

In the Matter of the Compensation of
JOSINA LASAGE, Claimant

WCB Case No. 03-02134

ORDER ON REVIEW

Hollander & Lebenbaum, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) found she was not a subject worker; and (2) upheld the SAIF Corporation's denial of claimant's right elbow injury claim. On review, the issue is subjectivity.

We adopt and affirm the ALJ's order with the following changes and supplementation. In the first full paragraph on page 2, we replace the last sentence with the following:

“Dancers have been told not to return to dance for violations of OLCC regulations and for being under 21 at a time when that was a controversial issue. The employer has also asked dancers not to return because of drug use, bringing alcohol into the dressing room, fighting or for not performing.”

Also on page 2, we replace the third full paragraph with the following:

“The employer has used agencies to supply dancers, but some dancers are scheduled directly with the employer. Because of claimant's long relationship with the employer, she was scheduled directly by the employer, not through an agency.”

We supplement the ALJ's order with the following. SAIF argues that, in addition to the reasons relied on by the ALJ, claimant was not a “subject worker” at the time of her injury because she was not engaged to perform services for a “remuneration.”¹

¹ The ALJ determined that claimant, an exotic dancer, was not a subject worker based on the “right to control” and the “nature of the work” tests. See *Stamp v. DCBS*, 169 Or App 354 (2000). In *Cy Investment, Inc v. Natl. Council on Comp. Ins.*, 128 Or App 579 (1994), a case that involved a determination of whether exotic dancers were subject workers, the court found that, based on the record in that case, the “right to control” test was

The ALJ found, and we agree, that claimant was not paid an income from the employer and her sole source of income was tips from customers.

In *Hopkins v. Kobos Co.*, 186 Or App 273, 276-77 (2003), the court explained:

“To receive workers’ compensation, a person must be a ‘worker’ as that term is defined by ORS 656.005(30): ‘any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer[.]’ This definition contains two elements: an agreement between the claimant and the employer *that the employer will provide remuneration for the claimant’s services*, and the employer’s right to direct and control the services the claimant provides. A claimant bears the burden of establishing the existence of the employment relationship.” (Citations omitted; emphasis supplied).

In *Hopkins*, the court found that the fact that the claimant did not receive remuneration from the employer and did not expect to be paid by the employer defeated any argument that claimant was a “worker” for the employer.

Here, there is no dispute that claimant was not paid an income from the employer. Claimant testified that the neither the employer nor the agency paid her any money. (Tr. 15, 21, 30, 46-47). There is no evidence of an agreement between claimant and the employer that the *employer* would provide remuneration for claimant’s services. We agree with SAIF that claimant was not engaged to furnish services for a remuneration and, therefore, she is not a “worker” pursuant to ORS 656.005(30).

ORDER

The ALJ’s order dated June 5, 2003 is affirmed.

Entered at Salem, Oregon on November 21, 2003

inconclusive and remanded for a application of the “nature of the work” test. In contrast to *Cy Investment*, we find for the reasons the ALJ cited that the “right to control” test conclusively establishes that, based on this record, claimant was not a subject worker. Moreover, we agree with the ALJ’s reasoning that, alternatively, the result would be the same under the “nature of the work” test. Finally, claimant cites *State ex rel Roberts v. Acropolis McLoughlin, Inc.*, 149 Or App 220, *on recon* 150 Or App 180 (1997), in arguing that SAIF’s defense at hearing (that claimant worked for an agency run by Mr. Bryant) was a “sham.” We need not address the applicability of *Acropolis* because SAIF no longer asserts that defense on review.