
In the Matter of the Compensation of
JUDY BUNDY, Claimant
WCB Case No. 13-04329
ORDER ON REVIEW
Orrin L Grover PC, Claimant Attorneys
SAIF Legal, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that upheld the SAIF Corporation's denial of her injury claim for a right wrist condition. On review, the issue is compensability.

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

Claimant is employed by her parents' company (SAIF's insured), which owns both a restaurant and a gas station that are on adjacent lots. The office for both businesses is in the parents' home, which is also adjacent to the restaurant and the gas station. Claimant also lives nearby. (Exs. A, B, 11).

Claimant works as a manager and waitress for the restaurant. When her parents are out of town, claimant picks up deposit bags from both businesses at the end of the day and takes them to the office at her parents' house. (Exs. 11, 19A-7-9; Tr. 8-10, 17, 34-38, 41-42).

Claimant alleges that, on April 20, 2013, she was injured when she fell in the gas station parking lot while taking the station's deposit bag to her parents' house. In upholding SAIF's denial of the claimed injury, the ALJ determined that claimant was not a credible witness.

On review, claimant argues that any inconsistencies in the record are insufficient to defeat her claim because the witness testimony supported her testimony. Based on the following reasoning, we disagree.

Claimant must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618, *rev den*, 291 Or 893 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff'd without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that

claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation.¹ *Darla Litten*, 55 Van Natta 925, 926 (2003).

Whether claimant established legal causation hinges principally on her credibility/reliability. In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility findings. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder's credibility assessments).

Here, the ALJ did not make a demeanor-based credibility finding. Because the credibility issue concerns the substance of claimant's testimony, we are equally qualified to make our own credibility determination. *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987); *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008). Inconsistencies in the record may raise such doubt that we are unable to conclude that material testimony is reliable. *George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005).

The ALJ determined that claimant was not a sufficiently credible witness to establish legal causation based on the inconsistencies between her testimony, her prior statements, and the record as a whole. For the following reasons, we agree with that determination.

Claimant testified that she and her two daughters walked from her home to the gas station to pick up the deposit bag to take to her parents' house. She stated that she picked up the deposit bag from the gas station and spoke briefly to Mr. Clemens (her future son-in-law, who was working at the time) and proceeded to walk through the parking lot when she fell and injured her wrist. Claimant testified that Mr. Clemens and Ms. Ruiz (her sister, who also worked at the gas station and lived nearby) ran over and helped her up. According to claimant, Ms. Ruiz picked up her cell phone and the deposit bag, which she had dropped during the fall, and walked her over to her parents' house. Claimant testified that she tried to complete the deposit, but was in too much pain, so she called her niece who took her to the hospital. (Tr. 9-11, 17).

¹ Here, the parties do not dispute "medical causation." (Tr. 8).

However, in an April 23, 2013 statement to the employer's liability insurer (shortly after the April 20, 2013 injury), claimant stated that she was walking from her home to the restaurant, cut through the gas station parking lot, and only stopped to say "Hi" to Mr. Clemens. She also stated that she was alone and was carrying only her keys at the time of her fall. When asked if she was working at the time she replied that she was not. Claimant did not mention picking up a deposit bag, or that she was walking to her parents' house. (Ex. 3A). Moreover, although Ms. Ruiz testified that she helped claimant get up and walked her over to her parents' house, Ms. Ruiz also stated that she did not notice that claimant had dropped anything. (Tr. 41).

Furthermore, claimant did not refer to a work-related injury until June 24, 2013, after her claim with the liability insurer was denied. (Tr. 24, 26; Ex. 11). In the June 24, 2013 initial injury claim form filed with SAIF, claimant first reported picking up the deposit bag from the gas station to make the deposit. (Ex. 11). Moreover, in her July 2013 statement to SAIF, claimant reported that she walked from the restaurant (where she had picked up the restaurant's money) to the gas station to pick up the deposit bag, and then proceeded to her parents' house. (Ex. 19A).

Based on the aforementioned inconsistencies, along with those detailed in the ALJ's order, we agree with the ALJ's determination that claimant's testimony does not credibly establish a work-related injury. *Jolley*, 56 Van Natta at 2348. Consequently, we affirm.

ORDER

The ALJ's order dated December 6, 2013 is affirmed.

Entered at Salem, Oregon on October 22, 2014

Member Lanning dissenting.

The majority finds that, because of inconsistencies in her testimony and considering the record as a whole, claimant did not credibly establish that she sustained a right wrist injury at work. Because I disagree with the majority's conclusion, I respectfully dissent.

Claimant works as a manager and waitress for a restaurant. She typically works Monday through Friday from 5 a.m. to 1 p.m., but is also on-call as needed. (Ex. 11). When her parents are out of town, claimant picks up deposit bags from both businesses at the end of the day and takes them to the office at her parents' house.² (Exs. 11, 19A-7-9; Tr. 8-10, 17, 34-38, 41-42).

On April 20, 2013, at about 8 p.m., claimant was injured when she fell onto her right wrist. (See Exs. 2, 11). She sought emergency medical treatment that night and was treated for a fractured wrist. (Exs. 2, 3). The emergency department report noted that the incident occurred at home. (Ex. 2-4-5).

I find the emergency department chart note, which is the only report that refers to the right wrist injury occurring at home, to be an anomaly. (Ex. 2). Specifically, claimant subsequently and consistently reported that she was walking across the gas station parking lot when her foot got caught in a hole in the concrete, which caused her to fall and break her right wrist. (See Exs. 3A, 4, 11, 19A). She also consistently stated that Mr. Clemens and Ms. Ruiz (both of whom worked at the gas station) ran over and helped her up. (Exs. 3A-7, 19A-14; Tr. 11). At hearing, Mr. Clemens and Ms. Ruiz testified that claimant had stopped by the gas station to pick up the deposit bag on the night of the injury, and that they heard her cry out after she left the station. (Tr. 34, 40-41). Although they did not actually observe claimant's fall, Mr. Clemens and Ms. Ruiz confirmed that they immediately ran over to the parking lot and found her lying on the ground holding her arm and helped her up. (Tr. 34, 38, 40-42). Thus, based on the record as a whole, I am persuaded that claimant injured her right wrist when she fell in the gas station parking lot, rather than at home.

Important to the determination of legal causation in this matter is whether claimant injured her wrist *while working* for the employer. See *Christie A. Teel*, 57 Van Natta 2849, 2851 (2005). Although claimant works as the manager of the restaurant, the uncontroverted evidence supports a conclusion that her job also involved picking up the deposit bags from both the restaurant and the gas station and taking them to the office at her parents' house, which is adjacent to both businesses, when her parents are out of town. (See Exs. 11, 19A-7-9; Tr. 8-10, 17, 22, 34-38, 41-42). On the April 20, 2013 date of injury, claimant's parents were out of town. (Tr. 9, 22).

² Claimant uses the term "bag" even if the money is in an envelope. (Tr. 27).

Claimant testified that, at approximately 8 p.m., she went to the gas station to pick up the deposit bag to take to her parents' house to count the money and prepare the deposit. (Tr. 9-11, 17). Claimant testified that she picked up the deposit bag from the door of the gas station, and that she spoke briefly with Mr. Clemens, who was working at the time. (Tr. 11, 17, 18).

Claimant testified that, after leaving the gas station, she walked through the parking lot towards a sidewalk that leads to her parents' house when her foot got caught in a hole and she fell on her wrist. (Tr. 10, 11, 17). She stated that Mr. Clemens and Ms. Ruiz ran over and helped her up. (Tr. 11). Claimant testified that she proceeded to her parents' house and tried to do the deposit, but was in too much pain, so she called her niece to take her to the hospital. (Tr. 11-12).

Claimant's testimony is supported by the testimonies of Mr. Clemens and Ms. Ruiz.³ Mr. Clemens testified that he was working at the gas station and prepared the deposit bag when he saw claimant approaching. (Tr. 34, 37). According to Mr. Clemens, claimant came to the door, they spoke briefly, and he handed her the deposit bag. (Tr. 34, 37, 38). Claimant left the shop and, moments later, he heard her yelling. (Tr. 34). He immediately ran outside and saw her lying on the ground holding her arm. (*Id.*) Mr. Clemens testified that he tried to help claimant up and, by that point, Ms. Ruiz (who was working earlier that evening) was already there. (Tr. 38).

Ms. Ruiz testified that, on the evening of claimant's injury, she was walking to her yard next to the gas station when claimant came by to pick up the deposit. (Tr. 40). Ms. Ruiz was just outside her gate, which is "right by where [claimant] fell[.]" when she heard claimant cry out. (Tr. 40-41). Ms. Ruiz went over and helped claimant get up, and walked her over to her parents' house. (Tr. 41). According to Ms. Ruiz, claimant would pick up the deposits when her parents were out of town, and would take it to the office at her parents' house to do the deposit. (Tr. 41-42).

SAIF argues that claimant's testimony is not credible because it was inconsistent with previous statements given to Ms. Herman (who interviewed claimant on behalf of the employer's liability insurer) and Ms. Russell (who interviewed claimant on behalf of SAIF). (Exs. 3A, 19A). For example, SAIF

³ Claimant also testified that she called another niece (Ms. Puente) to finish the deposit while she went to the hospital. (Tr. 12). Claimant's testimony was corroborated by Ms. Puente, who testified that it looked like the deposit processing had been started, but was unfinished. (Tr. 29-30).

contends that claimant provided inconsistent statements regarding whether she went to the gas station from her house, or from the restaurant. As another example, SAIF asserts that claimant's statement to Ms. Herman that she "wasn't working" is inconsistent with her subsequent statements that she was injured while performing a job duty (*i.e.*, picking up the deposit bag and taking it to the office at her parents' house).

As noted above, however, Mr. Clemens's testimony that claimant picked up the deposit bag from him at the gas station, as well as Mr. Clemens's and Ms. Ruiz's testimonies that they heard claimant cry out and found her lying on the ground of the parking lot with a right wrist/arm injury, corroborates claimant's testimony regarding a work-related injury. (Tr. 34-38, 40-42). I do not consider any discrepancies regarding whether claimant came from her own home, or from the restaurant, to be a material inconsistency.

Moreover, considering the fact that claimant's regular job is as the manager and waitress of the restaurant and that she works on Monday through Friday from 5 a.m. to 1 p.m., I do not consider claimant's statement to Ms. Herman that she "wasn't working" at the time she was injured (*i.e.*, on Saturday, April 20, 2013 at approximately 8:00 p.m.) necessarily precludes a finding that she was still performing job duties for the insured, as described in the 801 Form. (*See* Exs. 3A-2, -10-11, 11).

After evaluating claimant's testimony within the context of the other testimony and the record as a whole, I do not find the inconsistencies to be sufficient to undermine her testimony regarding her injury. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Donna Lenocker*, 66 Van Natta 628, 631 (2014) (considering the claimant's testimony in the context of other testimony and the record as a whole, finding no material inconsistency that would undermine claimant's credibility).

SAIF also contends that, even if claimant credibly described her injury, it did not occur "in the course of" employment. ORS 656.005(7)(a). The requirement that the injury occur "in the course of" employment concerns the time, place, and circumstances of the injury. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997).

Here, SAIF's insured checked the "YES" box, indicating that the injury occurred during the course of her employment. (Ex. 11). Moreover, although claimant is employed as the manager and waitress at the restaurant, the

uncontroverted evidence indicates that her job duties also include picking up the deposit bags from both the restaurant and the gas station and taking them to the office at her parents' house when her parents are out of town. (*See* Exs. 11, 19A-7-9; Tr. 8-10, 17, 22, 34-38, 41-42).

In conclusion, despite the inconsistencies in claimant's testimony and prior statements, I would find that she has established "legal causation." I am also persuaded that her injury occurred in the course of her employment. Because the majority concludes otherwise, I respectfully dissent.