
In the Matter of the Compensation
CHRISTOPHER L. WILLIAMS, Claimant
WCB Case No. 01-07738
ORDER ON REVIEW (REMANDING)
Claimant Unrepresented
Jacqueline A Weber, Defense Attorneys

Reviewing Panel: Members Lowell, Phillip Polich and Bock. Member Phillips Polich concurs in part and dissents in part.

Claimant, *pro se*,¹ requests review of Administrative Law Judge (ALJ) Peterson's order that found he was not eligible to receive workers' compensation benefits. On review, the issue is subjectivity. We vacate and remand.

FINDINGS OF FACT

On August 28, 2000, claimant was incarcerated at the employer's detention center. (Ex. 34). Claimant had not been sentenced at that time. He was assigned duty as a trustee in one of the housing units. (Exs. 33, 34). In the course of performing his duties, claimant was asked to check on another inmate, and claimant discovered that the inmate was dead. (Exs. 28-16, 29, 33, 34). After that incident, claimant sought medical services for emotional distress. (Exs. 28-16, -17, 29). Claimant filed a claim, asserting that he experienced post-traumatic stress syndrome and depression as a result of that incident. (Ex. 34)

The employer denied compensability on the basis that claimant was "not a sentenced inmate" at the time of the incident. (Ex. 35). The employer asserted that, pursuant to ORS 656.041 and Multnomah County Code 15, only sentenced inmate workers were eligible for workers' compensation benefits. (*Id.*) Claimant requested a hearing.

¹ Because claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in workers' compensation matters. He may contact the Workers' Compensation Ombudsman at (503) 378-3351 or 1-800-0927-1271 (V/TTY) (within the State of Oregon), or write to:

Workers' Compensation Ombudsman
Dept. of Consumer & Business Services
PO Box 14480
Salem OR 97309-0405

CONCLUSIONS OF LAW AND OPINION

The ALJ found that ORS 656.041 allowed the county to elect whether or not to have workers' compensation coverage for its jail inmates. The ALJ reasoned that Multnomah County Code sections 15.026 and 15.027 provided that an inmate worker of the county was entitled to and restricted to workers' compensation benefits as a worker and jail inmate, provided that he is a convict *sentenced* to a term in a county adult correctional facility by a court. (Ex. A). The ALJ concluded that, because claimant was an "unsentenced inmate," he was not eligible for workers' compensation benefits.² Claimant requested review.

Although claimant appeared on his own behalf, he was not sworn in and did not testify. The employer did not present any witnesses. Nevertheless, the transcript of the proceedings includes information and arguments from both parties regarding the factual background of the case. The parties agreed that claimant was working as a "trustee" at the employer's detention center on August 28, 2000, and that claimant had not been sentenced at that time. The parties also agreed that claimant was paid for his work.

Claimant explained that he had been hired by the employer to be a "trustee" and he was paid for performing "module" and facility work. (Tr. 10). He said he was paid \$1 a day. (Tr. 18). Claimant asserted that he had been incarcerated for four years without a trial and because of his experience as a trustee, he trained other trustees. (Tr. 11). Claimant argued that he was a paid worker and was covered by workers' compensation on August 28, 2000. (*Id.*)

The employer's attorney agreed that claimant was hired to work as a trustee, and that he worked as a kitchen trustee on August 28, 2000. (Tr. 11). The employer did not question that the incident actually occurred. (Tr. 28). The employer's attorney explained that claimant was incarcerated but had not been tried, and his legal status in August 2000 was that of an "unsentenced inmate" or "volunteer unsentenced inmate." (Tr. 11, 16). The employer's attorney said that claimant received payment of a "dollar or two per day of work[.]" but he did not receive work time credit because that could only be given to a sentenced inmate. (Tr. 13). The employer's attorney asserted that inmates were paid by crediting

² The ALJ explained that the parties had agreed that he would first rule on whether claimant was covered by workers' compensation and, if claimant prevailed, the matter would be continued and reset for a hearing on medical causation.

their inmate trust account, and that claimant had received a positive deposit to his inmate account for the days that he worked. (Tr. 14).

The employer's attorney referred to the section 17 of the Corrections Division Manual³ and explained there were two types of inmates.

“And what that indicates is that there are two different statuses of working inmates. Inmates who have been sentenced have no – and if they are told to work, they must work at whatever is assigned to them, unless they have a medical excuse to not work. And then there are unsentenced inmates who can volunteer to work and still be in a paid status as a worker. And that is the status that [claimant] was in. The priority of assignment of jobs, the sentenced inmates get first priority; unsentenced inmates get last priority. And they are assigned according to that prioritization that's set out in the procedures manual.

“So yes, [claimant] was working as a trustee, which meant he was a volunteer worker because he was an unsentenced inmate. And the sheriff cannot require unsentenced inmates to work. They can only require sentenced inmates to work, which is why the code and the statute is written the way it is, that it is only sentenced inmates who are required to work that are covered by the statute.” (Tr. 15).

ORS 656.041(2) provides: “A city or county may elect to have inmates performing authorized employment considered as subject workers of the city or county for purposes of this chapter.” ORS 656.041(1)(a) defines “authorized employment” as “the employment of an inmate on work authorized by the governing body of a city or county.” An “inmate” is “a person sentenced by any court or legal authority * * * to serve sentence in a city or county jail or other place of incarceration except state and federal institutions.” ORS 656.041(1)(b). Subsection (5) of ORS 656.041 provides that the filing of claims for benefits under

³ We note that the ALJ's order cited to the Multnomah County operational procedures manual, CD 17.102.072(3), but that manual was not admitted at hearing. The parties discussed the rules in the manual at hearing, but claimant pointed out that the employer was referring to the 2001 version. (Tr. 14-18, 20-22). The employer's attorney said she would provide claimant and the ALJ with a copy of the manual in effect in 2000. (Tr. 22-24, 32). The ALJ did not admit either version of the manual into evidence.

this section is the “exclusive remedy of an inmate or beneficiary of an inmate” for compensable injuries.

We find that ORS 656.041 does not apply to the facts in this case. Because claimant had not been sentenced, he was not an “inmate” pursuant to ORS 656.041(1)(b). Furthermore, because claimant was not an “inmate,” he could not have performed “authorized employment” as defined under ORS 656.041(1)(a). Although ORS 656.041(2) allows the employer to “elect to have inmates performing authorized employment considered as subject workers[,]” there is no such provision for *unsentenced*, incarcerated persons.

Multnomah County Code section 15.026 provides:

“(A) Any convict *sentenced* to a term in a county adult correctional facility by any court, whether in default of the payment of a fine, or committed for a definite number of days, and who, in the judgment of the Sheriff, has satisfactorily met the rules governing conduct within the facility, has the physical qualifications therefor and who has no legal or medical restraints prohibiting such work, shall be eligible to perform authorized work under this subchapter.

“(B) Any eligible convict may be required by the Sheriff to perform work prescribed, whether or not such eligible convict has volunteered so to perform, and failure to comply with the Sheriff’s order to perform such work shall be the basis for appropriate disciplinary proceedings.” (Ex. A; emphasis supplied).

Because claimant was not “sentenced,” he was not eligible pursuant to Multnomah County Code section 15.026(A) to perform “authorized employment.” Subsection (A) states that a “convict sentenced” to a term in a county adult correctional facility “shall be eligible to perform authorized work under this subchapter.” Subsection (B) states that an “eligible convict” may be required by the Sheriff to perform work prescribed. Thus, Multnomah County Code section 15.026 applies to “sentenced convicts.” Because claimant was not “sentenced,” he was not eligible pursuant to Multnomah County Code section 15.026 to perform “authorized employment.”

Multnomah County Code section 15.027 provides:

“Persons authorized under these rules to perform authorized employment are subject workers of the county entitled and restricted to benefits provided by the state Workers’ Compensation Act for any injuries incurred in the performance of such employment, pursuant to ORS 656.041.” (Ex. A).

Multnomah County Code section 15.027 does not apply here because claimant was not authorized to perform “authorized employment.” We conclude that ORS 656.041 and Multnomah County Code sections 15.026 and 15.027 do not apply to this case.

Next, we must address whether claimant is a “subject worker.” We begin by discussing the holding in *Westfall v. Multnomah County*, 57 Or App 459 (1982). In that case, the claimant was injured while incarcerated at the county correctional institution serving a sentence. He was assigned to an inmate work crew and was paid one dollar per day for working on the crew. The claimant injured his back and filed a workers' compensation claim with the county. The parties stipulated that the county was self-insured but had not filed an election to cover jail inmates pursuant to ORS 656.041.

The claimant argued that he was a "subject worker" as defined in ORS 656.027, which provides that "[a]ll workers are subject to 656.001 to 656.794 except those nonsubject workers described in the following subsections[.]” The court noted that none of the subsections specifically excluded jail inmates. The claimant asserted that, if he was a "worker," he was covered under the Workers’ Compensation Act because his type of employment was not excluded under ORS 656.027. He argued that he was a worker because there was an employment relationship at the time of his injury. The claimant contended that both prongs of the employment relationship test were met because the county exerted control over his performance of duties as part of the work crew and because he was paid one dollar per day for his labor. Further, he argued that, because he was a subject worker under ORS 656.027, it was immaterial that the county did not elect to cover jail inmates under ORS 656.041.

The court rejected the claimant’s argument. The court found that the claimant was not a subject worker and was not covered under the Act because the county did not file the election of coverage. The court reasoned that the authority

of the county to require inmates to perform work derived from ORS 169.320, which provided:

"Except as otherwise provided in ORS 169.170 to 169.210, each county sheriff shall have custody and control of all persons legally committed or confined in the county local correctional facility * * *, he shall work such prisoners in the county local correctional facility * * * at such places and such time and in such manner as the [county] court or board may direct. The sheriff may retain and put to work such number of such prisoners as may be required to perform necessary services in and about the facility and in the care thereof."⁴

The court explained:

“The sheriff is authorized to require the inmates to work because of their status as prisoners, not because they are employes. They are essentially conscripts. For inmates to be covered under the Act for injuries while performing ‘authorized employment’ the county must file a notice of election with the director of the Workers' Compensation Department. ‘Authorized employment’ means the employment of an inmate on work authorized by the governing body of the county. ORS 656.041(1)(a). Reading these statutes together, it is clear that the legislature did not intend to include inmates performing work authorized by ORS 169.320 as subject workers under the Workers' Compensation Act. If, as claimant contends, inmates doing such work for even token remuneration are subject workers, it would have been unnecessary to provide specifically a special provision for coverage of inmate injuries. The two statutes – ORS 656.027 and 656.041 -- would be inconsistent if we adopted claimant's construction.” 57 Or App at 462.

The claimant in *Westfall* also relied on ORS 656.031, which provided that volunteer personnel of a city "shall not be considered as workers unless the municipality filed the election." The claimant argued that, because that language did not appear in ORS 656.041, the legislature did not intend the election of

⁴ We note that ORS 169.320 has been amended since *Westfall* was decided. The current version of the statute is discussed later in our order.

coverage to be the sole method of covering inmates for work injuries, and it followed that an injured inmate might seek compensation under the general provisions for subject workers. The court disagreed, explaining that ORS 656.041(2) provided that "[a] * * * county may elect to have inmates performing authorized employment considered as subject workers[.]" The court concluded that there was no material difference in the effect of the two statutory provisions (ORS 656.031 and ORS 656.041), and it reasoned that "[i]n either instance a volunteer or an inmate becomes a subject worker only if the election is filed."

The present case is distinguishable from *Westfall* in some respects. The claimant in *Westfall* was serving a sentence at a county correctional facility, whereas claimant in this case had not been sentenced. In *Westfall*, the county did not elect to cover inmates under ORS 656.041. Here, although the county elected to cover "inmates" pursuant to ORS 656.041 and Multnomah County Code sections 15.026 and 15.027, claimant was not an "inmate" because he had not been sentenced.

Although ORS 169.320 has been amended since *Westfall* was decided, those amendments are not significant to this case. The current version of ORS 169.320(1) provides:

"Except as otherwise provided in ORS 169.170 to 169.210, each county sheriff has custody and control of all persons legally committed or confined in the county local correctional facility of the county of the sheriff during the period of the commitment or confinement. Under the direction of the county court or board of county commissioners of the county, the sheriff may cause the prisoners in the county local correctional facility to engage in any work that is otherwise authorized by law. The work shall be performed at the places and times and in the manner as the court or board may direct. The sheriff may retain and put to work any prisoners as may be required to perform necessary services in and about the facility."

Thus, ORS 169.320 provides that the county sheriff has "custody and control of all persons legally committed or confined in the county local correctional facility[.]" Further, ORS 169.320 authorizes the sheriff to require "prisoners" in the county correctional facility "to engage in any work that is otherwise authorized

by law.”⁵ As in *Westfall*, the sheriff is authorized to require the inmates to work because of their status as prisoners (sentenced or unsentenced), not because they are employees. In *Westfall*, the court explained that the prisoners were “essentially conscripts” and were not covered as “subject workers” unless the county filed a notice of election treating some prisoners as “subject workers.”

Here, although the county elected to cover “inmates” pursuant to ORS 656.041 and Multnomah County Code sections 15.026 and 15.027, only *sentenced* inmates were “subject workers.” Because claimant was not sentenced at the time of the alleged injury, he does not qualify under the county’s “election.” Consequently, ORS 656.041 is not applicable.

Nevertheless, as previously noted, under ORS 656.031(1), volunteer personnel of a municipality “shall not be considered as workers unless the municipality filed the election[.]” Here, the record suggests that claimant was a volunteer trustee. However, the record is insufficiently developed regarding that issue. The record is also silent regarding whether an election under ORS 656.031 was filed to include claimant, or personnel such as him, as municipal workers if it is determined that claimant was a volunteer trustee.

We may remand to the ALJ if we find that the case has been “improperly, incompletely or otherwise insufficiently developed[.]” ORS 656.295(5). There must be a compelling reason for remand to the ALJ for the taking of additional evidence. *SAIF v. Avery*, 167 Or App 327, 333 (2000).

Here, we find that the record is insufficiently developed on the issue of whether the county filed a notice of election under ORS 656.031 treating claimant or others like him as municipal workers.⁶ Accordingly, in order to sufficiently develop the record on this issue, this matter is remanded to ALJ Peterson to conduct further proceedings consistent with this order. These proceedings may be

⁵ We note that a 1994 Ballot Measure amended the Oregon Constitution to require greater employment of inmates. Subsection (2) of Article I, section 41, of the Oregon Constitution, provides that all inmates of state corrections institutions shall be actively engaged full-time in work or on-the-job training. Subsection (6) states that the provisions are permissive for county or city corrections facilities.

⁶ We note that the ALJ’s order said that Exhibits 1 through 36 were “offered into evidence” by the employer, but there is no evidence that the ALJ formally admitted any exhibits or allowed claimant to object to the employer’s exhibits. As noted in footnote 3, the employer also submitted additional documents after the hearing, which were not formerly admitted. On remand, the ALJ shall address these evidentiary issues.

conducted in any manner that the ALJ determines will achieve substantial justice. Thereafter, the ALJ shall issue a final, appealable order.

ORDER

The ALJ's order dated September 17, 2002 is vacated. This matter is remanded to ALJ Peterson to conduct further proceedings consistent with this order. Thereafter, the ALJ shall issue a final, appealable order.

Entered at Salem, Oregon on June 11, 2003

Board Member Phillips Polich, concurring in part and dissenting in part.

Although I agree with the majority that ORS 656.041 does not apply to this case, I disagree with the rest of its opinion. I believe claimant was a "subject worker" who was eligible for workers' compensation coverage and I would remand for a hearing on the merits. I respectfully dissent.

The majority indicates that the record suggests that claimant was a "volunteer trustee," but it finds that the record is insufficiently developed on the issue of whether the county had filed a notice of election under ORS 656.031 treating claimant or others like him as municipal workers. The majority's holding seems contrived based on the evidence and the positions of the parties.

Instead, I would find that claimant was a "subject worker" and remand the case for a hearing on the merits. I reason as follows. In *Stamp v. Dept. of Consumer and Bus. Services*, 169 Or App 354 (2000), the court explained the methodology set forth in *S-W Floor Cover Shop v. Natl. Council on Comp. Ins.*, 318 Or 614 (1994), to determine whether an individual is a "subject worker" under the workers' compensation law:

"We must first determine whether the individual is a 'worker' as defined under ORS 656.005(30). To make that determination, we apply the 'right to control' test. If, and only if, that test is inconclusive, we apply the 'relative nature of the work' test. If the person is determined to be a worker under either test, we must then determine whether that person is a subject worker or is excluded from subject status by one of the subsections under ORS 656.027. If the person is a subject worker and is not excluded, the worker is subject to the workers' compensation

laws and the employer must pay premiums for that worker. *S-W Floor Cover Shop*, 318 Or at 630-31.” *Stamp*, 169 Or App at 359-60 (footnote omitted).

ORS 656.005(30) provides, in part:

“‘Worker’ means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, *but does not include any person whose services are performed as an inmate or ward of a state institution* or as part of the eligibility requirements for a general or public assistance grant.” (Emphasis supplied).

Claimant was not an inmate as defined in ORS 656.041(1)(b), and, in any event, he was incarcerated in a county facility, not a state institution. Therefore, the exclusion in ORS 656.005(30) of “any person whose services are performed as an inmate or ward of a state institution” does not apply to claimant.

The principal factors considered under the "right to control" test are: (1) direct evidence of the right to, or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. *Castle Homes, Inc. v. Whaite*, 95 Or App 269, 272 (1989).

At hearing, both parties represented that claimant was working as a “trustee” at the employer’s detention center on August 28, 2000, and that claimant had not been sentenced at that time. The parties also agreed that claimant was paid for his work. Under these circumstances, I would find that the county had the requisite “right to control” claimant. Because claimant furnished services for a remuneration, subject to the direction and control of the employer, he was a “worker” pursuant to ORS 656.005(30).

ORS 656.027 provides that “[a]ll workers are subject to this chapter except those nonsubject workers described” by the statute's other provisions. Thus, ORS 656.027 makes all workers subject to the protections of the workers' compensation insurance laws unless a worker falls into one of the limited categories of "nonsubject" workers. *K-Mart Corp. v. Claussing*, 162 Or App 558, 561 (1999). Here, there are no exclusions under ORS 656.027 that apply to

claimant. Consequently, because claimant is a “worker” pursuant to ORS 656.005(30) and is not excluded, he is subject to the workers' compensation laws. *S-W Floor Cover Shop*, 318 Or at 630-31.

In reaching this conclusion, I distinguish the holding in *Westfall v. Multnomah County*, 57 Or App 459 (1982). The claimant in *Westfall* was serving a sentence at a county correctional facility, whereas claimant in this case had not been sentenced at the time of the August 2000 injury. In *Westfall*, the county did not elect to cover inmates under ORS 656.041. Here, although the county elected to cover “inmates” (*i.e.*, sentenced convicts) pursuant to ORS 656.041 and Multnomah County Code sections 15.026 and 15.027, claimant was not an “inmate” because he had not been sentenced.

Although ORS 656.041(2) provides that a county may elect to have “inmates” performing “authorized employment” considered as subject workers of the county, there is no such statutory “election” pertaining to unsentenced prisoners. Here, as in *Westfall*, the authority of the county to require inmates to perform work derives from ORS 169.320. The current version of ORS 169.320(1) provides:

“Except as otherwise provided in ORS 169.170 to 169.210, each county sheriff has custody and control of all persons legally committed or confined in the county local correctional facility of the county of the sheriff during the period of the commitment or confinement. Under the direction of the county court or board of county commissioners of the county, the sheriff may cause the prisoners in the county local correctional facility to engage in any work that is otherwise authorized by law. The work shall be performed at the places and times and in the manner as the court or board may direct. The sheriff may retain and put to work any prisoners as may be required to perform necessary services in and about the facility.”

ORS 169.320 has been amended since *Westfall* was decided, but those amendments are not significant to this case. ORS 169.320 authorizes the sheriff to require “prisoners in the county local correctional facility to engage in any work that is otherwise authorized by law.” Despite the fact that ORS 169.320 authorizes the county to require prisoners to work, it does not address workers’ compensation coverage. Because claimant is a “worker” pursuant to ORS 656.005(30) and is not excluded, he is subject to the workers' compensation laws. *See S-W Floor Cover*

Shop, 318 Or at 630-31; ORS 656.027 (all workers are subject to Chapter 656 except those nonsubject workers described by the statute's other provisions). I would remand the case to the ALJ for a hearing on the merits.

I respectfully dissent.