

In the Matter of the Compensation of
AUDENCIA MONTEZ, Claimant
WCB Case No. 99-06577, 99-02429
ORDER ON REMAND

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Reviewing Panel: Members Biehl, Phillips Polich, and Bock.¹

This matter is before the Board on remand from the Court of Appeals. *Montez v. Roloff Farms, Inc.*, 165 Or App 532 (2001). The court has reversed our prior order, *Audencia Montez*, 52 Van Natta 805, *on recon* 52 Van Natta 830 (2000), that affirmed an Administrative Law Judge's (ALJ's) order that upheld the SAIF Corporation's denial of claimant's injury claim. In reaching our conclusion, we were not persuaded that claimant was a "subject worker" at the time of injury. Reasoning that we "did not consider claimant's implied contract theory, particularly whether employer had imputed knowledge that claimant worked for, was directed by, and receiving compensation from employer," the court has remanded for reconsideration. *Montez*, 165 Or App at 539.

FINDINGS OF FACT

We republish the "Findings of Fact" contained in our prior order, with the following correction and supplementation.

All events relevant to this claim took place in 1998, not 1999.

Angie, the employer's daughter-in-law, worked as supervisor of the employer's orchards. Her job primarily involved "supervising;" *i.e.*, "making sure everybody is working and they have everything they need." (Tr. 83-84). Javier, one of the employer's 6 foremen, assigned workers' picking areas. (Tr. 34, 65).

On the morning of June 11, 1998, Angie or Javier transported claimant, her husband, and her son (among others) to the employer's cherry orchards and told them where to pick cherries. (Tr. 12-13, 34, 83). This was claimant's first day picking cherries.

¹ After consultation with the Department of Justice, this Board has chosen to exercise its right to issue orders as a panel of three pursuant to ORS 656.718(2) and (3).

The employer provided workers, including claimant, with a ladder for picking cherries and boxes for the picked cherries. (Tr. 13-14, 31, 65-66).

Sometimes Angie walked by the workers while they picked cherries. She told claimant not to throw away too many cherries and to be careful not to drop them. (Tr. 14-15).

Claimant picked the employer's cherries for 6 or 7 days. The employer transported claimant to the orchard, provided ladders and boxes, and told her where to work each day. The employer paid for the cherries that claimant and her son picked, with a check made out to her husband. (Tr. 15).

On June 19, 1998, claimant fell from a ladder and fractured the little finger of her right hand while picking cherries in the employer's orchard. Claimant filed an injury claim which SAIF denied.

CONCLUSIONS OF LAW AND OPINION

The issue is whether claimant was a "worker" when she fell from a ladder and fractured her right little finger, while picking cherries for the employer on June 19, 1998.

A worker is "any person, * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *." ORS 656.005(30); *see Martelli v. R. A. Chambers and Associates*, 310 Or 529, 537 (1990). The "engagement" requirement of ORS 656.005(30) is satisfied by either an express or implied contract. *Montez*, 175 Or App at 536; *see also Hix v. SAIF*, 34 Or App 819, 825 *rev den* 284 Or 1 (1978).

We previously found that the record did not establish the existence of an express employment contract between claimant and the employer. We reach the same conclusion on reconsideration. Therefore, the remaining question is whether there was an "implied-in-fact contract [of employment] based on the parties' course of conduct." 175 Or App at 536. "In an implied-in-fact contract, the parties' agreement is inferred, in whole or in part, from their conduct." *Id.* (quoting *Staley v. Taylor*, 165 Or App 256, 262 (2000)).

As the *Montez* court explained:

“[t]he conduct that is relevant to the inference of [contractual] assent is not limited to the parties' actions at the commencement of the alleged relationship; such a limitation would belie the very nature of the implied-in-fact doctrine as recognizing that parties may manifest their assent to an agreement through their actions over an extended period of time * * * *

[T]he ‘crucial fact on which the existence or nonexistence of an implied contract [depends is] whether employer's supervisory employees, whose knowledge may be imputed to employer, knew that claimant was working for, being directed by, and receiving compensation from employer.’” *Id.* at 536-37 (citations omitted).

SAIF contends that the employer's supervisory personnel exceeded their authority as agents, because they were not authorized to direct or control persons who had not completed the formal hiring process. In a similar vein, SAIF argues that the employer's supervisors' “knowledge” should not be imputed to the employer in this case, because the supervisors “lacked authority to employ persons who had failed to complete the formal hiring process.” These arguments are unpersuasive.

As the court explained in *Montez*, existence of an implied-in fact employment contract does not depend on completion of the formal hiring process, or on the employer's agents' knowledge about any such process. *Id.* Instead, it depends on the parties' *conduct* over time, and the agents' knowledge about whether “claimant was working for, being directed by, and receiving compensation from the employer.”² *Id.*; see *Staley v. Taylor*, 165 Or App at 262 (2000).

Here, it is undisputed that claimant picked cherries for the employer for 6 or 7 days. It is similarly undisputed that Supervisor Angie and Foreman Javier were in charge of the employer's workers. (Tr. 65, 83-84). Thus, Angie and Javier were the employer's agents for purposes of directing and controlling its workers.³ When

² As we explain herein, the employer's agents' knowledge about these matters is properly imputed to the employer because it is knowledge about matters *within the agents' supervisory authority*.

³ The employer testified, “I have foremans [sic] that do all the work.” (Tr. 66).

claimant picked cherries for the employer, and Javier told her where to pick them and Angie told her how to pick them, these supervisory persons exercised their authority as the employer's agents and supervisory personnel. By the same conduct, Angie and Foreman Javier exhibited knowledge that claimant was working for and being directed by the employer. This knowledge was knowledge about matters within the agents' supervisory authority; *i.e.*, who was picking the employer's cherries, where and how they were doing that. Angie's and Javier's knowledge about these matters is properly imputed to the employer.⁴ See *Odighizua v. Tri-Met, Inc.*, 112 Or App 159, 164 (1992) ("The knowledge of an agent is imputable [to the principal] only if it is about matters within the agent's authority as agent.") (Citations omitted).

To summarize, we reiterate that claimant picked the employer's cherries for 6 or 7 days. And we have determined that Angie's and Javier's conduct during this time manifested knowledge that "that claimant was working for [and] being directed by * * * the employer." 175 Or App at 537. This knowledge is imputed to the employer.

Finally, claimant's undisputed testimony establishes that she was paid for the work she performed for the employer, albeit by a check made out to her husband.⁵ (Tr. 14-15). There is no evidence suggesting that claimant was a volunteer or that the employer or its agents thought that claimant's work was gratuitous.

Under these circumstances, we find that the employer knew that claimant was working for and being directed and paid by the employer. Therefore, claimant was a worker (subject to an "implied-in-fact" employment contract), acting within the course and scope of her employment, when she was injured. Her claim is compensable. Compare *Hix v. SAIF*, 34 Or App 819, 824-25, *rev den* 284 Or 1 (1978) (no employer-employee relationship, where the claimant's work and the

⁴ In *Colvin v. Industrial Indemnity*, 301 Or 743 (1986), the Supreme Court "reversed the Court of Appeals' holding that supervisory authority is unimportant for determining whether knowledge will be imputed to an employer[.]" *Id.* at 747. However, the Court also agreed with 3 *Larson's Workers' Compensation Law* § 78.31(b), 15-116 through 15-129, quoting the following with approval: "[A]ny degree of authority that places a man in charge of even a small group of workers is enough to confer this representative status." *Id.* (remainder of quotation and emphasis omitted).

⁵ Claimant's testimony that her husband's check included payment for the cherries that she had picked is similarly undisputed. (Tr. 15).

employer's payment were "equally gratuitous," and the employer neither had nor exercised a right of direction and control over the claimant).

Claimant's attorney is entitled to an assessed fee for services on remand.⁶ *See* ORS 656.388(1); 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on remand is \$1,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's supplemental briefs on remand), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Accordingly, on reconsideration, the ALJ's order dated December 1, 1999 is reversed in part and affirmed in part. SAIF's denial is set aside and the claim is remanded to SAIF for processing according to law. For services on remand, claimant is awarded a \$1,500 attorney fee, payable by SAIF. The remainder of the ALJ's order is affirmed.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 12, 2002

⁶ In its appellate judgment, the court awarded claimant costs and a \$4,725 attorney fee, in the event that claimant prevailed on remand. Thus, our award is in addition to the court's judgment.