

---

In the Matter of the Compensation of  
**JESUS TERRAZAS, Claimant**  
WCB Case Nos. 04-00141, 03-04584  
ORDER ON REVIEW  
James Dodge, Claimant Attorneys  
John E Snarskis & Assocs, Defense Attorneys

Reviewing Panel: Members Kasubhai, Langer and Herman. Member Kasubhai dissents.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Fisher's order that upheld Hartford Insurance Company's (Hartford's) denial of claimant's injury claim for an L1 vertebra fracture. Hartford cross-requests review of that portion of the ALJ's order that found that claimant was a subject worker. On review, the issues are coverage and subjectivity. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the exception of the last line of the second paragraph on page three.

CONCLUSIONS OF LAW AND OPINION

Subjectivity

Claimant injured his low back on January 24, 2003, as a result of which he filed a claim alleging that he was an employee of Cascade Pacific Interiors (Cascade), owned by Eichelberger. Asserting that claimant was not an employee of Cascade, Hartford denied compensability of the claim on June 25, 2003. Claimant requested a hearing.

Hartford subsequently denied that it was responsible for the claim and that it provided coverage for Cascade on the date of injury. (Exs. 9, 10). Claimant requested a hearing from those denials as well.

In addition to finding that claimant sustained an injury in the course and scope of his employment, the ALJ determined that claimant was a subject worker employed by Cascade. In making this determination, the ALJ reasoned that Eichelberger had the right to control the manner and means of claimant's work

and to fire claimant at any time. The ALJ concluded in support of this reasoning that claimant and two coworkers (Alvarez and Ramero) completed employment applications at Eichelberger's request, which the ALJ found was consistent with an employment relationship.

On review, Hartford argues that Eichelberger did not have the right to control claimant's work and to fire claimant. Specifically, Hartford observes that only Alvarez, not claimant, testified that an "application" was filled out and even then, it was only in relation to the second job that he and claimant performed for Eichelberger, not the job during which claimant sustained his injury. Moreover, Hartford cites other testimony from Eichelberger, claimant and Alvarez that it argues establishes there was no continuous employment relationship between Eichelberger and claimant, but rather a series of individual, separate projects indicating that claimant was an independent contractor. For the following reasons, we find Hartford's arguments persuasive.

When deciding whether a claimant comes under workers' compensation law, the first inquiry is whether the claimant is a "worker" under ORS 656.005(30) and the judicially created "right to control" test. *See S-W Floor Cover Shop v. Natl. Council on Comp. Ins.*, 318 Or 614, 630-631 (1994). If the relationship between the parties cannot be established by the "right to control" test, it is permissible to apply the "nature of the work" test. *Id.* at 622 n 6.

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. *See Castle Homes, Inc. v. Whaite*, 95 Or App 269, 272 (1989). None of these factors are dispositive; rather, they are viewed in their totality. *See Cy Investment, Inc. v. Natl. Council on Comp. Ins.*, 128 Or App 579, 583 (1994).

We agree with the ALJ's reasoning that the method of payment (primarily based on square footage at a rate agreed on before the start of work) was indicative of a non-employment relationship between claimant and Eichelberger and that the furnishing of equipment (Eichelberger provided scaffolding, but claimant provided his own tools) was a neutral factor. As the ALJ stated (and the parties agree), the primary dispute under the "right to control" test centers on the direct evidence of the right to, or the exercise of, control and on the right to fire.

Notwithstanding the ALJ's reasoning, we agree with Hartford that there is insufficient evidence that claimant completed an employment application with regard to the work he was performing when injured. As Hartford notes, only Alvarez testified that he and claimant completed an "application." (Tr. 62).<sup>1</sup> Moreover, that alleged application was only completed with regard to the second job of the several that Alvarez and claimant had performed for Eichelberger. (Tr. 63). Any alleged employment applications were not made a part of the record, so it is unclear what terms and conditions of employment may have been contained within them. Under these circumstances, we are not persuaded that Eichelberger had the right to control claimant's work or to fire claimant based on the existence of the alleged employment application.

To the contrary, Eichelberger testified that he did not supervise claimant and his coworkers and did not control when they arrived to work, their actions while on the job, when they left work or whether they could work for someone else. (Tr. 12). Moreover, Eichelberger provided un rebutted testimony that he could not fire claimant without incurring liability from the Construction Contractor's Board. (Trs. 75-79). Eichelberger also explained that claimant could hire or fire as many of his own crew members as he wanted, which was consistent with claimant's testimony that the size of his crew varied from project to project. (Trs. 55, 78). In addition, Eichelberger could not control or direct the performance of claimant's work and could not order claimant and his crew from one worksite to another. (Trs. 74, 77). Claimant testified that he and his crew jointly determined whether to bid or work on a project involving Cascade. (Tr. 43).

Granted, claimant and Alvarez testified that Eichelberger could fire them and control the manner in which they performed their job. (Trs. 44, 59, 60). Nevertheless, having reviewed this record *de novo*, we conclude that the "right of control" and the "right to fire" factors weigh against an employment relationship between claimant and Eichelberger. Accordingly, we conclude that, under the "right to control" test, there was no employer/employee relationship between Eichelberger and claimant. Instead, we conclude that claimant's status at the time of injury was that of an independent contractor. Thus, we find that claimant was not a subject worker. Therefore, we reverse ALJ's subjectivity determination.

---

<sup>1</sup> We note that claimant was recalled as a witness after Alvarez's testimony. Yet, he did not testify regarding this subject.

---

Coverage

Even assuming that claimant was a subject worker, we agree with the ALJ's reasoning that Hartford did not provide coverage when claimant's January 24, 2003 injury occurred. That is, we agree with the ALJ's conclusion that Cascade cancelled Hartford's coverage on August 22, 2001, when it obtained coverage by SAIF on that date, and that Hartford did not resume coverage after SAIF's coverage was terminated on January 16, 2002. Thus, Hartford was not responsible for claimant's January 24, 2003 injury.

In addition to the ALJ's reasoning, we find that Hartford cancelled its coverage of Cascade in September 1999 (effective November 3, 1999) when it mailed a notice of cancellation of workers' compensation coverage to the Workers' Compensation Division (WCD), even though the WCD did not acknowledge receipt until April 29, 2003. Hartford established through testimony of Mr. Nordone, Hartford's claim manager, that it was the normal business practice of Hartford to mail a copy of the notice of cancellation to the employer with the original to the WCD. Nordone further testified that he had no reason to believe that the normal business practices were not followed. (Trs. 90, 93).

Considering this evidence, the copy of the cancellation letter, with its date and the employer's correct address (Ex. 2), we find the record sufficient to raise the presumption that Hartford followed its ordinary course of business and mailed the notice of impending cancellation of coverage to the WCD and to the employer in September 1999. *See Burl R. Hayes*, 57 Van Natta 838, 846 (2005) (finding the employer did not rebut presumption that carrier mailed cancellation of coverage notice to it); *Bill D. Coleman*, 48 Van Natta 2154 (1996) (where evidence was insufficient to rebut the presumption that the carrier had followed its ordinary course of business, the claimant failed to carry his burden of rebutting that presumption); *compare Lonnie L. Pope*, 53 Van Natta 297 (2002) (where there was no evidence that the insurer ever mailed notice to the employer, coverage not terminated under ORS 656.427).

Moreover, we find insufficient evidence to rebut that presumption. We recognize that Mr. Gregory, manager of employer compliance at the WCD, testified that Hartford's cancellation notice was not received until April 23, 2003. (Ex. 11-6). However, Gregory also testified that if the document was not entered into the computer, there would be no knowledge of its existence. (Ex. 11-10). Moreover, Nordone testified that he was aware of an instance in which the WCD

had misplaced a cancellation notice. (Tr. 97). In light of the above, we find the evidence insufficient to rebut the presumption that Hartford followed its ordinary course of business regarding mailing.

Because Hartford cancelled its coverage before claimant's January 24, 2003 injury, it was not responsible for claimant's injury, even assuming that claimant was a subject worker for Cascade/Eichelberger. Thus, we affirm this portion of the ALJ's order.

### ORDER

The ALJ's order dated May 3, 2005 is reversed in part and affirmed in part. That portion of the ALJ's order that set aside Hartford's denial to the extent it denied compensability is reversed. Hartford's denial is reinstated and upheld in its entirety. The ALJ's \$4,500 attorney fee award is also reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on January 20, 2006

Member Kasubhai dissenting.

The majority reverses that portion of the ALJ's order that determined that claimant was a subject worker of Eichelberger on the date of injury. Because I would find that claimant was a subject worker and affirm the ALJ's order in its entirety, I respectfully dissent.

The majority correctly recites the applicable law regarding the subjectivity issue. When deciding whether a claimant comes under workers' compensation law, the first inquiry is whether the claimant is a "worker" under ORS 656.005(30) and the judicially created "right to control" test. *See S-W Floor Cover Shop v. Natl. Council on Comp. Ins.*, 318 Or 614, 630-631 (1994).

As recited by the majority, 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. *See Castle Homes, Inc. v. Whaite*, 95 Or App 269, 272 (1989). I agree with the majority that here the primary dispute under the "right to control" test centers on the direct evidence of the right to, or the exercise of, control and on the right to fire. For the following reasons, I would conclude, unlike the majority, that claimant was a subject worker under the "right to control" test.

My review of Alvarez' testimony leads me to conclude that Eichelberger was the employer. Alvarez believed that Eichelberger could fire him and his coworkers at any time. (Trs. 60, 62). There were instances in which Eichelberger would direct Alvarez's crew to leave one job site to go to another to address an urgent need. (Tr. 61). Moreover, Eichelberger provided scaffolding and other materials to Alvarez and his crew. (Tr. 62, 67). Also, according to Alvarez, Eichelberger would direct certain aspects of their work, including where to leave openings in sheetrock. (Tr. 59).

Moreover, I am inclined to accept the testimony of Alvarez and claimant over that of Eichelberger for the same reasons that the ALJ did. Alvarez testified that he and claimant met with Eichelberger and completed employment forms. (Tr. 62). While Eichelberger testified that no one filled out employment applications, he also testified that he always kept such forms in his office. (Tr. 79).

Like the ALJ, I find it unusual that Eichelberger would have employment applications in his office if he were, as he alleges, an exempt employer. Moreover, it is highly unlikely that Alvarez would know that Eichelberger would have employment applications in the absence of a request that he complete a form. Thus, I would conclude that claimant and Alvarez did complete employment applications at Eichelberger's request and that such forms are highly probative of an employment relationship.

I also find it noteworthy that the ALJ found Alvarez and claimant to be credible witnesses based on their demeanor in testifying with regard to the compensability issue. I find those demeanor-based credibility findings relevant to a determination of the veracity of the testimony of Alvarez and claimant on the issues of whether Eichelberger had the right to fire claimant and to exercise control over claimant. I would give deference to those findings. *See Erck v. Brown Oldsmobile*, 311 Or 510, 528 (1991).

In conclusion, I agree with the ALJ that Eichelberger had the right to control the manner and means of claimant's work and that he had the right to terminate the employment relationship at any time. Therefore, I find the "right to control" test satisfied on this record. Thus, I would find claimant to have been a subject worker.<sup>2</sup>

---

<sup>2</sup> Given this conclusion, as well as my agreement with the majority that Hartford cancelled its coverage of the employer before claimant's injury, Eichelberger/Cascade Pacific Interiors, Inc. would be a noncomplying employer.