

In the Matter of the Compensation of
ROBERT W. SPRAUER, Claimant

WCB Case No. 04-02329

ORDER ON REVIEW

Daniel M Spencer, Claimant Attorneys

Alice M Bartelt, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

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

We adopt and affirm the ALJ's order with the following supplementation.¹

On review, claimant contends that: (1) SAIF did not notify him of the need to elect personal workers' compensation coverage for himself before his February 2004 injury; and (2) SAIF received full payment of all premiums, based on his wages as an employee, and therefore, should be estopped from denying coverage. We disagree based on the following reasoning.

In *James E. Baucum*, 55 Van Natta 3251 (2003), there was no evidence that the employer's insurer was provided with notice that the employer's corporate officers, including the claimant, elected workers' compensation coverage. Relying on ORS 656.039(1)², we found that because there was no written election of coverage pertaining to the claimant, he was not a subject worker.

¹ Inasmuch as claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. He may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM OR 97309-0405

² This statute provides in relevant part:

"656.039. Employer may elect to provide coverage for workers not subject to law; procedure; cancellation.

Here, as in *Baucum*, claimant was a corporate officer of the insured corporation at the time of his injury. However, in December 2002, when claimant initially applied for workers' compensation coverage with SAIF, he applied as a partnership (claimant and his wife), with one employee. That employee was covered by the insurance contract, but neither claimant nor his wife elected to have personal coverage. Claimant did not notify SAIF when he and his wife subsequently incorporated their business in January 2003. Claimant became an employee of the corporation in August 2003, and thereafter reported his payroll wages to SAIF. However, claimant did not provide SAIF with a written notice of election of coverage at any time before his February 2004 injury claim.

Under these circumstances, we find that *Baucum* is controlling. Because there was no written election of coverage pertaining to claimant before his February 2004 injury, we agree with the ALJ that claimant was not a subject worker when he sustained that injury.

Claimant also contends that because SAIF accepted premiums based on his wages as an employee of the corporation, SAIF is "estopped" from denying coverage. We disagree.

In *Day v. Advanced M&D Sales, Inc.*, 184 Or App 260, 264-65 (2002), the court explained that for equitable estoppel to apply, there must be: (1) a false representation; (2) made with knowledge of the facts; (3) with the intent that the other party rely; (4) when the other party was ignorant of the truth; and (5) the other party must have been induced to rely upon the representation to his or her detriment. *See also James E. Baucum*, 55 Van Natta at 3255.

Here, the record does not establish that SAIF represented to claimant that payment of premiums, based on *his* wages, would constitute a formal written election of coverage of corporate officers as required by ORS 656.039(1). The false representation that claimant allegedly relied on took place sometime in

(1) An employer of one or more persons defined as nonsubject workers or not defined as subject workers may elect to make them subject workers. If the employer is or becomes a carrier-insured employer, the election shall be made by filing written notice thereof with the insurer with a copy to the Director of the Department of Consumer and Business Services. The effective date of coverage is governed by ORS 656.419 (3). If the employer is or becomes a self-insured employer, the election shall be made by filing written notice thereof with the director, the effective date of coverage to be the date specified in the notice."

March 2003, when he called SAIF to report that a new employee was being hired temporarily. (Tr. 20-21). SAIF allegedly told claimant that it was unnecessary to report a new employee because that information could be obtained from the wage and hourly reports that were sent to them. (Tr. 21). At the time, SAIF was unaware that claimant and his wife were no longer a partnership, but rather, had incorporated. Additionally, claimant did not become an employee of the corporation until August 2003. Finally, this conversation made no representations regarding claimant's status as an employee of the corporation.

Based on this record, we are not persuaded that SAIF falsely represented that claimant would be covered. In addition, there is no evidence that SAIF knew that claimant was to begin working as an employee in March 2003. Thus, based on this record, it cannot be said that SAIF had knowledge of the facts or that it induced claimant to rely on a false representation.

Under such circumstances, we find that claimant could not reasonably interpret the March 2003 conversation to mean that, as a corporate officer, he was not required to provide a written request for election of workers' compensation insurance coverage. Therefore, we conclude that SAIF is not estopped from asserting a lack of coverage.

ORDER

The ALJ's order dated August 20, 2004 is affirmed.

Entered at Salem, Oregon on January 21, 2005