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In the Matter of the Compensation of  
**GARY D. DAVIS, Claimant**  
WCB Case No. 08-04147  
ORDER ON REVIEW  
Black Chapman et al, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Bloom's order that: (1) set aside its denial of claimant's right hip and ankle injury claim; and (2) awarded a \$7,000 assessed attorney fee under ORS 656.386(1). On review, the issues are subjectivity and attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant was a subject worker at the time of his April 18, 2007 injury. On review, SAIF disagrees, contending that claimant was not subject to the direction and control of the employer at the time of injury. For the following reasons, we conclude that claimant was a "worker" under ORS 656.005(30), and thus entitled to workers' compensation benefits for his injury.<sup>1</sup>

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.<sup>2</sup> "Subject to the direction and control of an employer," requires that an employer retain some control over the method and details of a claimant's work if that claimant is to be classified as a "worker." *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 27 (2002); *Woody v. Waibel*, 276 Or 189, 197 (1976). However, when

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<sup>1</sup> Entitlement to compensation for an injury begins with an evaluation into whether the individual is a "worker" under ORS 656.005(30) before determining whether that "worker" is a "non-subject" worker pursuant to one of the exemptions under ORS 656.027. *S-W Floor Cover Shop v. Nat'l Council on Comp. Ins.*, 318 Or 614, 630 (1994). Here, there is no contention that one of the exemptions under ORS 656.027 would apply in the event claimant is determined to be a "worker."

<sup>2</sup> 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).

an employer has the right to control a claimant's performance in some respects but not others, we must also consider the nature of the claimant's work for the employer (the "nature of the work" test) in deciding whether the control that employer retains makes the relationship one of master and servant. *Id.*; see also *Bovet v. Law*, 214 Or App 349, 353 (2007). Thus, "in situations in which there is some evidence suggesting that an employer retained the right to control the method and details of a claimant's work, a conclusion about the claimant's status depends on the analytical factors relevant to both tests." *Rubalcaba*, 333 Or at 627;<sup>3</sup> *Bovet*, 214 Or App at 353.

The principle factors in the "right to control" test are: (1) direct evidence of the right to, or the exercise of, control;<sup>4</sup> (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. *Castle Homes, Inc. v. Whaite*, 95 Or App 269, 272 (1989); *Jason A. Cozine*, 59 Van Natta 1680, 1681 (2007). 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).

Here, an analysis of the employer's right to control claimant's work is inconclusive. The employer specified the number of days per week that claimant was required to work (*i.e.*, at least five), and provided the equipment necessary for claimant to service and maintain the golf course. It also restricted claimant's access to storage facilities containing tools and equipment needed for the job, as well as employer-provided fuel for such equipment. To access the equipment needed to perform his work, claimant had to get a key from one of the on-site employees; he was not provided his own set of keys. Furthermore, the employer's equipment, which claimant was required to use, was specifically calibrated for certain grass heights. Thus, the employer maintained some control over how the grass would be cut and how the ultimate product would look. The employer also had the right to terminate claimant's employment at any time without incurring any liability, as long as claimant was given one day's notice. (Ex. 1); see *Perry J. Gregg*, 61 Van Natta 1962, 1968 (2009) (the employer's power to discharge the claimant without liability was strong evidence of the right to control).

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<sup>3</sup> In *Rubalcaba*, the court explained that the "right to control" and "nature of the work" tests are not independent of one another. It rejected the proposition that the "nature of the work" factors are only relevant in situations where a claimant's status cannot be determined through application of the "right to control" test. *Id.*

<sup>4</sup> With respect to this factor, the pertinent consideration is the employer's control over the method of performance, as opposed to control over the result to be reached. See *Great American Ins. v. General Ins.*, 257 Or 62, 68 (1970).

However, the employer did not control how many hours a day claimant worked, or which specific days out of the seven he worked, or when he started or stopped his workday. In addition, to ensure the proper outcome regarding the maintenance of the golf course, the employer agreed to pay claimant \$900 per month if he kept-up his duties and worked five days per week. Claimant was not paid hourly.<sup>5</sup> Claimant could also terminate his employment with one day's notice. Finally, claimant did not have a direct supervisor on site, but was to contact the owner (or her assistant) if he had any questions or concerns.

Although the parties' written agreement provided that claimant was a "contractor" who was an "independent person/entity responsible for all his actions," and that no employer/employee relationship was being established, we do not find the fact that either or both of the parties considered their relationship to be that of employer-independent contractor controlling in this case. *See Woody*, 276 Or at 198-99 ("The fact that either or both of the parties mistakenly considered their relationship to be that of employer-independent contractor cannot, of course, be controlling in applying the definition sections of the Workmen's Compensation Act."). Furthermore, claimant did not have a contractor's license or a business card representing that he was a contractor, and he did not work for anyone other than the employer.

Based on the foregoing reasoning, we conclude that a preponderance of the evidence establishes that the employer had a right to control claimant in the performance of his job. Nevertheless, because the employer had a right to control some aspects of the method of claimant's job activities, but not others, we also consider the factors that make up the "nature of the work" test. *Rubalcaba*, 333 Or at 627; *Woody*, 276 Or at 196-97; *Bovet*, 214 Or App at 354. As explained below, this test supports a finding that claimant was a "worker."

Under the "nature of the work" test, we consider: (1) the character of 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

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<sup>5</sup> The court has previously noted that, to the extent that the method of payment lessens an employer's interest in the details of how the worker spends his or her time, it suggests an independent contractor relationship. To the extent that it indicates continuing service, it suggests employment. *Henn v. SAIF*, 60 Or App 587, 592 (1982).

services, as distinguished for completion of a particular job. *Bovet*, 214 Or App at 355 n 4; *Richard R. Pate*, 59 Van Natta 1444, 1450 (2007). This test “is directly linked to the underlying policy of distributing the costs of doing business to society.” *Bovet*, 214 Or App at 355. Thus,

“\* \* \*[i]t follows that any worker whose services form a regular and continuing part of the cost of [a] product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the presumptive area of intended protection. \* \* \*.” *Id.* at 354-55 (quoting *Woody*, 276 Or at 194-95).

Here, maintenance of the golf course and its equipment formed a fundamental and regular part of the employer’s business. Furthermore, the character of claimant’s work was not that of a separate enterprise. Claimant used the employer’s equipment, which was stored on the employer’s premises at all times, and to which access was restricted. Claimant did not have a separate office or place of business. Nor did he carry liability insurance to cover the loss of or damage to the employer’s equipment. Thus, the services provided by claimant did not constitute a separate business or enterprise, but were an integral part of the employer’s golf course business. Under these circumstances, we find that the employer can more effectively distribute the cost of injuries resulting from the hazards of maintaining the golf course. *See Woody*, 276 Or at 198 (finding that the employer was in a superior position to distribute the cost of injuries, as compared to the owner/operator hired to haul logs).

Accordingly, for all of the aforementioned reasons, we conclude that, at all relevant times, claimant was a “worker” within the meaning of ORS 656.005(30).

Next, SAIF contends that the ALJ’s \$7,000 assessed attorney fee award was excessive. Based on the following reasoning, we conclude that a \$7,000 assessed attorney fee is reasonable for claimant’s counsel’s services at the hearings level.

In so deciding, we consider the following factors: (1) the legal complexity of the “subject worker” issue; (2) the considerable value of the interest involved; (3) the nature of the proceedings/time devoted to the case (as referenced in the hearings record, claimant’s counsel’s travel from Medford to the Klamath Falls’ hearing, claimant’s counsel’s preliminary actions, the fact that the hearing lasted

about an hour and a half, with a 51-page transcript, and written closing arguments);<sup>6</sup> (4) the skill and extensive experience of the attorneys; and (5) the substantial risk that claimant's counsel might go uncompensated, given SAIF's vigorous defense. *See Schoch v. Leopold & Stevens*, 325 Or 112, 118-19 (1997) (in determining a reasonable assessed attorney fee, we apply the factors set forth in OAR 438-015-0010(4) to the circumstances of each case).<sup>7</sup>

Claimant's attorney is also 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 SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's contested attorney fee request), the complexity of the issue, and the value of the interest involved. Claimant's attorney is not entitled to a fee for services on review regarding the penalty and attorney fee issues. *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).

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 438-015-0019; *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 December 9, 2008 is affirmed. For services on review, claimant's attorney is awarded a \$2,500 assessed attorney fee, payable 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 September 29, 2009

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<sup>6</sup> *See Carmen O. Macias*, 53 Van Natta 689 (2001) (an attorney's travel time to a hearing and deposition represents hours of legal services rendered on behalf of the claimant, which is considered in determining a reasonable attorney fee award).

<sup>7</sup> In reaching this conclusion, we do not consider SAIF's defense to this claim to be frivolous. As reflected in our analysis concerning the subjectivity issue, the question of whether claimant was a subject worker was not free from doubt.