

---

In the Matter of the Compensation of  
**JUAN ESTRADA, Claimant**  
WCB Case No. 11-06447  
**ORDER ON REMAND**  
Alvey Law Group, Claimant Attorneys  
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Weddell, Curey, and Somers.<sup>1</sup> Member Weddell dissents.

This matter is before the Board on remand from the Court of Appeals. *Fed. Express Corp. v. Estrada*, 275 Or App 400 (2015). The court has reversed our order, *Juan Estrada*, 65 Van Natta 613 (2013), that: (1) found that claimant had established “good cause” under ORS 656.265(4)(c) for failing to give notice of his injury claim within 90 days after the accident; and (2) set aside the self-insured employer’s denial of that injury claim. Reasoning that our order included inconsistent factual findings and did not explain how those findings logically led to our conclusion, the court concluded that our order was not supported by substantial reason. Consequently, the court reversed and remanded. Having received the parties’ briefs on remand, we proceed with our review in accordance with the court’s directive.

#### FINDINGS OF FACT

We adopt the ALJ’s “Findings of Fact,” as supplemented in our Order on Review and briefly summarized below.

Claimant worked for five years as a delivery truck driver for the employer, loading and unloading items weighing up to 150 pounds. (Tr. 5-6). On April 27, 2011, he felt “a weird pull” around his left testis area while he was loading a heavy item into the truck. (Tr. 8-9). He did not report a work injury because he thought it was “just soreness \* \* \* from extra work.” (Tr. 9).

Thereafter, claimant experienced continued symptoms, particularly with heavy lifting or pushing, which he understood as having begun as a result of the April 27, 2011 incident. (Tr. 9, 14). He continued to work. (Tr. 13). After his symptoms increased, causing increased difficulty in working, he first sought treatment in September 2011. (Tr. 9, 15). He was diagnosed with a hernia in October 2011 and first reported the work injury that month. (Tr. 13).

---

<sup>1</sup> Member Lowell was previously a member of the reviewing panel. Because Member Lowell is no longer a member, Member Curey has participated in this review.

---

After the employer denied the claim, claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The parties agreed that the timeliness of claimant's injury claim depended on whether he had "good cause" for failing to give notice of the injury within 90 days. (Tr. 18, 21-22). The ALJ concluded that claimant did not have "good cause" for his untimely claim because he knew his symptoms were attributable to the April 27, 2011 work incident.

Claimant sought Board review of the ALJ's order, contending that he had "good cause" for his failure to give timely notice of his injury. Reasoning that claimant did not know that the work incident had injured him, we agreed with claimant's contention. *Estrada*, 65 Van Natta at 616. Based on our determination that claimant had established "good cause" for failing to timely report the injury, we reversed the ALJ's order.<sup>2</sup> *Id.* at 620.

The court reversed our decision and remanded for further consideration. *Estrada*, 275 Or App at 407. The court noted that our analysis was predicated on the determination that claimant did not know that he had been injured, and not on the fact that he had "worked through it." *Id.* at 405. However, the court concluded that we had not articulated a rational connection between our factual findings and our ultimate conclusion that claimant lacked knowledge that he had been injured. *Id.* at 406.

In particular, the court noted our findings that claimant was aware of the moment that he felt a distinct painful sensation in his body while lifting a heavy object at work, had soreness in the same area that made work more difficult for him over the next few months, was previously free of such symptoms, and consistently and exclusively attributed his symptoms to the work incident upon receiving his hernia diagnosis. *Id.* The court reasoned that such findings appeared inconsistent with our ultimate conclusion that claimant had not realized that he was injured, and that our order did not include a rational explanation of how our findings logically led to our conclusion. *Id.* at 406-07. Therefore, the court concluded that our order lacked substantial reason. *Id.* at 407.

---

<sup>2</sup> We also concluded that claimant established that the work injury was at least a material contributing cause of his disability or need for treatment of his left inguinal hernia. 65 Van Natta at 619. Accordingly, we concluded that the claim was compensable and set aside the employer's denial. *Id.* at 620.

The court also noted apparent inconsistencies in our prior case law regarding whether the “significance” of an injury is relevant to the “good cause” inquiry. *Id.* at 407 n 3 (discussing *Michael D. Chilcote*, 64 Van Natta 766 (2012), and *Corey A. Otterson*, 63 Van Natta 156 (2011)). The court stated that if we evaluate “good cause” in light of a determination that ORS 656.265 requires workers to report only those injuries that are “significant” or that meet some other limiting criteria, further explanation of such a rationale would be required. *Id.*

Accordingly, the court reversed and remanded for further consideration. Having considered the parties’ supplemental briefs, we proceed with our review.

Under ORS 656.265(1)(a), “Notice of an accident resulting in an injury or death shall be given immediately \* \* \*, but not later than 90 days after the accident.” Failure to give such notice does not bar a claim if the notice is given within one year after the accident and “the worker had good cause for failure to give notice within 90 days after the accident.” ORS 656.265(4)(c). Claimant bears the burden of establishing “good cause” for the untimely notice of the injury. *Andrew Kuralt*, 67 Van Natta 589, 591 (2015); *see also Riddel v. Sears, Roebuck & Co.*, 8 Or App 438, 441-42 (1972).

The ninetieth day after the work incident was July 26, 2011. As explained below, we are not persuaded that claimant had “good cause” for his failure to give notice of the accident by that date.

To begin, we address the court’s observation of apparent inconsistencies in our prior case law regarding what constitutes “good cause” for a failure to timely report an accident resulting in an injury. After reviewing our case law, we recognize that we have not articulated a general standard for finding “good cause” under ORS 656.265(4)(c). Instead, we have addressed “good cause” contentions on a case-by-case basis. Accordingly, we begin with our general inquiry.

This inquiry necessarily involves the consideration of the circumstances of each case, and such “good cause” may exist for a variety of different reasons. For example, “good cause” under ORS 656.265 for untimely notice was found when the worker believed that reporting the accident would result in job termination, *Riddel v. Sears, Roebuck & Co.*, 8 Or App 438 (1972), and when the worker believed that he would not be covered under Oregon workers’ compensation law because he was injured while working outside of Oregon, *Wilson v. SAIF*, 3 Or App 573 (1970).<sup>3</sup>

---

<sup>3</sup> From 1965 through 1995, ORS 656.265(4)(c) excused the failure to give timely notice of an accident if the notice was given within one year and the worker had “good cause” for the untimely notice. The “good cause” provision of ORS 656.265 was repealed in 1995, but was reinstated in its current form in 2003. *See* Or Laws 1995, chapter 332, § 29; Or Laws 2003, chapter 707, § 1.

“Good cause” may also involve the type of “mistake, inadvertence, surprise or excusable neglect” that would constitute “good cause” for untimely filing of a hearing request under ORS 656.319(1)(a). For example, reasonable reliance on erroneous information regarding workers’ compensation rights and responsibilities may constitute “good cause.” See *Voorhies v. Wood, Tatum, Mosser*, 81 Or App 336 (1985), *rev den*, 302 Or 342 (1986) (“good cause” for late hearing request established where a claim supervisor provided erroneous information regarding when the claimant could mail his request). In a similar view, an incapacitating medical condition preventing timely notice would also constitute “good cause” under this standard. See *Patricia J. Mayo*, 44 Van Natta 2260 (1992); *Jerry M. McClung*, 42 Van Natta 400 (1990).

We have found “good cause” if the worker did not know of “an accident resulting in an injury or death” to report. In *Otterson*, for example, we found “good cause” where the worker believed, based on medical advice, that there was no medical condition that would constitute an “injury.” 63 Van Natta at 157. Similarly, in *John S. Smith*, 64 Van Natta 340 (2012), we found “good cause” where the worker believed that prior, nonwork-related accidents were the cause of his condition. Thus, a worker’s reasonable belief that there was no “accident” or no “injury or death” to report, or that the accident did not “result in” the injury or death, has been found to constitute “good cause” for a failure to provide timely notice.

When evaluating whether a worker knew of “an accident resulting in an injury or death,” we consider it appropriate to apply a standard analogous to that used when analyzing whether an employer had “knowledge” of an injury sufficient to excuse the untimely filing of a claim under ORS 656.265(4)(a).<sup>4</sup> In the ORS 656.265(4)(a) context, we examine whether the employer’s “knowledge” included enough facts to lead a “reasonable employer” to conclude that workers’ compensation liability was a possibility and that further investigation was appropriate. See *Argonaut Ins. Co. v. Mock*, 95 Or App 1, 5, *rev den*, 308 Or 79 (1989).

Similarly, in the ORS 656.265(4)(c) context, we will apply a “reasonable worker” standard to determine whether a worker has established good cause for failing to make the report within the 90-day period allowed by ORS 656.265(1)(a). Specifically, we will examine whether the worker knew of enough facts to lead a reasonable worker to conclude that workers’ compensation liability was a reasonable possibility and that notice to the employer was appropriate. In doing

---

<sup>4</sup> ORS 656.265(4)(a) provides that failure to give timely notice under ORS 656.265(1)(a) does not bar a claim if the notice is given within one year after the date of the accident and “[t]he employer had knowledge of the injury or death.” Such knowledge must be acquired within the initial 90-day notice period of ORS 656.265(1)(a). *Keller v. SAIF*, 175 Or App 78, 82, *rev den*, 333 Or 260 (2002).

so, for example, we will consider the worker's credible testimony regarding such knowledge, as well as the circumstances supporting the worker's understanding. Such circumstances may include (but will not be limited to) the nature of the work accident and subsequent symptoms, the worker's understanding of the accident's relationship with subsequent symptoms, contemporaneous medical evidence regarding the nature or cause of a condition, alternative explanations for symptoms, self-treatment, the degree to which the symptoms restricted the worker's on- and off-work activities, the worker's education and occupational background, and reasonable reliance on legal or medical advice.

With respect to those prior cases that addressed the "significance" of an injury, we clarify that in evaluating whether the nature of the accident or symptoms gave the claimant knowledge of the "accident resulting in an injury or death," we may consider the significance of the accident or symptoms. However, if a worker is aware of such an accident, untimely notice has not been excused by the worker's belief that the accident or the injury was or was not "significant."<sup>5</sup> *See Chilcote*, 64 Van Natta at 767 (ORS 656.265(1) does not require a claimant to give notice of an accident only if it is "significant" or "serious"). Insofar as our case law may be interpreted to suggest that "good cause" for untimely notice exists simply because the worker believed that the known accident or injury was not "significant," we disavow such reasoning.

We turn to the case at hand, in which claimant contends that, although he was aware of symptoms resulting from the work accident, he did not know of an "injury" to report because he did not need professional medical treatment or self-treatment in lieu of professional medical treatment, and was not impaired in performing his job or activities of daily living. Under these particular circumstances, we do not find "good cause" for claimant's untimely notice of the accident. We reason as follows.

An "injury" may be broadly defined as "an act that damages, harms, or hurts," or as a "hurt, damage, or loss sustained." *Webster's Third New Int'l Dictionary* 1164 (unabridged ed 1993). However, for workers' compensation

---

<sup>5</sup> In *Smith*, we noted that the claimant did not believe that the work-related accident (a fall) was "significant" at the time. 64 Van Natta at 342. However, as noted above, we found good cause because the worker believed that his injury had resulted not from the work accident, but from previous nonwork-related accidents. *Id.* at 342. In *Otterson*, we stated that the claimant lacked knowledge that he had incurred a "significant injury." 63 Van Natta at 157. However, because the claimant had obtained medical evaluations that had identified no medical condition, and did not require any subsequent time off of work, our finding of "good cause" was based on the lack of knowledge of an injury. *Id.* Therefore, although our statements in *Smith* and *Otterson*, regarding the "significance" of an accident or injury, were inartful, we consider our ultimate conclusions in those cases regarding the "good cause" issue to be consistent with today's decision.

purposes, an “injury” requires medical treatment or results in disability or death. ORS 656.005(7)(a); *K-Mart v. Evenson*, 167 Or App 46, 50 (2000). Therefore, we agree with claimant’s general contention that “good cause” for untimely notice of an accident may theoretically be established where a worker believes that there was no potentially compensable injury because no medical treatment would be required by, and no disability would result from, a work accident.

Nevertheless, even in the circumstances described above, if the worker had sufficient knowledge to lead a reasonable worker to conclude that workers’ compensation liability was a reasonable possibility and that notice to the employer was appropriate, the worker’s choice to “work through” symptoms or to avoid professional medical treatment would not necessarily establish that the worker was unaware of an “injury.” In *Chilcote*, for example, we found that a worker “knew all along that his symptoms resulted from a work-related injury” where he self-treated and “lay in bed all weekend, ‘week after week,’” due to his severe symptoms. 64 Van Natta at 768-69. In *Chilcote*, we found no good cause for a failure to timely report an accident, despite a lack of professional medical treatment, the worker’s choice to “work through” his symptoms, and his assertion that he was not aware of a “significant” injury. *Id.* at 769.

Here, claimant testified that “originally,” he “wasn’t aware [he] was injured,” and believed that his symptoms were “just soreness from working harder during that period of time.” (Tr. 10). However, he noted a particular lifting incident that resulted in a “weird pull.” (Tr. 8-9). He further identified that incident as the beginning of his symptoms, which continued, increased, and were particularly associated with lifting and pushing heavy items, and made his work increasingly difficult. (Tr. 9, 13, 15). Claimant did not testify that he continued to believe that his symptoms were “just soreness from working harder” during the entire 90-day reporting period allowed by ORS 656.265(1)(a), or that he believed his symptoms to have been attributable to anything other than the identifiable work incident.<sup>6</sup> He also did not testify that, as his symptoms escalated during the 90-day reporting period, he did not understand that he would likely miss work or require medical treatment.

---

<sup>6</sup> We previously interpreted claimant’s testimony to be that he considered his symptoms to be “just soreness from working harder” during the entire period until he noticed swelling, which prompted him to become “more concerned.” *Estrada*, 65 Van Natta at 617. On remand, we interpret claimant’s testimony differently. Claimant’s testimony that he “originally” was not aware that he was injured does not support the conclusion that he continued to believe himself to be uninjured as his symptoms increased and his work became more difficult. (Tr. 10). Further, his testimony that he became “more concerned” when he noticed swelling does not indicate that he was not “concerned” about an injury before that time. (*Id.*)

As noted above, if a claimant is aware of an injury resulting from a work accident, a choice to avoid medical treatment and “work through” the injury would not be consistent with a finding of “good cause” for an untimely accident report (regardless of the perceived “significance” of the injury). Thus, even if claimant initially believed that the work accident did not result in an injury, he has not established that he was not aware of the injury within the statutory 90-day period following the work incident.

Therefore, based on the aforementioned reasoning, this record establishes that a reasonable worker would conclude that workers’ compensation liability was reasonably possible and that it was appropriate to report the accident within the 90-day period allowed by ORS 656.265(1)(a). Under such circumstances, we are not persuaded that claimant had “good cause” for failing to timely report the accident as required by ORS 656.265(1)(a).

Accordingly, on remand, in lieu of our March 31, 2013 order, we affirm the ALJ’s order dated August 31, 2012.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on January 17, 2017

Member Weddell dissenting.

The majority concludes that claimant did not establish “good cause” for his failure to give timely notice of his work-related accident based on his lack of knowledge of his injury. Because I reach a contrary conclusion, I respectfully dissent.

I agree with the majority’s application of a “reasonable worker” standard to determine whether “good cause” exists under ORS 656.265(4)(c). I further agree that where a worker asserts “good cause” based on the lack of knowledge of an injury, “good cause” depends on whether the worker had knowledge of enough facts to lead a reasonable person in the worker’s position to conclude that workers’ compensation liability was a reasonable possibility and that notice to the employer was appropriate. However, in this case, I conclude that claimant did not have such knowledge.

At the time of his injury, claimant had worked for five years as a delivery truck driver. (Tr. 6). He felt a “weird pull” when lifting. (Tr. 8). He was unaware that he was injured because he thought his symptoms were “just soreness \* \* \*

---

from extra work.” (*Id.*) Claimant testified that even with his persistent pain symptoms, he continued to believe that his symptoms were “just soreness from working harder during that period of time.” (Tr. 10). He became more concerned, and sought treatment, after he noticed swelling in August 2011. (*Id.*)

There is no reason to disregard claimant’s testimony that he believed that his symptoms were “just soreness” from “extra work” or “working harder.” Considering the nature of his job and his experience as a delivery truck driver, his explanation is reasonable. There is no evidence that claimant understood, until after he noticed swelling, that his work accident might cause disability or require medical treatment. There is no evidence that he made a choice to “work through” a known injury or avoid professional treatment for a known injury. To the contrary, the record supports the conclusion that claimant sought treatment when he realized that treatment was appropriate. Under such circumstances, I conclude that, despite his symptoms, claimant initially believed himself to be uninjured and did not appreciate the possibility of a work-related injury until at least August 2011.

Under these circumstances, I conclude that claimant did not have sufficient knowledge to make a reasonable worker in his position aware that workers’ compensation liability was a reasonable possibility and that notice to the employer was appropriate. Therefore, I would find “good cause” for his untimely notice under ORS 656.265. Accordingly, I respectfully dissent.