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In the Matter of the Compensation of  
**NANCY L. KUEHL, Claimant**  
WCB Case No. 04-08657  
ORDER ON REVIEW  
Welch Bruun & Green, Claimant Attorneys  
Dept Of Justice - GCD-BAS, Defense Attorneys

Reviewing Panel: Members Kasubhai and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Bethlahmy's order that found that claimant was not entitled to supplemental temporary disability benefits under ORS 656.210. On review, the issue is temporary disability.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant was compensably injured on December 22, 2003. At the time of her injury, she had a second job as a home healthcare worker. In that regard, claimant provided home care services to clients of the Seniors and People with Disabilities program of the Department of Human Services (DHS),<sup>1</sup> a state agency.<sup>2</sup> Claimant was reimbursed for her home care services by DHS. (Ex. 5).

On July 1, 2004, claimant's attorney wrote a letter to the insurer, ACE ESIS, requesting supplemental temporary disability benefits based on claimant's earnings as an in-home caregiver during the 52 week period prior to her injury. (Exs. 2; 4; 5).

On November 18, 2004, ComPro, Inc. (ComPro)<sup>3</sup> advised claimant that she was not eligible to receive supplemental disability benefits because her second job as a home healthcare worker was not employment as a subject worker of a subject employer. (Ex. 6). Claimant requested a hearing.

Finding that claimant was a nonsubject worker under the "home health worker" exception of ORS 656.027(1), the ALJ approved ComPro's determination

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<sup>1</sup> Formerly called Senior and Disabled Services.

<sup>2</sup> The program is a Medicaid in-home program for senior and disabled persons. It is not a state-delivered program. (See Tr. 14; 18).

<sup>3</sup> ACE ESIS elected not to process supplemental disability benefits. Therefore, pursuant to ORS 656.210(5)(b), this claim was referred to ComPro who, by contract, administers the supplemental disability program for the Workers' Compensation Division (WCD).

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that claimant was not eligible to receive supplemental disability relating to her home healthcare work.

On review, claimant argues that the “home health worker” exception does not apply because she performed her home healthcare work as an employee of DHS. Thus, because her employment contract was “public” in nature, not private, she contends that ORS 656.027(1) is inapplicable and she qualifies as a subject worker. For the following reasons, we disagree with claimant’s contentions.

Under ORS 656.210(2)(a)(B), for workers employed in more than one job at the time of injury, the weekly wage of the worker is ascertained by “adding all earnings the worker was receiving from all subject employment.” Under ORS 656.210(5)(b), if the “insurer or self-insured employer elects not to pay the supplemental temporary disability benefits for a worker employed in more than one job at the time of injury,” the Director shall either administer and pay the supplemental benefits directly or shall assign responsibility to administer and process the payment to a paying agent.

In response to ORS 656.210(2)(a)(B) and (5)(b), OAR 436-060-0035(1)(c) defines a “secondary job” as “any other job(s) held by the worker in Oregon subject employment at the time of injury.” Additionally, OAR 436-060-0035(5)(a) states that a worker is eligible for supplemental disability if “the worker was employed at the secondary job by an Oregon subject employer at the time of the injury.”

Together, the statute and rules establish a mechanism for qualified workers who are compensably injured in a primary employment to obtain supplemental wage loss replacement for secondary jobs with *Oregon subject employers*.

Thus, for claimant to receive supplemental temporary disability under ORS 656.210(5), she must prove that her secondary job was with a “subject employer.” ORS 656.023 defines a “subject employer” as an “employer employing one or more subject workers in the state \* \* \*.” Therefore, the statute’s coverage of an employer is derivative of its coverage of a worker: A “subject employer” is one who employs one or more “subject workers.” Under ORS 656.005(28), a “subject worker” means a worker who is subject to the Workers’ Compensation laws by ORS 656.027. ORS 656.027(1) excludes employers from the obligations of workers’ compensation coverage for domestic servants, who are defined as “any worker engaged in household domestic service

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by *private employment contract*, including, but not limited to, home health workers.” (Emphasis added).

Finally, ORS 411.590 provides:

“A person who is hired as a housekeeper or homemaker, or home care worker as defined in ORS 410.600,<sup>4</sup> and is not otherwise employed by the Department of Human Services, an area agency or other public agency, shall not *for any purposes* be deemed to be an employee of the State of Oregon or an area agency whether or not the department or agency selects the person for employment or exercises any direction or control over the person’s employment. However, nothing in this section precludes the state or an area agency from being considered the employer of the person for purposes of ORS chapter 657.” (Emphasis added).

Thus, under ORS 411.590, home care workers of persons receiving public assistance from DHS (through the “Client-Employed Provider Program”) are not employees of the agency, even if the worker was paid by DHS rather than the person for whom services were performed.<sup>5</sup> Therefore, notwithstanding the tests that may otherwise be applied in determining whether an employer-employee relationship exists, by statute, DHS was not claimant’s employer.

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<sup>4</sup> Under ORS 410.600(7), a “Home care worker” means a person:

“(a) Who is hired directly by an elderly person or disabled person who receives moneys from the Department of Human Services for that purpose;

“(b) Whose compensation is paid in whole or in part by the department, an area agency or other public agency that receives moneys from the department for that purpose; and

“(c) Who provides either hourly or live-in home care services.”

<sup>5</sup> The parties do not argue that claimant does not qualify as a “home care worker” under ORS 410.600, nor do they dispute that she is a member of the “Client-Employed Provider Program,” maintained by DHS and subject to the provisions of OAR 411-031-0020, -0030, -0040 and -0050.

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We conclude that claimant was not employed by DHS while performing her work as a home care provider through DHS's Client-Employed Provider Program. Rather, she was an employee of the person needing the care, and thus had a "private" contract to provide home care services, regardless of reimbursement from DHS or whether she was subject to its control.

As such, pursuant to ORS 656.027(1), claimant was not a "subject worker" with respect to her home healthcare work. Because she was not a subject worker, her employer (the client of the program) was not a "subject employer" under ORS 656.023, and, consequently, claimant is not entitled to receive supplemental disability benefits for her secondary job under ORS 656.210(5). *See McFarland v. SAIF*, 89 Or App 184 (1988) (applying former ORS 411.590, the court determined that a domestic servant of persons receiving public assistance from the Senior Services Division was not a subject worker under ORS 656.027, nor was the division a subject employer). Accordingly, we affirm.

#### ORDER

The ALJ's order dated April 1, 2005 is affirmed.

Entered at Salem, Oregon on August 18, 2005