IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Juan Estrada, Claimant.

Juan ESTRADA,
Petitioner,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

Workers' Compensation Board
1106447; A164200

Argued and submitted March 13, 2018.

Julene M. Quinn argued the cause and filed the briefs for petitioner.

Jerald P. Keene argued the cause for respondent. Also on the brief was Oregon Workers' Compensation Institute, LLC.

Before Hadlock, Presiding Judge, and Aoyagi, Judge, and Linder, Senior Judge.

AOYAGI, J.

Affirmed.

AOYAGI, J.

Generally, an injured worker must give notice of a work-related accident to the employer within 90 days after the accident, or a worker's compensation claim for an injury resulting from the accident will be barred. ORS 656.265 (1), (4). However, a worker may give notice within one year after the date of the accident in some circumstances, including when the worker establishes that he or she had "good cause" for failing to give notice within 90 days. ORS 656.265(4)(c). In this case, the Workers' Compensation Board affirmed an administrative law judge's (ALJ) order in which the ALJ concluded that claimant had not established good cause for failing to report within 90 days the accident that caused his injury. Claimant challenges the board's order on multiple grounds. For the reasons that follow, we affirm.

The historical facts relating to the claim are taken from unchallenged findings in the board's order. *See Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351 (1995), *overruled in part on other grounds by State v. Hickman/Hickman*, 358 Or 1, 23, 358 P3d 987 (2015). Other undisputed facts, including procedural facts and a brief summary of claimant's hearing testimony, are included to provide context.

Claimant worked as a delivery truck driver for employer, loading and unloading items weighing up to 150 pounds. On April 27, 2011, he felt "a weird pull" around his left testis area while loading a heavy item into the truck. He did not report a work injury because he thought it was "just soreness *** from extra work." Thereafter, claimant experienced continued symptoms, particularly with heavy lifting or pushing, which he understood as having begun as a result of the April 27, 2011, incident. He continued to work. After his symptoms increased, and work became more difficult, claimant sought treatment in September 2011. He was diagnosed with an inguinal hernia in October 2011. Claimant then reported the injury to employer and filed a workers' compensation claim. Employer denied the claim.

Claimant requested a hearing before an ALJ. At the hearing, claimant testified as to the date, circumstances,

and location of the incident in which he was injured. He testified that he had "originally *** set aside the soreness," which he had thought was "just soreness from working harder." But, claimant testified, "between April 27th and about September," he "notice[d] an increase and just more constant soreness, constant pain, you know, just randomly, especially when [he] would do certain moves, you know—mainly lifting or, you know, pushing heavy items." It became harder to do his work. He "notice[d] it more and more and more, progressing," until "[i]t finally became, actually, even physically visible." The swelling in his left testis became "visibly noticeable" around late July or August, at which time he became "more concerned." Although it was "a personal kind of thing," and he "didn't want to just bring it up," claimant raised his concern to his doctor in September. Asked why he did not report the accident to his supervisors between April and September, claimant testified that he "wasn't aware [he] was injured" and "thought it was just a heavier work soreness." He also testified that he was still able to complete his job duties.

The ALJ upheld employer's denial of the claim, based on ORS 656.265,[1] which states in relevant part:

> "(1)(a) Notice of an accident resulting in an injury or death shall be given immediately by the worker or a beneficiary of the worker to the employer, but not later than 90 days after the accident. The employer shall acknowledge forthwith receipt of such notice.
>
> "*****
>
> "(4) Failure to give notice as required by this section bars a claim under this chapter unless the notice is given within one year after the date of the accident and:
>
> "(a) The employer had knowledge of the injury or death;

[1] It is not entirely clear what version of ORS 656.265 was applied at each stage of the ALJ and board proceedings. Moreover, in the briefs on review, claimant appears to rely on the 2011 version, while employer relies on the 2015 version. We refer to the current version of ORS 656.265, because the portions of the statute that we discuss have not changed since 2011 in any way material to our review.

> "(b) The worker died within 180 days after the date of the accident; or
>
> "(c) The worker or beneficiaries of the worker establish that the worker had good cause for failure to give notice within 90 days after the accident."

See also Godfrey v. Fred Meyer Stores, 202 Or App 673, 689-90, 124 P3d 621 (2005), *rev den*, 340 Or 672 (2006) (legislative history and prior case law indicate that the purposes of the notice requirement in ORS 656.265 are to ensure that employers have sufficient information to decide whether to investigate accidents, to facilitate prompt investigations and diagnoses of injuries, and to allow employers to conduct timely investigations).

Claimant had notified employer of the accident in October. He did not contest that that was more than 90 days after the accident, and thus did not satisfy paragraph (1)(a), but he argued that he had "good cause" to give notice within one year, under paragraph (4)(c), because he did not know that the accident had resulted in an injury until after the 90 days. The ALJ rejected claimant's good-cause argument, reasoning, among other things, that two of claimant's assertions—that he did not know that he was injured and that he could pinpoint exactly when the injury occurred—were irreconcilable.

Claimant appealed. In a 2013 order, the board reversed the ALJ's order, ruling that "claimant's lack of knowledge that he had incurred an injury provided him with good cause for his failure to provide the employer with notice of an accident within the applicable 90-day period." Employer petitioned for judicial review. On review, we reversed and remanded for lack of substantial reason. *Federal Express Corp. v. Estrada*, 275 Or App 400, 407, 364 P3d 25 (2015) (*Estrada I*). Specifically, "the board's findings about the work incident and the sensations that claimant experienced appear[ed] to be inconsistent with the board's ultimate finding that claimant did not know, when he experienced the pull in his testicle, that he had been injured." *Id.*

On remand, the board received additional briefing, and it issued a new order in 2017. The board began by

recognizing, in response to a statement in *Estrada I*, that it has never articulated a "general standard" for good cause under ORS 656.265(4)(c) but that it instead was the board's practice to address the issue on a case-by-case basis. The board stressed that good cause "may exist for a variety of different reasons," and it provided several examples from prior board decisions.[2] The example relevant here is when a worker does not *know*, until more than 90 days after the accident, that "an accident resulting in an injury or death" has occurred. *See* ORS 656.265(1)(a) (requiring worker to report "an accident resulting in an injury or death"). To determine whether a worker *knew* of an accident resulting in an injury or death, the board articulated an objective "reasonable worker" standard, which it described, in relevant part, as follows:

> "When evaluating whether a worker knew of 'an accident resulting in an injury or death,' we consider it appropriate to apply a standard analogous to that used when analyzing whether an employer had 'knowledge' of an injury sufficient to excuse the untimely filing of a claim under ORS 656.265(4)(a). In the ORS 656.265(4)(a) context, we examine whether the employer's 'knowledge' included enough facts to lead a 'reasonable employer' to conclude that workers' compensation liability was a possibility and that further investigation was appropriate.
>
> "Similarly, in the ORS 656.265(4)(c) context, we will apply a 'reasonable worker' standard to determine whether a worker has established good cause for failing to make the report within the 90-day period allowed by ORS 656.265 (1)(a). Specifically, *we will examine whether the worker knew of enough facts to lead a reasonable worker to conclude that workers' compensation liability was a reasonable possibility and that notice to the employer was appropriate.* In doing so, *** we will consider the worker's credible testimony regarding such knowledge, as well as the circumstances supporting the worker's understanding. Such circumstances may include (but will not be limited to) the nature of the work accident and subsequent symptoms, the

[2] For example, the board cited prior decisions in which it had ruled that a worker had good cause to give late notice because the worker believed that reporting an accident would result in job termination, believed Oregon worker's compensation law did not cover accidents outside Oregon, reasonably relied on erroneous information, or had an incapacitating medical condition.

> worker's understanding of the accident's relationship with subsequent symptoms, contemporaneous medical evidence regarding the nature or cause of a condition, alternative explanations for symptoms, self-treatment, the degree to which the symptoms restricted the worker's on- and off-work activities, the worker's education and occupational background, and reasonable reliance on legal or medical advice."

(Emphasis added; internal citation and footnote omitted.)

Applying that standard, the board agreed with the ALJ that claimant had not established good cause. The board acknowledged claimant's testimony that, "originally," he had not been aware that he was injured and believed that his symptoms were "just soreness from working harder during that period of time." But, the board said, claimant had "noted a particular lifting incident that resulted in a 'weird pull'" and had "further identified that incident as the beginning of his symptoms, which continued, increased, and were particularly associated with lifting and pushing heavy items, and made his work increasingly difficult." Further, the board noted, claimant had *not* testified "that he continued to believe that his symptoms were 'just soreness from working harder' during the entire 90-day reporting period";[3] that he attributed his symptoms to anything other than the work incident; or "that, as his symptoms escalated during the 90-day reporting period, he did not understand that he would likely miss work or require medical treatment." Referring to prior decisions, the board stated, "[I]f a claimant is aware of an injury resulting from a work accident, a choice to avoid medical treatment and 'work through' the injury would not be consistent with a finding of 'good cause' for an untimely accident report." The board then concluded that, "even if claimant initially believed that the work

[3] The board acknowledged that, in its 2013 order, it had "previously interpreted claimant's testimony to be that he considered his symptoms to be 'just soreness from working harder' during the entire period until he noticed swelling." On remand, the board "interpret[ed] claimant's testimony differently," because "[c]laimant's testimony that he 'originally' was not aware that he was injured does not support the conclusion that he continued to believe himself to be uninjured as his symptoms increased and his work became more difficult" and because "his testimony that he became 'more concerned' when he noticed swelling does not indicate that he was not 'concerned' about an injury before that time."

accident did not result in an injury, he has not established that he was not aware of the injury within the statutory 90-day period," and that a "reasonable worker" in claimant's position "would conclude that workers' compensation liability was reasonably possible and that it was appropriate to report the accident within the 90-day period allowed by ORS 656.265(1)(a)." Accordingly, the board determined that claimant had not established good cause under ORS 656.265(4)(c) and affirmed the ALJ's order.

On judicial review, claimant raises three assignments of error. In his first assignment, claimant asserts that the board violated the "law of the case" doctrine by applying a different legal standard for "good cause" in its 2017 order than it did in its 2013 order. In his second assignment, claimant argues alternatively that the board's "reasonable worker" standard is unlawful because it is inconsistent with the statute. In his third assignment, claimant asserts that the board violated the "law of the case" doctrine by finding that claimant had "not testif[ied] that he continued to believe that his symptoms were 'just soreness from working harder' during the entire 90-day reporting period," or, alternatively, that that finding is not supported by substantial evidence.

We begin with the first assignment of error. Under the "law of the case" doctrine, an appellate decision is binding and conclusive for purposes of future proceedings in the same case. *ILWU, Local 8 v. Port of Portland*, 279 Or App 157, 164, 379 P3d 1172, *rev den*, 360 Or 422 (2016). However, the doctrine applies only to "the portions of a prior appellate opinion that were necessary to the disposition of the appeal." *Hayes Oyster Co. v. Dulcich*, 199 Or App 43, 53, 110 P3d 615, *rev den*, 339 Or 544 (2005) (internal quotation marks omitted). In *Estrada I*, we reversed the board's 2013 order based on a lack of substantial reason related to a seeming inconsistency in the board's factual findings. 275 Or App at 407. Given the parties' arguments and our disposition, we never addressed the correct legal standard for "good cause." The only statement we made even tangentially related to that issue was to note, in a footnote, some "apparent inconsistencies" in previous board orders involving the

notice requirement in ORS 656.265(1)(a). *Id.* at 407 n 3. Because the correct legal standard for "good cause" was not addressed in *Estrada I*, let alone necessary to the disposition in *Estrada I*, we reject claimant's first assignment of error.

We next address the third assignment of error, because it also involves the "law of the case" doctrine. Claimant contends that a finding in the board's 2013 order—that claimant did not realize he was injured until after the 90-day notice period had passed—became the law of the case as a result of *Estrada I*. It did not. In *Estrada I*, we concluded that the board's 2013 order lacked substantial reason because it failed to "resolve or explain away the apparent tension between" the cited finding and a separate finding that "claimant was aware of an incident that caused symptoms and his symptoms did not improve." *Estrada I*, 275 Or App at 406. *Estrada I* did not make either finding the law of the case. To the contrary, in remanding, we left it to the board to decide how to resolve the apparent tension between its findings. *E.g.*, *Estrada I*, 275 Or App at 406 n 2 (noting that, if the board agreed with a particular argument by claimant, it could "set out that finding, as well as the related legal reasoning, on remand"); *see also Liberty Northwest Ins. Corp. v. Verner*, 147 Or App 475, 479, 936 P2d 1033, *rev den*, 325 Or 438 (1997) ("Our holdings in [previous decisions on judicial review] did not preclude the Board on remand from reviewing the record and making the findings of fact that appear in the order now on review."). One option was for the board to keep the same findings and provide a satisfactory explanation. However, if our decision led the board to realize that its reasoning was flawed and could not be adequately explained, the board could—and indeed, had to—adjust its findings, adjust its reasoning, or both, to achieve an order supported by substantial reason. The board did not violate the law of the case by changing one of its prior findings.

Claimant argues alternatively that the board's 2017 finding—that claimant "did not testify that he continued to believe that his symptoms were 'just soreness from working harder' during the entire 90-day reporting period allowed

by ORS 656.265(1)(a)"—is not supported by substantial evidence.[4] Claimant asserts that he *did* so testify, citing the following excerpt from his testimony:

> "Q. Mr. Estrada, why didn't you report anything to your supervisors between April and September?
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> "A. Again, to me I didn't—I wasn't aware I was injured. To me—I just thought it was just a heavier work soreness. It wasn't a—you know, anything like a—smashed my thumb or anything. I mean, to me I was just sore. I did feel that pull, again, with the heavier lifting that I had been doing, you know, during that period of time. It was just maybe I just, you know, lifted something, you know, I—or just part of it. It was—I wasn't aware that it was—that I had an injury. It just occurred, you know.
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> "Q. You were still able to complete your job duties?
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> "A. Yes."

"Substantial evidence supports a factual finding when the record, viewed as a whole, would permit a reasonable person to make that finding." *Stone v. Employment Dept.*, 274 Or App 555, 556, 361 P3d 638 (2015) (quotation marks omitted). Here, it might have been reasonable for the board to infer from the foregoing testimony that claimant was claiming to have sustained a belief that he was not injured during the entire period from April to September. But the board was not *required* to view the evidence that way. The cited testimony was susceptible to more than one interpretation, especially when considered in conjunction with other things that claimant had said (such as his earlier testimony that, "originally," he "wasn't aware [he] was injured") or had not said (for example, claimant did not attribute his symptoms to something other than the work accident). The board could reasonably view claimant's testimony as a whole as meaning to convey that claimant originally did not realize that he was injured but became increasingly concerned that he was injured as his symptoms—which he specifically attributed to the April 27 incident—continued

[4] That "finding" appears in the board's conclusions of law, but, for present purposes, we assume that it is a finding and address it as such.

to worsen, until he finally went to the doctor in September. We reject claimant's third assignment of error.[5]

That brings us to the second assignment of error. Claimant challenges on multiple grounds the board's "reasonable worker" standard for evaluating "good cause" under ORS 656.265(4)(c) when a worker claims not to have known until more than 90 days after an accident that the accident resulted in an injury. Before addressing the substance of claimant's arguments, we address the standard of review.

The term "good cause" in ORS 656.265(4)(c) is a delegative term, as we implicitly recognized in *Lopez v. SAIF*, 281 Or App 679, 684, 388 P3d 728 (2016). "'Delegative' terms are those that express 'non-completed legislation which the agency is given delegated authority to complete.'" *Karjalainen v. Curtis Johnston & Pennywise, Inc.*, 208 Or App 674, 680, 146 P3d 336 (2006), *rev den*, 342 Or 473 (2007) (quoting *Springfield Education Assn. v. School Dist.*, 290 Or 217, 228, 621 P2d 547 (1980)). As we said in *Lopez*, "the legislature has given the board the authority to determine, within statutory limits, whether a claimant has 'good cause' for the failure to file a timely claim" under ORS 656.265 (4)(c). *Lopez*, 281 Or App at 684; *see also DCBS v. Muliro*, 359 Or 736, 745, 380 P3d 270 (2016) (describing "good cause" as "an open-ended phrase that necessitates further administrative agency policymaking"); *Springfield Education Assn.*, 290 Or at 228 (citing "good cause" as an example of a delegative term). "Our inquiry on review of the board's determination of good cause is whether the board's order falls within the range of the board's discretion." *Lopez*, 281 Or App at 684. We cannot "substitute [our] judgment for that of the agency as to any issue of *** agency discretion." ORS 183.482(7).

With that in mind, we turn to claimant's arguments. First, claimant argues that using an objective standard

[5] We also note that, given the objective standard that the board ultimately applied, it would not affect the outcome even if claimant had testified unequivocally that he did not subjectively believe that he was injured until more than 90 days after the accident. *See Innovative Design & Construction, LLC v. CCB*, 278 Or App 448, 458, 375 P3d 533 (2016) ("We may not set aside or remand a final order, even if some findings are not supported by substantial evidence, unless the erroneous findings somehow affect the validity of the order." (Citation omitted.)).

for good cause is "inconsistent" with the statute. Claimant views the text of ORS 656.265(4)(c)—especially its reference to "the worker" having to establish that "the worker" had good cause—as imposing an individualized and therefore purely subjective standard. Thus, in claimant's view, if a worker establishes that he did not subjectively "know" that he was injured in a work-related accident until more than 90 days after the accident, the board must find good cause for late notice, even if the worker's professed lack of knowledge was objectively unreasonable under the circumstances. We reject that argument. The standard that the board applied to determine whether claimant had established good cause did not fall outside the range of the board's discretion. Although it is true that the board had to make an individualized determination whether claimant had good cause to give late notice of the accident, it does not follow that the board could not apply an objective standard. Within its delegated discretion, the board could determine that failing to give notice of an accident within 90 days, despite knowing facts from which a reasonable person would conclude that workers' compensation liability was a reasonable possibility and that notice to the employer was appropriate, is not good cause under ORS 656.265(4)(c).

Second, claimant contends that the standard articulated by the board is "unworkable" because the board's non-exclusive list of considerations includes factors such as the worker's "understanding of the accident's relationship with subsequent symptoms," the worker's "education and occupational background," and the worker's "reasonable reliance on legal or medical advice." Claimant describes those as "subjective factors" that "highlight[] that 'good cause' is a personal and subjective standard." We disagree. An objective standard need not strip out all of the circumstances of a situation. We understand the board to have focused on whether a reasonable person in claimant's situation would have known enough facts to be expected to give notice of the accident to the employer. Viewing the claimant's situation broadly, rather than narrowly, in making that assessment does not mean that the standard is secretly subjective or is unworkable. *Cf. Doe v. Lake Oswego School District*, 353 Or 321, 333, 297 P3d 1287 (2013) (for

purposes of applying the discovery rule to a tort claim, "plaintiff's status as a minor, the relationship between the parties, and the nature of the harm suffered" were factors relevant to what a "reasonable person" would have known); *McDowell v. Employment Dept.*, 348 Or 605, 619, 236 P3d 722 (2010) (for purposes of determining whether a person had "good cause" to leave employment, under a "reasonable person" standard, "[t]hat objective inquiry depends on what claimant in fact knew and reasonably should have known when he made his decision").

Third, claimant argues that the standard articulated by the board "requires the worker to predict whether an accident will eventually (outside of the 90 days) become an injury." He points to the board's statement that it "will examine whether the worker knew of enough facts to lead a reasonable worker to conclude that *workers' compensation liability* was a reasonable possibility and that notice to the employer was appropriate." (Emphasis added.) Claimant's argument is misguided. Claimant has consistently asserted that he was injured on April 27, 2011, and the board found that he was injured on that date.[6] On remand, the board reconsidered its position as to when claimant *knew* that he was injured—essentially adopting a constructive knowledge standard—but the board has never suggested that claimant's injury occurred at any time other than April 27, 2011. The board's standard may require an injured worker to "predict" to some degree whether his injury will, for example, necessitate medical services—*i.e.*, whether "workers' compensation liability" is a reasonable possibility—but that is different from requiring a worker to predict the injury itself.[7] *See* ORS 656.005(7)(a) (defining a "compensable injury" as an accidental "injury" that arises out of and in the course of employment and requires medical services or

[6] *See also Estrada I*, 275 Or App at 404 (describing claimant as arguing "that the board's analysis 'led it to correctly determine that [claimant] attempted to work through his injury'" and "that a decision to 'work through an injury' constitutes good cause for not timely reporting it" (brackets in original)).

[7] Further, the board "agree[d] with claimant's general contention that 'good cause' for untimely notice of an accident may theoretically be established where a worker believes that there was no potentially compensable injury because no medical treatment would be required by, and no disability would result from, a work accident."

results in disability or death). It is settled that claimant was injured on April 27, 2011.

Finally, claimant challenges the appropriateness of the board's analogy between employer knowledge under ORS 656.265(4)(a) and employee knowledge for claimant's type of "good cause" argument under ORS 656.265(4)(c). However, even if that analogy is imperfect, it does not follow that the board acted outside of its delegated discretion, *i.e.*, applied a standard that exceeded the board's "authority to determine, within statutory limits, whether a claimant has 'good cause' for the failure to file a timely claim." *Lopez*, 281 Or App at 684. The board did not act outside of its delegated discretion by relying in part on the analogy that it did.

Because the standard that the board applied to determine whether claimant had established "good cause" for giving late notice of the accident does not fall outside of the statutory limits of ORS 656.265(4)(c), the board did not abuse its discretion, and we reject claimant's second assignment of error. Accordingly, we affirm the board's order.[8]

Affirmed.

[8] Claimant has requested that, if we reject his arguments on appeal, we remand to the board with instructions that it remand the case to the ALJ for a new hearing on what claimant describes as "the newly announced legal standard." Claimant relies on ORS 656.295(5), which gives the board authority to remand a case to the ALJ "for further evidence taking, correction or other necessary action" if "the board determines that a case has been improperly, incompletely or otherwise insufficiently developed or heard" by the ALJ. Claimant's argument presumes that we have authority to direct the board to exercise its authority under ORS 656.295(5). Assuming without deciding that we have such authority, we are unpersuaded that a remand with such an instruction is necessary or appropriate in this case. Claimant has not persuaded us that the board's discussion of "good cause" in its 2017 order announced principles of law that the parties did not have a fair opportunity to litigate in the initial hearing.