



When is fear of retaliation good cause for not timely reporting an injury in Oregon?

By Karen S. Varney ■ April 19, 2018

A recent Oregon Court of Appeals' decision emphasizes the importance of carefully examining whether a claim should be denied on the basis of untimely filing.

It is an unpleasant surprise when an employee reports a work injury long after the alleged incident took place. Such a delay significantly thwarts the employer's ability to corroborate and investigate the claim. In some instances, workers may cite fear of retaliation as justification for late filing. Although a claimant must provide the employer notice of a work injury within 90 days after an accident, one exception is if the worker can establish "good cause" for failing to give notice within 90 days.¹ The court recently clarified the standard for determining whether a worker has established good cause.

In *Kuralt v. SAIF*,² claimant had previously filed several workers' compensation claims with the employer. Regarding the injury at issue, he told two coworkers (one who claimant mistakenly thought was his supervisor) that he was injured at work the day before. He asked them not to tell the safety coordinator. More than 90 days later, claimant filed a workers' compensation claim. He told the safety coordinator he had not immediately reported the work injury because he had been led to believe by the employer's controller that he would be laid off if he filed another workers' compensation claim. The claim was denied in part on the basis it was untimely filed.

Claimant testified he was not sure the controller had the authority to terminate him, but believed the controller was integral to the process and claimed others who had issues with the controller did not stay with the employer for long. At hearing, two coworkers confirmed claimant had relayed to them the conversation he had with the controller prior to the work injury. The controller testified she did not have the authority to terminate employees' employment. Although she stated she probably warned claimant to be safe on the job to avoid injuries, she explained she would not have threatened claimant that another work injury would result in termination. The controller and the safety coordinator testified it was not the employer's policy to discipline employees who filed workers' compensation claims.

At hearing, the ALJ found all of the witnesses credible. The ALJ concluded

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Fear of retaliation and timely filing in Oregon (continued)

claimant's belief that he would be laid off for filing a workers' compensation claim was a misunderstanding. However, the ALJ found claimant's belief was sincere and had established good cause for the late notice. The Board reversed the ALJ, relying on its interpretation of older case law. The Board asserted in the absence of evidence that claimant's subjective belief was based on an "actual occurrence," by which it meant an actual threat to terminate claimant by a person with the authority to do so, claimant had not sustained his burden of proof.

The court disagreed with the Board's analysis. It concluded the Board erred in determining that a worker can establish good cause only by showing an actual threat of being laid off. It clarified a workers' subjective belief must only be objectively reasonable. If the worker's subjective belief that the worker will be laid off is based on an actual occurrence from which the worker could reasonably conclude he could be laid off, the worker can establish good cause. The court found the conversation between claimant and the controller was an "actual occurrence." They remanded the case to the Board for determination whether claimant's subjective belief based on the actual occurrence was objectively reasonable.

The attorneys at Reinisch Wilson Weier PC are available to discuss the scenarios specific to your claims and can provide assistance in determining whether an untimely filing defense is legally feasible and advisable. ■

¹ ORS 656.265(4)(c).

² *Kuralt v. SAIF*, 290 Or App 479 (2018).

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