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In the Matter of the Compensation of  
**ANDREW KURALT, Claimant**  
WCB Case No. 14-00188  
ORDER ON REVIEW  
Alana C DiCicco Law, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

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

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Mills's order that: (1) found that claimant had established good cause under ORS 656.265(4)(c) for the untimely filing of his injury claim; and (2) set aside its denials of claimant's injury claim for a right shoulder condition. 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. We replace the references to "Kathy Myers" with "Cathey Myers." We provide the following summary.

Claimant has worked for the employer as an HVAC service technician since 2000.<sup>1</sup> He and his coworkers, Mr. Peters and Mr. Wager, work at a Boeing facility pursuant to his employer's contract. Claimant works the swing shift and Mr. Peters and Mr. Wager work the day shift. Claimant does not work out of the employer's office, but goes there on a regular basis to pick up checks or paperwork.

On August 8, 2013, claimant had finished a project hanging an air conditioner on a furnace control panel. He cleaned up his work area and rolled out his tool cart. When the cart got stuck, tools started to fall, and claimant reached out to catch them. He had an immediate onset of right shoulder pain. (Tr. 5). Claimant did not report the incident to the employer at that time.

On the following day, claimant sought medical treatment and told Mr. Peters and Mr. Wager about the work injury. (Ex. 1).

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<sup>1</sup> Claimant was a union-represented journeyman with seniority, including 15 years with the employer.

Claimant sought medical treatment for his right shoulder in September and November 2013. (Exs. 2, 3, 4). In December 2013, Dr. McWeeney recommended surgery for a right rotator cuff tear. (Ex. 8).

On December 19, 2013, claimant filed a claim for the August 8, 2013 injury. (Ex. 9). SAIF initially denied the claim as untimely, and amended the denial to include compensability. (Exs. 11, 19B). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant did not file a claim with the employer within 90 days of the August 8, 2013 work incident. In addressing claimant's "good cause" argument, the ALJ rejected his contention that the employer had knowledge of the incident based on his report of the incident to Mr. Peters. The ALJ reasoned that Mr. Peters was a coworker, not a foreman or claimant's supervisor.<sup>2</sup> Cf. *Colvin v. Indus. Indem.*, 301 Or 743, 747 (1986) (a supervisor's knowledge of an injury may be imputed to the employer).

Claimant also argued that he had good cause for his failure to provide notice within 90 days because he felt his job would be in jeopardy if he filed a claim. Based on claimant's demeanor and manner while testifying, the ALJ found him to be a credible witness. The ALJ found that claimant's testimony regarding his concern that his job would be in jeopardy if he filed a claim was corroborated by Mr. Peters and Mr. Wager, both of whom indicated that claimant had explained why he did not want to report the injury to the employer.

The ALJ explained that Cathey Myers, a coworker who worked in the office, denied telling claimant that his job would be in jeopardy if he filed another workers' compensation claim. The ALJ found no reason to doubt her credibility and determined that the conflict in the testimony represented more of a communication misunderstanding than a lack of credibility. The ALJ noted that Cathey acknowledged that she occasionally spoke to the employees about being safe and not getting hurt.

Based on the testimony of all witnesses, the ALJ stated that there was no reason to believe that the employer actually intended to fire or layoff claimant if he filed another workers' compensation claim. Nevertheless, the ALJ concluded that

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<sup>2</sup> Because neither party challenges this portion of the ALJ's reasoning, we do not address this issue on review.

claimant's subjective belief that he would be fired or laid off if he filed a claim for this incident was based on his interpretation of actual statements made to him regarding avoiding job injuries. Consequently, the ALJ found that claimant had established good cause for his failure to provide notice within 90 days of the work incident.

On review, SAIF contests the ALJ's "good cause" findings. Based on the following reasoning, we reverse.

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 August 8, 2013 injury. ORS 656.265(4)(c). Whether a claimant has good cause for the failure to file within the statutory time is a factual question that depends on the circumstances of the case. *Wilson v. SAIF*, 3 Or App 573, 576 (1970). Claimant bears the burden of proving good cause under ORS 656.265. *Id.*; *Phillip E. Ledbury*, 41 Van Natta 189, 190, *aff'd*, *Ledbury v. Montgomery Ward*, 99 Or App 631 (1989).

On review, SAIF cites *Riddel v. Sears, Roebuck & Co.*, 8 Or App 438 (1972), and *David D. Grimes*, 38 Van Natta 1038 (1986), *rev'd on other grounds*, *Grimes v. SAIF*, 87 Or App 597 (1987),<sup>3</sup> and argues that claimant's subjective belief of job loss or discipline is not sufficient. SAIF contends that claimant's belief was not objectively reasonable because there was no persuasive evidence that the employer had in fact threatened disciplinary action.

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<sup>3</sup> Because our decision in *Grimes* was reversed by the Court of Appeals on other grounds, we consider it to be of limited precedential value.

Claimant contends that we should defer to the ALJ's finding that he was a credible witness. He argues that the ALJ correctly concluded that he did not timely file his claim because he was afraid of being terminated or laid off. Claimant asserts that the testimony of Mr. Peters and Mr. Wager confirmed his fear of retaliation for filing another claim.

For the following reasons, we find that, based on these facts, claimant's subjective belief that he would be disciplined or fired as a result of filing a claim was insufficient to support a finding of "good cause" under ORS 656.265(4)(c).

In *Riddel*, 8 Or App at 438, the claimant injured his back in 1969, but the accident was not reported to the employer until 1970, after he had severed his employment. The claimant had previously sustained back injuries while working for the same employer. He testified that at that time he was allegedly warned by his supervisor that the company would not, in the future, "put up" with any more back trouble. The claimant testified that he so feared the loss of his job that he did not report the injury. The claimant's supervisor, denied giving such a "warning" to the claimant. *Id.* at 440. However, the hearing officer believed the claimant, explaining:

"The undersigned is persuaded that claimant had good cause for delaying as long as he did. This is not to say that [the supervisor] was untruthful in his testimony. He obviously has many duties and has many employees to deal with. It would be no surprise if he failed to remember a perhaps exasperated, if ill advised, remark to one of his workmen back in 1962. \* \* \*. Tending to bolster this line of thinking is [the supervisor's] inability to remember claimant's 1965 surgery-requiring at least three months' recuperative absence from work." *Id.*

The *Riddel* court discussed the employer's contention that, as a matter of law, the evidence was insufficient to establish that the claimant had good cause for the delay:

"As to the first point the employer's argument seems to be that the mere fact that a man believes reporting an accident will cause him to lose his job is insufficient as a matter of law unless this belief is induced by some actual occurrence which is susceptible of such an interpretation

by him. Whether the employer is right or wrong on this score we need not here decide, because here there was evidence of such an occurrence—the alleged warning from his supervisor about the consequences of making a claim.” *Id.* at 441.

The *Riddell* court did not address whether a claimant’s subjective belief that he would lose his job, by itself, was sufficient to establish “good cause” for untimely filing because there was evidence that the claimant’s supervisor had warned him of the consequences of filing a claim. The court gave great weight to the hearing officer’s finding that the claimant was a credible witness and concluded that he had established good cause under ORS 656.265(4)(c). *Id.* at 441-42. In reaching that conclusion, the court apparently also relied on the hearing officer’s reasoning that, although the testimony of the claimant’s supervisor was not untruthful, he failed to remember his remark to claimant. *Id.* at 440.

Here, unlike the claimant in *Riddell*, claimant relies on his understanding of remarks allegedly made by Cathey Myers, who was not his supervisor and had no power to fire him, to support his argument that he had good cause for the untimely filing. However, based on these particular facts, we conclude that claimant’s subjective belief that he would be fired or laid off if he filed another claim is not supported by the preponderance of evidence. In other words, the record does not establish that there was an “actual occurrence” of a threat to claimant’s job to support his subjective belief. *Id.* at 441. We reason as follows.

At hearing, claimant was asked about a medical form he had completed in November 2013, which indicated he had injured his shoulder at home. (Tr. 9-10; Ex. 4-1, -6). Claimant testified that the injury did not occur at home, but he wrote that on the form because he “had an opinion that my job may be terminated if I filed more [Workers’] Comp claims.”<sup>4</sup> (Tr. 10). He explained: “A month or so earlier, when I was in the office Cathey Myers had gone to me and told me that-I don’t know the circumstances were prior to me coming in, but the gist of the conversation was one more [Workers’] Comp and we’re going to have to let you go.” (*Id.*) He filed a claim in December 2013, shortly after Dr. McWeeney recommended shoulder surgery. (Ex. 9).

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<sup>4</sup> Claimant filed other workers’ compensation claims while working for the employer. However, he does not allege any retaliatory treatment based on those claim filings.

Later in the hearing, claimant said that he did not recall how that discussion with Cathey Myers had begun. (Tr. 25). He explained that she was concerned with safety and that was not the first time that she told claimant to be safe at work. (*Id.*) He testified: “But on this particular instance, she had mentioned that one more [Workers’] Comp claim and my job was in jeopardy.” (*Id.*) Claimant was quite shocked by Cathey’s statement and told Mr. Wager, a coworker, about it the next day. (Tr. 25, 31).

The day after the August 8, 2013 work injury, claimant told Mr. Wager and Mr. Peters, his coworkers, about the accident. (Tr. 6). Mr. Wager and Mr. Peters corroborated claimant’s testimony in that regard. (Tr. 30, 34, 45). Mr. Wager and Mr. Peters testified that claimant told them he was afraid to file a claim because he was afraid he would lose his job. (Tr. 31, 34, 46). Claimant explained that when he eventually filed a claim with Katrina Myers,<sup>5</sup> the employer’s operations manager and safety coordinator, he told her he had not previously filed a claim because Cathey Myers told him his job would be in jeopardy. (Tr. 11, 20-21).

But Cathey Myers denied ever threatening claimant’s job if he had any more work-related injuries. (Tr. 57-58). She testified: “I do not recall saying that and I don’t think I would have ever said anything like that, because I don’t think that. It’s not in my head we would do that. We’ve never let anyone go because of accidents. That’s never been an issue, that I know of, that’s ever happened.” (Tr. 58). Cathey Myers also testified that she did not even have the power to threaten claimant’s job. (Tr. 58). She explained that Mr. Rollins has the power to hire and fire the technicians. (Tr. 55). She acknowledged that she had cautioned employees to work safely because she did not want them getting hurt. (Tr. 60-61, 62, 65, 67).

Cathey Myers was first aware that claimant was worried about losing his job for filing a claim when he reported the August 2013 injury to Mr. Rollins and she overheard him say that he was afraid he would lose his job. (Tr. 64). Cathey was surprised and went to talk to claimant about it after Mr. Rollins left. (Tr. 64-65). She testified that she was in tears and asked claimant what she had said to make him think that, because she would never do that. (Tr. 65).

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<sup>5</sup> Katrina Myers is the daughter of Cathey Myers.

Cathey Myers testified that she would never threaten claimant. (Tr. 60). She was asked if she recalled a conversation with claimant about carrying a 100-pound pump up a ladder. (*Id.*) She did not remember the exact conversation, but said that she “probably would have chewed him out for doing that” and recommended that he get help. (Tr. 60, 61-62).

Despite claimant’s apparent belief that his job was in jeopardy, he said that Mr. Rollins, the owner of the company, was the only one who could fire him. (Tr. 22). He did not know if Cathey Myers had the right to hire and fire. (*Id.*)

Furthermore, claimant was not aware of anyone who had been terminated at the employer because of a workers’ compensation claim. (Tr. 24). Similarly, Mr. Peters and Katrina Myers were not aware of anyone working for the employer who had been fired for filing a workers’ compensation claim.<sup>6</sup> (Tr. 42, 48, 81). Katrina Myers explained that claimant had filed previous workers’ compensation claims and never had a problem related to the claim filing.<sup>7</sup> (Tr. 81).

On *de novo* review (despite the dissent’s assertion), we are not departing from the 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). We also agree with the ALJ’s conclusion that, based on the testimony of all witnesses, there is no reason to believe that the employer actually intended to fire or layoff claimant if he filed another workers’ compensation claim. Moreover, claimant testified that he had a good rapport with the company and believed he was a valuable employee. (Tr. 23). Consistent with that testimony, Cathey Myers said that claimant was a good technician and was important to the employer’s contract with Boeing. (Tr. 63). Katrina Myers explained that claimant was the senior

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<sup>6</sup> Katrina Myers further testified that an employee who had been involved in an “after hours” accident in a company car (after drinking) was still working for the employer. (Tr. 81).

<sup>7</sup> When claimant was asked how many work injuries he had experienced, he responded: “I would think more than six, but not more than ten.” (Tr. 18). However, he did not specify how many work injuries he had while working for the employer. When he was asked if he had lost much time from any work injuries, he explained that he had carpal tunnel surgery while working for another employer and had time off after the surgery. (Tr. 18-19). SAIF’s attorney asked: “But in terms of working for [the employer] since 2000, you know, have all your things been kind of minor type deals?” (Tr. 19). Claimant replied: “I believe so.” (*Id.*) He did not recall losing any time from work. (*Id.*) Claimant testified that, before the August 2013 injury, he had filed a claim in 2012 for a finger laceration. (*Id.*) Katrina Myers explained that claimant had filed workers’ compensation claims with her in 2010, 2011, and 2012. (Tr. 81).

person on the job with Boeing and the people at Boeing liked claimant and were happy with his work. (Tr. 78, 79). She said that when the employer rehired Mr. Peters on a temporary basis, they would not have hired him permanently if he had not gotten along with claimant. (Tr. 79, 94, 95).

Under these circumstances, we do not consider claimant's subjective belief that he would be fired or laid off if he filed another claim to be supported by the preponderance of evidence. Unlike *Riddel*, this record does not support the conclusion that there was an "actual occurrence" of a threat to claimant's job to support his subjective belief. See 8 Or App at 441. Therefore, claimant has not sustained his burden of proving that he had good cause for failing to give notice of his injury within 90 days. See ORS 656.265(4)(c); *Ledbury*, 41 Van Natta at 191. Consequently, we reverse.

### ORDER

The ALJ's order dated August 7, 2014 is reversed. SAIF's denials are reinstated and upheld. The ALJ's \$8,000 attorney fee and cost awards are also reversed.

Entered at Salem, Oregon on April 8, 2015

Member Curey dissenting.

The majority concludes that claimant did not establish good cause under ORS 656.265(4)(c) for failing to give timely notice of his injury. Because I disagree with the majority's evaluation of the evidence and would affirm the ALJ's order, I respectfully dissent.

The ALJ found that claimant was a credible witness based on his demeanor and manner while testifying. On these facts, I find no persuasive reason to deviate from the practice of deferring to the ALJ's "demeanor-based" credibility finding regarding claimant's testimony. 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).

Like the claimant in *Riddel v. Sears, Roebuck & Co.*, 8 Or App 438 (1972), the record establishes a reasonable basis for claimant's fear of job loss or discipline for filing a claim, which is sufficient to prove "good cause" for his untimely claim filing. I reason as follows.

Claimant testified that he had six to 10 previous work injuries (Tr. 18), but he did not specify how many work injuries he had while working for the employer. He indicated that, before the August 2013 work injury, his work injuries for the employer had been minor without much time loss. (Tr. 19). Katrina Myers, the employer's operations manager and safety coordinator, explained that claimant had filed workers' compensation claims with her in 2010, 2011, and 2012, and that he did not have problems with filing the claims. (Tr. 81).

At hearing, claimant was asked about his November 2013 medical form that indicated he had injured his shoulder at home. (Tr. 9-10; Ex. 4-1, -6). Although the injury did not occur at home, claimant testified that he wrote that on the form because he "had an opinion that my job may be terminated if I filed more [Workers'] Comp claims." (Tr. 10). He explained: "A month or so earlier, when I was in the office Cathey Myers had gone to me and told me that-I don't know the circumstances were prior to me coming in, but the gist of the conversation was one more [Workers'] Comp and we're going to have to let you go." (*Id.*). The claim was ultimately filed in December 2013. (Ex. 9).

Later in the hearing, claimant did not recall how that discussion with Cathey Myers had begun. (Tr. 25). He explained that she was always concerned with safety and that was not the first time that she told claimant to be safe at work. (*Id.*) He testified: "But on this particular instance, she had mentioned that one more [Workers'] Comp claim and my job was in jeopardy." (*Id.*) Claimant was quite shocked by Cathey's statement and told Mr. Wager about it the next day. (Tr. 25). Mr. Wager testified that, before the August 2013 work injury, claimant told him that Cathey Myers "said something about, you know, possibly his job being at risk if he had another injury." (Tr. 31).

Both co-workers, Mr. Wager and Mr. Peters, testified that claimant told them about the August 8, 2013 work injury on the following day. (Tr. 30, 34, 45). Mr. Peters advised claimant to file a claim, but claimant told him that he did not want to file a claim because he was afraid that he would lose his job. (Tr. 34, 46). Claimant testified that he told Mr. Peters that his job was in jeopardy, and Mr. Peters confirmed that in his testimony. (Tr. 29, 34).

When claimant filed the August 2013 claim on December 19, 2013, he explained that Katrina Myers asked him why he had not filed sooner. (Tr. 11, 20; Ex. 9). Claimant testified that he told Katrina "that [Cathey Myers] had told me my job was in jeopardy." (Tr. 11). He told Katrina that Cathey Myers "had, in essence, threatened me with termination if I filed more [Workers'] Comp claims." (Tr. 20-21).

Mr. Peters also testified that about one month before claimant's August 2013 injury, claimant had been in the office and mentioned something to Cathey Myers about picking up a big motor. (Tr. 42-44). Mr. Peters was not there and did not hear the conversation. (Tr. 43). However, when Mr. Peters was in the office the following Monday, Cathey Myers "made a point for me to let the other people know that we need to be extra careful, you know, because she said between [claimant] and Jason \* \* \* there was—they had more accidents than anybody else, and it can co--raise the cost[.]" (*Id.*) Mr. Peters relayed the information to claimant that they needed to be more careful. (*Id.*)

Cathey Myers was asked if she recalled claimant telling her about carrying a 100-pound pump up a ladder. (Tr. 60). She replied:

"Well, I don't remember the exact conversation, but I do remember—I mean I sort of have this vague idea that this took place. I was trying to figure out what could have happened to have this conversation that he thought—could think that, because I would never threaten him, and I can't underst—I couldn't figure it out. That came up that he mentioned to me he was carrying a hundred-pound motor up a ladder. And my normal response would be what are you thinking, what are you doing, you know better than that, you're working there by yourself at night, don't do that, get help or do it tomorrow when Thom's there, don't be doing something like that, you could get hurt, you'll be left there, Jackie [claimant's wife] will call and kill me, don't do that. So I probably would have—I probably would have chewed him out for doing that. That sounds like me." (*Id.*)

Cathey Myers was asked: "So your recollection, however vague it is, is [claimant] would have come in and said something about lifting a motor up, and that's when you would have jumped on him?" (Tr. 61-62). She responded: "I would have told him not to do that, don't be stupid, use your brain" and get help. (Tr. 62).

Thus, although Cathey Myers did not recall threatening claimant's job if he filed another workers' compensation claim, she acknowledged that she "probably would have chewed him out" for lifting a 100-pound motor. She acknowledged that she had previously cautioned employees to work safely because she did not want them getting hurt. (Tr. 60-61, 62, 65, 67).

Moreover, Mr. Peters testified that Cathey Myers told him that claimant and another employee had “more accidents than anybody else,” which could raise the cost. (Tr. 43). Mr. Peters’s testimony tends to support claimant’s understanding that his job was in jeopardy if he filed another workers’ compensation claim. Under these circumstances, I find that claimant had a reasonable belief that his job was in jeopardy if he filed another claim.

In reaching this conclusion, I acknowledge Cathey Myers’s testimony that she did not have the power to threaten claimant’s job. (Tr. 58). She explained that Mr. Rollins, the owner, had the power to hire and fire the technicians. (Tr. 55). Claimant agreed that Mr. Rollins could fire him. (Tr. 22). I do not find who had the right to hire/fire determinative. Claimant did not know if Cathey Myers had the right to hire and fire, but he testified that she was an “integral part” in the process. (*Id.*) Claimant explained that over his years with the employer, he had observed that if employees had issues with Cathey, generally they were not there for long. (Tr. 27). Thus, even if Cathey Myers did not have the authority to directly fire claimant, his testimony supports the conclusion that she was an “integral part” of the hiring and firing process and could influence the decision-making.

I also acknowledge the testimony from claimant, Mr. Peters, and Katrina Myers that they were not aware of anyone working for the employer who had been fired for filing a workers’ compensation claim. (Tr. 24, 42, 48, 81). That point is also not determinative. Claimant believed he had a good rapport with the company and was a valuable employee. (Tr. 23). The focus of this case is not on whether others had not been fired for filing a claim, but on whether this particular claimant thought he would be fired. “Good cause” is a factual determination based upon the particular circumstances of each claim.

Based on claimant’s credible testimony regarding his interpretation of what Cathey Myers told him (and his reasonable belief that) his job was in jeopardy if he filed another workers’ compensation claim, his statements to Mr. Peters and Mr. Wager the day after the injury reiterating his interpretation, and Mr. Peters’s testimony that Cathey had complained that claimant and another employee had more accidents than anybody else, I find that the record establishes a reasonable basis for claimant’s fear of job loss or discipline were he to file another claim, and good cause for not timely filing a claim. *See Riddel*, 8 Or App at 441. Under these circumstances, claimant sustained his burden of proving that he had good cause for failing to give notice of his injury within 90 days. *See* ORS 656.265(4)(c). Because the majority concludes otherwise, I dissent.