IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Buzz Vsetecka, Claimant.	)	
BUZZ VSETECKA,	)	AGENCY NO. 00-02916
Petitioner/Petitioner on Review	)	
v.	)	CA NO. A113353
SAFEWAY STORES, INC.	)	SC NO. S49908
Respondent/Respondent on Review	)	

RESPONSE OF RESPONDENT SAFEWAY STORES, INC. TO PETITIONER'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals

on appeal from the Workers' Compensation Board's Order on Review

Opinion filed: August 14, 2002

Author: Landau, Presiding Judge
Brewer, Judge
Schuman, Judge (dissenting)

Kenneth L. Kleinsmith, OSB #53061
RADLER, BOHY, REPLOGLE & MILLER
9445 S.W. Locust Street
Portland, Oregon 97223
(503) 892-8911
Of Attorneys for Respondent
on Review Safeway Stores, Inc.

Edward J. Harri, OSB #73122
P.O. Box 528
Salem, Oregon 97308
(503) 364-5220
Of Attorneys for Petitioner
on Review Buzz Vsetecka

J. Michael Casey, OSB #85033
1515 S.W. 5th Avenue
Suite 808
Portland, Oregon 97201
(503) 219-0629
Of Attorneys for Petitioner
on Review Buzz Vsetecka

May 2003

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BRIEF ON THE MERITS OF RESPONDENT SAFEWAY STORES, INC.

QUESTIONS PRESENTED ON REVIEW

1. Did the worker provide a notice of accident which complies with the requirements of ORS 656.265(1) and (2)?

2. Was the worker required to comply with the statutory requirements of ORS 656.265(1) and (2) to perfect his claim for compensation?

3. Did the Court of Appeals err in holding that claimant did not perfect his claim for compensation as required by ORS 656.265?

PROPOSED RULE OF LAW

The statutory procedure for a worker's notice of claim requires that within ninety days of an accident he submit a writing to the employer which informs the employer when and where and how an accident occurred to the worker. The failure to give such a notice as required by ORS 656.265(1) and (2) bars a claim unless a written notice complying with ORS 656.265(1) and (2) and (3) is given by the worker to the employer within one year after the date of accident and the employer had knowledge of the injury within ninety days of its occurrence.

NATURE OF JUDGMENT

On claimant's request for hearing the Administrative Law Judge set aside the employer's March 27, 2000 denial of a right wrist injury claim; awarded claimant's attorney a fee; and remanded the matter to the employer for processing. (Opinion and Order of

August 22, 2000).

On the employer's request for review, the Workers' Compensation Board reversed the ALJ's order; reinstated the employer's denial; reversed the award of an attorney fee to claimant's attorney; and dismissed claimant's hearing request. (Order on Review of January 17, 2001).

Claimant sought review by the Court of Appeals which affirmed the Board's order by its opinion filed August 14, 2002. (Decision of Court of Appeals).

The present status of claimant's claim is that it is denied and claimant's request for hearing is dismissed.

MATERIAL FACTS

The employer accepts the facts found by the ALJ and adopted by the Workers' Compensation Board. (Claimant's Brief, Pgs, 3, 4).

SUMMARY OF ARGUMENT

Claimant did not comply with provisions of ORS 656.265(1) and (2) to make and perfect his claim for compensation. To make a viable claim claimant must comply with all the requirements in those two subsections. Claimant did not provide sufficient notice to invoke the employer's processing obligations.

To invoke the processing procedure claimant must meet the obligations imposed upon an injured worker by the statute. Claimant did not provide notice sufficient to perfect his claim because he failed to inform the employer by a timely written

description how he injured his right wrist.

Claimant did not raise the doctrine of estoppel timely. He has not shown he was deprived of relief by any action or inaction of the employer. He was denied relief because he failed to comply with his statutory obligations.

ARGUMENT

A. Claimant contends that by following the employer's procedures and making entries on the first aid log, he provided timely notice of his right wrist injury. He does not argue that the provisions of ORS 656.265(1) and (2) do not apply. He recognizes that he must provide proper notice under that statute within ninety days after the injury.

Specifically, he argues that his entries upon a blank sheet of paper (which he extracted from a recycling box) constitute adequate notice under ORS 656.265(2). On April 30, 1998 he made an entry of "pain in right wrist" and signed "Buzz V." (Ex. 2B). He contends that this is legally adequate written notice to the employer concerning a claim for an injury. Claimant made similar notations regarding right wrist pain on May 8, 1998 and on May 29, 1998. (Exs. 3, 5).

According to his logic, he would then have made three claims of which only the first was tried at the hearing. This is, of course, a preposterous predicament but it is a logical deduction

from claimant's reasoning.

Both the Board and the Court of Appeals pointed out that claimant must comply with the provisions of ORS 656.265(2) in order to perfect his claim. That section provides that the notice "shall be in writing and shall apprise the employer when and where and how an injury has occurred to a worker." ORS 656.265(2).

Moreover, Section 3 of the statute provides that the written notice must be given to the employer by mail addressed to the employer or by personal delivery to the employer or a foreman or supervisor. Claimant did not comply with the manner of giving notice in writing which is required by the statute.

The Board and the Court of Appeals found that claimant's notice was defective in that it did not describe "how" an injury occurred to claimant. Nor did it specifically refer to an "injury" by stating only that claimant experienced pain in his wrist.

The effect of a failure to comply with the provisions of ORS 656.265(1) and (2) is to bar the claim. See ORS 656.265(4).

The wisdom of the holding of a majority of the Court of Appeals in finding claimant's notice not to comply with statutory requirements is best illustrated by the dissent to the majority opinion of the Court. To make the claim compensable, the dissenter would substitute his own words for the claimant's words in the log book. Vsetecka v. Safeway Stores, Inc., 183 Or App 239, 243, 51 P3d 688 (2002).

In apparent recognition of the deficiency of proof on the question of "how" an alleged injury occurred, the claimant argues that the other words he used state how an injury occurred.

The Court of Appeals considered this argument and rejected it with the reasoning found in its opinion. It cited the rules of construction requiring an adjudicative body to give effect to all words in a statute, if possible, and to give each word its ordinary meaning. 183 Or App, Pgs. 242-243.

The claimant has attempted to deflect his own failure to comply with the notice statute by arguing that the employer neglected its processing obligations. In fact, the claimant did not miss work and did not seek medical attention for twenty months after he entered his complaint of pain on the first aid log. These facts do not bespeak a need for processing.

B. The processing obligations of the employer would begin only when claimant provided a notice of accident resulting in injury as required by ORS 656.265. That statute imposes obligations upon the worker, not the employer. The written notice of an accident apprising the employer how, when, and where an injury occurred must be given "immediately by the worker***to the employer, but not later than 90 days after the accident." ORS 656.265(1).

The employer's obligations do not begin until a notice of injury in conformity with ORS 656.265 is provided to it, after

which "[t]he employer shall acknowledge forthwith receipt of such notice." The claimant did not provide a timely notice sufficient to perfect a claim. If a claim is determined to be a written request for compensation, this claimant made no claim because he did not seek medical attention or become disabled. ORS 656.005(6).

Under ORS 656.265 the employer's knowledge of an injury is irrelevant unless the worker brings himself within the compensation system by giving the notice required by ORS 656.265. In this case claimant did not give notice of an injury within one year after the date of the alleged accident, so the issue of employer's knowledge does not arise. Keller v. SAIF, 175 Or App 78, 27 P3d 1064 (2001) (emphasis supplied). No compensation became due because the claimant did not seek medical attention or miss work.

Claimant's contentions that the employer was derelict in "statutory claims processing obligations" because it had notice of the injury and notice of a possible claim are not well taken. The Court of Appeals dealt with the meaning of ORS 656.265 in the recent case of Simmons v. Lane Mass Transit District, 171 Or App 268, 15 P3d 568 (2000) in which the issue was the validity of a settlement stipulation which attempted to resolve a new injury claim (by leaving it in a denied status) through a settlement stipulation rather than a DCS. The court had the following to state on the relationship between the definition of a claim and the requirements of ORS 656.265:

> "Although the portion of the definition that refers to the employer's knowledge of the injury might suggest that the injury itself is the 'claim,' that suggestion is incorrect. The first part of the definition expressly requires a writing, and even when the employer knows of the injury, ORS 656.265 requires a written request, generally within 90 days, in order to perfect the claim. An injury that is a 'claim' under the statutory definition only because the employer has notice of it will become void in the absence of a written request made within the required time. See McPhail v. Milwaukie Lumber Co., 165 Or App 596, 603-05, 999 P2d 1144 (2000). Thus, although an injury creates the basis for a claim, for the purposes of processing, the 'claim' is the written request for compensation." 171 Or App, at 275.

As applied to this case, that analysis of ORS 656.265 would render void any claim made by the claimant because he did not perfect his claim by complying with the requirements of ORS 656.265(1) and (2).

C. Claimant is not entitled to invoke the doctrine of estoppel.

The Court of Appeals noted in its written opinion in this case that claimant had not raised an issue of equitable estoppel before it. Vsetecka v. Safeway Stores, Inc., 183 Or App, at 244.

That issue should have been raised before the Court of Appeals or the Board. Stevenson v. Blue Cross of Oregon, 108 Or App 247, 814 P2d 185 (1991). Therefore, claimant cannot raise estoppel at this stage.

Even if claimant were entitled to raise such a defense, he should not prevail in this case. Claimant failed to get the relief he sought because he did not comply with the provisions of ORS

656.265(1) and (2). That statute imposes upon claimant certain reporting obligations which he did not meet. That failure was not induced by any action or inaction of the employer. By his failure to comply with the statute, he did not perfect his claim. Simmons v. Lane Mass Transit District, 171 Or App, at 275; McPhail v. Milwaukie Lumber Co., 165 Or App 596, 999 P2d 1144 (2000).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

Kenneth L. Kleinsmith, OSB #53061
Attorney for Respondent/
Respondent on Review
Safeway Stores, Inc.
Radler, Bohy, Replogle & Miller
9445 S.W. Locust Street
Portland, Oregon 97223
(503) 892-8911

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Response of Respondent Safeway Stores, Inc. to Petitioner's Brief on the Merits on the State Court Administrator at the following address:

Kingsley Click
State Court Administrator
1163 State Street
Supreme Court Building
Salem, Oregon 97310

by placing the original and fifteen copies in a sealed envelope and depositing it in the mail at the United States Post Office in Portland, Oregon on the 14th day of May, 2003, with postage prepaid.

I also certify that I served the foregoing Response of Respondent Safeway Stores, Inc. to Petitioner's Brief on the Merits, on the following persons or parties, at the following addresses, by mailing to them two correct copies thereof, certified by me as such, and placed in a sealed envelope and deposited at the United States Post Office in Portland, Oregon on the 14th day of May, 2003, with postage prepaid.

J. Michael Casey, OSB #85033
1515 S.W. 5th Avenue
Suite 808
Portland, Oregon 97201
(503) 219-0629
Of Attorneys for Petitioner
on Review Buzz Vsetecka

Edward J. Harri, OSB #73122
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