimely under ORS 656.265(1). The ALJ rejected claimant's assertion that the "employer knowledge" exception under ORS 656.265(4)(a)¹ applied. Instead, the ALJ concluded that claimant's own knowledge of the accidents was not sufficient to satisfy the statutory "knowledge" requirement.

¹ ORS 656.265(4)(a) provides, in pertinent part:

(4) Failure to give notice as required by this section bars a claim under this chapter unless the notice is given within one year after the date of the accident and:

(a) The employer had knowledge of the injury or death[.]

On review, claimant acknowledges that he did not provide written notice of his accidents within 90 days. He contends, however, that, because he is a sole proprietor, his knowledge of the accidents is sufficient for application of the “employer knowledge” exception under ORS 656.265(4)(a). Therefore, he argues that his claims were timely filed. We conclude that claimant has satisfied the aforementioned statutory “employer knowledge” exception. We reason as follows.

ORS 656.128 provides that:

“(1) Any person who is a sole proprietor * * * may make written application to an insurer to become entitled as a subject worker to compensation benefits. Thereupon, the insurer may accept such application and fix a classification and an assumed monthly wage at which such person shall be carried on the payroll as a worker for purposes of computations under this chapter.

(2) When the application is accepted, such person thereupon is subject to the provisions and entitled to the benefits of this chapter. * * *

(3) No claim shall be allowed or paid under this section, except upon corroborative evidence in addition to the evidence of the claimant.”

Thus, in accordance with ORS 656.128(2), upon SAIF’s acceptance of claimant’s application for coverage, he became “subject to the provisions and entitled to the benefits of [Chapter 656].” Consistent with that provision, claimant must meet the notice requirement set forth in ORS 656.265(1) or one of the available exceptions.

Here, claimant contends that he met the requirements for application of the exception under ORS 656.265(4)(a) because, in his dual capacity as worker and employer, he had knowledge of his injuries within 90 days of each incident. Based on the following reasoning, we agree with claimant’s contention.

SAIF argues that claimant’s own knowledge is insufficient knowledge to satisfy the exception under ORS 656.265(4)(a). In support of its contention, SAIF relies on Board case law holding that a supervisor’s knowledge of his or her own injury may not be imputed to the employer. *See J. Bradley Ross,*

58 Van Natta 1714 (2006) (rejecting the claimant’s argument that because he had supervisory authority, his own knowledge of the injurious event was “knowledge” by his employer within the meaning of ORS 656.265(4)(a)); *see also Sharon N. Kay*, 54 Van Natta 1582 (2002). We find those cases inapposite because, as a sole proprietor under ORS 656.128, claimant is in essence *both* the worker and the employer for purposes of ORS 656.265(4). Thus, because claimant was aware of his injuries when they occurred, he likewise simultaneously had knowledge of the injuries as an “employer.”

SAIF further asserts that it would be substantially prejudiced if a “sole proprietor” claimant was not required to give written notice of an injury within 90 days. However, as explained in *Marshall v. SAIF*, 328 Or 49, 57-59 (1998), if there is the potential for such “prejudice,” the legislature appears to have addressed that issue by requiring “corroborative evidence” for establishing the *compensability* of the claim when a sole proprietor is also the claimant. *See* ORS 656.128(3).

SAIF next contends that the equitable defense of “laches” applies to bar claimant’s injury claims. Although workers’ compensation law is a creature of statute, in some instances, equitable principles, such as equitable estoppel, occasionally have been applied. *See, e.g., Meier & Frank Co. v. Smith-Sanders*, 115 Or App 159, 162-63 (1992), *modified on recons*, 118 Or App 261, *rev den*, 316 Or 142 (1993) (equitable estoppel applied where the claimant changed her position and underwent surgery in reliance on the employer’s directive to proceed with surgery).

Here, however, there are specific statutes addressing these “sole proprietor/timely notice” issues. *See* ORS 656.128; ORS 656.265. Considering these express intentions from the legislature, we decline to apply the equitable doctrine of “laches” to this particular situation, especially when application of such principles would conflict with the statutory scheme.

SAIF also asserts that a violation of the notice requirements under ORS 656.262(3)(a)² necessitates rejection of the claim. We note, however, to the extent the statute applies to this situation, a failure to give notice under that

² ORS 656.262(3) provides in pertinent part:

(a) Employers shall, immediately and not later than five days after notice of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. * * *

* * * * *

provision does not bar a claim. Rather, a “[f]ailure to so report subjects the offending employer to a charge for reimbursing the insurer for any penalty the insurer is required to pay[.]” ORS 656.262(3)(b).

In summary, we find that both of claimant’s injury claims were timely filed under ORS 656.265(4)(a). Because SAIF does not otherwise contest the validity or compensability of the claims, we set aside both of its denials.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review for prevailing over SAIF’s denials. 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 \$8,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant’s appellate briefs), the complexity of the issues, the values of the interests involved, and the risks 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 SAIF’s denials, 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 order dated May 19, 2014 is reversed. SAIF’s denials of claimant’s injury claims are set aside and the claims are remanded to SAIF for processing according to law. For services at hearing and on review, claimant’s attorney is awarded an assessed fee of \$8,000, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denials, to be paid by SAIF.

Entered at Salem, Oregon on December 24, 2014

(b) Failure to so report subjects the offending employer to a charge reimbursing the insurer for any penalty the insurer is required to pay under subsection (11) of this section because of such failure.