

In the Matter of the Compensation of
MATTHEW S. APPLGATE, Claimant

WCB Case No. 05-01796, 05-00012NC

ORDER ON REVIEW

Peter O Hansen, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys
Dept Of Justice - GCD-BAS, Defense Attorneys

Reviewing Panel: Members Kasubhai and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Hoguet's order that: (1) reversed a Workers' Compensation Division's (WCD) order that found Barbara Petersen (BP) to be a noncomplying employer (NCE); and (2) set aside Sedgwick Claims Management's (Sedgwick's) acceptance of claimant's injury claim. On review, the issue is subjectivity. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation. We do not adopt the ALJ's "Ultimate Findings of Fact."

BP and her (then) husband owned and operated a boarding house/rental building for a period of time before October 2004. (Ex. 6-2; Tr. 51, 52). Thereafter, BP sold the property. (Tr. 51). The purchaser had no interest in the buildings on the property, and told BP she could take any materials out of the buildings, including wood and fixtures. (Tr. 52). The purchaser gave BP until October 28, 2004 to salvage those building materials.¹ (*Id.*)

BP gathered a number of friends and other people to assist her with the salvage project. (Tr. 54, 55, 56). She had recently suffered financial losses, and wanted to get "anything" she could from the property. (Tr. 54). Kay Wright (KW) and her daughter, Joanna Wright (JW), removed "tongue and groove" boards from the interior of one or more of the structures, which they were allowed to keep. (Tr. 10, 30).

¹ The original deadline was October 27, 2004, but the purchaser extended the deadline by one day.

BP allowed Thomas Cox (Cox) to cut down trees on the property, keeping one half of the firewood for himself and giving one half to BP. (Tr. 87, 88). BP and Cox each received approximately four cords of firewood under this arrangement, valued at roughly \$100 per cord, for a total value of approximately \$400 to each. (Tr. 88, 89). During the course of the project, BP gave Cox \$100 for fuel and \$20 for food. (Tr. 63). BP also spent \$200 to \$250 for gasoline throughout the course of the project (Tr. 69), and another unspecified amount for coffee, doughnuts, and snacks. (Tr. 69, 70).

In October 2004, BP also held a garage sale on the property around the time of the salvage project. (Tr. 41, 42). She and the helpers attempted to sell the salvaged materials. She also allowed people to bring outside items to sell. (Tr. 71, 72). BP handled the money at the garage sale, writing checks to the helpers for their sold items. (Tr. 41, 42, 71, 72).

On October 27, 2004, BP engaged the services of Jacob Coe (Coe) to salvage plywood from one of the building's roofs. She paid Coe \$10 per hour for what amounted to 10 hours of work, for a total of \$100. (Tr. 56). Coe provided his own tools. (Tr. 60).

Claimant, JW's then-boyfriend, accompanied JW and KW to the property on October 27, 2004. BP was aware that claimant assisted "Big Tom" (Cox) with the firewood and any other needs. Claimant testified that BP was happy to see him, and that she instructed him to "follow everybody's instructions." (Ex. 6-3; Tr. 108). Claimant and BP did not discuss payment, but claimant expected that he would be paid and kept track of his hours. (Ex. 6-3; Tr. 110, 111).

On the evening of October 28, 2004, the final day of the salvage project, claimant assisted Cox in pulling down an 8-foot beam from one of the buildings. (Tr. 57). BP and Cox had discussed taking down the beam because it was expensive and, consistent with the purpose of the salvage project, possibly valuable to BP. (Tr. 57). Claimant helped Cox with the process of taking down the beam. (Tr. 57, 109). Chains were connected from the beam to the back of Cox's truck. (Tr. 109). The chains came apart, and, as claimant was reconnecting the chain to the beam, he brushed against a hidden electrical source and received an electrical shock. (*Id.*)

Claimant sought medical attention on October 29, 2004 and November 2, 2004. (Exs. 1, 3). He completed an “801 Form” on November 15, 2004, which was referred to WCD, as BP did not maintain workers’ compensation coverage at the time of the incident. (Exs. 4, 5).²

WCD conducted an investigation and determined that BP was an NCE. (Ex. 6-5). On January 14, 2005, WCD issued a “Proposed and Final Order Declaring Noncompliance and Assessing Civil Penalty.” (Ex. 7). On that same date, WCD referred the claim to Sedgwick for processing. (Ex. 8). On March 15, 2005, Sedgwick accepted claimant’s claim for injuries resulting from the electrocution. (Ex. 11).

BP requested a hearing, contesting WCD’s noncompliance order, as well as Sedgwick’s claim acceptance.

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside both WCD’s order and Sedgwick’s Notice of Acceptance. In doing so, the ALJ reasoned that BP did not employ any subject workers on the salvage project in October 2004. The ALJ also found that Coe was not under BP’s direction and control, and that Cox was just a retired friend helping BP with the firewood. Alternatively, the ALJ concluded that, even if BP employed workers at that time, they were “casual workers” under ORS 656.027(3). The ALJ was not persuaded that BP paid, or promised to pay, JW or claimant for their assistance on the salvage project.

On review, claimant contends that BP was a subject employer and that he was a subject worker. Based on the following reasoning, we reverse.³
“NCE” Order

WCD determined that BP was an NCE. (Ex. 7-2). As the party who challenged WCD’s order, BP bears the burden of proving the incorrectness of the order. ORS 656.740(1) (“an order by the director under this subsection is prima

² It is undisputed that BP had no workers’ compensation coverage during the period(s) relevant to this dispute.

³ Claimant objects to the ALJ’s “assistance” of BP at the hearing. Yet, claimant did not raise this issue at hearing. Therefore, we do not consider claimant’s objection. *See Deborah Bilbrew*, 58 Van Natta 1525, 1526 (2006) (in absence of timely objection at hearing, Board will not consider evidentiary issue on review).

facie correct and the burden is upon the employer to prove the order is incorrect.”); *Douglas Fredinburg*, 45 Van Natta 1060, 1061 (1993) (party challenging WCD’s order bears burden of proof). Essentially, BP’s burden is to prove that she was not a “subject employer” as defined by ORS 656.023. For the following reasons, we find that BP has not met this burden, and agree with WCD that she is an NCE.

ORS 656.023 defines a “subject employer” as an “employer employing one or more subject workers in the state * * *.” ORS 656.005(30) defines worker as “any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer.” Subject workers are defined as all workers, subject to a number of specified exceptions set forth at ORS 656.027. Thus, if BP employed at least one subject worker in the state, she is a “subject employer.”

We find that BP employed at least one “subject worker” during the salvage project of October 2004. We base this finding on the following reasoning.

When deciding whether an individual is a worker, we must determine whether the employer had a right to control the individual under 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).

The record indicates that Coe supplied his own tools. (Tr. 60). Furthermore, the record is silent concerning whether BP could discharge Coe. Nevertheless, BP exercised control over Coe’s work by directing him on what specific project to complete, giving him a deadline, and exercising general control over the entire salvage project. (Ex. 6-5; Tr. 35, 36, 56, 59, 60, 114). Also, BP testified that she paid Coe hourly, paying him \$10 an hour for 10 hours of work. (Tr. 56). In general, payment of an hourly wage suggests an employer-employee relationship. *Bowser v. State Industrial Acci. Com.*, 182 Or 42, 60 (1942); *Sheldon Mount*, 42 Van Natta 2756, 2757 (1990).

After considering the factors under the “right to control” test, we find that Coe was a worker, and, as explained below, none of the exceptions under ORS 656.027 make him a nonsubject worker.⁴ Thus, since BP employed one or more subject workers, she was a “subject employer.” Further, lacking workers’ compensation coverage, BP was an NCE. Therefore, we reverse that portion of the ALJ’s order that concluded otherwise.

“Subject Worker”

Claimant has the burden of establishing the existence of an employment relationship between himself and BP. *See Hopkins v. Kobos Co.*, 186 Or App 273, 276-77 (2003), *citing Konell v. Konell*, 48 Or App 551, 557 (1980). As described above, claimant has to prove that he was a “worker” as defined by ORS 656.005(30). To do so, claimant must establish that BP had the right to control his work during the salvage project, under the test set forth in *Whaite*. He also must establish that he was remunerated, or expected to be remunerated, for his services. *See Mark Hopkins*, 53 Van Natta 967, 967 (2001), *aff’d Hopkins v. Kobos Co.*, 186 Or App 273 (2003) (the claimant was not a “worker” under ORS 656.005(30) because he was not remunerated for his services, nor did he expect such remuneration); *Michael P. Cortinas*, 42 Van Natta 2719, 2719 (1990), *aff’d without opinion Cortinas v. SAIF*, 109 Or App 329 (1991) (the claimant was not a worker under ORS 656.005(30) because he did not expect to be paid for his services).

The record establishes that BP had a direct right to control claimant’s work. BP exercised general control over the salvage project. (Tr. 114). She directed claimant to complete the specific assignment of helping Cox with the wood and following Cox’s orders and directions. (Ex. 6-3; Tr. 107, 108).⁵ Though BP did not supply any tools to claimant, there is no indication in the record that she could

⁴ There is no dispute that Coe was remunerated for his services, as BP admitted to paying him around \$100. (Tr. 60).

⁵ We acknowledge that there was conflicting testimony regarding whether BP instructed claimant to help Cox. BP testified that she did not want claimant there, while claimant testified that BP was happy to have him there, and told him to help Cox. (Tr. 53, 107, 108). The ALJ did not make a specific demeanor-based credibility finding. If the credibility of a witness’s testimony is evaluated based on an objective evaluation of the record rather than on demeanor, we are equally able to determine credibility. *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987); *William J. Cook*, 58 Van Natta 625, 625-26 (2006). Based on our review of the testimony, we find that a preponderance of evidence supports a finding that claimant was under the direction and control of BP.

not remove him from the project on her property at any time. Finally, although no payment was made, claimant reasonably expected to be paid for his work on the project. All of these factors, when viewed as a whole, support a finding that claimant was subject to BP's direction and control. *See Whaite*, 95 Or App at 272; *see also Newport Seafood v. Shine*, 71 Or App 119, 135 (1984) (determination of employment relationship for workers' compensation purposes focuses first on the claimant's perspective). Furthermore, claimant's expectation of payment is sufficient to fulfill the "remuneration" requirement of ORS 656.005(30). *Hopkins*, 53 Van Natta at 967; *Cortinas*, 42 Van Natta at 2719. Thus, we find that claimant was BP's "worker," as ORS 656.005(30) defines that term.⁶

In addition, at the time of his injury, claimant was helping Cox remove a large beam from one of the buildings. (Tr. 109). BP and Cox had discussed removing the beam. (Tr. 57). BP's understanding was that the beam was "expensive," and she wanted it removed. (*Id.*) BP had instructed claimant to "follow everybody's instructions." (Ex. 6-3). Claimant's expectation was that he would be paid for this work. (Tr. 110, 111). We find that BP's exercise of control over the salvage project and the beam removal aspect of the project, coupled with claimant's expectation of payment, is further evidence that claimant was a "worker" under ORS 656.005(30).

Because we have concluded that claimant is a worker, we must next determine whether he is a "subject worker" under ORS 656.027. Under ORS 656.027, all workers are subject workers, with the exception of certain specified categories. The only potentially relevant statutory exception here is found at ORS 656.027(3), which excepts from subject worker status:

"(3)(a) A worker whose employment is casual and either:

"(A) The employment is not in the course of the trade, business or profession of the employer; or

⁶ Alternatively, even assuming claimant was not under BP's direction and control, he was under the direction and control of Cox, to whom BP delegated some supervisory authority. (Ex. 6-3, -4; Tr. 107, 108). The record supports a finding that BP directed claimant to work with Cox and follow Cox's directions. (Ex. 6-3, -4; Tr. 107, 108). This is sufficient to find an employment relationship between claimant and BP, regardless of whether Cox believed that he was simply volunteering his services. *See Montez v. Roloff Farms*, 165 Or App 532 (2001), *on remand Audencia Montez*, 54 Van Natta 155, 158 (2002) (knowledge of the employer's supervisory personnel was imputed to the employer, and, as such, the claimant was considered a "worker"). Claimant was in fact assisting Cox with the removal of the beam at the time of his injury. (Tr. 57, 109).

“(B) The employment is in the course of the trade, business or profession of a nonsubject employer.

“(b) For the purpose of this subsection, ‘casual’ refers only to employments where the work in any 30-day period, without regard to the total number of workers employed, involves a total labor cost of less than \$500.”

Here, BP’s usual business was either managing a rental property or running a bead shop, rather than managing a salvage/demolition project. ORS 656.027(3) is written in the conjunctive. Therefore, to be excepted from subject worker status, claimant’s employment must be casual *and* not in the course of the trade, business, or profession of BP. *See Seely v. Hanson*, 317 Or 476, 480 (1993) (statute or rule written using “and” is conjunctive, and mandates that all statutory requirements be met); *Lake v. Motor Vehicles Div.*, 133 Or App 550, 552 (1995) (use of “and” in ORS 813.160(1)(b)(C) made statute conjunctive, requiring state to both “test” and “certify” accuracy of equipment).

Thus, to be considered a subject worker under ORS 656.027(3)(a)(A), claimant’s employment must not be “casual.” The statute defines “casual” as “employments where the work in any 30-day period * * * involves a total labor cost of less than \$500.” ORS 656.027(3)(b). To resolve that question, we must determine whether BP’s total labor costs for the month of October 2004 met or exceeded \$500. For the following reasons, we find that BP’s total labor costs exceeded \$500.

BP admittedly paid Coe \$100 for his roofing work. She further acknowledged that she gave Cox \$100 to \$120 for fuel. Throughout the course of the October 2004 project, she also spent about \$200 to \$250 supplying money for fuel, food and beverages. BP also allowed Cox to keep half of the firewood, valued at approximately \$400. Without considering other potential wages and other costs that were arguably expended during the October 2004 project, the aforementioned labor costs for the project totaled approximately \$800 to \$870.

In reaching this conclusion, we note that the court has considered remuneration to include more than just wages paid. *See Clevidence v. Portland School District*, 125 Or App 608, 611-12 (1994) (free lunches given to student cafeteria worker could be considered remuneration); *Buckner v. Kennedy’s Riding Academy*, 18 Or App 516, 521-22 (1974) (free lunches and horse riding lessons considered sufficient remuneration for purposes of ORS 656.005(30)). In light of such holdings, BP’s reimbursements for gas and food, as well as the value of the

firewood provided to Cox, likewise constitute remuneration and, as such, are considered labor costs under ORS 656.027(3)(b). Thus, the “casual worker” exception does not apply. Accordingly, claimant was a subject worker for BP when he suffered his October 28, 2004 injuries. We, therefore, reverse the ALJ’s contrary determination.

Attorney Fees

Claimant is entitled to an assessed attorney fee under ORS 656.054 for prevailing over the ALJ’s order overturning Sedgwick’s claim acceptance. ORS 656.054(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services at hearing and on review is \$3,000, to be paid directly to claimant’s counsel by Sedgwick on behalf of BP.

In addition, claimant is entitled to an attorney fee under ORS 656.740(6)(c) for prevailing over the ALJ’s nonsubjectivity determination. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that \$3,000 is a reasonable attorney fee for services at hearing and on review relating to the issue of nonsubjectivity, payable directly to claimant’s counsel from the Worker’s Benefit Fund.

ORDER

The ALJ’s order dated February 7, 2006 is reversed. WCD’s NCE order is reinstated and affirmed. Sedgwick’s acceptance of claimant’s claim is reinstated. For services at hearing and on review, claimant’s attorney is awarded an assessed fee of \$3,000 under ORS 656.054(1), to be paid by Sedgwick on behalf of BP, and an assessed fee of \$3,000 under ORS 656.740(6)(c), payable directly from the Workers’ Benefit Fund.

Entered at Salem, Oregon on September 15, 2006