

In the Matter of the Compensation of
ROBERT NELSON, Claimant

WCB Case No. 04-02127

ORDER ON REVIEW

Vinson & Vinson, Claimant Attorneys
LJ Stanley & Assoc Inc, Employer's Attorneys
James B Northrop, SAIF Legal Salem, Insurance Carrier

Reviewing Panel: Members Kasubhai and Lowell.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Pardington's order that set aside its denial of claimant's injury claim for a right rotator shoulder cuff tear. On review, the issue is subjectivity. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant was a sales manager for the employer from September 2000 until July 2002. The employer is an Oregon corporation, with its headquarters in Eugene, Oregon. Claimant lived in Michigan at all times; he was interviewed and hired over the telephone and came to Oregon on business twice. The employer did not withhold any Oregon state taxes from claimant's paychecks, although the paychecks were issued from Oregon. Claimant worked from his home office in Michigan. Neither the employer nor claimant intended that he would work in Oregon.

On June 4, 2002, while on a business trip in Ohio, claimant injured his right shoulder. (Ex. 9). The employer did not carry workers' compensation insurance in Ohio or Michigan. (Tr. 20).

Claimant filed a workers' compensation claim in both Michigan and Oregon. The employer moved to dismiss the Michigan claim, for lack of subject matter jurisdiction, because the "contract for hire was effectuated in Oregon." (Ex. 24-6). In support of its motion, the employer relied on Michigan's workers' compensation statutes which provide that Michigan has jurisdiction over claims involving injuries suffered outside the state if the injured employee is a resident at the time of the injury and the "contract of hire" was made in Michigan. (*Id.* at 7). In

November 2003, claimant's "Application for Hearing" in Michigan was dismissed, because the parties stipulated that Michigan workers' compensation system had no jurisdiction over the claim. (*Id.* at 3).

Meanwhile, SAIF denied the Oregon claim on the basis that claimant was not an Oregon subject worker. (Ex 21). Claimant requested a hearing.

After applying the "permanent employment relation" test under *Northwest Greentree, Inc. v. Cervantes-Ochoa*, 113 Or App 186 (1992), the ALJ concluded that claimant was a "subject worker" for purposes of receiving benefits under Oregon law. ORS 656.005(28); ORS 656.027. We disagree with that reasoning.

"Subject worker" means a worker who is subject to this chapter as provided by ORS 656.027." ORS 656.005(28). ORS 656.027 provides that "[a]ll workers are subject to this chapter * * *" with certain exceptions not relevant here. See *Northwest Greentree, Inc.*, 113 Or App at 188. In addition, Oregon workers' compensation coverage applies to a worker who works outside of Oregon temporarily if Oregon is the place of his or her *permanent* employment. See *Quinton v. Lt&L Logging, Inc.*, 146 Or App 344, 347 (1997).

Whether Oregon workers injured out of state are entitled to benefits under Oregon's workers' compensation system is governed by ORS 656.126. Under that statute, coverage for a worker temporarily out of state is available "[i]f a worker employed in this state and subject to this chapter temporarily leaves the state incidental to that employment and receives an accidental injury arising out of and in the course of employment * * *." ORS 656.126(1). The necessary conjunctive elements the worker must establish to receive benefits are: (1) the worker is employed in this state and subject to chapter 656; (2) the worker *temporarily* leaves Oregon incidental to that employment; and (3) the worker receives an accidental injury arising out of and in the course of employment.

There is no dispute that claimant sustained an out-of-state accidental injury arising out of and in the course of employment. Nevertheless, in order for claimant to receive benefits, all three prongs must be met. To meet the second prong, claimant must have left Oregon temporarily subject to his employment. We find that claimant failed to prove this prong.

The key inquiry under ORS 656.126(1) is "the extent to which the claimant's work outside the state is *temporary*." See *Hobson v. Ore Dressing, Inc.*, 87 Or App 397, 400, *rev den* 304 Or 437 (1987) (emphasis added). Claimant must

establish with persuasive evidence that his presence out of state was incidental to his employment. *See Berkey v. Dept. of Ins. & Finance*, 129 Or App 494, 498 (1994). In determining whether claimant's work outside the state is temporary, the applicable standard is the permanent employment relation test. *SAIF v. Moe*, 142 Or App 62, 67 (1996).

In this case, however, claimant's departure from Oregon was not *temporary* because a necessary predicate to leaving Oregon temporarily is being permanently employed in Oregon in the first place. In other words, claimant cannot leave Oregon temporarily if he was not first permanently employed in Oregon.

At first glance, it appears that Oregon case law supports a general application of the "permanent employment relation test" in all cases involving a worker employed by an Oregon employer who is injured outside Oregon and is injured incidental to that employment. However, it is apparent from a close review of relevant case law that in those earlier cases, there was no dispute that the claimants had in fact worked in Oregon before leaving Oregon; instead, the question was only whether the claimants' absence from Oregon was temporary. *See Quinton*, 146 Or App at 347-348 (permanent employment relation test applied where prior to injury in Colorado, the claimant was working in Oregon); *Moe*, 142 Or App at 66 (where the claimant was killed on the job in Montana, but was hired and worked in Oregon prior to his death, permanent employment relation test applied to determine if out-of-state work was temporary); *Northwest Greentree*, 113 Or App at 191 (where the claimant was hired in Oregon and worked in both Oregon and Washington, permanent employment relation test applied to determine if work out-of-state was temporary); *Kolar v. B & C Contractors*, 36 Or App 65, 69 (1978) (the claimant was an Oregon subject worker because he was an Oregon resident working out-of-state temporarily).

In this case, claimant and the employer both intended that claimant work out of Michigan.¹ It logically follows then that he could not temporarily leave Oregon. In other words, the question of whether claimant *temporarily* left Oregon (*i.e.*, the "permanent employment relations" test) is based on a predicate fact that is absent from this record.

Thus, claimant did not "temporarily" leave the state, but rather was employed by an Oregon corporation to work permanently in another state. Under

¹ Claimant visited Oregon on two occasions for business related meetings; however, it was never the parties' intention that claimant work in Oregon. (Tr. 28-30).

such circumstances, ORS 656.126(1) does not apply. To apply the permanent employment test without considering the plain language of ORS 656.126(1)², would lead to absurd results. For example, a person living and working in India for an Oregon-based corporation, who was hired by the corporation but never lived or worked in Oregon, would be entitled to Oregon workers' compensation benefits if injured on the job in India. Oregon's workers' compensation statutes cannot be reasonably read to impute to Oregon employers the responsibility to provide workers' compensation benefits to workers who are not permanent Oregon employees. Consequently, we conclude that claimant is not an Oregon subject worker.

ORDER

The ALJ's order dated July 9, 2004 is reversed. SAIF's denial is reinstated and upheld. The ALJ's \$4,000 attorney fee award is reversed.

Entered at Salem, Oregon on September 16, 2005

² A review of the legislative history, as part of House Bill 779, deleting the word "to work" in this state, did not provide any contrary interpretation of the legislature intent. Or Laws 1957, ch 474, § 1.