
In the Matter of the Compensation of
DALIA R. LOPEZ, Claimant
WCB Case No. 13-01036
ORDER ON REMAND
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Reviewing Panel: Members Lanning and Johnson.¹

This matter is before the Board on remand from the Court of Appeals. *Lopez v. SAIF*, 281 Or App 679 (2016). The court has reversed our order, *Dalia R. Lopez*, 65 Van Natta 2173 (2013), which had found that claimant had not established “good cause” under ORS 656.265(4)(c) for her untimely notice of her injury claim.² Reasoning that we may have relied on a misconception of law (*i.e.*, that claimant could establish “good cause” under the statute *only* by presenting medical evidence to support her contentions), the court has 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 as an advocate in a “Head Start” program. She assisted pre-kindergarten students and their parents with issues of food, clothing, shelter, and health care, using her own vehicle to make home visits. (Tr. 5-6). Claimant worked irregular hours. (Tr. 7).

On June 5, 2012, claimant had obtained immunization records from a client, who lived in a city near her home. (Tr. 8). Claimant told the client that she would return the records in the afternoon of the next day. (Tr. 50).

¹ Member Langer was previously a member of the reviewing panel. Because Member Langer is no longer a member, Member Johnson has participated in this review.

² The court concluded that our determinations that the knowledge of claimant’s supervisor in this case was not sufficient to lead a reasonable employer to have concluded that workers’ compensation liability was a possibility and that an investigation was appropriate were supported by substantial evidence. *Lopez*, 281 Or App at 683.

On June 6, 2012, at 3:40 p.m., after having left the office, claimant was involved in a motor vehicle accident (MVA). (Tr. 9). The client's immunization records were in claimant's car. (*Id.*) Claimant was life-flighted to a hospital, where she was admitted for injuries to her face, neck, shoulders, upper back, and abdomen. (Tr. 10; Ex. 6). She was assessed with neck pain and possible ligamentous injury of the neck. (Ex. 6-3). CT scans showed "possible widening of C3-C4 spinous process which may reflect ligamentous damage." (*Id.*) As a result, claimant was not cleared from the "C-Collar" and was referred for an MRI and a spine consult. (*Id.*) The MRI findings, which confirmed the CT findings, showed an "[i]ncreased T2 signal in the interspinous ligaments of C2-C3 and C3-C4 consistent with ligamentous strain/injury." (Exs. 6-4, 9). Claimant's head CT was considered "normal." (Ex. 10-1).

On June 7, 2012, the day after the accident, claimant's supervisor, Ms. Swain, visited her in the hospital. (Tr. 56). Ms. Swain testified that claimant was able to tell her details about the accident. (*Id.*) When Ms. Swain asked claimant where she was going when the accident occurred, she said that she was going home and she was not on work time. (Tr. 56). Ms. Swain had no information at that time that claimant's accident was possibly work-related. (Tr. 58).

Also, on June 7, 2012, claimant was discharged from the hospital and transferred to another facility. (Ex. 10-1). The medical provider noted that claimant was "mainly here because she did not get her condition explained." (*Id.*) Claimant was diagnosed with a neck paraspinal ligamentous injury and placed in a brace. (Ex. 10-2). Thereafter, she followed-up with several orthopedists. Conservative treatment was prescribed, including wearing a cervical collar, physical therapy, and medications. (Exs. 12 through 14).

On June 19, 2012, claimant had an orthopedic spine consultation with Ms. Nastansky, a physician's assistant. (Ex. 12-1). Ms. Nastansky noted that claimant's sister was with her to act as a historian "as patient does not recall incident." (*Id.*) Ms. Nastansky reported that claimant did not lose consciousness during the MVA, and that she was "[r]eassured that OHSU was correct, there was no significant trauma, this will take 6 months to 1 year and require massage, Physical Therapy." (Ex. 12-1, -5).

On July 3, 2012, claimant was examined by Ms. Nastansky for an orthopedic spine follow up. (Ex. 14-1). At that time, claimant was not taking pain medication and she was driving. (*Id.*)

On August 6, 2012, claimant's mental status examination showed that she was "alert, oriented x3," and "able to give a confluent history." (Ex. 17-5). Her immediate and remote memory was "intact," as well as her attention and concentration. (*Id.*) Her mood and affect were considered "appropriate." (*Id.*)

On August 7, 2012, claimant was released for part-time work, four hours a day, three days a week. (Ex. 18-3). According to claimant, she went back to work for "one day and that was it." (Tr. 30). She was unsure whether she returned to work in August or September. (Tr. 30-31).

Claimant testified that, during Ms. Swain's hospital visit, she did not remember that she had intended to visit the client's home. (Tr. 12). She added that her memory of the purpose of her trip was not triggered until September 2012, when she reviewed her belongings from work and found some paperwork documenting her intended trip (*i.e.*, her mileage sheet and time sheet (Ex. 36A-1, -2)). (Tr. 13-14, 29-30). She was unsure of when she received her belongings from work, but indicated that she did not review them until sometime in September 2012. (Tr. 13). Claimant also testified that she found a sticky note that said "[client's] at 4:00 o'clock," indicating to her that she was on her way to meet with the client when the accident occurred.³ (Tr. 40).

Claimant recounted that she "bumped into" the client at a grocery store sometime in October 2012, told her about the accident, and that the client responded: "Well, that's why you didn't show up." (Tr. 38-39). The client testified that she did not "run into [claimant] at a store and talk to her about her [MVA.]" (Tr. 50). The client also testified that, when claimant picked up the immunization records, she said that she would return them the next day. (Tr. 50).

On January 15, 2013, claimant completed an "Incident Analysis Report Form," reporting that she had been driving to a client home visit at the time of the MVA. (Ex. 32-1). On that same day, she filed a workers' compensation claim. (Ex. 34).

The SAIF Corporation denied the claim because it was untimely filed and that the injury did not arise out of and in the course of claimant's employment. (Ex. 38-1). Claimant requested a hearing.

³ Claimant did not know where the sticky note was at the time of the hearing. (Tr. 40).

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that claimant did not have “good cause” for her untimely claim because, even though she recalled her intended home visit by September 2012, she did not advise the employer of her recollection until three months later, in January 2013. Under such circumstances, the ALJ determined that claimant had not established “good cause” for her untimely notice of her injury claim. *See* ORS 656.265(4)(c).

Claimant sought Board review, contending that she had “good cause” for her untimely notice of her injury, because she was “heavily medicated and overwhelmed” by her injuries and did not remember (until she reviewed her paperwork in September 2012) that the MVA occurred while she was on her way to a home visit. Claimant asserted that she was understandably “forgetful and confused,” leading to her mistaken belief that she was on her way home when the accident occurred.

We adopted and affirmed the ALJ’s order. *Lopez*, 65 Van Natta at 2173. In doing so, we reasoned that claimant had not offered, and the record did not contain, medical evidence that persuasively supported her assertions. Consequently, we concluded that claimant had not established “good cause” for her untimely filed claim. *Id.* at 2176.

The court reversed our decision and remanded for further consideration. *Lopez*, 281 Or App at 684. The court noted that our analysis was predicated on the absence of medical evidence to support claimant’s contention that, as a result of heavy medication or her serious injuries, she had mistakenly believed that the MVA occurred while she was on her way home and did not remember, until September 2012, that she had been on her way to the client’s home. The court reasoned: “the language of the order on review seems to imply that, as a matter of law, claimant could meet her burden only by presenting medical evidence.” *Id.* The court concluded that medical evidence was not required and that “it is for the board to decide whether it is persuaded by the evidence that is in the record, whether or not that record includes medical evidence.” *Id.* Accordingly, the court reversed and remanded. *Id.*

Having considered the parties’ supplemental briefs, we proceed with our review. For the following reasons, we adhere to our previous conclusion.

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).

As claimant notes, ORS 656.310(1)(a) creates a rebuttable presumption that “[s]ufficient notice of injury was given and timely filed.” However, where claimant relies on “good cause” to excuse notice given more than 90 days after the date of the accident, claimant bears the burden of showing “good cause.” *Wilson v. SAIF*, 3 Or App 573, 576 (1970); *Andrew Kuralt*, 67 Van Natta 589, 591 (2015); see also *Riddel v. Sears, Roebuck & Co.*, 8 Or App 438, 441-42 (1972).

In support of “good cause,” claimant relies on her inability to recall the work-related purpose of her travel at the time of the MVA as a result of her serious injuries and heavy medication. However, after conducting our review, including claimant’s testimony, we are not persuaded that she has established “good cause” for her untimely notice of her injury. We reason as follows.

Claimant testified that she remembered that she was going to deliver immunization records to a client’s house only after she reviewed her belongings from work, which included her timesheet, her mileage sheet, and a “sticky note” that said “[client’s] at 4 o’clock.” (Tr. 12, 34-35). She did not begin to go through her work belongings until September 2012, several months after the June 2012 MVA. (Tr. 13). She explained that the paperwork caused her to remember that she was supposed to go to her client’s house on the afternoon of her June 2012 MVA before she went home.⁴ She testified that the MVA occurred on a route that was between her office, the client’s house, and her house. (Tr. 15-16).

Notwithstanding claimant’s subsequent recollections, she did not initially inform her supervisor that she had been on “work time” when the MVA occurred. (Tr. 12, 56). Instead, she described details of the MVA and recounted that she had

⁴ Claimant testified that her memory was also “triggered” by an encounter with the client at a grocery store (when she was still wearing the neck brace) at which time they discussed the MVA and the client said: “Well, that’s why you didn’t show up.” (Tr. 38-39). But, the client testified that she did not run into claimant at a store and talk to her about her MVA. (Tr. 50). The client did recall that claimant had told her when she picked up the immunization records at the client’s house the day before the MVA that “she would bring them back the next day in the afternoon[.]” (*Id.*) However, this testimony does not corroborate claimant’s assertion of memory loss.

been on her way home. (Tr. 56). At that time, she did not indicate that her memory was impaired. Further, the medical record does not suggest that she sustained any memory loss regarding the nature of her travel at the time of the MVA.⁵

Moreover, by July 3, 2017 (one month after the MVA), the record establishes that claimant was not taking any pain medication and that she was driving. (Ex. 14-1). Subsequently, on August 6, 2012, claimant's examining physician reported that:

“The mental status exam reveals a woman alert, oriented x3, able to give a confluent history. Speech and language has normal mechanics and content. Fund of knowledge appropriate to age. Her immediate and remote history is intact. Attention and concentration is intact. Mood and affect appropriate to the situation. There is no apraxia or agnosia.” (Ex. 17-5).

Finally, on August 7, 2012, claimant was released to work on a part-time basis. (Tr. 12, 61; Ex. 18-3). The record does not indicate that her work limitations pertained to any mental or memory-related matters.

In sum, after conducting our review of this record (including all lay and medical evidence), we consider claimant's uncorroborated explanation regarding the effects of her MVA injury and treatment (when compared with other portions of the record, as detailed above) insufficient to establish that her untimely notice of her injury was due to any impaired mental capacity or loss of memory. Thus, we conclude that claimant has not proven “good cause” for her untimely filed claim under ORS 656.265(4)(c). *See* ORS 656.266(1); *Kuralt*, 67 Van Natta at 591; *see also Riddel*, 8 Or App at 441-42.

Accordingly, on remand, as supplemented and modified herein, we republish our November 12, 2013 order.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 16, 2017

⁵ We acknowledge the notation in Ms. Natansky's notes that claimant's sister came with her to act as a historian because she did not recall the incident. (Ex. 12-1). However, that entry appears to be expressly limited to details of the accident itself and does not establish that claimant had memory loss pertaining to whether she was or was not working when the MVA occurred.