IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of BUZZ VSETECKA, Claimant.	)	Agency No. 00-12916
BUZZ VSETECKA,	)	
Petitioner/Petitioner on Review,	)	CA No. A113353
v.	)	SC No. 49908
SAFEWAY STORES, INC.,	)	
Respondent/Respondent on Review.	)	

BRIEF OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION

Petition for Review from the decision of the Court of Appeals on appeal from an order of the Workers' Compensation Board

Opinion filed: August 14, 2002
Opinion by Landau, Presiding Judge
Brewer, Judge
Schuman, Judge (dissenting)

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BRIEF OF AMICUS CURIAE OTLA

INTRODUCTION

Amicus Curiae Oregon Trial Lawyers Association (Amicus) submits the following brief in support of the petition for Supreme Court review of injured worker Buzz Vsetecka.

Amicus submits the Court of Appeals erred in three particulars. First, it interpreted ORS 656.265(2) too narrowly. Second, the Court of Appeals erred in finding injured worker did not raise an estoppel argument. Finally, the Court of Appeals erred in not finding employer estopped from denying the worker's claim based on his method of giving notice, when he followed employer's own reporting policy.

In this case, the Court of Appeals raised the notice bar too high. Its hypertechnical interpretation of ORS 656.265(2) relied more upon dictionary definitions than case precedent and the stated policy intentions of the Act. The "how" prong of the notice requirement was satisfied by worker's entry in the "work injury" log.

Although he did not flaunt his knowledge of ornate French legalese, claimant did indeed raise an estoppel argument in this case. From the opening statement at the administrative hearing through the assignments of error in his Petitioner's Brief at the Court of Appeals, claimant argued that employer should not be permitted to clearly communicate rules for filing claims, then use an injured worker's compliance with those rules to argue the worker did not timely notify employer of his claim. The estoppel issue was preserved and may be decided by this court.

The equitable estoppel doctrine is applicable in Oregon's workers' compensation cases. In this case, employer made a false representation, the true facts of which it knew, to this worker, who was ignorant of the truth, with the intention that the worker act upon the misrepresentation, and act upon it the worker did. Employer is estopped from denying the claim based on insufficient notice.

The Court of Appeals, in allowing this employer to use its own work injury rules to defeat an injured worker's claim based on an insufficient notice defense, accomplished two ends. First, it allowed this employer's manipulation of the system to

frustrate the policy intentions of the Act. Second, it invited all employers in the state to emulate this manipulative strategy. The Court of Appeals decision should be reversed.

ARGUMENT

1. **Claimant did comply with ORS 656.265(2), as his notation in the employer's "work injury" log apprised the employer of when and where and how his injury occurred.**

The Oregon legislature has articulated findings of policy regarding the Workers' Compensation Act. The Act is intended to provided "sure, prompt and complete" medical benefits and "fair, adequate and reasonable" income benefits to injured workers, to ensure that insurers and self-insured employers bear the costs of returning injured workers to productive society, and to "provide a fair and just administrative system" for the delivery of benefits to injured workers that "reduces litigation and eliminates the adversary nature of the compensation proceedings to the greatest extent practicable." ORS 656.012.

The majority opinion below foils those stated intentions by reading too narrowly the ORS 656.265(2) requirements of "when, where and how" an industrial injury occurred. This court has stated the reasons that underlie the "knowledge" requirement of ORS 656.265(4). In *Colvin v. Industrial Indemnity*, 301 Or 743, 755 P2d 356 (1986), the court found that worker's claim was sufficiently made when she told her supervisors that she hurt herself on the job and over two years later filed a written claim.

Although in *Colvin*, this court was addressing ORS 656.265(4), the "savings" subsection of the statute, and it was interpreting an older version of the statute than the one being interpreted in this case, the underlying policy is still valid. The court held the purpose of its "employer knowledge" test was to assess "the fairness of attributing knowledge of the accident to the employer. " *Colvin*, *Id* at 748, 725 P2d at 359.

Apropos of the case on review, in *Colvin*, Justice Gillette held: "[A] claimant may not avoid the notice requirements if the company has clear procedures for reporting accidents and injuries and the employe knows or should know of and is able to follow the procedures but does not." Of course, in this case, claimant followed employer's

procedures to the letter.

Although in this case, claimant followed precisely his employer's rules for reporting work injuries, the Court of Appeals turned away from the policy intentions of the Act and the *Colvin* court's articulation of policy and toward Webster's dictionary to interpret ORS 656.265(2). An approach far more in tune with ORS 656.012 and the *Colvin* policy was taken by Judge Schuman's dissent below. In analyzing ORS 656.265(2) and applying it to injured worker's log notation, Judge Schuman found the notation "not precise or articulate," but statutorily satisfactory. *Vsetecka v. Safeway Stores Inc.*, 183 Or App 239, 246, 51 P3d 688, 691 (2002).

Finally, as further illustration for the proper interpretation of the word "how" in ORS 656.265(2), Amicus offers the WCD's own forms. ORS 656.265(6) delegates to the director the duty to "promulgate and prescribed uniform rules to be used by workers in reporting injuries to their employers."

Claimant was injured in April 1998; at that time, none of the Department's reporting forms asked an injured worker to report specifically "when, where and how" a work injury occurred. Regarding the "how" requirement, the instruction sheet for the worker's initial claim form (801) instructed a worker only to "describe the accident as completely as possible." (App 1). The 801 form itself directed the worker to "describe accident fully." (App 2). The initial physician claim form (827) used in 1998 required only that the worker "describe accident." (App 3).

The legislature has delegated to the director broad authority to define policy by promulgating rules. ORS 656.726(4). This court has traditionally deferred to the Department's interpretation of statute when such delegative power is granted. *See Booth v. Tektronix*, 312 Or 463, 473, 823 P2d 402, 407 (1991). The Court of Appeals has set the notice bar higher than the Department has. If the Court of Appeals's decision is allowed to stand, even injured workers who fill out the state forms could well have their claims denied as untimely filed. Such a result would not only frustrate the policy intentions of the Act, it would undermine the credibility of our state agencies. The Court of Appeals misinterpreted the "how" requirement set forth in ORS 656.265(2).

2. **Although he did not so name it, claimant did raise an estoppel argument below, by raising the general issue of the sufficiency of notice and by arguing that employer should not be allowed to deny claimant's claim after he followed employer's own reporting policy.**

In a footnote to its decision, the Court of Appeals held claimant did not raise an estoppel argument. *Vsetecka*, 183 Or App at 246, 51 P3d at 691. The Court erred in so holding.

A party may not argue an assignment of error or issue not preserved. ORAP 5.45. In addressing the issue of preservation, this court has held there is a distinction to be drawn between raising an issue, identifying a source or authority in support of that issue, and making a particular argument. "The first is essential, the second less so, the third the least." *Northwest Natural Gas v. Chase Gardens Inc.*, 328 Or 487, 499, 982 P2d 1117, 1124 (1999), quoting *State v. Hitz*, 307 Or 183, 188, 766 P2d 373, 375 (1988).

In *Chase Gardens*, this court found that plaintiff did preserve the issue of causation at trial; to decide whether plaintiff satisfactorily preserved its alternate arguments in support of the issue, the court "view[ed] the record in light of the purposes of fairness and efficiency [that] underlie the preservation requirement." *Id* at 499 -500, 982 P2d at 1125.

The *Chase Gardens* court reviewed the underlying purposes of the preservation requirement. Relying on *Davis v. O'Brien*, 320 Or 729, 737, 891 P2d 1307 (1995), the court found the requirement is intended to effectuate the goals of making clear the positions of the parties, avoiding surprise and avoiding denying one party the opportunity to meet and engage a particular argument. The Court also found the preservation rule was "not merely to promote form over substance, but to promote an efficient administration of justice and the saving of judicial time." *Chase Gardens*, 328 Or at 500, 982 P2d at 1125, quoting *Shields v. Campbell*, 277 Or 71, 77 - 78, 559 P2d 1275 (1977).

Finally, citing *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997), the court held that when a plaintiff raises and presents a broader legal issue, a specific alternative argument regarding that issue could be raised initially before the Supreme Court. *Chase Gardens*, 328 Or at 500, 982 P2d at 1125.

In this case, sufficiency of notice has been directly at issue from the day the hearing convened through judicial review. (Tr 2; Rec 14, 64; Pet Br 1 - 2). The equitable estoppel theory is simply one argument to persuade the finder of fact to find for claimant regarding the notice issue.

Further, it is not accurate to state that injured worker never raised an estoppel argument below. In opening arguments at hearing, claimant specified the issue as sufficiency of notice. In presenting his opening argument, claimant stated: "the employer keeps this first aid log, and Mr. Vsetecka followed the rules. He reported this incident to his foreman, a working foreman, and pursuant to the usual rules, he then wrote down an account of what occurred." (Tr 4).

On Board review, claimant argued: "The employer set the rules for reporting work-related injuries." (Rec 50). Claimant also pointed out: "In this case, the employer has a prescribed method for a worker to report a work injury." (Rec 53). Claimant noted he "entered his name [in the work injury log], the date of injury, and the nature of the pain. His supervisor advised him that his report would be passed on to upper level management." *Id.* Claimant argued that he made his entry "in a First Aid Log that was designated by the employer as the method for reporting work injuries." (Rec 54).

In his Petitioner's Brief at the Court of Appeals, claimant argued that allowing employer's denial to stand would "permit[ ] an employer to assert that although an employee followed its instructions carefully, and made the requisite reporting for the employer to be on notice of work-related injuries, it may nonetheless later assert that the notice was not adequate." (Pet Br 3). Add a fancy French name, and that argument is *estoppel in pais*.

At page 11 of his brief, claimant argued: "In this case, employer's *ex post facto* defense, after its employee met its reporting requirements, should not bar the

compensability of the claim. The employer failed to act on the claim, and the failure to act should not result in a dismissal of the claim. In this instance, claimant followed his employer's instructions." (Pet Br 11). This too, at its core, is an estoppel argument.

Finally, claimant's second "question presented on appeal" on judicial review is a pure equitable estoppel argument: "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 workers' compensation claim?" (Pet Br 2).

The equitable estoppel argument has been preserved and may be decided by this court without remand. *Northwest Natural Gas v. Chase Gardens*, 328 Or at 501, 982 P2d at 1125.

3. **Employer is estopped from denying worker's claim using the defense of insufficiency of notice.**

In *Stovall v. Sally Salmon Seafood*, 306 Or 25 , 757 P2d 410 (1988), a divided Supreme Court found the equitable estoppel doctrine was not a tool available to an employer to defeat a worker's claim when she made misrepresentations on her employment application. The court decided the merits of the case on different grounds, avoiding the issue of the applicability of equitable estoppel to workers' compensation cases. In *Frasure v. Agripac*, 290 Or 99, 619 P2d 274 (1980), this court found an equitable estoppel argument unavailing because the elements of estoppel were not present. *Id* at 107, 619 P2d at 279.

In *Meier & Frank* Co. v. *Smith-Sanders*, 115 Or App 159, 836 P2d 1359, *on recon* 118 Or App 261, 846 P2d 1194, *rev den* 316 Or 142, 852 P2d 838 (1993), the Court of Appeals found an employer estopped from denying an injured worker's surgery after its agent authorized the surgery. Invited to review that case, this court declined.

There is no impediment to the estoppel doctrine being used to decide workers' compensation cases. No decision from this court forbids this application. Many other nonstatutory, common law doctrines are readily available to decide workers' compensation claims in Oregon. For example, the *res judicata* doctrines of issue

preclusion and claim preclusion are regularly used in workers' compensation litigation. *See North Clackamas School Dist. v. White*, 305 Or 48, 51 - 52, 750 P2d 485, 487 (1988). Also, the doctrine of waiver is used to decide workers' compensation cases. *See Drews v. EBI Companies*, 310 Or 134, 154, 795 P2d 531, 541 (1990).

The doctrine of equitable estoppel is intended to protect those who materially change their position in reliance upon another's acts or representations. *Stovall*, 306 Or at 34, 757 P2d at 415, quoting *Bush v. Fir Grove Cemeteries*, 282 Or 677, 687, 541 P2d 75 (1978). The elements of equitable estoppel are (1) there must be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; and (5) the other party must have been induced to act upon it. *Bennett v. City of Salem*, 192 Or 531, 541, 235 P2d 772 (1951). Regarding the fourth element, the doctrine may be applied "when conduct is 'misleading,' even if it is innocent." *Pilgrim Turkey Packers v. Dept. of Revenue*, 261 Or 305, 310, 493 P2d 1372 (1972).

In this case, employer told injured worker his claim could be made by completing the "work injury" log as directed. Employer is self-insured; it certainly knew that the log, in and of itself, was unsatisfactory - - especially as that is the precise defense it used a year and a half later. The record demonstrates the worker was ignorant of the "proper" method of giving notice. The employer, based upon the record in this case, probably intended the worker to fill out the log and take no further steps to perfect his claim; its misrepresentations certainly misled claimant into thinking he had given sufficient notice. As claimant was told the proper way to file an injury was to fill out the log, his supervisor knew he was filling it out, and his supervisor told him the injury would be reported to "upper management," it is hard to escape the conclusion that the employer intended the worker to rely upon this misrepresentation. The worker then acted upon the misrepresentation (filling out the log at work); he also failed to act based upon the misrepresentation (taking no steps to complete a more "satisfactory" notification form).

Under the doctrine of equitable estoppel, employer is barred from denying claimant's claim based on its alleged insufficient notice.

REASONS FOR REVIEW

This case presents to the court a significant issue of law. It presents to the court an issue of first impression: it allows this court the opportunity to apply the common law estoppel doctrine to decide a workers' compensation case.

This case presents the court with its first opportunity to interpret the "notice" requirement of ORS 656.265(2). The court has interpreted the employer "knowledge" requirement of the "savings" subsection in *former* ORS 656.265(4). The court should interpret ORS 656.265(2) to be consistent with its interpretation of the "knowledge" language and with the legislative policy of providing sure, complete and speedy benefits within the framework of a fair and nonadversarial system. To do so, the court must reverse the Court of Appeals's decision, which chose a hypertechnical dictionary analysis rather than keeping its eye on precedent and the articulated legislative policy goals.

The issue of notice arises every single time an Oregon worker is injured on the job or suffers an occupational disease. The Court of Appeals's opinion can be read to encourage insurers and self-insured employers to look at every 801 form, every 827 form, every written notice of a claim, not to see how best to investigate the compensability of the claim, but to parse the notice out to see if it can simply deny or ignore the claim as technically "deficient" in notice. That is precisely the sort of adversarial gamesmanship the legislature has stated is to be avoided.

The Court of Appeals's opinion has the potential to affect not only every claimant for benefits in this state, but every social service plan and every private health plan and every taxpayer in the state. The Department's own claim forms do not demand the specificity of notice required by the Court of Appeals majority. It is not an exaggeration to state that this decision, if taken to its ultimate end, would pull the bottom out of the entire workers' compensation benefits delivery system, and spread the costs intended to be borne by employers to the state's already overburden coffers.

OTLA urges this court of accept review of this very important case. The Court of Appeals's decision is not only very likely to encourage hypertechnical readings of claim notices, thereby leading to denials of legitimate work injuries, it could well lead to deliberate and malicious employer misrepresentations made for the sole purpose of denying legitimate claims. It is a clear invitation to mischief. In thousands of cases similar to the one on review, self-insured employers could provide to injured workers preprinted forms, "deficient" under the Court of Appeals's decision. As stated above, this would lead to the denial of many legitimate claims. It would place an unintended and unwelcome financial burden on the state and taxpayers. And it could well lead to quite a few civil cases of fraud and deceit filed against employers, thereby further frustrating the intentions of the legislature to provide an exclusive remedy for workers injured on the job.

The Court of Appeals's decision is a Pandora's box. Amicus respectfully requests this court shut and seal the lid.

Respectfully submitted

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the November 13, 2002, I filed the foregoing Brief of Amicus Curiae by depositing in the United States mail in Eugene, Oregon, the original and 15 copies to:

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I hereby certify that on the November 13, 2002, I served the foregoing Brief of Amicus Curiae on the below-listed attorneys by depositing in the United States mail in Eugene, Oregon two certified copies thereof in a sealed envelope with postage prepaid, addressed to:

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