
In the Matter of the Compensation of
STEVE E. EDE, Claimant
WCB Case No. 08-03020
ORDER ON REVIEW
Black Chapman et al, Claimant Attorneys
Michael G Fetrow, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Bloom's order that upheld the SAIF Corporation's denial, on behalf of J GM Construction (J GM), of claimant's head and ankle injury claim. On review, the issue is subjectivity. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and summarize the pertinent facts as follows.

J GM is a company that builds foundations for building contractors.¹ (Tr. 12). Mr. Seela (Seela) is an unpaid consultant for J GM with the authority to act on behalf of J GM. (Stipulation #2).

At the time of hearing, claimant had worked for J GM just over a year as a laborer. (Tr. 12, 13). He worked six to seven days a week for J GM, supervised by Seela. (Tr. 13, 16, 28). Claimant's typical work activity for J GM is "just at ground level" and has not involved overhead work, or demolishing barns/removing trusses. (Tr. 35). Claimant receives \$175 per job, which is usually pouring foundations. (Tr. 13, 15, 64).

B&M Concrete Pumping (B&M) is a corporation that pumps, fixes and attends to concrete. (Tr. 46). Mr. Oster (Oster) is a salaried employee of the corporation. His wife is the president of the corporation. (Stipulation #1).

When doing "side jobs" for B&M, Seela and claimant would go to Oster's shop, pick up a truck and cement pump, complete the job, and return the equipment. (Tr. 17, 18). Claimant was paid by Oster's wife. (Tr. 18, 30).

¹ SAIF is the insurer for J GM.

Claimant has performed between five to 10 such “side jobs” for Oster. On occasion, the side-job was for B&M, and sometimes it was for jobs Oster had on his “own” that he had “bid on himself.” (Tr. 32).

J GM owed a debt to B&M, which Seela (on behalf of J GM) “worked off.” (Tr. 46). Oster stated that when Seela was working to pay off the bill, half of the money would go towards the bill, the other half would go to claimant. (Tr. 46). Seela assumed that the work done on March 5, 2008 (when claimant sustained his injury) was under the arrangement that J GM would be working off a debt, but claimant would be paid. (Tr. 75).

Although there was no discussion regarding how much claimant would be paid, such course of conduct was normal when working with Oster. (Tr. 76). Usually, when J GM did a “removal” for Oster, J GM and claimant were paid by the hour, as opposed to a “pump” job, which was paid at a flat rate. (*Id.*)

On or before March 5, 2008, Seela, on behalf of J GM, agreed to assist B&M in demolishing a barn and salvaging wood from the barn to be used by B&M to construct a shop. Seela told Oster he was going to bring claimant to work on the demolition project. (Stipulation #4).

On March 4, 2008, Seela contacted claimant, indicating that Oster had a job to do. (Tr. 19). Seela transported claimant to the jobsite. The job was the barn demolition, which included removing and salvaging its trusses. While at the jobsite, Seela supervised claimant. (Tr. 20).

Seela had advised Oster how to remove the trusses with a “scissors lift,” but Oster had opted to use a back-hoe. (Tr. 20). Before Oster arrived, claimant was using a ladder and saw, provided by Seela, to cut the trusses. (Tr. 37). When Oster arrived, they removed the trusses by using the backhoe’s front bucket, and a two by six board, to push up on the trusses. (Tr. 29, 37, 38). Oster was going to use the trusses to build a shop for B&M. (Tr. 23; stipulation #4).

Claimant could not recall discussing the method of payment for this job. (Tr. 22). However, he believed he would be paid for his services. Neither claimant nor Seela was paid for the demolition work on this job. (Tr. 33). Oster did not intend to pay Seela for the demolition. (Tr. 50). Oster indicated that he had helped Seela at his home pouring concrete and, when he asked for Seela’s help in demolishing the building, he believed that it was just “a neighbor thing.” (Tr. 50).

Seela testified that, although Oster had occasionally worked for him without payment, Oster would charge Seela for any employees that would assist in the work. Seela specifically noted that Oster had charged him for “employee” time for the concrete work done at his home. (Tr. 66, 69). Seela further testified that if he was doing work for Oster for a “flat price” or “working off” a debt, claimant had been paid for his work. (Tr. 67, 70). When called for the demolition job, Seela believed that payment would be consistent with prior “pump jobs.” (Tr. 68, 69).

Seela noted that if B&M did not pay claimant, he would have paid claimant his wages “out of his own pocket.” (Tr. 71). Seela did not consider it “employment” unless J GM received a check from Oster. (*Id.*)

There is a dispute between J GM Construction and B&M as to who, if anyone, is responsible for paying claimant for the barn demolition work. (Stipulation #9).

Mr. Williamson was an employee of B&M on March 5, 2008 and he was directed by B&M to assist in demolishing the barn. Williamson was paid his regular wage by B&M for the work that he performed on that date. (Stipulation #10).

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant had not met his burden of establishing an employment relationship with J GM (or B&M) under the “right to control” test, the “nature of the work” test, or the “loaned servant” doctrine. Consequently, the ALJ upheld SAIF’s denial, issued on behalf of J GM.²

On review, claimant argues that, because J GM agreed that he was a “worker” within the meaning of ORS 656.005(30), either J GM or B&M was his employer. Thus, claimant asserts that the issue is which company was his employer. In that regard, claimant contends that J GM was the employer because Seela (an unpaid consultant for J GM) supervised his work and that B&M (Oster’s company) neither withheld taxes nor had an actual or implied contract with him regarding the March 5 project. Based on the following reasoning, we find that J GM was the subject employer.

² Although B&M was a party at the hearing, the ALJ issued a separate Opinion and Order regarding SAIF/B&M’s denial. That Opinion and Order, which found that claimant’s hearing request regarding that denial was untimely, has not been appealed. Thus, SAIF’s denial, issued on behalf of B&M, is not currently at issue.

SAIF agrees that claimant was a “subject worker” who was employed by a “subject employer.” (Tr. 87). It is SAIF’s contention, however, that claimant was employed by B&M either directly or under the “loaned servant” doctrine. In arguing that claimant was employed directly by B&M, SAIF cites the “test” for determining whether there is an “employment relationship” enunciated in *Multnomah County v. Hunter*, 34 Or App 718, 721 (1981).

Before it can be determined whether the “loaned servant” doctrine applies, we must first determine whether J GM or B&M was claimant’s employer on March 5, 2008. *Hunter*, 34 Or App at 722 (“loaned servant” analysis presupposes that an employment relationship already exists between the putative general employer and the employee upon which to base workers’ compensation coverage).³

The basic test for determining an employment relationship for workers’ compensation consists of two elements: (1) the existence of a contract for hire, either expressed or implied; and (2) the employer’s right to control the employee’s services. *Hix v. SAIF*, 34 Or App 819 (1978); *see also Liberty Northwest Ins. Corp. v. Church*, 106 Or App 477, 481, *rev den*, 312 Or 16 (1991). A contract for hire that satisfies the “engagement” requirement of ORS 656.005(30) may be based on either an express or implied contract. *Oremus v. Ore. Pub. Co./Leibrand*, 11 Or App 444, 446 (1972), *rev den* (1973).

In *Montez v. Roloff Farms*, 175 Or App 532 (2001), the court explained the various permutations of the term “implied contract:”

“The term ‘implied contract’ can refer either to a contract implied-in-fact or to one implied-in-law. The two concepts differ substantially, and the failure to distinguish them has sometimes led to confusion. An implied-in-fact contract is no different in legal effect from an express contract. The only difference between them is the means by which the parties manifest their agreement. In an express contract, the parties manifest their agreement by their words, whether written or

³ In *Hunter*, the court referenced this doctrine as the “borrowed servant” doctrine. *Id.* at 721. However, in *Newport Seafood v. Shine*, 71 Or App 119 (1984), the court, referencing the use of the doctrine in *Hunter*, called it the “loaned servant” doctrine. *Id.* at 124. For consistency, we reference the “loaned servant” doctrine.

spoken. In an implied-in-fact contract, the parties' agreement is inferred, in whole or in part, from their conduct. Other than questions of proof, the two types of contracts have the same legal effect." *Id.* at 536.

Claimant asserts that there was an implied-in-fact contract with J GM based on the parties' course of conduct. The conduct that is relevant to infer assent is not limited to the parties' actions at the commencement of the alleged relationship; but includes consideration of their actions over an extended period of time in determining assent to an agreement. *Hix*, 34 Or App at 821-825 (examining the parties' conduct over the course of an entire summer to determine whether there was sufficient evidence of either an express or implied contract).

Claimant is regularly employed as a construction worker for J GM, although it disputes "employing" claimant on March 5, 2008. Seela, on behalf of J GM, however, contacted claimant for the job that day and transported him to the jobsite. Moreover, claimant looked to Seela for his "truss" removal instructions. (Tr. 29). Further, claimant's work for J GM is "heavy labor," which generally includes driving stakes, setting forms, and pouring concrete foundations. (Tr. 13). While J GM does not usually conduct demolition work, Seela (on behalf of J GM) bids on jobs, supervises claimant's work, and instructs him on what to do. (Tr. 14, 16, 28). Such was the case on March 5, 2008.

Thus, by their conduct, J GM (through its consultant Seela) had an implied-in-fact contract for hire with claimant. Moreover, J GM exercised control over claimant (through Seela) in directing his actions and transporting him to the jobsite. Consequently, claimant has established an employment relationship between himself and J GM.

J GM argues that B&M was claimant's general employer on March 5. In response, claimant asserts that B&M was not his general employer because, among other things, J GM brought claimant to the jobsite without B&M/Oster requesting claimant's services. (Tr. 50). However, Seela, on behalf of J GM, did bring claimant to perform duties for B&M (on five to 10 occasions) with the understanding that claimant would receive half of whatever J GM was paid. (Tr. 46). Therefore, the record does not reveal that B&M would specifically request claimant's presence, even on jobs for which it paid claimant. Thus, the fact that B&M did not request claimant's presence at the job site, or only became aware of his presence at the job site, does not weigh on one side or the other in determining whether there was an implied contract between B&M and claimant.

However, claimant's usual work for which he was paid by B&M was pouring foundations. (Tr. 17, 18). The record does not reveal that claimant would be paid by B&M for a variety of work performed, other than pouring or removing concrete. The employment in question involved a barn demolition/truss removal project. Therefore, we do not find that claimant's and B&M's actions on the previous concrete jobs manifest assent to an agreement, or an implied contract, regarding the barn demolition project. Accordingly, we find that B&M was not claimant's general employer.⁴

J GM argues that, if it is determined that it was the general employer, responsibility for claimant's injuries shifts to B&M under the "loaned servant" doctrine. Based on the following reasoning, we disagree.

Generally, in determining whether the "loaned servant" doctrine applies, we must first determine if claimant was loaned by the general employer (J GM) to the special employer (B&M). *Hunter*, 34 Or App at 721; *see also Newport Seafood v. Shine*, 71 Or App 119, 123 (1984) (the first inquiry is whether the loaned servant doctrine applies between the disputed employers).

"Loan" is defined as "the grant of temporary use made by a lender" and "the temporary duty of a person transferred by a superior to the service of another for a limited time[.]" *Webster's Third New Int'l Dictionary* 1326 (unabridged ed 1993). In *Thomas v. A-1 Sandblasting and Steam Cleaning Co.*, 112 Or App 185 (1992), the court analyzed whether the worker (decedent) had been "loaned" to a special employer. In making its determination, the court noted that it was undisputed that "A-1" was the decedent's general employer. Because of out-of-state license problems, the decedent's general employer agreed to allow the special employer (Ross) to put the decedent on its payroll as its employee. In light of such facts, the court concluded that Ross was a special employer and, therefore, that the loaned-servant doctrine applied. *Id.* at 188.

Such is not the case here. Unlike *Thomas*, there is insufficient evidence that J GM temporarily transferred claimant's job duties to Oster/B&M or that J GM granted Oster/B&M temporary use of claimant. Here, J GM, through its consultant Seela, bid on jobs and brought claimant on various assignments. Although Oster paid claimant on jobs J GM performed for B&M, the record does not reveal that claimant, thereby, became an employee of B&M.

⁴ Additionally, we note that we are not persuaded, as testified by Oster, that this was a "neighbor thing." (Tr. 50). Seela testified that, even when Oster and he worked for free, their respective employees were paid for their time. (Tr. 66, 67, 69, 70). Regardless, for the reasons expressed in our order, we conclude that B&M was not claimant's "general employer."

We acknowledge that claimant and Seela both expected Oster to pay J GM and claimant for their work that day. Furthermore, although the record shows that the barn demolition was ultimately B&M's project, Seela exercised the right to control claimant. Seela, claimant's boss at J GM, picked claimant up and drove to the jobsite. Seela then proceeded to direct and assist claimant in removing the trusses. Seela and claimant also used Seela's tools for the barn demolition.

Oster subsequently arrived with one of his employees and decided on a different method of accomplishing the task. Oster then directed claimant in an action that caused his injuries. Although Oster gave claimant direction, we do not consider that "employment." Instead, claimant was J GM's employee, who performed a job agreed to between Oster (B&M) and J GM (through Seela). Moreover, Seela remained on the jobsite the entire time.

Absent from the record is evidence that Seela "transferred," or "loaned" claimant to the service of B&M (Oster). In light of the foregoing, the evidence does not preponderate in favor of concluding that J GM "loaned" claimant to B&M to demolish the barn. Thus, the "loaned servant" doctrine does not apply, and claimant remained an employee for J GM. Accordingly, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at hearing and on review is \$15,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, 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 SAIF. *See* ORS 656.386(2); OAR 438015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated September 2, 2008 is reversed. SAIF's denial, on behalf of J GM, is set aside and the claim is remanded to SAIF to process in accordance with law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$15,000, to be paid by SAIF. 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 SAIF.

Entered at Salem, Oregon on June 5, 2009