APR 16 2003

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Buzz Vsetecka, Claimant.	)	WCB Case No. 00-12916
BUZZ VSETECKA,	)	CA No. A113353
Petitioner/Petitioner on Review,	)	SC No. S49908
v.	)	
SAFEWAY STORES, INC.,	)	
Respondent/Respondent on Review.	)	

PETITIONER VSETECKA'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)

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April 16, 2003

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER VSETECKA'S BRIEF ON THE MERITS

QUESTIONS PRESENTED ON REVIEW

1. Does an injured worker provide notice of an injury when he follows his employer's requirements for both verbal and written reporting of an on-the-job injury and posts the information on the company's authorized injury log sheet on the employer's premises?

2. When an injured worker follows his employer's instructions concerning reporting an on-the-job injury, may the employer later assert that compliance with its own requirements is insufficient to provide the employer with notice of the possibility of a worker's compensation claim?

3. Does the court's opinion permit an employer to ignore the actual knowledge it has regarding an on-the-job injury and later to deny the claim by alleging that the employee's compliance with its own reporting requirements for on-the-job injuries did not fulfill the requirements of the reporting statute?

PROPOSED RULE OF LAW

When an employer establishes procedures for reporting on-the-job injuries, and the worker follows those procedures, the employer has notice of a potential worker's compensation liability or a claim and the worker has met the statutory requirements for reporting an on-the-job injury. An employer may not interpose a technical or statutory defense to the compensability of the claim regarding notice that the employer's own procedures did not require.

NATURE OF JUDGMENT

This is a workers' compensation case. An administrative law judge found that petitioner (claimant) had provided timely notice of his on-the-job injury to his employer. The Board reversed and the Court of Appeals affirmed the Board's decision, thereby denying compensation. *Vsetecka v. Safeway Stores, Inc.*, 183 Or App 239, 51 P3d 688 (2002).

MATERIAL FACTS RELEVANT TO THE APPEAL

The Court of Appeals' statement of facts, supplemented by the Administrative Law Judge's findings of fact, form the basis for review. The Court of Appeals noted the following facts:

> The relevant facts are undisputed. Claimant worked for employer as a warehouseman. On April 30, 1998, a 50-pound box of apples fell from an overhead bin. Claimant deflected the box with his raised right arm. He immediately experienced soreness and stiffness in his right wrist.
>
> Following employer's policy for reporting on-the-job injuries, claimant made an entry in a first aid log. The log contained preprinted forms that required an injured worker to provide his or her name, the date, and a description of the injury. Claimant made the following entry: "Buzz V., 4/30/98, pain in right wrist" Despite the symptoms, claimant did not leave work and did not seek medical treatment. On two other days the following month, claimant made similar entries complaining of "Right Wrist Pain" and "Right Wrist Pain Again."
>
> Eighteen months later, claimant sought medical treatment for the pain in his wrist. On January 17, 2000, he filed a claim for workers' compensation benefits.
>
> Employer denied the claim, asserting that claimant had not provided written notice of when, where, and how the injury occurred within 90 days, as required by ORS 656.265(2). Claimant maintained that his written notation in the first aid log sufficed. The board concluded that the notation in the log supplied the required information as to when the injury occurred and at least

arguably informed employer where the injury occurred. But, the board concluded, the notation gave employer no information as to *how* the injury occurred, as required by the statute:

> "[T]he fact remains that none of the entries contain[s] any explanation of 'how' the injury occurred. All that is contained in the three logbook entries are the statements: 'Right Wrist Pain,' 'pain in right wrist,' and 'Right Wrist Pain Again.' No explanation is offered regarding 'how' the alleged injury happened. While claimant's notations in the logbook are similar to those of other workers and appeared to satisfy the employer's reporting procedures, claimant's written reports of injury did not satisfy the precise requirements of ORS 656.265(2) that written notice apprise the employer of when and where and how the injury occurred."

183 Or App at 241-42.

The ALJ found as facts:

> Claimant has been with the employer as a warehouseman since 1994. Duties included selecting and palletizing food shipments for delivery to the stores. On April 30, 1998, claimant was working in the swing shift in the produce department. While selecting, a 50 pound apple box fell from an overhead bin. To block the box, claimant raised his right arm with his hand in a fist. The box hit the fist square. Claimant experienced immediate soreness and stiffness in the right wrist.
>
> In the event of an on the job injury, it was the employer's policy the injured worker was to notify his or her shift supervisor within 24 hours of the injury, and make an annotation in the first aid log. In accordance with this policy, claimant notified the working foreman a box had fallen on his right wrist. Claimant then proceeded to make an entry in the first aid log. The entry consisted of the date of injury, a brief description, and claimant's name. Despite some symptoms claimant did not leave work. Nor did he seek first aid or medical attention. The next day claimant got an ace bandage out of the first aid kit to wear.
>
> Thereafter, right wrist symptoms waxed and waned. On some days pain was intense, on other days claimant was pain free. On two other occasions claimant informed the working foreman of continuing symptoms. The first aid log reflects claimant made two additional entries concerning the presence of right wrist pain, on May 8, 1998 and on May 29, 1998. Still

medical treatment was not sought. Claimant believed he had suffered a sprain which would improve with the passage of time.

In the fall of 1999, right wrist symptoms increased. Sometime during this period, claimant contacted the wellness nurse. A brace was provided.

When symptoms continued to worsen, claimant sought medical treatment from Dr. Lisook on January 17, 2000. At the time of examination, claimant told Dr. Lisook he had been injured on April 30, 1998 and that he had reported the injury to his employer.

Dr. Lisook signed an 827 form on January 17, 2000. Also on this date claimant filed out an employee incident form. An 801 form was filed as well, with the date of injury of April 30, 1998.

Because x-rays taken indicated a fracture, claimant was referred to Dr. Layman. He examined claimant on January 26, 2000, and diagnosed a non-union of the scaphoid fracture, right wrist.

Claimant was examined by Dr. Duff on March 6, 2000 on behalf of the employer. The diagnosis was non-union fracture of the right scaphoid.

The claim was denied on March 27, 2000 on the basis of an untimely filing of the claim, and because the employer believed the incident described was not the cause of the condition and need for treatment.

Right wrist surgery consisting of a bone graft was performed by Dr. Layman on April 5, 2000. (Record at 15-16).

Following a hearing, the ALJ set aside the employer's denial and the employer requested review. (Record at 22). The Board reversed the ALJ's Opinion and Order and affirmed the denial of the claim based upon the timeliness of the filing of the claim. (Record at 67). Claimant petitioned for judicial review. (Record at 71, *et seq.*). The Court of Appeals affirmed the Board. (Record at 71, *et seq.*). This Court granted review.

SUMMARY OF ARGUMENT

In this case, the employer received proper notice of the injury via its own on-the-job injury form known as the first-aid log. The contexts of the injury reports by petitioner were sufficient notice to initiate the employer's duty to investigate a possible workers' compensation liability, effectively putting the employer on notice. The employer received actual notice in both verbal and written form, which would estop it from denying adequate notice.

Petitioner met the notice requirements when he provided information as to "how an injury has occurred." He filled out the employer's preprinted on-the-job injury log sheet after receiving his supervisor's permission to do so on the day of the injury. Consistent with the form, he noted his name, the date, and a description of the injury. Given that he noted wrist pain on the on-the-job injury log, the available answer to "how the injury occurred" is that the claimant injured his wrist while on the job. This information is sufficient to put the employer on notice of potential workers' compensation liability.

The Court of Appeals' approach relieves the employer of its statutory duty to process claims: the employer may ignore information it possesses and fail to process an injured worker's claim without negative consequences. When an employer has provided a particular procedure and form for workers to report on-the-job injuries, that procedure, when followed, provides notice. Under such circumstances, an employer should be estopped from asserting that it did not have timely notice when its employees followed the procedures that the employer established to report on-the-job injuries on the form reserved only for on-the-job injury reports. For these and other reasons, this Court should reverse the Court of Appeals'

and boards' opinions, and reinstate the administrative law judge's Opinion and Order.

ARGUMENT

A. Claimant provided timely notice of his on-the-job injury and claim when he followed his employer's procedures and made the required entries on the employer's log at work reserved for on-the-job injuries.

Under Oregon law, an injured worker must give timely notice of the injury to receive workers' compensation. Written notice must be given within 90 days, which can extend to one year where the employer has actual knowledge of the injury. ORS 656.265(1), (4)(a). At issue here is whether claimant provided proper notice within 90 days after the injury. The statute provides for notice in this way:

> The notice need not be in any particular form. However, it shall be in writing and shall apprise the employer when and where and how an injury has occurred to a worker. A report or statement secured from a worker, or from the doctor of the worker, and signed by the worker, concerning an accident which may involve a compensable injury shall be considered notice from the worker and the employer shall forthwith furnish the worker a copy of any such report or statement. ORS 656.265(2). (Emphasis added.)

The employer had notice and knowledge of this injury well before claimant sought medical attention or filed a formal claim. When he sustained his injury on April 30, 1998, claimant noted the wrist pain on the employer's first aid log. On May 8 and on May 29, he made two subsequent notations of right wrist pain. Exs. 2B, 3-7. The entries in the first aid log were for work related injuries only. Tr 20, 23, 53, 75. Before workers could make an entry on the log, they had to notify a supervisor or foreman. Tr 23, 79, see also exs. 7B, 7C, 7D, 7E, 7F. This rule was in effect when claimant sustained his injury. Claimant complied by talking to his foreman about the falling box of apples that had hit his wrist and then by

making entries on the employer's log. Tr 19-24, 79. When claimant made an entry on the first aid log, he complied with his employer's requirements to report an on-the-job injury, which also complied with the statute's requirements of "when and where and how the injury occurred."

1. By filling out his employer's specific form, the worker implicitly communicated "how" the injury occurred.

The Board and the Court of Appeals concluded that claimant had provided information concerning the "when and where" aspects of the statute. 183 Or App at 243. Thus the controversy focused on the "how." *Id.* The statute provides that the notice need not be in any particular form and it does not define the word "how." ORS 656.265(2). Neither does the Worker's Compensation Act generally.

When interpreting a statute, the court examines the text and context of the statutory provision for the meanings of terms. *Portland General Electric Co. v. Bureau of Labor and Industries,* 317 Or 606, 612, 859 P2d 1143 (1993). The statute does not define the word "how." In the absence of specific statutory definitions, it is appropriate to consider dictionary definitions. *See e.g., SAIF v. Lewis,* 335 Or 92, 95, 58 P3d 814 (2002); *Smoldt v. Henkels & McCoy, Inc.,* 334 Or 507, 511, 53 P3d 443 (2002); *Lane Unified Bargaining v. South Lane School District,* 334 Or 157, 163, 47 P3d 4 (2002). Those definitions are helpful in this case because the meanings overlap in such a way that one source of information can provide answers to more than one of the statutes' three inquiries. The word "how" means "in what manner or way," "by what means or process," "to what extent, degree, number or

amount," "in what state, condition or plight," "for what reason or excuse," and "from what cause." *Webster's Third New International Dictionary,* G. & C. Merriam Co., page 1097 (1966). Significantly, the word "how" shares some congruence of meaning with the words "where" and "when." The same dictionary defines "where" as "at or in what place," and "in what situation, position, circumstances." *Webster's* at 2602. Likewise, "when" means "at what time," "in what period," or "how long ago." "When" also means "in what circumstances" and "while." *Webster's* at 2602.

In this case, Buzz Vstecka entered a report of an on-the-job injury on the first aid log. The entries demonstrated the work connectedness and necessarily the circumstances of the occurrence. In other words, recording an event on a document reserved only for on-the-job injuries provides the "how." As Judge Schuman's dissent explained, Mr. Vsetecka's entry answered the questions "where" and "how" claimant injured his wrist because he stated in effect that he had injured his wrist at work in the warehouse and thus his answer provided both the location and an event, or an explanation of how. 183 Or App at 244. By analogy, under Oregon Worker's Compensation Law, it is not necessary to utilize magic words in order to provide a "formula" proof of the medical causation of the claim. ORS 656.005(7)(a); *Liberty Northwest Insurance Corp. v. Cross,* 109 Or App 109, 112, 817 P2d 1350 (1991); *McClendon v. Nabisco Brands, Inc.,* 77 Or App 412, 417, 713 P2d 647 (1986); *see also Clayton v. State Compensation Dept.,* 253 Or 397, 406-07 454 P2d 628 (1969) (doctor's use of a particular word not solely dispositive; fact finder should review causation opinion in context.) That principle seems especially apposite to analysis of the present case. The information claimant provided on the log answered "how," "where" and "when."

2. The injured worker's communication of facts satisfied the statute's requirement.

Several other principles are applicable in interpreting statutes. This Court has held that a meaning, though not overtly stated in the words of the statute, may be imbedded in a coherent statutory scheme. *Morgan v. Portland Tractor Co.*, 222 Or 614, 625, 331 P2d 344 (1958). In evaluating a statute, the court does not look at one subsection of a statute in a vacuum, but rather construes each part together with other parts in an attempt to produce a harmonious whole. *Lane County v. Land Conservation and Development Comm.*, 325 Or 569, 578, 942 P2d 278 (1997). Where possible, related statutes should be construed in such a manner as to give effect to each and to effectuate the overall policy which the statute was intended to promote. *Wimer v. Miller*, 235 Or 25, 30, 383 P2d 1005 (1963). Thus, the context of the statute is important in evaluating the statutory meaning.

Here, the statute does not require any particular form to bring a potential claim to the employer's attention. ORS 656.265(2). Consequently, the statute does not impose a particular level of sophistication or detail in order to be adequate, so long as it puts the employer on notice of the possibility of a worker's compensation claim. *Colvin v. Industrial Indemnity*, 301 Or 743, 747, 725 P2d 356 (1986) (interpreting former ORS 656.265(4)(a) employer had knowledge of the injury); *see also Allied Systems Co. v. Nelson*, 158 Or App 639, 647, 975 P2d 923 (1999) overruled in part, *Keller v. SAIF*, 175 Or App 78, 82, 27 P3d 1064 (2001), *rev den*, 333 Or 260 (2002); *Baldwin v. Thatcher Construction*, 49 Or App 421, 425, 619 P2d 682 (1980); *Frasure v. Agripac*, 290 Or 99, 619 P2d 274 (1980), *on remand* 50 Or App 71, 73, 622 P2d 321 (1981) (employer had actual knowledge of injury from report to supervisor). Although the legislature had been aware of the cases from the appellate courts

dealing with ORS 656.265(2), it did not amend the statute recently, thereby suggesting that the legislature did not intend to alter the judicially created definition and interpretation of the statute. *See Consolidated Freightways v. West Coast Fast Freight,* 188 Or 117, 124, 214 P3d 475 (1950). While the Court of Appeals recently disavowed part of *Allied Systems,* this case is distinguishable because, in the present case, Safeway had knowledge of the injury and of its potential workers' compensation liability contemporaneously with the event and thus was on notice of the injury with three separate log entries within thirty days, well within the requisite 90 day time period for initial notice. Tr 19-24; Exs 2B, 3, 4; ORS 656.265(1); *Keller v. SAIF Corp.*, 175 Or App 82.

Form 801 is the Workers' Compensation Division's official report form for a report of an occupational injury or disease. When it asks a worker to explain an accident, it directs only "Describe accident fully (please print)." Ex 11-line 17. Thus, even the official form does not impose the specificity of "how" the accident happened. Certainly, the form includes the date and time of the injury, the location and the nature of the injury and body parts affected. Nonetheless, the 801 form is the approved method by which to file a claim, thereby alerting an employer of potential workers' compensation liability. In this case, claimant accomplished that twice. Immediately after his on-the-job injury occurred and after he talked to his foreman, he made entries on the injury log at work. Claimant later filed an official 801 form. Ex 11. The statute does not require the writing to be in any particular form. His employer deemed its first aid log form adequate for its notification and records keeping purposes. Given these circumstances, this case should not serve to impose greater descriptive specificity in the filing of an 801 form than the state approved form itself requires.

Moreover, a related subsection of the statute highlights the level of notice required. ORS 656.265(4) allows notice within one year if the "employer had knowledge of the injury." While this Court has not defined the phrase directly, it has considered what constitutes "knowledge of the injury." *Colvin*, 301 Or at 747 (verbal report to supervisor adequate). "Knowledge of the injury" merely means information sufficiently reasonable to meet the purposes of prompt notice of the industrial injury or accident. *Argonaut Insurance Co. v. Mock*, 95 Or App 1, 5, 768 P2d 401, *rev den* 308 Or 79 (1989). The test concerning timely notice is one which requires sufficiency of the knowledge of the injury, not ultimate proof of its compensability. Thus, knowledge of the injury need encompass only sufficient facts as to lead a reasonable employer to conclude that worker's compensation liability is a possibility and that further investigation is appropriate. *Id.* The purpose of the statute is analogous in terms of providing timely notice of an on-the-job injury. *Id.* Thus, only general notice is necessary. *Id. See also* ORS 656.265(2).

Therefore, under the statute and the case law dealing with reporting on-the-job injuries, the employer had actual knowledge of the injury and the possibility of workers' compensation liability. Thus, the statute provides no bar to the claim. ORS 656.265(2). The statute remains fundamentally a notice statute which provides information and triggers a duty for the employer to investigate the potential on-the-job injury. *Id.* The statute merely requires claimant to "apprise the employer when and where and how an injury has occurred." ORS 656.265(2). The employer had knowledge via the form in which it required its employees to provide notice of an on-the-job injury. The statute does not require a magic formulation. The circumstances of the recording and the information provided gave the

employer notice of the when, where and how the injury had occurred on the job. Beyond verbally explaining the incident to his supervisor, claimant satisfied that notice statute by following the employer's form and communicating the following: when -- "4/30/98", where -- "right wrist," and how -- "performing my regular duties at work." *See Vsetecka,* 183 Or App at 242 (Schuman, J., dissenting).

B. The Court of Appeals decision erroneously excuses the employer's statutory claims processing obligations.

Under long-established Oregon law, an employer or carrier has the duty to process a worker's compensation claim. ORS 656.262(1). In this case, Mr. Vsetecka followed his employer's procedures He provided his employer with notice of his on-the-job injury by reporting to his supervisor on the day the injury occurred and by making an entry on the employer's first aid log, a document reserved for on-the-job injuries. Exs 2D, 7B, Tr 20-23, 79. These initial acts placed the employer on notice of a work related incident. Tr 20-23, 75. Ultimately, after explaining to his foreman that a box of apples had fallen on his wrist, claimant made three notations of wrist pain, on April 30, 1998 (the day of injury), May 8, 1998, and May 29, 1998 (Exs 2B. 4, 5). At the hearing, Mr. Faddis, a supervisor, admitted that three entries in a month would put an employer on notice of a potential worker's compensation liability. Tr 76-78.

In its response to the Petition for Review, the employer suggested that it had no processing obligations because there was no claim made. Brief at 3. However, Oregon law does not permit the employer to disclaim its long established statutory claims processing obligations. The purpose of ORS 656.265(2) is to provide notice that worker's compensation

liability is a possibility. It does not yet have to be a proven compensable claim. *Id.*

The underlying rationale is that there need be only sufficient information for a reasonable employer to consider the possibility of worker's compensation liability. For example, this Court considered the question of an employer's sufficient knowledge of an injury. The Court concluded that knowledge was imputed to the employer under the principle that the knowledge of individuals in supervisory positions may be attributed to the employer. *See Colvin*, 301 Or at 747. The *Colvin* court interpreted ORS 656.265(4) to determine if an alleged failure to give notice constituted a bar to a claim. 301 Or at 745. [1] The dispute in *Colvin* involved a report that an injured worker made to a supervising paralegal and an associate of a law firm and whether that report thereby put the employer on notice even though claimant did not file a written worker's compensation claim until later. The decision dealt with the issue of how the employer gained knowledge of the injury, and the Court concluded that a report to a supervisor was sufficient. 301 Or at 746. Consequently, the underlying theme was notice to the employer. In other words, if the employer had timely knowledge of the on-the-job injury, the injured worker came within the protection of the statute and the employer had to process the claim.

The Court of Appeals has considered this issue more directly. In evaluating the phrase "knowledge of the injury" and construing ORS 656.265(4)(a), the court reasoned:

> It follows that the "knowledge of the injury" must be sufficient reasonably to meet the purpose of prompt notice of an industrial accident or injury. If an

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[1] While that subsection has undergone some amendment, (eliminating the good cause evaluation of failure to give timely notice), the focus of the subsection remains on providing notice of the potential workers' compensation liability.

> employer is aware that a worker has an injury without having any knowledge of how it occurred in relation to the employment, there is no reason for the employer to investigate or to meet its responsibilities under the Worker's Compensation Act. Actual knowledge by the employer need not include detailed elements of the occurrence necessary to determine coverage under the act. However, knowledge of the injury should include enough facts to lead a reasonable employer to conclude that worker's compensation liability is a possibility and that further investigation is appropriate.

Argonaut Insurance Co. v. Mock, 95 Or App at 5. *See also Wilson v. Roseburg Forest Products,* 113 Or App 670, 673, 833 P2d 1362 (1992) *(citing Mock).*

The purpose of timely notice is to facilitate prompt investigation and diagnosis of the injury, to give the employer an opportunity to make an accurate record of the occurrence, and to decrease the chance of confusion due to intervening or non-employment related causes. *Mock,* 95 Or App at 5, citing *Vandre v. Weyerhaeuser Co.,* 42 Or App 705, 709, 601 P2d 1265 (1979). Consequently, the purpose of notice is to trigger the employer's investigation of the possibility of worker's compensation liability. Processing obligations are not contingent upon the ultimate substantive compensability of the claim. *See generally, Jones v. Emanuel Hospital,* 280 Or 147, 151-52, 570 P2d 70 (1977). Thus, knowledge of a work injury constitutes a claim even in the absence of a written notice required to perfect it. *See McPhail v. Milwaukie Lumber Co.,* 165 Or App 596, 604, 999 P2d 1144 (2000); *Allied Systems Co.,* 158 Or App at 641, citing *SAIF Corp. v. Allen,* 320 Or 192, 201, 210-211,881 P2d 773 (1994).

Here, the employer not only had notice of the injury, but, according to the statute, also had notice of a possible claim. A claim is a written request for compensation from a subject worker or someone on the worker's behalf or *"any compensable injury of which a subject*

employer has notice or knowledge." ORS 656.005(6)(emphasis added). A claim occurred here. The employer provided a log for its workers to document work incidents. Tr 75. The entries were sufficient to meet the purpose of notice to the employer. The employer did not require further detail on the log beyond "name, date, time and description."and frequently none appeared. Exs 2, 3-5, Tr 20, 24, 25. The employer had no discussions with claimant about needing more details on the first aid log. In fact, the employer, via Mr. Faddis' admission, viewed the entries as adequate for legal purposes. Tr 75-78. The employer keeps the notices on file and was able to produce them for hearing. Tr 74, Exs 2-5 Consequently, the employer had notice of the possibility of a workers' compensation claim, and thus had a statutory duty to process the claim. ORS 656.265(2), 656.262(1).

When it received the information about the claim, the employer had a choice concerning what action it could take. Here, it failed to act on the claim. The employer did not process it through further investigation or inquiry. The employer's decision not to act does not excuse it from its claims processing and investigation responsibilities. Further, the employer's inaction does not relieve it from liability for a timely filed claim when the worker has given notice and the employer thus has knowledge of the possibility of worker's compensation liability. ORS 656.005(6); *McPhail*, 165 Or App at 605; *Allied Systems Co.*, 158 Or App at 639; *Mock*, 95 Or App at 5. Statutory claims processing obligations do not permit an employer to ignore knowledge within its possession, particularly when the employee follows his employer's instructions concerning reporting procedures. *Colvin*, 301 Or at 748 (company may not avoid knowledge of an injury because it is poorly organized or fails to educate its employees about their rights and obligations under the Worker's

Compensation Law.) Thus the employer's knowledge of this injury required it to process the claim promptly after claimant gave notice on the employer's injury log.

C. The doctrine of estoppel prevents an employer from asserting a lack of timely notice defense when its employee followed its procedures for reporting an on-the-job injury.

In construing the statute as a whole, ORS 656.265 provides that the notice which an injured worker gives "need not be in any particular form." The statute does require that notice be in writing (which it was here) and that it shall apprise the employer when and where and how an injury has occurred to a worker. That notice occurred fully when claimant followed the instructions of his employer and obtained his supervisor's permission to record the injury on the first aid log.

An employer or insurer has the obligation to investigate the claim, even after it issues a denial. See ORS 656.262(1); *Brown v. Argonaut Insurance Co.*, 93 Or App 588, 592, 763 P2d 408 (1988). Under the circumstances of the Oregon Workers' Compensation Law and the doctrine of estoppel, an employer may not avoid potential liability by asserting that it had no notice when its employee followed the particular procedure the employer prescribed to provide it with notice of an on-the-job injury.

This Court has explained the doctrine of equitable estoppel:

> This doctrine of equitable estoppel or estoppel in pais is that a person may be precluded by his act or conduct, or silence when it was his duty to speak, *from asserting a right* which he otherwise would have had. [Emphasis in original.] *Marshall v. Wilson*, 175 Or 506, 518, 154 P2d 547 (1944). [Footnote omitted.] "The doctrine of estoppel is only intended to protect those who materially change their position in reliance upon another's acts or representations." *Bash v. Fir Grove Cemeteries, Co.*, 282 Or 677, 687, 581 P2d 75 (1978).

Stovall v. Sally Salmon Seafood, 306 Or 25, 34, 757 P2d 410 (1988)). *See also Coos County v. State of Oregon,* 303 Or 173, 180-181, 734 P2d 1348 (1987).

The *Stovall* opinion dealt with whether worker's compensation benefits were available to a worker who had misrepresented information on an employment application. The Court concluded that equitable estoppel did not defeat a claim for benefits because the legislature had not so specifically provided. *Stovall,* 306 Or at 39. In a later case, the Court of Appeals affirmed the application of the doctrine and required employer to pay claimant's expenses of surgery. *Meier & Frank Co. v. Smith -Sanders*, 115 Or App 159, 163, 836 P2d 1359 (1992), *recon allowed on attorney fees*, 118 Or 261, 846 P2d 1194, *rev den* 316, 142 (1993). While both *Stovall* and *Smith-Sanders* referenced the goal of construing the Worker's Compensation Act liberally in favor of the worker, the viability of the doctrine of equitable estoppel survives. The legislature has continued to place claims processing obligations upon the insurer or self-insured employer. ORS 656.262(1). As such, it remains the employer's obligation to investigate and process claims of which it has knowledge.

In this case, it is particularly inappropriate to allow an employer to avoid responsibility for a claim that the employee timely filed by following the employer's required reporting steps. As noted above, the injured worker could make an entry on the first aid log only after he or she had sustained a work-related injury and only after he or she had notified a supervisor or foreman. Claimant complied by talking to his foreman about the falling box of apples and then by making entries on the employer's log which was reserved solely for work injuries. Tr 75. The employer kept the log for its records. Even the employer admitted through a supervisor, Mr. Faddis, that three entries appearing on this particular log within a month put

the employer on notice and raised the possibility of a worker's compensation claim. Tr 74, 77-78. Not only did the employer receive notice, that notice came by way of the employer's own choosing: the work injury log that the employer created and controlled. When the employee contemporaneously gave his employer actual knowledge of the on-the-job injury on the form the employer directed, estoppel bars the employer from asserting that it did not have sufficient timely notice of the on-the-job injury.

Moreover, the nature of the traditional employment relationship usually requires employees to follow their employer's directions. In this case, the employee reported the work-related injury to his employer, both verbally and in writing. To permit an employer later to claim that it did not have "sufficient notice" further complicates and confounds an already highly technical system. When an employer requires employees to follow particular procedures for reporting an on-the-job injury, and when the statute provides that no particular form of writing is required, and when an employee follows his employer's procedures, as here, the employer has the requisite knowledge of the claim.

The employer should not be able to avoid liability on the basis of an inconsistency between its procedures and statutory requirements. Permitting employers to rely on technical defenses (that their own procedures create) destabilizes the workplace and injects even greater inefficiency and unpredictability into the claims processing of on-the-job injuries. Such an approach effectively defeats the purpose of the statute as well because an employer can deny knowledge of an injury of which it had actual knowledge, but had required the employee to report in a particular way. (See Tr 20, 23, 75, 79). As such, compensation ultimately depends upon technicalities or manipulations, rather than the employer's actual

knowledge of facts that would lead it to believe that workers' compensation liability was a possibility.

The practical result of the employer's demanding greater specificity than the statute requires places more technicalities and greater barriers on injured workers in their efforts to obtain compensation for their legitimate on-the-job injuries. Many injured workers are unrepresented and ill-equipped to navigate the shoals of an increasingly complex system of compensation for on-the-job injuries. The Court of Appeals' opinion creates even greater hazards than the legislature intended for notice provisions. The Court's approach violates the employer's statutory obligation to process the claim after notice of injury. When the statute provides that no particular form is necessary and that a lack of a particular form will not defeat a claim (ORS 656.265(2), (6)) an employer's knowledge of an injury suffices to provide notice of potential liability and requires it to investigate the claim. In this case, timely investigation and processing would have avoided the current litigation that the employer's inaction created.

The employer violated the policy of the Workers' Compensation Law when it imposed additional technical notice requirements after the injured worker already had complied with the employer's own reporting procedure. The law seeks to provide reasonable income benefits to injured workers and their dependents and to provide a fair and just administrative system for the delivery of medical and financial benefits that reduces litigation and eliminates the adversary nature of the compensation proceedings to the greatest extent practicable. ORS 656.012(2)(a)(b). Under such circumstances, the employer should be estopped from asserting that the statute permits it to deny a claim of which it had actual knowledge pursuant to its

own procedures. Under the employer's approach, procedures for reporting injuries would become rules of engagement for battle, (i.e. semantic games) rather than a simple and straightforward process for providing notice of an injury, as the legislature intended.

CONCLUSION

This Court should reverse the majority opinion of the Court of Appeals and the Worker's Compensation Board and reinstate the Administrative Law Judge's Opinion and Order which found the claim timely and compensable.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that I filed the original and 12 copies of the Petitioner's Brief on the Merits with the

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I further hereby certify that I served the foregoing Petitioner's Brief on the Merits upon the other party by causing to be mailed in the United States Post Office at Salem Oregon, on the 16th day of April, 2003, two certified, true, exact and full copies thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

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