

In the Matter of the Compensation of
JULIE GRAYSON-HEMPSTEAD, Claimant

WCB Case No. 13-00916

ORDER ON REVIEW

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Reviewing Panel: Members Johnson and Lanning.

The self-insured employer requests review of Administrative Law Judge (ALJ) Crummé's order that: (1) admitted a "post-hearing" report from claimant's physical therapist; (2) found that claimant's injury claim for a bilateral foot/ankle condition was timely filed; (3) set aside the employer's denial of the claim; and (4) awarded a \$10,500 employer-paid attorney fee. On review, the issues are evidence, timeliness, compensability, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the evidentiary, timeliness, and compensability issues.

Before June 14, 2012, claimant was undergoing physical therapy related to an earlier, April 3, 2012, work-related incident. (Exs. 1, 5, 6).

On June 15, 2012, claimant attended the last of her scheduled physical therapy appointments with Mr. Crebbin, who did not note a June 14, 2012 work incident or re-injury of the left ankle. (Ex. 22).

On June 18, 2012, claimant was evaluated by Ms. Olson, a nurse practitioner, who noted that claimant had slipped, on cardboard covering a soapy floor, at work on June 14, 2012. (Ex. 25). She noted ecchymosis over the lateral ankle and diagnosed a left ankle sprain re-injury. (*Id.*) Claimant completed an 827 form describing slipping on cardboard at work, and identifying April 3, 2012 as the "Date/time of original injury." (Ex. 24). Both of these records are stamped with date stamps of June 25 and June 28, 2012. (Exs. 24, 25).

On February 22, 2013, claimant made a claim for right and left ankle sprains due to the June 14, 2012 incident. (Ex. 115). The employer denied the claim. (Ex. 116).

At the hearing on May 20, 2014, the employer moved for a continuance to obtain rebuttal evidence to a May 2014 report from Dr. Leonard, a podiatrist. (II Tr. 17, 25). On June 25, 2014, the ALJ issued an interim order granting the

employer's motion. Reasoning that claimant would otherwise be prejudiced by the employer's amendment of its denial at hearing, the ALJ allowed claimant to submit additional evidence regarding the "combined condition" issue before the employer's submission of its rebuttal evidence.

Following the ALJ's interim order, claimant submitted a narrative report from Mr. Crebbin, a physical therapist. (Ex. 125). The employer then submitted a report from Dr. Fuller. (Ex. 126). The ALJ admitted those reports.

The ALJ determined that claimant had given timely notice of the June 14, 2012 injury. Based on the opinions of Drs. Glidden and Leonard and Ms. Olson (a family nurse practitioner), the ALJ found that the work injury incident was a material cause of claimant's disability/need for treatment. Reasoning that claimant's congenital flat feet did not meet the statutory definition of a preexisting condition, the ALJ concluded that the employer did not establish the existence of a combined condition. Accordingly, the ALJ set aside the denial.

On review, the employer challenges the ALJ's admission of Mr. Crebbin's report. (Ex. 125). The employer further contends that claimant did not establish the timeliness or compensability of her June 2012 work injury claim. Based on the following reasoning, in addition to that expressed by the ALJ, we disagree with the employer's contentions.

Evidence

The employer contends that Mr. Crebbin's report (Ex. 125) does not specifically address the "combined condition" issue. Rather, the employer asserts that the focus of the report is on the objective findings indicating an acute injury on June 14, 2012, which is arguably more relevant to claimant's initial burden to show that the work injury was a material contributing cause of her disability/need for treatment.

An ALJ is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct a hearing in any manner that will achieve substantial justice. ORS 656.283(6). The ALJ is given broad discretion on determinations concerning the admissibility of evidence. *See, e.g., Brown v. SAIF*, 51 Or App 389, 394 (1991) (the ALJ's decision to admit or exclude evidence is limited only by the consideration that the hearing as a whole achieve substantial justice). We review the ALJ's evidentiary ruling for abuse of discretion.

SAIF v. Kurcin, 334 Or 399, 409 (2002). If the record justifies the ALJ's ruling, it is not an abuse of discretion. *Rick Sandeno*, 59 Van Natta 2779, 2781 (2007) (citing *Kurcin*, 334 Or at 409).

It is apparent from the ALJ's ruling that Mr. Crebbin's report was admitted based on its relevance regarding the "combined condition" issue. For instance, to the extent that Mr. Crebbin attributed claimant's symptoms and objective findings to an acute injury on June 14, 2012, his opinion weighs against a preexisting condition being the major contributing cause of claimant's disability or need for treatment. Accordingly, we do not consider the ALJ's admission of the disputed report to constitute an abuse of discretion.¹ See *Andrew C. Kahl*, 68 Van Natta 639, 643 (finding no abuse of discretion in the ALJ's evidentiary rulings, and in the alternative, determining that the ALJ's order would be affirmed even without consideration of the disputed exhibits).²

Timeliness

The employer contends that the testimony of claimant's supervisor, Mr. Westling, and of a co-worker, Mr. Ellis, overcomes the statutory presumption that claimant timely reported the June 14, 2012 work injury. See ORS 656.310(1)(a). Claimant responds that the employer's witness's lack of recall does not sufficiently rebut the testimony of claimant and her husband. Moreover, claimant relies on a date stamped 827 form and corresponding chart note from Ms. Olson. (Exs. 24, 25). Based on the following reasoning, we conclude that claimant gave timely notice regarding the June 14, 2012 work injury.

A claimant is required to give an employer notice of an accident resulting in an injury within 90 days after the accident. ORS 656.265(1). Such notice may be oral or written. See *Godfrey v. Fred Meyer Stores*, 202 Or App 673, 689

¹ In any event, the ALJ's order, as well as our decision, does not rely on Mr. Crebbin's report (Ex. 125) in resolving the timeliness/compensability issues.

² The employer also objects to the admission of Exhibit 19A, a photograph of a "sticky note" informing a supervisor that the soap dispenser tubing was disconnected. In doing so, the employer contends that the photograph was "unauthenticated." Yet, claimant described when and where she photographed the "sticky note" and described its size and appearance. (Tr. 52-53, 84). Relying on the testimony of other workers who did not see the "sticky note," the employer disputes claimant's representations regarding the note. However, such testimony does not establish that the note was not "authenticated" before being admitted into evidence by the ALJ. Accordingly, we find no abuse of discretion in the ALJ's admission of Exhibit 19A.

(2005), *rev den*, 340 Or 672 (2006) (notice of an injury under ORS 656.265 may be oral or written); *Susan D. Wonderly*, 62 Van Natta 1517, 1518-19 (2010) (contemporaneous oral report of injury to the employer was sufficient notice of the accident under ORS 656.265).

ORS 656.310(1)(a) provides that in any proceeding for the enforcement of a claim for compensation under this chapter, there is a rebuttable presumption that “[s]ufficient notice of injury was given and timely filed[.]” Thus, before a claim can be barred for late filing, the carrier must establish that notice was not given within 90 days as required by ORS 656.265(1). *Nat’l Farmers’ Union Ins. v. Scofield*, 57 Or App 23, 25, *rev den*, 293 Or 373 (1982); *Robert A. Lienhard*, 63 Van Natta 313, 315 (2011).

A claim is generally barred if notice is not given within 90 days. ORS 656.265(1), (4). However, a claim is not barred by ORS 656.265(4) if notice is given within one year after the accident and the employer had knowledge of the injury within 90 days of the accident. ORS 656.265(4)(a); *see also Keller v. SAIF*, 175 Or App 78, 82, *rev den*, 333 Or 260 (2002) (knowledge of the injury must be acquired within the initial 90-day notice period).

“Knowledge” of the injury should include enough facts as to lead a reasonable employer to conclude that workers’ compensation liability is a possibility and that further investigation is appropriate. *Argonaut Ins. v. Mock*, 95 Or App 1, 5, *rev den*, 308 Or 79 (1989); *Bob J. Traweck*, 61 Van Natta 2180, 2181 (2009), *aff’d without opinion*, 238 Or App 580 (2010). Claimant has the burden of proving that the employer had such “knowledge.” *Mock*, 95 Or App at 4.

Here, Mr. Westling testified that he did not recall the meeting described by claimant and her husband in which they allegedly gave notice of the injury to Mr. Westling and another supervisor, Mr. Johnson. (II Tr. 134). Mr. Westling also did not recall receiving a phone call from claimant informing him of the occurrence of the June 14, 2012 work injury. (II Tr. 132-133). He testified that if either he or Mr. Johnson had received a report of an injury, the appropriate forms would have been completed to begin processing the claim. (II Tr. 133).³

³ At the time of hearing, Mr. Johnson had relocated outside of the state and was not available to provide testimony. (II Tr. 133). Mr. Ellis testified that he was uncertain about when he first learned of the June 14, 2012 work injury, but it was much later than June 2012. (II Tr. 153).

It is unnecessary for us to resolve the conflicting testimony between claimant and her husband and the employer's witnesses, because the record otherwise establishes that the employer had knowledge of the June 14, 2012 work injury within 90 days of the date of injury, and claimant subsequently filed a claim within one year. ORS 656.265(4)(a). We base our conclusion on the following reasoning.

On June 18, 2012, claimant sought treatment with Ms. Olson, who noted that she slipped at work on June 14, 2012 and reinjured her left ankle. (Ex. 25). The date stamp on Ms. Olson's chart note confirms that it was received by the employer on June 25, 2012. (*Id.*) Also on June 28, 2012, the employer received an 827 form, signed on June 18, 2012 by claimant and Ms. Olson, describing the work incident as slipping on cardboard covering a pool of soap. (Ex. 24). The 827 form was marked as a report of "aggravation of original injury" and the original injury date of April 3, 2012 was indicated. (*Id.*)⁴

While the employer contends that the date stamp on the 827 form is "illegible" and that the form refers to the April 2012 injury, we conclude that the 827 form, in conjunction with Ms. Olson's corresponding chart note, was timely received by the employer and gave notice of a June 2012 left ankle injury. (Exs. 24, 25). Consequently, the record establishes that the employer had knowledge of claimant's June 14, 2012 work injury within the statutory 90-day period, and consequently, her claim was timely filed on February 22, 2013, within one year of the June 14, 2012 injury. (Ex. 115). *See Mock*, 95 Or App at 5 (1989); *Patricia A. Epperson*, 49 Van Natta 690 (1997) (chart note and 827 form received by the carrier sufficient to establish its knowledge of the work injury).

Legal Causation

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. *Darla Litten*, 55 Van Natta 925, 926 (2003).

⁴ While the date stamps do not identify the recipient, we conclude that the date stamps are the employer's. *See* OAR 436-060-0017 (a carrier must date stamp each document received with the month, day, year, and name of the recipient company).

Claimant contends that she slipped on cardboard covering a soap-covered floor, re-injuring her left ankle. The employer disputes her credibility and contests the occurrence of the described incident.

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.⁵ 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). However, even if a claimant lacks credibility or reliability in certain respects, she can still prove compensability if the remainder of the record supports the claim. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985).

Based on the testimony of a supervisor, Mr. Westling, the written statement of a co-worker, Mr. Huang, and observations from another co-worker, Mr. Ellis, the employer contests the credibility of claimant's testimony regarding the occurrence of a work-related injury.

Mr. Westling testified that he did not recall receiving a phone call or claim form from claimant regarding the June 2012 work incident. (II-Tr. 133-34). He explained that the employer had a strict requirement to report work-related injuries within 24 hours. (II Tr. 132).

Mr. Ellis testified that claimant was in competition with him for a promotion to the deli manager position. (II Tr. 143). He stated that things had always felt "very abrasive" with claimant, and that his promotion required him to regularly work directly with her. (*Id.*) Mr. Ellis further testified that on "at least" two occasions he saw claimant "walking just fine" and then developing a limp after she entered the employer's premises. (II Tr. 144).

⁵ However, reasoning that the record supported claimant's version of events, the ALJ considered her to be a credible witness.

The employer also relies on certain portions of Mr. Huang's written statement in which he states that he did not recognize the "sticky note" stating that the soap dispenser had become disconnected, and that claimant did not appear upset or injured on the date of the June 2012 work incident. (Ex. 123). However, Mr. Huang also stated that he remembered claimant holding onto a sink and that he assisted her in stepping off cardboard covering a pool of "liquid." (*Id.*)

Based on our review, we conclude that claimant has satisfied her burden of showing legal causation. First, her description of the mechanism of injury was corroborated by the written statement of Mr. Huang. (*Id.*) Second, claimant reported the injury to Ms. Olson, who noted "ecchymosis over [the] lateral ankle" and diagnosed a left ankle sprain re-injury. (Ex. 25).

While the testimony of Mr. Westling and Mr. Ellis may call certain elements of claimant's reliability into question, neither witness's testimony persuasively rebuts claimant's description of the work incident as corroborated by Mr. Huang and reported to Ms. Olson, and further corroborated by Ms. Olson's examination findings several days after the June 2012 work incident. *See, e.g., Lynda L. Spangler*, 66 Van Natta 222, 225 (2014) (objective findings of an unwitnessed injury supported the claimant's burden to establish legal causation).

The employer further contends that inconsistencies in the medical record lead to the conclusion that claimant's testimony was not credible or reliable. In particular, the employer argues that Mr. Crebbin's physical therapy note is inconsistent with claimant's testimony regarding whom she told of the injury and when, and that lack of any notation of an injury event in Mr. Crebbin's June 15, 2012 chart note cannot be explained by a language barrier because claimant's husband would have clarified any misstatements.⁶ The employer asserts that claimant's testimony contradicts her previous statements that she attempted to inform Mr. Crebbin regarding the work injury on June 15, 2012, and that her husband would have corrected any misunderstanding between claimant and Mr. Crebbin regarding the occurrence of a work-related injury.

However, claimant's answer to whether she informed Mr. Crebbin about the injury on June 15, 2012 is unclear, stating that she "only told them on the Monday morning." (II Tr. 89). We are unable to conclude that claimant affirmatively denied informing Mr. Crebbin regarding the injury on June 15, 2012

⁶ Claimant's native language is Chinese. (Ex. 24)

on the basis of this testimony. Claimant also explained that she did not remember precisely what she told Mr. Crebbin at the appointment. (*Id.*) Additionally, the record suggests that claimant's husband was not present at that appointment. (II Tr. 90). Therefore, the employer's assumption that he would have corrected any misstatements is not substantiated. Given Mr. Crebbin's acknowledgment of a miscommunication with claimant regarding the occurrence of a work-related injury, the record supports a finding that claimant attempted to inform him regarding her June 14, 2012 work-related injury. (Ex. 32).

Medical Causation

The employer contends that the opinions of Ms. Olson and Drs. Glidden and Leonard are insufficient to establish that the June 14, 2012 work incident was a material contributing cause of claimant's disability/need for treatment. In the alternative, the employer asserts that claimant's left ankle condition is a "combined condition" and that the work injury was not the major contributing cause of disability or need for treatment. Based on the following reasoning, we disagree with the employer's contentions.

Claimant must prove that her June 14, 2012 work injury was a material contributing cause of the disability/need for treatment related to her ankle/foot conditions. ORS 656.005(7)(a); ORS 656.266(1); *Tricia A. Somers*, 55 Van Natta 462, 463 (2003). If she establishes an "otherwise compensable injury," and a "combined condition" is present, the employer must prove that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined ankle/foot condition. ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). The "otherwise compensable injury" means the "work-related injury incident." *See Brown v. SAIF*, 262 Or App 640, 652 (2014); *see also Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014), *aff'd without opinion*, 278 Or App 447 (2016) (applying the *Brown* definition of an "otherwise compensable injury" to initial and new/omitted medical condition claims under ORS 656.266(2)(a)).

Here, the opinions of Ms. Olson, Dr. Leonard, and Dr. Glidden all support a conclusion that claimant's June 14, 2012 work-related injury incident was a material contributing cause of her disability and need for medical treatment. (Exs. 25, 114A, 118, 124).

In disputing material causation, the employer contends that claimant did not sufficiently rebut Dr. Fuller's explanation that she would not have been able to engage in physical therapy on the day following the work injury had she actually sustained a work injury on June 14, 2012. (Ex. 119-7). However, Ms. Olson, who examined claimant on June 18, 2012, noted that claimant experienced left ankle pain on the evening of the work injury on June 14, 2012, and recorded objective findings of ecchymosis over the lateral ankle. (Ex. 25). Ms. Olson noted that claimant's pain increased following the physical therapy appointment on June 15, 2012. (*Id.*) Additionally, Dr. Leonard explained that the delayed onset of claimant's left ankle pain did not affect his diagnoses or causation opinion because, he noted, "It is not uncommon for pain to develop several days after an incident." (Exs. 114A, 124-2).

Considering Dr. Leonard's explanation, in addition to Ms. Olson's findings of left ankle ecchymosis on June 18, 2012, we conclude that claimant has persuasively established that her June 12, 2012 work injury was a material contributing cause of her need for treatment/disability regarding her left ankle condition.

Additionally, we adopt the ALJ's reasoning that the employer did not establish the existence of a preexisting condition that combined with the otherwise compensable injury. Finally, even if a combined condition were established, we would not consider Dr. Fuller's explanation that a "flat feet" condition would be the major contributing cause of claimant's need for treatment/disability following her compensable work injury/incident to be persuasive. In advancing this proposition, Dr. Fuller continued to question the occurrence of a new injury on June 14, 2012 based on claimant's presentation at physical therapy on June 15, 2012. (Ex. 126-2).⁷ Additionally, Dr. Fuller did not persuasively address

⁷ Assuming the existence of a combined condition, Dr. Fuller explained that he did not consider the June 12, 2014 work injury to be the major contributing cause of the combined condition and that "[f]urther, Mr. Crebbin's June 15, 2012 chart note does not offer any indication of an acute and new injury such as reduced range of motion or loss of strength that absolutely would have been present if [claimant's] June 14, 2012 work injury had any significant contribution to the disability or need for treatment of the combined condition." (Ex. 126-2). Based on this explanation, we conclude that Dr. Fuller's "combined condition" analysis did not accept the presence of an "otherwise compensable injury". See *Knaggs v. Allegheny Techs.*, 223 Or App 91, 93-94 (2008); see also *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); *Robert Prabucki*, 61 Van Natta 1877, 1881-82 (2009) (where the claimant established an "otherwise compensable injury," physicians' opinions that his symptoms were not due to the work injury, when discussing a hypothetical "combined condition" were not considered persuasive because they did not weigh the contribution of the work injury), *aff'd*, 240 Or App 384 (2011). Accordingly, his opinion regarding a combined condition is not persuasive.

Ms. Olson's objective findings on June 18, 2012, other than to assert, without explanation, that any swelling after June 15, 2012 would be caused by a flat-foot condition. (*Id.*)

In conclusion, based on the abovementioned reasoning, the ALJ's order is affirmed.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2), (3). After considering the factors set forth in OAR 438-015-0010(4) and OAR 438-015-0110 and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$4,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by claimant's respondent's brief), the complexity of the issues, the value of the interest involved, and the risk that claimant's counsel might 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. *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's September 9, 2015 order is affirmed. For services on review, claimant's counsel is awarded an assessed fee of \$4,500, 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 June 30, 2016