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In the Matter of the Compensation of  
**PERRY J. GREGG, Claimant**  
WCB Case No. 07-03856  
ORDER ON REVIEW  
Hooton Wold & Okrent LLP, Claimant Attorneys  
Reinisch Mackenzie PC, Defense Attorneys

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

The self-insured employer requests review of Administrative Law Judge (ALJ) Otto's order that: (1) found that claimant was a subject worker; and (2) set aside the employer's denial of his injury claim for a low back condition. On review, the issues are subjectivity and, potentially, compensability. We affirm.

FINDINGS OF FACT

On March 12, 2007, claimant began working for the employer as a courier. Shortly before he was hired, the employer had contracted with a new pharmaceutical company to deliver supplies throughout the state. In making deliveries for the employer, claimant drove a van, which was owned by his wife. He carried insurance on his wife's van. Claimant also provided a hand truck that converted into a cart. He was not reimbursed for mileage, gasoline or other expenses.

Mr. Luty,<sup>1</sup> who also worked for the employer, testified that claimant was paid 65 percent of the gross figure of the route stop. Claimant was not required to exclusively work as a courier for the employer, but could obtain other jobs as well. On March 7, 2007, claimant signed an "independent contractor agreement," which was not signed or dated by the employer. (Ex. b).

Claimant injured his back at work on April 18, 2007, when he grabbed his courier cart to prevent it from tipping over. He initially had a piercing pain in his back. (Tr. 37). Once the cart was stabilized, he did not feel any pain for awhile until after he completed his route. At the terminal, claimant had difficulty unloading the empty totes. (Tr. 38). When he got home, his pain gradually increased. (Tr. 38-39). Claimant worked the following two days with pain

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<sup>1</sup> Mr. Luty's job title is not clear from the record, although he was apparently in a management position. He was hired about the same time that claimant was hired. (Tr. 63).

medication and then rested in bed on the following Saturday. (Tr. 39-41). His back condition worsened and he sought emergency treatment on April 22, 2007. (Tr. 41). Claimant waited to seek treatment because he thought his condition would improve with rest and not working. (Tr. 40-41).

On April 22, 2007, Dr. Pruett reported that claimant was “neurologically intact” and diagnosed a lumbar strain. Dr. Pruett reported that claimant stated “I hurt my back after returning home from work on Wednesday.” (Ex. D). However, claimant testified that he told the emergency room physician that he hurt his back at work. (Tr. 42-43).

An April 23, 2007 chart note indicated that claimant requested an “off-work” note from Dr. Kotamarti, his primary care physician. (Ex. E; Tr. 44). A nurse’s note of the same date reported that claimant did not know how he injured his back. (Ex. E).

Claimant treated with Dr. Kotamarti on April 27, 2007, explaining that he had developed low back pain after doing some heavy lifting at work. (Ex. F). On May 2, 2007, Dr. Ushman diagnosed a lumbosacral strain and sciatica and recommended an MRI. (Ex. 1). A lumbar MRI showed a large L3-4 central/left disc extrusion and multilevel neural foraminal narrowing on the right at L4-5 and on the left at L5-S1. (Ex. 5).

Claimant was referred to Dr. Weinstein, neurosurgeon, who diagnosed a “huge” lumbar disc extrusion and recommended urgent surgery. (Ex. 6). On May 19, 2007, Dr. Weinstein performed partial L3 and L4 laminectomies with bilateral excision of disc herniation. (Ex. 11).

The employer denied the claim on the basis that claimant was an independent contractor. (Ex. 9). Claimant requested a hearing. At hearing, the employer amended the denial to raise all legal and medical issues. (Tr. 2, 3).

## CONCLUSIONS OF LAW AND OPINION

### Subjectivity

The ALJ applied the “right to control” test and concluded that claimant was a subject employee at the time of the April 18, 2007 injury. We adopt and affirm this portion of the ALJ’s order with the following change and supplementation. In the last paragraph on page 6, we delete the sentence indicating that claimant rendered services exclusively for the employer.

The employer argues that claimant was not a subject worker because the evidence on all factors weighs against an employment relationship. Among other things, the employer contends that the lack of an exclusive relationship weighs strongly against its right to exercise direction and control. The employer argues that claimant was engaged in an independent enterprise.

Claimant has the burden of establishing the existence of an employment relationship between himself and the employer. *Hopkins v. Kobos Co.*, 186 Or App 273, 277 (2003). We first determine whether an individual is a “worker” before determining whether that “worker” is a “non-subject” worker pursuant to one of the exemptions of ORS 656.027. *S-W Floor Cover Shop v. Nat’l Council on Comp. Ins.*, 318 Or 614, 630 (1994).

Pursuant to ORS 656.005(30), a “worker” is a person who engages to furnish services for remuneration subject to the direction and control of an employer. 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*, 318 Or at 630-631. Under the “right to control” test, the relevant factors include whether the employer retains the right to control the details of the method of performance, the extent of the employer’s control over work schedules, whether the employer has power to discharge the person without liability for breach of contract, and payment of wages. *Id.* at 622. Another factor considered is the furnishing of tools and equipment. *Stamp v. DCBS*, 169 Or App 354, 357 (2000). 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).

#### Right to Control Details of Method of Performance

The ALJ found that the employer assigned the customers to claimant, and he had no right to reject any deliveries added to his route. Claimant worked full time for the employer, 8 to 10 hours per day. The employer was in communication with claimant at all times via cell phone. Although claimant was not required to wear a shirt with the employer’s logo, the ALJ found that he did wear it because he felt it was representative of the employer.

In *Michael R. Dunham*, 60 Van Natta 3466 (2008), the claimant drove a truck for the insured, whose business was hauling freight around the country. The insured prohibited him from hauling loads for any other employer, and the claimant was subject to termination if he did so. We found that the insured retained the right to control significant details concerning methods of the

claimant's job performance, including coordinating and directing where and when he could pick up and deliver loads, including the time windows for deliveries. We explained that the insured dictated the load to be picked up and there was no indication that the claimant could select a load that he wanted, or reject a load that the insured directed him to haul. *See Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 624 (2002) (employer/employee relationship strongly established where the record did not suggest that the claimant had a choice over which load he was going to take); *Bowser v. State Indus. Accident Comm'n*, 182 Or 42, 58 (1947) (same).

In *Dunham*, we reasoned that the claimant was precluded from hauling loads for other employers, which weighed in favor of finding that he was a "worker." Here, in contrast, neither claimant nor the employer intended the relationship to be exclusive. When claimant began working for the employer, he was also working for another courier service (Express Messenger). (Tr. 30-31). After claimant began working for the employer, Express Messenger fired him. (*Id.*) At the time of the April 2007 injury, claimant was only performing work for the employer, but he testified that he could have also worked for another courier service. (Tr. 24-25). He had declined offers from other companies. (Tr. 25). Mr. Luty testified that the employer encouraged the drivers to work for other companies. (Tr. 68-69).

Claimant contends that, as a practical matter, his work for the employer took up to 10 hours a day, which did not allow time to work for another company. He worked five days a week for the employer, 8 to 10 hours a day. (Tr. 24). In any event, although claimant had the option to work for other companies in addition to employer, we find that other facts establish the employer's right to or exercise of control.

The employer acknowledges that it provided a list of deliveries to claimant based on the customers' needs. The employer asserts that the list included a "suggested" schedule.

We do not agree that the timelines for deliveries were merely "suggested." Claimant testified that he was directed to be at one client's premises by 7:30 a.m. and was directed to have everything completed by 9:00 a.m. (Tr. 20). The deliveries were assigned to claimant and he did not have the right to reject any of them. (Tr. 35). He testified that the pharmaceutical supplies were very valuable and transporting them was a very delicate job; damaging the drugs was a "no-no." (Tr. 37, 52). Claimant's job for the employer also involved picking up orders for controlled substances. (Tr. 38). When he returned to the employer's terminal, he "had to deliver those right away because they had to off right away by air usually." (*Id.*) Mr. Luty testified that the delivery route was based on the client's

requirements and time frames. (Tr. 67). Under these circumstances, we are persuaded that the employer had the right to control significant details regarding the methods of claimant's job performance. *See Rubalcaba*, 333 Or at 624 (employer/employee relationship strongly established where the record did not suggest that the claimant had a choice over which load he was going to take); *Dunham*, 60 Van Natta at 3471 (the insured dictated the load to be picked up and there was no indication that the claimant could select a load that he wanted, or reject a load that the insured directed him to haul).

We acknowledge that the employer did not supervise how claimant actually delivered the pharmaceutical supplies or how he decided his particular route. Nevertheless, as in *Dunham*, the record does not establish that the discretion granted to claimant in delivering and driving his route was different from that afforded to the employer's driver employees. *See Bowser*, 182 Or at 58 (the court downplayed the claimant's independence because there was "no difference at all between [the claimant's] actual situation in so far as control is concerned and the situation of one hired to drive a logging truck and trailer owned and operated by the logging company"); *Dunham*, 60 Van Natta at 3472.

The employer contends that it hired hourly employees as drivers and only engaged independent couriers, such as claimant, to meet "special needs." However, the record does not establish that claimant was only hired to meet a "special" need or a temporary one.

Mr. Luty testified that when the employer obtained the new pharmaceutical contract, it was "trying to get some employees on board to take care of this work." (Tr. 63). He explained that "in some cases where we weren't able to get enough hiring done in 30 days, we brought these folks on board as contractors." (*Id.*) Mr. Luty testified that the delivery route was based on the new client's desires and requested timeframes. (Tr. 67). The employer was in a "hurry" to get the new route put together. (*Id.*) Mr. Luty's testimony indicates that claimant was hired to meet an ongoing and continuous need, not merely a special or temporary need.

The employer argues that it is significant that claimant maintained an independent business name. Claimant had a separate business name, *i.e.*, "Modern Courier." (Tr. 23, 33, 50; Ex. a). However, claimant explained that he had the business name because it was required by his prior employer, Express Messenger. (Tr. 33).

There is no evidence that the employer required claimant to have a separate business name or a registered business. Claimant did not have any business cards for “Modern Courier” and did not have an office or place of business separate from the employer. (Tr. 23). Claimant did not have any signs on his van. (Tr. 32). He purchased some shirts with the employer’s logo and testified that he was acting as a representative of the employer when making deliveries, not as a representative of his own business. (Tr. 33, 34). Under these circumstances, we find that claimant’s independent business name does not have any particular significance in deciding whether he was a “worker.”

We acknowledge that claimant filled out documents for the employer indicating he was an independent contractor. (Tr. 49-50; Exs. a, b). However, the contract was signed only by claimant, and was not signed or dated by the employer. Claimant testified that the employer indicated it was a temporary contract until they had a “permanent” contract. (Tr. 50). In any event, the record does not establish that the employer enforced the contract provisions. Mr. Luty testified that the provision requiring claimant to provide the employer with a certificate of insurance was not enforced. In addition, the employer did not enforce the “assignment” clause. (Tr. 98). Mr. Luty testified that “we were inconsistent in how we apply that contract.” (Tr. 99).

Furthermore, although the copy of the contract in the record included a “contract bid description,” it was blank and claimant testified that he had never seen that page before. (Tr. 56, 57). Claimant never bid on anything while working for the employer and the employer never indicated that he should do so. (Tr. 56). Given this situation, we find that the fact that claimant signed a contract is entitled to little weight in determining whether he was a “worker.” *See Coghill v. Nat’l Council on Comp. Ins.*, 155 Or App 601, 607 n 6, *recons*, 157 Or App 125 (1998), *rev den*, 328 Or 365 (1999) (because “worker” status is determined by statute, the fact that installers signed documents declaring themselves to be independent contractors was not legally dispositive); *Daniel C. Greer*, 47 Van Natta 48, 50 (1995) (based on the claimant’s testimony that he signed a contract because he had to do so in order to be paid for his services, the description of the employment relationship in the personal services agreement was given little weight in determining subjectivity).

In summary, we find that the evidence regarding the employer’s right to or exercise of control supports claimant’s position that he was a “worker.”

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### Employer's Control over Work Schedules

Claimant decided when he needed to arrive at the employer's premises in order to complete his work. (Tr. 19). Mr. Luty testified that the "independent" couriers did not punch a clock. (Tr. 69). Although the employer did not directly control his precise work schedule, claimant testified that for some clients he was directed to arrive at particular times and have the delivery completed by certain times. (Tr. 20). Claimant testified that the employer "almost all the time had communication" with him by cell phone (Tr. 27), which implies that the employer monitored claimant's whereabouts and whether he was complying with the delivery requirements.

### Employer's Power to Discharge Without Liability

The ALJ found that the employer could fire claimant for violation of any policies or for any reasons, without any conditions or consequences. The employer contends that its right to terminate the relationship did not constitute a "right to fire" in the employment sense. Rather, the employer argues that claimant entered into contracts that could be cancelled for deficient or non-performance by either party.

The question is whether the employer had power to discharge claimant person without liability for breach of contract. *See S-W Floor Cover Shop*, 318 Or at 622. We agree with the ALJ that the employer had the right to fire claimant without any conditions or consequences. For example, claimant testified that he could be terminated for failing to observe traffic laws. (Tr. 32). He assumed that the employer had the right to fire him for a violation of its policy and he believed that if he did not do his job, he would get fired. (Tr. 27).

Mr. Luty testified the main reason the employer would end a relationship with a "contractor" was if they "screwed it up, didn't show up, maybe caused a customer to feel real violated in one way or another, that's about it." (Tr. 81). He explained that the employer "needed everybody to have a smile on their face when they walked in the door." (*Id.*)

The record does not establish that the employer would incur any liability for discharging claimant. In *Rubalcaba*, the court emphasized that an "employer's power to terminate was particularly strong evidence of the right to control, because the 'effect of [the power to terminate] possessed by the company required respondent to conduct his operations at all times as it might please the logging company and its manager.'" *Rubalcaba*, 333 Or at 620 (quoting *Bowser*, 182 Or at 56). We find that the employer's power to discharge claimant without liability is strong evidence of the right to control.

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### Method of Payment

The ALJ found that claimant was paid 65 percent of the gross figure of the route stops. Mr. Luty explained that claimant was paid by the piece, whereas the employees were paid by the hour. (Tr. 64, 65). Mr. Luty testified that the former “Express Messenger” contractors, such as claimant, had been paid 65 percent of what was sold on the routes and they requested and obtained the same amount from the employer. (Tr. 70, 87, 100, 103). He said they were paid 65 percent of the gross figure of the route stop. (Tr. 70). Claimant was paid every two weeks. (Tr. 29). He was not reimbursed for mileage or gasoline expenses. (*Id.*) Claimant testified that he did not understand the details of the employer’s payment method, despite several questions for the employer in that regard. (Tr. 28, 53).

In *Henn v. SAIF*, 60 Or App 587, 592 (1982), *rev den*, 294 Or 536 (1983), the court explained that when payment is by quantity or percentage, the method of payment factor in the “right to control” is largely neutral. We find that the method of payment is inconclusive.

### Furnishing Tools and Equipment

The employer contends that the fact that claimant provided all the tools and instrumentalities supports its view of an independent contractor situation. However, the employer acknowledges that this factor may not be conclusive.

Claimant provided his own van for the deliveries, which was owned by his wife. (Tr. 26). He provided insurance for the van. (Tr. 52). Claimant owned a hand truck that folded down into a cart, which he used for the deliveries. (Tr. 36). He purchased shirts with the employer’s logo, which he wore to indicate he was a representative of the employer. (Tr. 33).

Ownership and maintenance of a vehicle are not conclusive factors regarding an employer’s “right to control.” *Rubalcaba*, 333 Or at 624; *Dunham*, 60 Van Natta at 3472. The weight given to that factor in this case is even more questionable because the record does not indicate whether or not the employer’s “employee drivers” were provided with cars, hand trucks, or carts. We find that this factor is inconclusive.

We find that a preponderance of evidence establishes the requisite “right to control” by the employer. However, in *Rubalcaba*, 333 Or at 627, the court explained that when an employer has the right to control a claimant’s performance in some respects but not others, we also consider the factors that make up the “nature of the work” test. For the following reasons, we find that the “nature of the work” test reinforces our conclusion that claimant was a “worker.”

Under the “nature of the work” test, a worker whose services are a regular and continuing part of the cost of a product, and whose method of operation is not so independent that it forms a separate route through which the costs of industrial accident can be channeled, is presumptively a subject worker. *Trabosh v. Washington County*, 140 Or App 159, 166 (1996). The elements of the test are: (1) the character of the person’s work or business--its skill, status as a separate enterprise, and the extent to which it may be expected to carry the burden of its accidents itself; and (2) the relation of that work to the employer’s business--how much it is a regular part of the employer’s regular work, whether it is continuous or intermittent, and whether it is of sufficient duration to be the hiring of continuing services rather than contracting for a particular job. *Id.* at 166-67; *Dunham*, 60 Van Natta at 3473-74.

Here, we find that claimant’s work as a courier was a regular and continuous part of the employer’s business. Claimant had an agreement with the employer to carry pharmaceutical supplies. (Tr. 31). Claimant sought employment with the employer when he found out the employer would have the new contract with a pharmaceutical company. (Tr. 16, 30, 64). That company had been the main supplier for Express Messenger, claimant’s prior employer. (Tr. 16). Shortly after claimant began working for the employer, delivery stops at Kaiser were added. (Tr. 106-07). He explained that Kaiser was probably the pharmaceutical company’s largest account in the area. (Tr. 107). Claimant consistently delivered items to Kaiser. (Tr. 108).

Claimant delivered drug totes, coolers (containing chemotherapy materials and infusion materials), and cartons of intravenous materials that belonged to the pharmaceutical company. (Tr. 21, 36). Some totes contained controlled substances, which were sealed. (Tr. 22). The employer was “very stringent” about those totes because he had to wait for Kaiser to open them and make sure every item was there. (*Id.*) Claimant also delivered some glasses and “opticals.” (Tr. 89, 92-94).

As we discussed earlier, claimant was directed to be at one client’s premises by 7:30 a.m. and was directed to have everything completed by 9:00 a.m. (Tr. 20). The deliveries were assigned to claimant and he did not have the right to reject any of them. (Tr. 35). He testified that the drugs were very valuable and damaging the drugs was a “no-no.” (Tr. 36-37, 52). Claimant’s job for the employer also involved picking up orders for controlled substances. (Tr. 38). When he returned to the employer’s terminal, he “had to deliver those right away because they had to off right away by air usually.” (*Id.*)

Mr. Luty testified that the employer contracted with the new pharmaceutical company to deliver supplies throughout Oregon and southwest Washington. (Tr. 64). Mr. Luty testified that the delivery route was based on the client's desires and requested timeframes. (Tr. 67).

Thus, the testimony of claimant and Mr. Luty establishes that claimant's work as a courier was a regular and continuous part of the employer's regular business. Their testimony also indicates that the timely delivery of pharmaceutical supplies was critical to the employer's business because of the client's needs. For example, Mr. Luty testified that if a courier called in sick and no couriers were available, occasionally either he or the office manager had to perform the deliveries. (Tr. 98).

We also find that the nature of claimant's work involved continuing services rather than contracting for a particular job. In reaching our conclusion, we acknowledge that claimant testified that he only worked for the employer for a short time. (Tr. 24). He began working for the employer on March 12, 2007 and he was injured on April 18, 2007. Claimant testified that he had not been released to work as a courier after his back surgery. (Tr. 49). Based on claimant's testimony, we infer that his short duration with the employer was based on his work injury. The record does not provide a different reason for his leaving the employer or that the employer no longer had a need for couriers. To the contrary, Mr. Luty testified that when claimant was injured, arrangements were made to cover his route. (Tr. 80-81). Under these circumstances, we find that the short duration of claimant's employment is not a significant factor in applying the "nature of the work" test. The record indicates that claimant was apparently hired to work on a continuous basis, rather than for particular time period.

Furthermore, we find that the character of claimant's work was not that of a separate enterprise. Claimant's van was owned by his wife and he paid the insurance on the van. (Tr. 26, 52, 55). However, he did not have any business cards or a separate office or place of business. (Tr. 23). Claimant did not have any signs on his van. (Tr. 32). He did not have a telephone number for business advertising to attract new customers. (*Id.*) Claimant explained that when he worked for his prior employer, he was required to have a business name and a registered business. (Tr. 23, 33). There is no evidence, however, that the current employer required claimant to maintain a separate business name or a registered business.

Claimant did not carry workers' compensation insurance or liability insurance to cover loss or damage of the pharmaceutical items, although he testified that they were very valuable. (Tr. 36-37, 52, 55). Mr. Luty testified that the employer did not enforce the provision of its contracts with the independent contractors that required them to provide certificates of liability insurance. (Tr. 97-98). He explained that the employer had an umbrella liability insurance policy. (Tr. 68, 97).

We conclude that the services provided by claimant did not constitute a separate business or enterprise, but were an integral part of the employer's delivery business. Under these circumstances, we find that the employer can more effectively distribute the cost of injuries resulting from the hazards of delivering pharmaceutical supplies. *See Woody v. Waibel*, 276 Or 189, 198 (1976) (finding that employer was in a superior position to distribute the cost of injuries, as compared to the owner/operator hired to haul logs). We conclude that the "nature of the work" test establishes that claimant was a subject worker.<sup>2</sup> *See Dunham*, 60 Van Natta at 3474-75 ("nature of the work" test established that the claimant was a "worker" where hauling loads formed the fundamental and regular part of the insured's business and the claimant was hired on an ongoing and continuous basis); *compare Trabosh*, 140 Or App at 167 (providing hayrides was a separate business that could be expected to carry its own burden where the party carried liability insurance, had business cards, advertised in the Yellow Pages, the work had limited duration, and the hayrides were tangential to the fair's primary business).

### Compensability

On review, neither party challenges the ALJ's application of ORS 656.005(7)(a)(B) to the compensability issue. The ALJ determined that Dr. Weinstein's opinion was more persuasive than that of Dr. Ushman. Based on Dr. Weinstein's opinion, the ALJ concluded that claimant's April 18, 2007 work injury was compensable. For the following reasons, we agree with the ALJ's conclusion.

Claimant has the initial burden of proving, by a preponderance of the evidence, that his injury is "otherwise compensable," *i.e.*, he must prove that the April 2007 injury was at least a material contributing cause of his disability

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<sup>2</sup> The employer did not raise an issue on review regarding ORS 656.027. *Compare Dunham*, 60 Van Natta at 3475-79.

or need for treatment of the low back condition. ORS 656.005(7)(a); ORS 656.266(1). If the medical evidence establishes that the “otherwise compensable injury” combined with a preexisting condition to cause or prolong disability or a need for treatment, the employer has the burden to prove that the “otherwise compensable injury” was not the major contributing cause of claimant’s disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Claimant relies on the opinion of Dr. Weinstein to establish that the April 2007 injury was at least a material contributing cause of his disability or need for treatment of the low back condition.

Claimant was referred to Dr. Weinstein, neurosurgeon, after a May 8, 2007 lumbar MRI showed a large L3-4 disk extrusion. (Ex. 5). Dr. Weinstein examined claimant on May 15, 2007 and reported the following history of his injury:

“[Claimant] injured himself on April 18<sup>th</sup> this year while making deliveries to Kaiser Sunnyside Medical Center. He was delivering pharmaceutical products and using a delivery cart which began to tip over. At that time, he tried to prevent the cart from tipping and as he bent over felt pain in his mid back. Gradually this pain became increasingly severe and then associated with radiation bilaterally across his buttocks down the back of his legs and associated with mild leg weakness.” (Ex. 6).

Dr. Weinstein explained that claimant had a huge lumbar disk extrusion and required urgent surgery because of his pain and weakness. (*Id.*) In a letter to the employer, Dr. Weinstein explained that claimant had a large lumbar disk rupture that he sustained on April 18, 2007 while making deliveries. (Ex. 8A). On May 19, 2007, Dr. Weinstein performed partial L3 and L4 laminectomies with bilateral excision of disk herniation. He diagnosed a central disk herniation at L3-4. (Ex. 11).

In a February 2008 concurrence letter from claimant’s attorney, Dr. Weinstein explained that claimant’s symptoms began as he was attempting to prevent a delivery cart of pharmaceutical products from tipping over. He understood that before the work incident, claimant was completely asymptomatic with respect to any back or leg symptoms. Dr. Weinstein agreed that, following the April 18th incident, claimant “had the abrupt onset of acute symptoms which, based upon their severity, were an indication of the need for prompt surgical intervention.” (Ex. 13A). Based on claimant’s history and his report of the

onset of symptoms, Dr. Weinstein concluded that there was a clear association between the work incident and the onset of disability and need for treatment and that the work injury was the major contributing cause of the disability and need for treatment of the L3-4 disk herniation. (*Id.*)

The employer argues that Dr. Weinstein's opinion is not persuasive because he did not consider the significant delay between claimant's work incident and the onset of the symptoms whose severity prompted the surgery. According to the employer, Dr. Weinstein's concurrence letter implies that he incorrectly assumed that claimant's symptoms appeared immediately and abruptly following the work episode.

Dr. Weinstein's concurrence letter referred to an "abrupt onset of acute symptoms" after the April 18, 2007 work incident. The letter also said that the severity of symptoms indicated a need for prompt surgery. According to the employer, Dr. Weinstein did not consider the delay between claimant's work incident and the "severe" symptoms. However, we are not persuaded that Dr. Weinstein relied on a different history of symptoms than in his initial chart note, which explained that claimant initially felt pain in his back when he tried to prevent the cart from tipping over and the pain gradually became increasingly severe. (Ex. 6).

The more detailed history in Dr. Weinstein's chart note is consistent with claimant's testimony. Claimant testified that when he grabbed the cart to prevent it from tipping over, he had a piercing pain in his back. (Tr. 37). Once the cart was stabilized, he did not feel any pain for awhile. The pain returned after he completed his route and was heading back to the terminal to unload the empty material. Claimant had difficulty unloading the empty totes. (Tr. 38). When he got home, the pain gradually increased. (Tr. 38-39). Claimant worked the following two days with pain medication and then rested in bed on the following Saturday. (Tr. 39-41). His back condition worsened and he sought emergency treatment on Sunday morning. (Tr. 41). Claimant testified that he waited to seek treatment because he thought his condition would improve with rest and not working. (Tr. 40-41).

Based on claimant's testimony, we find that Dr. Weinstein's history was sufficiently complete. *See Jackson County v. Wehren*, 186 Or App 555, 560 (2003) (a history need only contain relevant information and is thus complete if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible).

The employer contends, however, that Dr. Ushman provided the most persuasive opinion on causation because he considered Dr. Pruett's failure to report findings suggestive of a herniated disk during the initial emergency room examination. Dr. Ushman was aware that claimant was "neurologically intact" at that time. The employer asserts that Dr. Ushman was concerned that claimant failed to report the cart incident at work during his first three examinations.

Nevertheless, Dr. Ushman did not question the accuracy of claimant's statement regarding the cart incident at work. In a deposition, he explained that he did not doubt claimant's "truthfulness." (Ex. 15-7). Dr. Ushman testified: "I mean, he does work. He does get in and out of a van. His back did start hurting him after he got home from work. He does some lifting. And probably, I mean, I believe him when he says he was pushing a cart with some pharmaceutical supplies and it went over a wheelchair bump and the load started to shift and he had to catch it." (Ex. 15-14).

However, Dr. Ushman questioned the severity of claimant's accident and whether it caused the herniation. Dr. Ushman initially treated claimant on May 2, 2007, and claimant described the April 18, 2007 work incident where the delivery cart started tipping over and he had to reach forward and grab product to keep it from falling. Dr. Ushman reported that claimant felt pain in his low back that was not severe at first, but became increasingly severe. (Ex. 1-2). Dr. Ushman's initial understanding of claimant's low back symptoms is consistent with claimant's testimony. For the following reasons, we do not agree with Dr. Ushman's later testimony that claimant's back did not hurt until *after* he got home from work.

Dr. Ushman was aware that when claimant sought treatment at the emergency room on April 22, 2007, Dr. Pruett reported that claimant was "neurologically intact" and that he had a negative straight leg raise test. (Exs. 1-2, 14-2; *see* Ex. D). Dr. Pruett diagnosed a lumbar strain.

In a deposition, Dr. Ushman explained that he questioned the severity of claimant's work incident because the first three times he came into contact with medical providers, he did not mention the work incident. (Ex. 15-7). Dr. Ushman referred to claimant's report to Dr. Pruett that he hurt his back *after* he got home. Dr. Ushman did not have a sense that the work incident was a "big deal," so he had difficulty attributing a great deal of significance to it. (Ex. 15-13).

Dr. Ushman is correct that Dr. Pruett's April 22, 2007 chart note reported that claimant stated "I hurt my back after returning home from work on Wednesday." (Ex. D). However, claimant testified that he told the emergency room physician that he had come home on Wednesday and that he had been hurt at work and did not know if he had torn a muscle or injured his back. (Tr. 42-43). Claimant denied that he told the emergency room physician that he hurt his back after returning home from work. (Tr. 43). He did not recall telling Dr. Pruett the specifics of the injury. (*Id.*) When claimant was asked why he had not done so, he explained that he was hurting so badly that he just wanted treatment and was not interested in going into details about the incident. (Tr. 43-44).

Based on claimant's testimony, we find that Dr. Ushman did not have an accurate understanding that claimant hurt his back *after* he returned home. Rather, we find that claimant credibly testified that he injured his back at work on April 18, 2007 during the "cart" incident. We are also persuaded by claimant's testimony that he did not initially report the specifics of his injury because of his pain and need for treatment.

Dr. Ushman questioned the severity of claimant's work incident in part because of Dr. Pruett's findings on April 22, 2007 that claimant was "neurologically intact" and that he had a negative straight leg raise test. (Ex. 14-2). On the other hand, Dr. Ushman testified that "a disk can herniate over a period of time to the point where it becomes evident. And over a period of hours to days. It doesn't have to all occur at once." (Ex. 15-10). Dr. Ushman agreed that it was possible to have an annular tear where the material oozes out more slowly. (*Id.*) Dr. Ushman's concerns about the severity of the work incident based on the April 22, 2007 emergency room findings appear to be inconsistent with his acknowledgment that a disk can herniate over a period of hours to days. We are not persuaded by Dr. Ushman's opinion because it lacks adequate explanation and because his opinion was apparently based on the inaccurate understanding that claimant hurt his back after he got home.

Instead, we are more persuaded by Dr. Weinstein's opinion because it is well-reasoned and based on complete and relevant information. *See Wehren*, 186 Or App at 559. Based on Dr. Weinstein's opinion, we conclude that claimant's April 18, 2007 work injury was at least a material contributing cause of his disability or need for treatment of his low back condition.

As noted above, the parties agree that claimant had a “combined” low back condition. In that situation, the burden shifts to the employer to prove that the “otherwise compensable injury” was not the major contributing cause of the disability or of the need for treatment of claimant’s combined condition. ORS 656.266(2)(a); *Scoggins*, 56 Van Natta at 2535.

As discussed earlier, Dr. Weinstein concluded that claimant’s work injury was the major contributing cause of his disability and need for treatment of the combined low back condition. (Ex. 13A). In reaching his conclusion, he relied on the fact that claimant did not have back or leg symptoms before the injury. Dr. Weinstein explained that many people with degenerative disc disease in the lumbar spine have no disability or need for treatment associated with that process. (*Id.*)

The employer relies on the opinion of Dr. Ushman to sustain its burden of proof regarding the combined condition. In a concurrence letter from the employer, Dr. Ushman explained that claimant had multiple levels of degenerative disc disease, as well as multiple levels of arthritic findings at L4-5 and L5-S1. He opined that the degenerative findings preexisted the work incident and were “normal age-related findings” for a person of claimant’s age. (Ex. 14-2). Dr. Ushman further opined that, assuming claimant was injured, his preexisting condition was the major contributing cause of his disability or need for treatment. He based his opinion on the level of degeneration/arthritis in his back, the development of claimant’s symptoms, the work exposure, and his examination of claimant and the medical records. (*Id.*)

In a deposition, however, Dr. Ushman agreed with Dr. Weinstein that degenerative disc disease “in and of itself” does not necessarily cause symptoms. (Ex. 15-11). He also agreed that claimant was asymptomatic before the April 2007 work incident. (Ex. 15-9).

As discussed above, we are not persuaded by Dr. Ushman’s concerns regarding the severity of claimant’s work incident. Moreover, in light of his opinion that claimant had “normal age-related” degenerative findings and his acknowledgment that claimant was asymptomatic before the work injury, we are not persuaded by his opinion that the preexisting condition, rather than the work injury, was the major contributing cause of his disability or need for treatment of the combined low back condition. Consequently, we conclude that the employer did not sustain its burden of proving that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined low back condition.

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 \$2,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, and the value of the interest involved.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinion, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. See *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated December 29, 2008 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,500, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on July 31, 2009

Member Langer, dissenting.

The majority concludes that claimant is a "worker" and finds that his low back injury is compensable. Because claimant did not sustain his burden of proving that he is a "worker," I respectfully dissent.

As the majority explains, when deciding whether an individual is a "worker," we must determine whether the employer had a right to control the individual under the "right to control" test. *S-W Floor Cover Shop v. Nat'l Council on Comp. Ins.*, 318 Or 614, 630-31 (1994). Relevant factors of that test include whether the employer retains the right to control the details of the method of performance, the extent of the employer's control over work schedules, whether the employer has power to discharge the person without liability for breach of contract, and payment of wages. *Id.* at 622. Another factor considered is the furnishing of tools and equipment. *Stamp v. DCBS*, 169 Or App 354, 357 (2000).

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Right to Control Details of Method of Performance

The majority finds that the evidence regarding the putative employer's right to or exercise of control supports claimant's position that he was a "worker." I disagree for the following reasons.

In *Michael R. Dunham*, 60 Van Natta 3466 (2008), the claimant drove a truck for the insured, whose business was hauling freight around the country. The insured prohibited him from hauling loads for any other employer, and the claimant was subject to termination if he did so. We found that the insured retained the right to control significant details concerning methods of the claimant's job performance, including coordinating and directing where and when he could pick up and deliver loads, including the time windows for deliveries. We explained that the insured dictated the load to be picked up and there was no indication that the claimant could select a load that he wanted, or reject a load that the insured directed him to haul. Because the claimant was precluded from hauling loads for other employers, and was subject to termination if he engaged in such actions, we found that also weighed in favor of finding that claimant was a "worker" within the meaning of the statute.

Here, as the majority acknowledges, neither claimant nor the employer intended the relationship to be exclusive. (Tr. 24-25, 30-31, 33, 68-69). The record establishes that claimant had the option to work for other companies in addition to employer, which is inconsistent with an employee/employer relationship. The fact that, as a practical matter, claimant did not have time to work for another company at the time of his injury does not transform his status into a "worker."

Furthermore, unlike *Dunham*, the employer did not have the right to control significant details concerning the methods of the claimant's job performance. Claimant obtained a list of deliveries from the employer based on customer needs, which required some deliveries by particular times. (Tr. 17-20). However, claimant testified that he independently determined the hours he needed to complete the work. (Tr. 19). He stayed in touch with the employer during the day via cell phone. (Tr. 27).

The employer did not supervise claimant while he was working and did not direct the performance of his work. Mr. Luty explained that the employer determined the delivery routes based on the needs of the clients, but it did not instruct the drivers how to perform their work. (Tr. 67). For example, the employer did not control the manner in which claimant loaded or unloaded his

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van. *Compare Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 624 (2002) (each hauler waited in line and then moved into position to receive produce in his truck from the harvesting crew; the employer then directed the haulers to the field being harvested and indicated where to take the produce).

Thus, although the employer notified claimant of the delivery schedule and some required times for the clients, how the deliveries were made was left to claimant's discretion. I am not persuaded that these factors establish that the employer had the necessary "right to control." *See Schmidt v. Intel*, 199 Or App 618, 624-25 (2005) (right to control "collateral details" of a specific task did not establish a "right to control" the method of performance).

Moreover, I agree with the employer that it is significant that claimant maintained an independent business name, *i.e.*, "Modern Courier." (Tr. 23, 33, 50). His vehicle did not include any signs he was delivering goods for the employer. (Tr. 32). He purchased some shirts with the employer's logo. (Tr. 33, 68). Although claimant testified that he was required to wear the shirts with the employer's logo (Tr. 33-34), Mr. Luty testified that he was not required to wear the shirts. (Tr. 68). Mr. Luty testified that "we'd love for [the contractors] to wear our things," but it "just wasn't one of those things we could ask them." (*Id.*) Based on Mr. Luty's testimony, I am not persuaded that claimant was required to wear a shirt with the employer's logo.

Claimant signed documents with the employer reflecting his intent and understanding that he was conducting business with the employer as an independent contractor. (Tr. 49-50; Exs. a, b). The "independent contractor" questionnaire claimant filled out referred to "Modern Couriers," his business name. (Ex. a). Claimant carried "commercial" insurance on the van he used for deliveries. (Tr. 55).

I also find that the method by which the parties' relationship began is also inconsistent with an employee/employer relationship. Claimant was originally working for Express Messenger as an independent contractor.<sup>3</sup> (Tr. 13-14, 16, 33). Claimant approached the employer after he heard that Express Messenger was losing a large pharmaceutical contract, which was going to the employer. (Tr. 16, 30). He testified that he went to the employer and asked if he could continue doing his route. (*Id.*)

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<sup>3</sup> The record does not support a finding that Express Messenger was claimant's "employer."

Mr. Luty said that the employer covered most of its delivery routes by hiring hourly employees. He explained that when the employer was obtaining the new pharmaceutical contract, several of the couriers from Express Messenger approached the employer in order to keep their routes. (Tr. 63). Mr. Luty explained that they brought them “on board as contractors.” (*Id.*) He said that the employees were paid by the hour, but the independent contractors for the new routes, such as claimant, were paid by the “piece.” (Tr. 64).

In summary, I find that the evidence concerning the employer’s right to or exercise of control over the method of claimant’s performance does not support the conclusion that he was a “worker.”

#### Employer’s Control over Work Schedules

Claimant did not punch a time clock and he determined the hours he worked in order to complete the deliveries. (Tr. 19). Claimant decided the routes he took. This factor does not support the conclusion that claimant was a “worker.”

#### Employer’s Power to Discharge Without Liability

The majority finds that the employer’s power to discharge claimant without liability was “strong” evidence of the right to control. I disagree.

In *Dunham*, we found that the insured retained the right to discipline and terminate the claimant for insured-imposed infractions. Although the agreement between the claimant and the insured purportedly required 30 days notice before either party could terminate the relationship, we explained that there was no evidence that the insured incurred any liability for terminating the claimant. We concluded that this factor weighed in favor of “worker” status. 60 Van Natta at 3471.

Here, the majority finds that the employer had the right to discharge claimant without liability. The employer argues that the fact that the employer could terminate its agreement with claimant in the event of a customer’s dissatisfaction was only a natural extension of their contractor/subcontractor relationship.

After reviewing the record, I find the evidence regarding the “right to fire” is equivocal. When claimant was asked whether employer had the right to fire him for a violation of the employer’s policy, he responded “I assume so, yes.” (Tr. 27). He believed that if he did not do his job, he would get fired. (*Id.*) Claimant testified that he could be terminated for failing to observe traffic laws. (Tr. 32).

Mr. Luty testified the main reason the employer would end a relationship with a “contractor” was if they “screwed it up, didn’t show up, maybe caused a customer to feel real violated in one way or another, that’s about it.” (Tr. 81). As discussed earlier, claimant was free to accept delivery jobs with other companies while he was working for the employer. (Tr. 68-69).

In *Henn v. SAIF*, 60 Or App 587, 592-93 (1982), *rev den*, 294 Or 536 (1983), the court explained: “An unqualified right to fire, indicative of an employer-employee relationship, must be distinguished from the right to terminate the contract of an independent contractor for bona fide reasons of dissatisfaction. The exercise of such a right is still consistent with the idea that a satisfactory end result is all that is aimed for by the contract.”

I find that the evidence is not sufficient to establish that the employer had an unqualified right to fire claimant, as opposed to a right to terminate an independent contractor relationship for unsatisfactory work. This factor does not support claimant’s position that he is a “worker.”

#### Method of Payment

The majority finds that the method of payment is inconclusive, but I believe it supports the employer’s position.

Claimant testified that he did not understand the details of the employer’s payment method. (Tr. 28, 53). He said that when he worked for Express Messenger, he was paid a “65 percentage of the delivery, which is very high.” (Tr. 105). At the employer, he was not reimbursed for mileage, gasoline or other expenses. (Tr. 29). Claimant carried insurance on his wife’s van. (Tr. 52, 55). Claimant described the payment discussions with the employer as “negotiations.” (Tr. 105).

Mr. Luty explained that claimant and the independent contractors were paid by the piece, whereas the employees were paid by the hour. (Tr. 64, 65). Mr. Luty testified that the Express Messenger contractors, such as claimant, had been paid 65 percent of what was sold on the routes and they requested and obtained the same amount from the employer. (Tr. 70, 87, 99, 100, 103). He said they were paid 65 percent of the gross figure of the route stop. (Tr. 70).

Although claimant’s payment method is not entirely clear, I find that it is more supportive of the employer’s position that he was not a “worker.” *See Bowser v. State Indus. Accident Comm’n*, 182 Or 42, 60 (1947) (payment on a weekly basis establishes employee status, while payment by the piece or quantity sometimes indicative of an “independent contractor”).

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### Furnishing of Tools and Equipment

Claimant provided his own van for the deliveries, which was owned by his wife. (Tr. 26). He had a “regular class C” driver’s license and no permits were required. (Tr. 26, 27). Claimant owned a hand truck that folded down into a cart, which he used for the deliveries. (Tr. 36). I find that this factor is inconsistent with “worker” status. *See McQuiggin v. Burr*, 119 Or App 202, 207 (1993) (the plaintiff furnished the major “tool” of the business (her car) and was not reimbursed for transportation expenses, which weighed against the conclusion that she was an employee).

In summary, after reviewing the “right to control” factors, I am not persuaded that the employer had a right to control claimant in the performance of his job. As noted by the majority, we also consider the “nature of work” test. *See Rubalcaba*, 333 Or at 627. Under the “nature of the work” test, we consider: (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 the hiring of continuous services, as distinguished for completion of a particular job. *Dunham*, 60 Van Natta at 3473-74.

In *Dunham*, we found that the hauling of loads formed the fundamental and regular part of the insured’s business and that the claimant was hired on a continuous basis for six years during which he was precluded from hauling loads for other employers. Although the claimant was directed to obtain his own workers’ compensation coverage, we found that, given the nature of his work and the exclusive hiring arrangement that prohibited him from driving for other employers, the insured could more effectively distribute the cost of injuries to the claimant resulting from the hazards of truck hauling. *Id.* at 3474.

This case is distinguishable from *Dunham* in material aspects. Unlike *Dunham*, claimant was not in an exclusive relationship with the employer and was free to accept other contracts, and in fact, had been offered other contracts. He operated his own business called “Modern Couriers.” The record indicates that claimant was paid 65 percent of the gross figure of the route stops. (Tr. 70, 87, 99, 100, 103). Claimant testified that he had been paid that percentage at Express Messenger, which he said was “very high.” (Tr. 105). Mr. Luty was not involved in the initial negotiations, but he testified that the 65 percent was “too high.” (Tr. 83-85, 99). Mr. Luty explained that was “very expensive” for the employer

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and that the former employee who had entered into contracts with couriers based on the 65 percent arrangement was no longer working for the employer. (Tr. 102-03). Mr. Luty was converting to employees, rather than independent contractors. (Tr. 82). Under these circumstances, I find that the nature of claimant's work and his compensation was more of a separate calling, which is expected to carry its own accident burden.

I also consider the relationship of claimant's work to the employer's business. Claimant testified that he had only worked for the employer for a short time before he was injured. (Tr. 24). He began working for the employer on March 12, 2007 and was injured on April 18, 2007. In light of Mr. Luty's testimony that the employer was converting to employees, rather than independent contractors (Tr. 82), the record is not clear whether claimant's employment was a continuous part of the employer's regular business. Mr. Luty testified that they hired independent contractors after obtaining the new pharmaceutical contract because they "weren't able to get enough hiring done in 30 days." (Tr. 63). Based on Mr. Luty's testimony and claimant's short relationship with the employer, the record does not establish that his relationship was intended to be continuous, as opposed to a short duration.

In sum, after considering the "right to control" factors and the "nature of the work" test, I conclude find that claimant failed to carry his burden of establishing that he was a "worker" within the meaning of ORS 656.005(30). Based on my conclusion that claimant is not a subject worker, it is not necessary to address the merits of the compensability issue. I respectfully dissent.