In the Matter of the Compensation of
**ANDREW W. JOHNSON, Claimant**
WCB Case Nos. 19-03883, 19-00121, 18-04851
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
Babcock Holloway Caldwell & Stires, Defense Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

Claimant requests review of Administrative Law Judge (ALJ) Somers's order that: (1) found that he had not provided timely notice of his low back injury; (2) upheld the SAIF Corporation's denials of his occupational disease claim for a low back condition.[1] On review, the issues are timely notice, compensability, and, potentially, responsibility.

We adopt and affirm the ALJ's order with the following supplementation regarding the timely notice issue.[2]

The ALJ found that claimant's injury claim was untimely filed, reasoning that claimant had not provided timely notice of his injury to the employer under ORS 656.265(1)(a). In doing so, the ALJ relied on the preponderance of credible testimony. Thus, the ALJ upheld SAIF's denial.

On review, claimant contends that the record is not sufficient to overcome the presumption of timely notice under ORS 656.310(1)(a), because the record demonstrates either that he reported the injury to his employer or his employer had knowledge of the injury within the initial 90-day notice period. Based on the following reasons, we find that claimant did not give the employer timely notice of his alleged July 2017 injury.

A claimant is required to give an employer notice of an accident resulting in an injury within 90 days after the accident. *See* ORS 656.265(1). Such notice may be oral or written. *See Godfrey v. Fred Meyer Stores*, 202 Or App 673, 689 (2005), *rev den*, 340 Or 672 (2006) (notice of an injury under ORS 656.265 may

[1] SAIF's denials were issued on behalf of MTA Industries, Inc. – Workforce and Banks Construction, Inc. respectively.

[2] We do not adopt the last two sentences of the second full paragraph on page 11 of the ALJ's order. Moreover, we do not adopt footnote one on page 11 of the ALJ's order.

be oral or written); *Susan D. Wonderly*, 62 Van Natta 1517, 1518-19 (2010) (oral report of injury to the employer was sufficient notice of the accident under ORS 656.265). "Notice" of an injury may be in the form of an oral statement concerning an accident that "may involve a compensable injury." *See* ORS 656.265(2); *Godfrey*, 202 Or App at 690. Such a statement must indicate some degree of likelihood of workers' compensation liability arising from the accident. *See Azam Ansarinezhad*, 71 Van Natta 1003, 1009 (2019), *aff'd*, *Double Tree Hotel v. Ansarinezhad*, 316 Or App 51 (2021); *Jose Amador*, 59 Van Natta 1538, 1540 (2007).

A claim is generally barred unless notice is given within 90 days. *See* ORS 656.265(1), (4). However, a claim is not barred by ORS 656.265(4) if notice of the injury is given within one year after the accident and the employer had knowledge of the injury within the initial 90- day notice period. ORS 656.265(4)(a); *Ansarinezhad*, 316 Or App at 55; *Keller v. SAIF*, 175 Or App 78, 82, *rev den*, 333 Or 260 (2002) (the employer must have knowledge of the injury within the initial 90-day notice period). Such "knowledge" of the injury should include enough facts to lead a reasonable employer to conclude that workers' compensation liability is a possibility and that further investigation is appropriate. *See Argonaut Ins. Co. v. Mock*, 95 Or App 1, 5, *rev den*, 308 Or 79 (1989); *Monte S. Wills*, 67 Van Natta 2105, 2106 (2015). Thus, the employer must have knowledge of not merely an injury, but also of the injury's possible relationship to employment. *See Keller*, 175 Or App at 83. The knowledge of a person with supervisory authority over an injured worker is imputed to the employer. *See Safeway Stores, Inc. v. Angus*, 200 Or App 94, 98 (2005); *Russell C. Hawkins*, 67 Van Natta 749, 753 (2015).

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[.]" Therefore, for a claim to be barred for late notice, the carrier must overcome the presumption that sufficient notice of injury was given and timely filed. *See Nat'l Farmers' Union Ins. v. Scofield*, 57 Or App 23, 25, *rev den*, 293 Or 373 (1982); *Hawkins*, 67 Van Natta at 751.

Here, we find that the employer's evidence is sufficient to overcome the presumption of timely notice under ORS 656.320(1)(a). Specifically, the record establishes that claimant did not provide adequate notice of his injury and the employer did not have knowledge of the injury within the initial 90-day notice period. We reason as follows.

At the time of his alleged July 2017 injury, claimant was an employee of Workforce, a worker leasing company under ORS 656.850. (Tr. 77-78). The parties stipulated that claimant worked for Workforce from April 12, 2016 through July 28 or 29, 2017. (Tr. I-6-7). Claimant was working for Workforce's client as a leased worker. (Tr. I-147). As such, notice to either Workforce or a client supervisor within 90 days of the injury date would have been timely. *See Karen L. Hodges*, 54 Van Natta 1303, 1304 (2002) (notice of injury to client supervisor is imputed to worker leasing company).

Claimant maintains that he provided timely notice to the employer when he made an oral report of the alleged work incident to Mr. Werner, a client supervisor, on the day of the injury while at the job site, as well as the next day in a phone call. (Tr. I-21-22). He also testified that he told a "redheaded" woman at Workforce's office about his alleged work injury.[3] (Tr. I-24-25, 167).

Here, the ALJ made a specific credibility determination that claimant was not a credible or reliable witness. In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility finding. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is good practice for an agency or court to give weight to the factfinder's credibility assessments); *James D. Miller*, 74 Van Natta 119, 119 (2022). Here, the ALJ's credibility finding was based, at least in part, on claimant's demeanor and for that reason we defer to the ALJ's credibility finding.

Claimant asserts that Mr. Werner's testimony that claimant experienced pain at work supports a conclusion that Mr. Werner knew of claimant's injury. However, Mr. Werner testified that claimant did not report a specific incident or injury to him and that he did not know that claimant had injured himself at work. (Tr. I-148-153). According to Mr. Werner, claimant was always complaining about being sore and that his body was hurting. (Tr. I-150, 154). Because claimant complained often, Mr. Werner had no reason to believe that a specific injury had happened at work. (Tr.-154). Thus, although the record establishes that Mr. Werner was aware that claimant had experienced pain at work, it does not support a conclusion that Mr. Werner knew of a specific work injury or that the pain was connected with work.[4]

[3] Ms. Anderson, Workforce's office and operations manager, testified that no one with red hair had worked for Workforce. (Tr. 93).

[4] We also defer to, and find no reason to disturb, the ALJ's finding that Mr. Werner's testimony was credible.

Accordingly, for the above reasons, as well as those expressed in the ALJ's order, we find that the record was sufficient to overcome the presumption of timely notice under ORS 656.320(1)(a) and that claimant's evidence was insufficient to establish timely notice. Accordingly, we affirm the ALJ's order.

## ORDER

The ALJ's order dated October 31, 2022, is affirmed.

Entered at Salem, Oregon on August 29, 2023