
In the Matter of the Compensation of
TRENTON WILSON, Claimant
WCB Case No. 13-01690
ORDER ON REVIEW
J Michael Casey, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lowell, Lanning, and Somers. Member Lanning dissents.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that upheld the self-insured employer's denial of his injury claim for a left arm condition. On review, the issue is compensability.

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

The ALJ found that claimant intentionally placed his left hand into the moving rollers of a metallic press machine at work. Furthermore, reasoning that claimant knew that such an action would naturally and probably result in a hand injury, the ALJ concluded that the employer had rebutted the presumption that his injury was not occasioned by the willful intention to commit self-injury. *See* 656.310(1)(b). Consequently, the ALJ held that claimant's injury claim was barred under ORS 656.156(1), which provides that an injury is not compensable if it results from the deliberate intention of the worker to produce such an injury.

The dissent contends that the employer has not rebutted the presumption in ORS 656.310(1)(b). In support of that contention, the dissent reasons that the record does not establish that: (1) claimant's condition resulted from his own conscious, volitional act; and (2) he had knowledge of the consequences of his act. *Nathaniel D. Hardy*, 63 Van Natta 1977 (2011).

The primary basis for the dissent's position is that, before his compensable injury, claimant did not express any dissatisfaction with his job or that he was angry with his employer. Noting that such circumstances were present in *Hardy* (a case where we did not find that a claimant's injury was intentional under ORS 656.156(1)), the dissent concludes that this absence of "motive" prevents the employer from rebutting the statutory presumption against a self-inflicted injury.

We consider *Hardy* to be of limited value to the case at hand. To begin, although *Hardy* discusses the claimant's frustrations with his job and coworkers, as well as his alleged desire to file a workers' compensation claim, our ultimate

conclusion was that the record did not establish that he had intentionally stepped in front of a forklift, causing his injury. Thus, the claimant's "motive" in *Hardy* was not an essential component in resolving the "conscious, volitional act" requirements of the "intentional injury" statute (ORS 656.156(1)).

In any event, unlike *Hardy*, the record in this case contains DVD recordings, which have recorded the work incident in question. Those recordings, which we have extensively reviewed, provide convincing evidence that claimant intentionally thrust his hand into the moving rollers of the press machine, resulting in his injury.

The dissent's reasoning is essentially premised on the proposition that claimant was a careless, untrained worker, whose curiosity concerning a dangerous piece of machinery got the better of him, prompting him to thrust his hand into its metal rollers. Yet, claimant does not advance such an explanation for his action. Rather, his excuse is basically that he does not remember what happened. However, in doing so, claimant does not expressly address the varying descriptions of the work incident he has provided to physicians and a safety investigator (*e.g.*, his sleeve caught in the feeder, his coat stuck in the press machine, and he was preparing the work area when the machine caught his shirt sleeve).

The dissent speculates that such confusion is understandable considering his shock from such a traumatic injury. Nevertheless, in doing so, the dissent does not refer to a medical opinion supporting such an explanation. Furthermore, even if such an excuse was supportable, it would presumably only apply to claimant's initial accounts of the incident; it would not persuasively explain why he subsequently attributed his injury to preparing or clearing the work area. Such a description would be inconsistent with our interpretation of the DVD recordings of the incident, which demonstrate him turning his head to either side before thrusting his left hand into the rollers.

In light of such circumstances, we share the ALJ's assessment that claimant was an unreliable witness and historian. As such, his accounts of the work incident and his state of mind (regardless of the explanations that he provided concerning the subject) are unpersuasive. Thus, our review of the record (particularly our thorough evaluation of the DVD recordings) establishes to our satisfaction that: (1) claimant's condition resulted from his own conscious, volitional act; and (2) he had knowledge of the consequences of his act. Moreover, considering the imposing metallic press machine, the record persuasively supports a conclusion that he knew by thrusting his hand into the moving roller, it was likely that he

would damage his hand. *See Frankie J. Voth*, 42 Van Natta 1970 (1990) (the claimant knew that by thrusting his hand through a glass juke box it was likely that he would cut his hand and, as such, he intentionally caused injury to himself).

Accordingly, we affirm the ALJ's decision that upheld the employer's denial.

ORDER

The ALJ's order dated September 18, 2013 is affirmed.

Entered at Salem, Oregon on March 21, 2014

Member Lanning dissenting.

I disagree with the majority's conclusion that the employer met its burden of proving that claimant intentionally caused his injury. Accordingly, I dissent.¹

Claimant bears the burden of proving that his injuries were accidental and arose out of and in the course of employment. ORS 656.005(7)(a); ORS 656.266(1). Pursuant to ORS 656.156(1), an injury is not compensable if it results "from the deliberate intention of the worker to produce such injury[.]" There is a "rebuttable presumption" that an "injury was not occasioned by the willful intention of the injured worker to commit self-injury[.]" ORS 656.310(1)(b); *Wayne Szymanski*, 58 Van Natta 738, 739 (2006). The employer acknowledges that it has the burden to rebut that presumption.

ORS 656.156(1) does not apply where the claimant's injuries result from negligence, carelessness or recklessness. *Jean R. Louis*, 50 Van Natta 2044, 2047 (1998); *see Youngren v. Weyerhaeuser*, 41 Or App 333 (1979) (where the claimant intended only to vent frustration, not injure himself, ORS 656.156(1) did not apply). The test for determining whether claimant's injury was intentional is: (1) whether claimant's condition was the result of his or her own conscious, volitional act; and (2) whether claimant had knowledge of the consequences of the act. *James G. Wesley*, 40 Van Natta 1841, 1844 (1988).

¹ The ALJ did not make express credibility findings regarding the testimony of witnesses. Therefore, I evaluate the credibility of witnesses based on an objective review of the substance of the record, including relevant testimony. *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987).

Here, in analyzing the compensability issue, I find instructive our decision in *Nathaniel D. Hardy*, 63 Van Natta 1977 (2011). In *Hardy*, the claimant was injured when a coworker, Burnett, ran over him with a forklift. The incident occurred outdoors, and there was no video, but Burnett testified that he saw the claimant intentionally “lunge” in front of the forklift. The claimant denied this, stating that the forklift caught the back of his heel, causing him to trip and fall in its path. *Id.* at 1977. The employer denied the claim on the ground that it did not occur in the course and scope of employment. *Id.* at 1978. The ALJ upheld the denial, finding that the claimant’s injuries resulted “from his own willful intention.”² *Id.*

On review, the claimant argued that the employer did not rebut the presumption in ORS 656.310(1) that his injury was not occasioned by the willful intention to commit self-injury. The employer responded that the claimant consciously and intentionally stepped in front of the forklift and that he knew that doing so would injure him. In addition to Burnett’s testimony, the employer relied on circumstantial evidence concerning the claimant’s attitude toward the job, the employer, and Burnett, which it offered as proof that he intentionally injured himself.

Before the work incident, the claimant had complained to a foreman that Burnett had used racial slurs against him. Burnett denied this allegation, and testified that the claimant had told him he was angry because he had not been given a pay raise. He stated that the claimant told him: “If I ever had a chance, * * * I’d get Workmen’s Comp in a heartbeat. It’s an easy way to go. * * * I’d sue anybody I could.” 63 Van Natta at 1980. Burnett also testified that the claimant told him that the employer was sending him out of town the next day (the day after the work incident occurred) and he did not want to go out of town because of a situation involving his girlfriend. *Id.*

After reviewing the only direct evidence regarding the circumstances surrounding the forklift incident, we were not persuaded that it was sufficient for us to conclude that the claimant’s injury resulted from a “deliberate intention.” ORS 656.156(1). Although we recognized that Burnett testified that the claimant “lunged” in front of the forklift, the claimant directly disputed Burnett’s testimony. No post-accident investigation concluded that the claimant intentionally injured himself. Similarly, we were unable to infer from Burnett’s observation that the

² At the hearing, the parties agreed that the only issue was legal causation; specifically, whether the claimant intentionally injured himself within the meaning of ORS 656.156(1).

claimant acted with a deliberate intention to injure himself. 63 Van Natta at 1982. We also noted that there was no medical evidence suggesting that the claimant's injury was intentional. *Id.* at 1981.

In finding the claim compensable, we acknowledged that the claimant's descriptions of the specific details surrounding the injury had not been entirely consistent. However, after evaluating his testimony within the context of the record as a whole, we did not find the inconsistencies sufficient to defeat his claim. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Crystal R. Emig*, 60 Van Natta 198, 199 (2008) (inconsistencies in the record did not lead to conclusion that the claimant's testimony was not credible).

Finally, there was no testimony that the claimant told anyone that he intentionally planned to cause an injury to himself. While there is evidence that he was upset with the employer, and Burnett testified that the claimant expressed a desire to file a workers' compensation claim, we found that the evidence did not rise to a level that would establish that he intentionally injured himself.³ 63 Van Natta at 1982.

Turning to the case at hand, I first note that, unlike in *Hardy*, there is no evidence that claimant ever mentioned that he did not like the employer, his job, or any of his coworkers. Nor is there evidence of him stating that he wanted to file a workers' compensation claim. Instead, we have a claimant whose grandfather and an older brother often worked at the lumberyard where he was injured (as independent contractors maintaining forklifts, trucks, etc.) and who testified that "I loved working there. It was fun. I enjoyed the people. I got along with everybody." (Tr. 23). Claimant's grandfather, father, and mother all testified that claimant liked his job. (Tr. 52, 55, 59). His father mentioned that he wanted him to go back to school, but claimant was content working for the lumberyard. (Tr. 55). In addition, claimant told his mother that he hoped to get hired on as a permanent employee (claimant was hired as a temporary worker through an agency). (Tr. 59).

³ *Cf. Brian J. Brown*, 42 Van Natta 261 (1990), where the claimant, a cook, told a coworker that he was angry with the employer and intended to purposely fall in some bacon grease while someone was watching (to witness the fall). The floor of the kitchen had been cleaned the night before. The bacon grease appeared to have been placed on the floor in a solid form, rather than spilled while still in a hot liquid form. We concluded that the claimant deliberately caused the fall and injury. In doing so, we agreed with the ALJ (then Referee) that the testimony that the claimant deliberately caused the slip and fall on the bacon grease was more persuasive than the claimant's testimony to the contrary.

Thus, in light of the above, what motivation would claimant have for intentionally injuring himself? The employer contends that it is because claimant got “chewed out” by the foreman for being late on the morning of the work incident. Yet, claimant did not remember the discussion that way, although he acknowledged that the foreman was a no-nonsense guy who tended toward gruffness. (Tr. 40, 41). Moreover, the foreman testified that, after telling claimant that he was unhappy about his coming in late to work, claimant said “‘Yes, sir,’ and that was the end of it.” (Tr. 66).

Compare this testimony to that in *Hardy*, where a much stronger alleged motive for self-injury existed (*i.e.*, that claimant allegedly did not like his job, and indicated a desire to file a workers’ compensation claim), yet we concluded that the evidence was insufficient for us to find that the claimant intended to injure himself. 63 Van Natta at 1982. I submit that here, the record does not establish that claimant was either unhappy with his job, or that he was angry at the employer. Consequently, without motive, I cannot agree that the employer has met its burden of overcoming the statutory presumption that claimant did not have an intent to self-injure. ORS 656.156(1).

I further submit that the video showing the work injury does not, without motive, establish why claimant touched the roller with his hand, which then became caught in the machine. (Ex. A). Claimant was cognizant of the video camera, and knew that anything done in the open-air shed where the roller press was located was being recorded. (Tr. 25). He also knew that the lumberyard owner could watch the video feed on his computer whenever he wanted. (Tr. 46). It defies logic, then, to conclude that claimant would stage an intentional injury in a locale where a record was being made of his every move.

Having watched the video numerous times, I disagree with the ALJ’s interpretation of it. The video shows claimant just standing around for several minutes because his coworker, the machine operator, suddenly left the shed to get something. If claimant had a plan to hurt himself, it would be more likely that, finding himself alone (and not knowing when the coworker would return), he would immediately go over to the machine and thrust his hand in it. This did not occur. Instead, the video shows him going over to his bag and casually looking through it, and then standing in front of the feed table (not in front of the machine) for several minutes.⁴ (Ex. A). Claimant stated that he decided to go get some

⁴ Claimant testified that he “didn’t know what to do. There was no direction for me what to do so I was kind of just standing there waiting for directions.” (Tr. 32).

“stickers” (used to raise the wood he would be stacking) and as he passed in front of the roller press,⁵ which was on his left as he was walking past it, reached out and touched the roller with his left hand because he thought he saw something on the roller.⁶ The roller grabs his hand and the sleeve of his jacket and pulls his arm in to approximately elbow level. (Ex. A). Claimant then stretches a leg out and kicks the emergency off button with his foot to stop the roller, although he cannot get his arm free from the machine until his coworkers come to his aid. (*Id.*)

The ALJ describes claimant stopping in front of the moving rollers, facing the machine, and placing his hand in it. The ALJ further stated that claimant was “not even looking directly at the rollers at or just before the point of the injury, but rather appeared to looking straight ahead, past the machine.”⁷ There is no denying that claimant touched the roller with his left hand. Yet, the ALJ primarily relied on his interpretation of what he viewed on the video, from which, I suggest, “intention” is very difficult to discern. As discussed above, I do not believe the employer has established, with persuasive direct or circumstantial evidence, that claimant had a motive to self-injure. When viewed in that light, claimant’s touching the moving roller, whether he saw something on it, or just wondered what would happen if he touched it, was more likely the act of an untrained worker who was careless, and unfortunately messed around with a piece of unguarded, dangerous machinery, and paid the price for it. And, as noted above, ORS 656.156(1) does not apply where the claimant’s injuries result from negligence, carelessness or recklessness.⁸ *Louis*, 50 Van Natta at 2047.

⁵ The roller press has two parallel rollers, approximately one inch apart, but only the bottom roller turns when the machine is turned on. The top roller turns when something is inserted into the machine. (Tr. 25).

⁶ Claimant had not been trained on this machine, had not operated it, or been told that he should not walk near the in-feed rollers while the machine was running. There were no signs on the machine warning employees to keep their hands away from the moving rollers. (Tr. 24). In fact, claimant walked in front of the machine three times while his supervisors stood there; neither of them spoke to claimant regarding safety. Claimant also testified that he had seen other workers touch the rollers while they were moving. (Tr. 32).

⁷ It is not clear how the ALJ was able to determine where claimant’s eyes were looking, as when claimant is in front of the roller press, we see him from above and behind. Thus, claimant’s face cannot be seen. (Exs. A, C).

⁸ No one at the lumber yard, including the owner, accused claimant of intentionally hurting himself. (Tr. 48). Moreover, I disagree with the ALJ’s reasoning that claimant’s “alternate and conflicting explanations of how the injury occurred are not credible * * *.” Claimant has stated that he does not clearly remember what happened, which would not be unusual for someone with a severe injury likely to produce shock. Some time after the injury, the owner showed claimant the video so he could see

Accordingly, based on the above reasoning, and also on our analysis in the *Hardy* case, I would find that the employer did not meet its burden of proving that claimant intentionally injured himself. Because the majority concludes otherwise, I respectfully dissent.

how the accident occurred. (Tr. 44). Before viewing the video, claimant had told the medical personnel and Mr. Frisco, the temporary agency's representative, that his jacket had been grabbed by the machine's roller. (Tr. 86; Ex. 2). Considering that it only took a second and a half after claimant's hand touched the roller for it to grab his jacket sleeve, I do not find his explanation (given just after the injury occurred), to be indicative of any intent to mislead. (Ex. A).