
In the Matter of the Compensation of
JASON A. COZINE, Claimant
WCB Case No. 05-07520, 05-06984, 05-04595
ORDER ON REVIEW
Hollander & Lebenbaum, Claimant Attorneys
Radler Bohy et al, Defense Attorneys
Sheridan Levine LLP, Defense Attorneys
Mark P Bronstein, Defense Attorneys
Sather Byerly & Holloway, Defense Attorneys

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

Dana Lee Construction, a noncomplying employer (NCE),¹ requests review of those portions of Administrative Law Judge (ALJ) Tenenbaum's order that: (1) found that claimant was a subject worker; and (2) set aside Sedgwick Claims Management Services' (Sedgwick's) denial of claimant's low back injury claim. On review, the issues are subjectivity and compensability.

We adopt and affirm the ALJ's order with the following changes. In the third full paragraph on page 3, we delete the last sentence. In the first paragraph of the ultimate findings of fact on page 5, we change the date to "May 6, 2005." In the second full paragraph on page 6, we delete the first sentence.

On review, the NCE argues that we should not defer to the ALJ's credibility findings. The NCE contends that claimant did not sustain an injury as he alleged.

Three witnesses testified at the hearing: claimant, Dana Lee (the alleged employer), and James Cox, a coworker of claimant. The ALJ found that, with respect to the material factual disputes and issues, claimant's testimony was credible and reliable, based on his attitude, appearance and demeanor. The ALJ also found that Cox was a credible and reliable witness based on his attitude, appearance, demeanor and responsiveness. On the other hand, the ALJ determined that, based on his attitude, appearance and demeanor, Lee was not a credible witness.

¹ The ALJ's order indicated that, without conceding compensability on the merits or that claimant was his subject employee, Dana Lee stipulated that he was a noncomplying employer at the time of the events in question.

We generally defer to the ALJ's demeanor-based credibility findings. *See International Paper Co. v. McElroy*, 101 Or App 61 (1990). After our *de novo* review, we find no reason to deviate from our longstanding practice of deferring to the ALJ's demeanor-based credibility findings. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991). We agree with the ALJ's conclusion that claimant sustained a work-related injury on or about May 6, 2005. With respect to any inconsistent statements, we do not find them sufficient to defeat claimant's claim where, as here, the record as a whole supports his testimony. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985).

At hearing, the NCE conceded that if claimant is found to have been injured in the course of employment and not while working as an independent contractor, claimant was an employee of the NCE. (Tr. 2). The ALJ determined that claimant was an employee, not an independent contractor. The ALJ reasoned that Lee admitted in testimony that claimant was not an independent contractor and was his employee. (Tr. 142). The ALJ explained that Lee acknowledged that he did not, but should have, asked claimant if he carried workers' compensation coverage before he started performing work. The ALJ concluded that under the terms of ORS 656.029(1), Lee (the NCE) was responsible for claimant's injury.

The NCE contends that claimant was not a "worker" under the "right to control" test. We disagree.

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. *S-W Floor Cover Shop v. Nat'l. Council on Comp. Ins.*, 318 Or 614, 630-631 (1994); *Matthew S. Applegate*, 58 Van Natta 2253 (2006). 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. *Castle Homes, Inc. v. Whaite*, 95 Or App 269, 272 (1989). None of these factors are dispositive; rather, they are viewed in their totality. *Cy Inv., Inc. v. Nat'l. Council on Comp. Ins.*, 128 Or App 579, 583 (1994).

At the time of the hearing, claimant had never been an independent contractor or a subcontractor and never had a contractor's license. (Tr. 18). He did not have a crew of any kind. (Tr. 19). Claimant testified that he never told Lee that he was licensed or bonded or had his own crew. (Tr. 41). He did not consider himself the "crew chief." (Tr. 42).

Cox (claimant's coworker) testified that Lee had "all the experience" because he had a license. (Tr. 84). Cox said that the work schedule was that Lee would show up in the morning and tell them what he wanted done and what they needed to do. (Tr. 87, 89, 90, 91). Cox testified that they generally saw Lee almost every day, typically in the morning. (Tr. 89). Cox said that when Lee was there, he was directing their work. (Tr. 91). Claimant testified that if Lee was not at the work site, they supervised themselves. (Tr. 43). Those facts represent direct evidence of Lee's right to control and his exercise of such control.

With regard to the second factor, the record shows that claimant and Cox were paid by the hour, which is strong evidence of employee status. *See Kaiel v. Cultural Homestay Institute*, 129 Or App 471, 476, *rev den*, 320 Or 453 (1994). Claimant said that Lee agreed to pay him \$18 per hour. (Tr. 20). Claimant submitted his hours only for himself. (Tr. 29). The check that claimant received from Lee was only for himself, not for any coworkers. (Tr. 38). Similarly, Cox testified that Lee hired him at a wage of \$17 per hour, to be paid directly by Lee. (Tr. 68, 82). Cox was not to be paid by claimant and did not have an agreement to be working for claimant. (Tr. 68).

The "furnishing of equipment" factor also indicates "employee" status. Claimant used Lee's air compressor, nail guns, a saw, some cords and some hoses. (Tr. 23). Claimant supplied a saw, hammer and a cord. Although he had a compressor, it was inoperable. (Tr. 42). Cox also testified that claimant's compressor did not work. (Tr. 82). Cox said that he brought his saw and cord and nail bags to the work site. (*Id.*) We find that Lee furnished the bulk of the equipment.

Finally, the record establishes that Lee had the "right to fire." After claimant told Lee that he had been injured, Lee fired claimant. (Tr. 22). Similarly, Cox testified that he was fired by Lee. (Tr. 85, 95, 97).

We conclude that, under the "right to control" test, there was an employer/employee relationship between Lee and claimant.² In light of the parties' stipulation, we need not determine whether claimant was a "subject worker."

² We acknowledge that Lee testified that claimant brought his "own crew" to the job site and that claimant supervised his crew. (Tr. 106). Lee also testified that claimant submitted a verbal bill for the work and that he issued a check to claimant that was supposed to be for the entire crew. (Tr. 111-12). However, we agree with the ALJ that Lee was not a credible witness and that his testimony is entitled to little weight.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 on review is \$2,800, payable by Sedgwick, on behalf of the NCE. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's counsel's affidavit and claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated August 23, 2006 is affirmed. For services on review, claimant's attorney is awarded \$2,800, payable by Sedgwick, on behalf of the NCE.

Entered at Salem, Oregon on July 9, 2007

Member Langer dissenting.

The majority defers to the ALJ's demeanor-based credibility findings and concludes that claimant sustained a work-related injury on or about May 6, 2005. Because I disagree with the majority's credibility findings and conclusions, I respectfully dissent.

Although the ALJ found that claimant's credibility was not "sterling," she determined that with respect to material factual disputes and issues, his testimony and evidence was credible and reliable, based on his attitude, appearance and demeanor. The ALJ acknowledged that there was some confusion among the witnesses about the actual date of claimant's injury. However, the ALJ reasoned that the inconsistencies were "inadvertent and immaterial" and did not reflect a pattern of deceit.

I acknowledge the ALJ's demeanor-based credibility finding regarding claimant's testimony. However, based on my review of the substance of testimony of the witnesses and other inconsistencies in the record, I find that both claimant's and his witness' testimony is not credible or reliable. *See George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005) (factual inconsistencies raised such doubt that we were unable to conclude that the claimant's material testimony was reliable). For the following reasons, I would reverse the ALJ's order and uphold the denial.

Contrary to the ALJ's (and the majority's) finding, the "confusion" among the witnesses about the date of claimant's alleged work-related injury is material. Claimant's "confusion" about the date of injury cannot be reconciled with the medical records, other documents, or the testimony of Jimmy Cox, his coworker, who allegedly witnessed the work injury.

The record reveals various versions of the time of the alleged injury. On May 12, 2005, claimant sought emergency room treatment for back pain and a medical form said that his injury occurred on May 9, 2005. (Ex. 7). Claimant told the doctor that he was injured on "Monday night." (Ex. 9-1). (I take administrative notice of the fact that May 12, 2005 was a Thursday, and the previous Monday was May 9, 2005).

On May 16, 2005, claimant signed an "827" form, which referred to a date of injury as May 9, 2005 (a Monday). (Ex. 16). On the same date, claimant signed an "801" form, which also said the injury occurred on May 9, 2005. (Ex. 17).³

The emergency room doctor's May 12, 2005 chart note said that claimant "states that Monday night he was at work lifting a 300 pound beam. The person on the other end of the beam accidentally dropped it." (Ex. 9). Claimant testified that the person carrying the other end of the beam at the time he was injured was Jimmy Cox. (Tr. 21, 22). Claimant and Cox testified that claimant was injured before the weekend, on a Thursday or a Friday. (Tr. 22, 40, 94). Cox testified that he did not work on Monday night. (Tr. 93-94). The last day he worked with claimant was on Friday, which was May 6, 2005. (Tr. 95, 97). Therefore, the injury could not have occurred on Monday, May 9, 2005, as claimant alleged when he sought treatment and when he supposedly remembered better the date of the injury, or even on Tuesday, May 10, 2005, as he stated on another occasion.⁴

³ Claimant was asked why the "801" form he filled out showed the date of injury as May 9, 2005, which was a Monday. (Tr. 52). Claimant responded: "I wasn't – whenever I was filling the paperwork out, I guess, I – I mean I wasn't looking at a calendar. I was just trying to remember. It was a Thursday or a Friday." (Tr. 53).

⁴ However, on May 12, 2005, claimant signed an "827" form, which referred to a date of injury on May 10, 2005 (a Tuesday). (Ex. 12). Claimant testified that he filled out that form. (Tr. 35). At hearing, claimant was asked about the "May 10th" date of injury on the May 12, 2005 "827" form. Claimant agreed that he would have had a better recollection on May 12th than at the time of hearing as to when he was hurt. (Tr. 45). Later in the hearing, claimant was again asked about the May 12, 2005 "827" form: "So when you filled this out on May 12th, I take it your memory is fairly good that you can

Claimant testified that he saw a doctor the following Monday or Tuesday after the injury (Tr. 22), but the record indicates the first treatment was on May 12, 2005, a Thursday. (Exs. 7, 8, 9). On cross-examination, claimant was asked: “Now, if you got hurt on a Thursday or a Friday, why would you have told the doctors when you went in to see them that you got hurt on – well, there’s two dates – Monday or a Tuesday. Have any idea?” (Tr. 44). Claimant replied: “I’m not for sure why that is. I – I was hurt on a Thursday, and maybe they had mistaken it as I was hurt that day when I came in. I can’t say.” (Tr. 44-45). However, the May 12, 2005 chart note specifically states that “[t]he patient states that Monday night he was at work lifting * * *.” (Ex. 9-1). Moreover, as stated above, because Cox did not work with claimant after May 6, 2005, the injury could not have occurred the following Thursday.

Claimant was asked why, if he was injured on a Thursday or a Friday, he did not seek medical treatment until the following Thursday. (Tr. 48). Claimant responded: “I was just not in enough pain, I guess, to go see a doctor. I very rarely go to the hospital for sickness or anything.” (*Id.*) However, claimant said that he did not continue to work the day he was injured, and they went home early. Cox also testified that they left work after claimant was hurt. (Tr. 87, 88). Cox testified that claimant was hurt and in his condition, there was “no way for him to drive.” (Tr. 88). On May 16, 2005, Dr. George said that claimant indicated that after the injury, he “had instant pain all throughout his low back.” (Ex. 14). Claimant’s explanation that he was “not in enough pain” to see a doctor is inconsistent with Cox’s testimony and Dr. George’s chart note.

Claimant testified that he received a check dated May 6, 2005 from Lee. (Tr. 38, 39). He assumed that Lee wrote the check on that date and claimant testified that he cashed the check the same day he received it. (Tr. 39). The bank stamp on the back of the check shows the date “05062005” (Ex. 6). Claimant said that he received and cashed the check *before* he got injured. (Tr. 39-40). At the same time he believed that he “got hurt on a Thursday or a Friday.” (Tr. 40). But then claimant thought he was injured on a Thursday because he had taken the following day off. (Tr. 48).

remember whether an accident happened to you two days before.” (Tr. 51). Claimant responded “Right.” (*Id.*) However, claimant testified that he did not work at all on Tuesday, May 10, 2005. (Tr. 45). He agreed that if he did not work that day, he could not have been injured that day. (Tr. 45-46). On the other hand, the record indicates that claimant filled out a time card asserting that he worked on May 9 and 10, 2005. (Tr. 25; Ex. 29-5).

Claimant's testimony does not establish that he was injured on Friday, May 6, 2005, the day he received and cashed the check. (Tr. 39). According to Cox, claimant was hurt after the alleged accident, in no shape even to drive and had to be taken home early, three or four hours before the end of the work day. (Tr. 87-88). Furthermore, claimant could not have been injured on Thursday, May 5, 2005, because that would be inconsistent with his testimony that he received the check before he was injured.

The injury could not have occurred on the intervening weekend after May 6, 2005 because Cox and Lee said that they did not work that weekend and there is no evidence that claimant worked that weekend. (Tr. 94, 113). The injury could not have occurred on Monday, May 9, 2005, because Cox did not work that Monday because of a prearranged event with his daughter. (Tr. 94-95, 97). Based on material inconsistencies with claimant's own testimony, as well the testimony of Cox and the medical records, I am not persuaded that claimant sustained a work-related injury in May 2005.

In addition, claimant's statements have changed about the date he was allegedly "fired" by Lee. Claimant testified that he told Lee on Monday, May 9, about the work-related injury the previous week. (Tr. 22, 40). Claimant said that Lee responded by firing him and Cox. (Tr. 22). However, Cox testified he was not at work on Monday, May 9, 2005. Furthermore, claimant reported different information to Dr. George as to when he was fired. Dr. George's May 16, 2005 chart note said that "when [claimant] reported the injury he was fired the same day he was injured." (Ex. 14). However, Dr. George's May 23, 2005 chart note said that claimant was fired "3 days after the injury." (Ex. 21).

I acknowledge that, in some cases, even if a claimant lacks credibility or reliability in certain respects, a claimant can still establish the compensability of a claimed condition where the remainder of the record supports the claim. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985). However, even minor inconsistencies can be a sufficient basis to disagree with the ALJ's credibility determination, particularly where factual inconsistencies in the record raise such doubt that we are unable to conclude that the testimony of a witness is credible. *See, e.g., Jolley*, 56 Van Natta at 2348.

Here, I am unable to reconcile the material inconsistencies between claimant's testimony at hearing with his medical records, other documents in the record, and the testimony of Cox, his coworker, regarding the alleged date he was injured and the events that occurred to cause the alleged work-related injury. I conclude that the inconsistencies in claimant's testimony raise such doubt that his

testimony is not credible or reliable. *See Jan A. Edwards*, 58 Van Natta 2794 (2006) (the claimant's testimony found not credible based on material contradictions between her statement to the carrier and her testimony, as well as the inconsistencies between her testimony and the contemporaneous medical records); *Jolley*, 56 Van Natta at 2348.

Because I am not persuaded that claimant was injured at work in May 2005, it is not necessary to determine whether or not claimant was a subject worker, nor is it necessary to examine Lee's testimony and compare any inconsistencies with claimant's testimony.

Finally, because I find that claimant's testimony was not credible or reliable, I am not persuaded that the medical opinions that relied on his version of the injury were based on accurate information. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical opinions unpersuasive when based on the impeached credibility of the claimant). Claimant has failed to sustain his burden of proving legal or medical causation. Because the majority decides otherwise, I respectfully dissent.