

In the Matter of the Compensation of
RICHARD R. PATE, Claimant

WCB Case No. 05-07376

ORDER ON REVIEW

Heiling Dwyer & Assoc, Claimant Attorneys

Radler Bohy et al, Defense Attorneys

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Reviewing Panel: Members Biehl and Lowell.

Sedgwick Claims Management Services (Sedgwick), the statutory claim processing agent for the noncomplying employer (NCE), and Karen Malkewitz, the NCE, request review of Administrative Law Judge (ALJ) Wren's order that: (1) set aside Sedgwick's denial of claimant's claim for bilateral leg injuries; and (2) awarded an \$11,000 assessed attorney fee under ORS 656.386(1). On review, the issues are subjectivity and attorney fees.

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

When claimant was a young boy, his family kept an ex-cavalry horse in their back yard. That horse died before claimant was old enough to saddle it by himself, but his father later brought a quarter horse and a Shetland pony home for claimant and his brother. Those horses lived in claimant's back yard, where he cared for the quarter horse.

After claimant graduated from high school, he joined the Navy. While stationed in Morocco, he had the opportunity to ride rental horses in intramural competitions. Claimant also found opportunities to ride horses while he was stationed in Spain and Cuba. His affection for horses continued after leaving the Navy. Later, in the late 1980s and early '90s, he and his wife provided two horses for their daughters.

Claimant did not own or ride any horses again until 2002. At his granddaughter's birthday party in July 2002, Ms. Malkewitz, the NCE,¹ approached claimant and said that the manager of her "Hobbs Road" horse farm was leaving. She invited claimant to replace the outgoing manager by living on Hobbs Farm and taking care of the horses. At the time, Hobbs Farm was a "hobby" farm, but she intended to turn it into a breeding business within five years.

¹ The Workers' Compensation Division (WCD) determined that Ms. Malkewitz was an NCE as a result of her employment of another worker. Her status as an NCE is not at issue in this proceeding.

Primarily motivated by his personal interest in horses, claimant enthusiastically accepted the NCE's proposal. Claimant also had a day job with the local sheriff's department. At that time, there were six horses at Hobbs Farm, but more horses were periodically added. Claimant's duties at Hobbs Farm included feeding the horses, cleaning the stalls, taking the horses out to, and retrieving them back from, the pasture, assisting the veterinarian and farrier, and doing other general maintenance that needed to be done such as fence mending and emergency plumbing. Much of this work, such as feeding the horses and cleaning their stalls, was determined by a fixed schedule. The parties discussed that these duties would require a consistent amount of work every month, but no agreement specifying the duties or hours to be worked was memorialized in writing. Claimant initially kept track of the hours he worked, but soon stopped because the NCE never requested records of his work. Claimant considered himself to be an employee of the NCE, but the NCE considered him to be a partner.

In return for his work at Hobbs Farm, claimant was provided rent-free housing at the farm. The rental value of the house was at least \$800 per month. In January 2003, to accommodate his duties at the farm, claimant changed from the daytime shift at the sheriff's department to the graveyard shift.

In August 2004, when the herd had grown to approximately 17 horses, the NCE moved the horse farm to "Valley Vista Farm." Claimant moved to Valley Vista Farm under the same arrangement that existed at Hobbs farm, wherein claimant and his wife could live in a house on the farm in exchange for his work caring for the horses. The herd continued to grow, and contained approximately 26 or 27 horses in January 2005.

Claimant declared the benefit of living on the NCE's farms as income while preparing taxes. For the 2003–05 tax years, he took deductions for his horse farm-related expenses as expenses for a sole proprietorship.

Throughout the time that claimant worked for the NCE, the NCE referred to claimant as her farm manager. After claimant began working as the farm manager, he developed an interest in the Parelli horse-training system. The NCE and claimant both paid some expenses for him to study the Parelli program and, in exchange for the NCE's expenditure, claimant agreed to train five horses. Claimant considered his agreement to train the NCE's horses separate from his employment relationship with the NCE, but the NCE considered the horse-training agreement part of their overall business relationship. Although claimant studied the Parelli program, he did not complete any of the ten levels and did not train the

NCE's horses. When he left Valley Vista Farm after his injury, claimant left some of the horse training equipment with the NCE because he felt he had not earned it by training the horses.

On January 24, 2005, claimant was pulling a bale of alfalfa with a hay hook in preparation for feeding the horses when the hook popped out of the bale and he fell backwards approximately 15 feet onto a concrete floor. Both legs were fractured in multiple locations. As a result of his injuries, claimant could not continue to care for the horses and, consequently, moved from Valley Vista Farm.

Claimant filed a claim for his injuries. Sedgwick denied the claim on behalf of the NCE on the ground that claimant was not a subject worker. Claimant requested a hearing

The ALJ found that Ms. Malkewitz had the right to control the manner and means of claimant's job performance while he cared for her horses and that the nature of claimant's work when he was injured constituted an employment relationship with the NCE. Accordingly, the ALJ found that claimant was an employee of the NCE at the time he was injured. Further considering the claimant's attorney's fee request in light of the factors set forth in OAR 438-015-0010(4) for the determination of a reasonable attorney fee, the ALJ awarded an assessed fee of \$11,000.

On review, both Sedgwick and the NCE contend that the NCE did not have the right to control claimant's activities and that the relationship of claimant to the NCE was more akin to that of a partner or an independent contractor than that of an employee. Alternatively, they contend that the ALJ's assessed attorney fee was excessive. We disagree with those contentions.

Subjectivity

All workers are subject workers unless they fall into certain specified categories. ORS 656.027. "Workers" are those persons who engage to furnish services for remuneration subject to the direction and control of an employer. ORS 656.005(30).

When deciding whether an individual is a worker, we must determine whether the NCE 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, 630-31 (1994). 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). 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. *S-W Floor Cover Shop*, 318 Or at 622 n 6.

The NCE described claimant as her “farm manager.” (Tr. I-25). His duties included taking care of the horses, cleaning the stalls, getting the horses in and out of the pasture every day, ordering feed, making sure the facilities were in good working order, and training horses. (Tr. II-10, 19). Sedgwick and the NCE contend that claimant had great flexibility regarding when and how he would manage the horse farm and was motivated to work by his affection for horses, rather than by the NCE’s direction. (Tr. II-27). Claimant, by contrast, considered himself an employee subject to the NCE’s control. (Tr. I-33). After reviewing the record, we find direct evidence of the right to, and the exercise of, control by the NCE.

Although claimant had flexibility regarding his working hours, the NCE provided direction regarding when claimant was to feed the horses. (Tr. II-44). The NCE determined what type of feed to use. (*Id.*) She also determined what supplements to feed the horses. (Tr. I-21). Although claimant could have discussed feed and supplement options with the NCE, she had final authority regarding any change in horse care. (Tr. I-55). The NCE also determined which pastures the horses would use² and what horses would be added to the herd, and when to do so. (Tr. I-24).

The NCE notes that claimant participated in the hiring and supervision of other workers. (Tr. II-12, 60). However, all hiring and firing decisions were

² Claimant testified that the NCE determined which pastures the horses would use, but the employer testified that claimant decided where to pasture the horses without seeking authorization from her. (Tr. I-24, II-46). The ALJ made a demeanor-based finding that claimant was a credible witness, but did not make such a finding regarding the employer. Generally, we give great weight to an ALJ’s credibility finding if it is based on the opportunity to observe the demeanor of the witness. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991). The record does not provide a persuasive reason not to do so here. Accordingly, we give more weight to claimant’s testimony.

subject to the NCE's approval. (Tr. I-36, II-60). Further, the other workers were paid by the NCE.³ (Tr. I-37).

On this record, we find direct evidence of the NCE's right to, and exercise of, control over claimant. We also find that the method of payment weighs in favor of claimant being a worker under the "right to control" test.

Claimant testified that the parties contemplated that the value of his housing, \$800, would reflect the value of his time spent caring for the NCE's horses and farm, 80 hours of work per month at \$10 per hour. (Tr. I-17). The NCE testified that she and claimant contemplated that he would work 40 hours per month for the value of his housing. (Tr. II-56). In either case, the parties contemplated the hourly value of claimant's work. Generally, payment of an hourly wage suggests an employer-employee relationship. *Bowser v. State Indus. Accident. Comm'n*, 182 Or 42, 60 (1942); *Matthew S. Applegate*, 58 Van Natta 2253, 2256 (2006).

Sedgwick and the NCE contend that claimant's tax statements show that he received payments as a separate business, rather than as an employee of the NCE. In his 2003, 2004, and 2005 tax returns, claimant filled out Schedule C forms for "horse business" as if his housing income was a sole proprietorship. (Exs. A-9; B-5; C-7). They argue that in completing the Schedule Cs, claimant admitted that the parties did not contemplate that the NCE would have the right to control the means and manner of his work.

Whether a worker has completed a Schedule C tax form may be relevant to whether a worker is an independent contractor.⁴ ORS 656.005(31); ORS 670.600(4). Independent contractors are not subject workers. ORS 656.027(25)(b). However, the completion of a Schedule C tax form is only one factor in determining whether a worker is an independent contractor. Because, as discussed above, claimant was not "free from the direction and control over the means and manner" in which he provided his services, he does not fit into the category of "independent contractor." ORS 670.600(2)(a).

³ On several occasions, the employer forgot to pay other workers. (Tr. I-36). On such occasions, claimant paid the other workers. (*Id.*) The employer reimbursed claimant for such payments. (*Id.*)

⁴ ORS 670.600 provides, in relevant part:

"(2) As used in ORS chapters 316, 656, 671, and 701, 'independent contractor' means a person who provides services for remuneration and who, in the provision of the services:

Claimant filed Schedule Cs because he interpreted the tax law as requiring “a separate tax code if you’re managing a horse property or something like that.” (Tr. I-41). He attempted to comply with the tax law by separately accounting for his income and expenses as the farm manager. (Tr. I-50). He reported his housing income as business income, and did not use a W-2, but did not know whether the distinction was significant. (Tr. I-51). On this record, we do not find that claimant’s tax treatment of his housing income evinces a lack of a “right to control” by the NCE.

Sedgwick and the NCE note that claimant brought personal tools, such as a circular saw, handsaw, and hammer to the farm. (Tr. I-26, II-40). On the other hand, claimant had no horse-related tools when he moved to the farm. (Tr. I-26, II-11, 41). He used the NCE’s horse trailer when transporting horses, and generally used her vehicle when performing his farm management duties. (Tr. I-26, II-42). Furthermore, if new tools were needed, the acquisition of such tools would have been the responsibility of the NCE. (Tr. II-40). Although claimant provided some equipment, we find that the “furnishing of equipment” factor supports the NCE’s “right to control.”

The NCE did not believe that she had the right to fire claimant because his business relationship with the NCE was more akin to partnership⁵ than an employer-employee relationship. (Tr. II-26). Although the record does not

“(a) Is free from the direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;

“(b) Except as provided in subsection (4) of this section, is customarily engaged in an independently established business;

“(c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701; and

“(d) Is responsible for obtaining other licenses or certificates necessary to provide the services.

“* * * * *

“(4) Subsection (2)(b) of this section does not apply if the person files a Schedule F as part of an income tax return and the person provides farm labor or farm services that are reportable on Schedule C of an income tax return.”

⁵ Partners may be either subject workers or non-subject workers. *See* ORS 656.026(8), (23).

support a partnership relationship between claimant and the NCE,⁶ neither does the record establish whether the NCE had the right to fire claimant.⁷ Therefore, this factor does not support a right to control.

Nevertheless, on balance, the “right to control” test establishes that claimant was a subject worker when he was injured. Moreover, even if the “right to control” test was inconclusive, the “nature of the work” test would establish claimant’s subjectivity. The factors that are considered under the “nature of the work” test include: (1) the character of the claimant’s work; *i.e.*, how skilled it is, how much of a separate calling it is, and the extent to which it may be expected to carry its own accident burden; and (2) the relationship of claimant’s work to the employer’s business; *i.e.*, how much of it is a part of the employer’s regular business, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services, as distinguished from contracting for completion of a particular job. *Jerry R. Vorce*, 48 Van Natta 480, 481 (1996).

The NCE testified that the factor that distinguished claimant’s work from that of an admittedly subject worker who performed many similar services was claimant’s horse training work. (Tr. II-25). Claimant testified that training horses did not fall within the employment relationship. (Tr. I-44). He first discussed his desire to study the Parelli horse training program in March 2003. (Tr. I-29). Thus, Sedgwick and the NCE argue that claimant was not a subject worker after March 2003 because of his horse training duties. However, claimant’s injury occurred when he was bringing down hay from the hayloft, rather than working with horses. (Tr. I-40). That was a part of his farm management duties to continuously care for the horses, a task central to the operation of the NCE’s business, and which he

⁶ A partnership is created by “the association of two or more persons to carry on as co-owners a business for profit.” ORS 67.055(1). The NCE testified that in addition to claimant’s housing, his interest in the partnership was his opportunity to work with the NCE’s horses. (Tr. II-17). Notwithstanding any benefit that accrued to claimant as a result of his opportunity to work with the NCE’s horses, there is no indication that claimant shared an ownership interest in either the property or the profits of the employer’s horse business. Therefore, the record does not support a partnership relationship.

⁷ The NCE argues that any attempt to fire claimant would have been complicated by landlord-tenant law because claimant was renting housing in exchange for his services. However, the mere fact that claimant was a tenant does not defeat the “right to control.” See *April Mayberry*, 42 Van Natta 527 (1990) (“caretakers” of a property, whose remuneration was in the form of free rent and stabling of their horses, were subject workers).

performed with an admittedly subject worker. (*Id.*) Thus, the nature of claimant's work at the time of injury, which was the day-to-day management of the farm, was that of a subject employee rather than horse training.

Sedgwick and the NCE also contend that although claimant was not engaged in horse training at the time he was injured, the agreement to train horses as an independent contractor changed the overall employment relationship. Even if becoming a horse trainer would have changed the overall relationship such a change would not have occurred by the time of the work accident because claimant had not yet become a horse trainer at that time.

Claimant began taking horse training classes and intended to train several of the NCE's horses. However, he did not become a horse trainer at any time prior to his work injury. Claimant decided to study Parelli to learn to handle horses more safely rather than to become a trainer, which he thought he was too old to do. (Tr. I-28). In March 2003, he merely discussed his desire to begin studying Parelli with the NCE. (Tr. I-29). He did not hold himself out as a horse trainer. (Tr. I-32, II-48). To the contrary, he never developed the level of expertise required to advertise himself as a Parelli trainer.⁸ Ultimately, he did not train the NCE's horses as he had agreed to do, and gave some horse training equipment to the NCE to compensate for that failure. (Tr. I-56).

Under these circumstances, we find that the nature of claimant's work was more akin to that of the admittedly subject worker than to horse training. Thus, under both the "right to control" and the "nature of the work" test, we find that claimant was a subject worker.

Attorney Fees

The ALJ awarded an \$11,000 attorney fee under ORS 656.386(1) for claimant's counsel's services at hearing. Sedgwick argues that the ALJ's attorney fee was excessive, contending that the assessed fee for services at hearing should be \$5,500.

We adopt and affirm the ALJ's reasoning and conclusions.

⁸ A horse trainer must have passed the third level of the Parelli system to advertise as a horse trainer. (Tr. I-31). Claimant never completed the first level. (*Id.*)

Finally, 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 regarding the subjectivity issue is \$2,000, payable by Sedgwick on behalf of the NCE. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved. Claimant is not entitled to an attorney fee for services on review regarding the attorney fee issue. *Saxton v. SAIF*, 80 Or App 631, *rev den*, 302 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986).

ORDER

The ALJ's order dated September 28, 2006 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,000, payable by Sedgwick on behalf of the NCE.

Entered at Salem, Oregon on June 13, 2007