

In the Matter of the Compensation of
KIM E. WILLIAMSON, Claimant

WCB Case No. 09-01156

ORDER ON REVIEW

Ransom Gilbertson et al, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Brazeau's order that found that: (1) claimant was a subject worker; and (2) set aside its denial of claimant's injury claim. On review, the issue is subjectivity.

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

In September 2005, claimant, a resident of Milton-Freewater, Oregon, was initially hired by the employer to be a taxi-driver for that city. (Tr. 3, 15, 24). Her taxi trips were in the Milton-Freewater vicinity and included non-medical purposes. (Tr. 25). Claimant's employer had a parking lot in Milton-Freewater for the taxi service cars. (Tr. 13, 15). When claimant was first hired, she drove from her house to that lot to get the taxi car and would then do the routes. (Tr. 15).

The employer lost the taxi contract with Milton-Freewater about three years ago. (Tr. 25, 26). At that time, however, the employer was beginning to obtain contracts with the states of Oregon and Washington to provide non-emergency medical transportation. (Tr. 26). Claimant was then asked to do the medical transports. (Tr. 27). The employer also obtained a similar contract with the state of Idaho. (Tr. 7). The employer employs drivers, three of whom live in Oregon and three of whom live in Washington. (Tr. 8, 18).

Claimant explained that the "base of where our transportation is all set up" is from a state office in The Dalles, Oregon. (Tr. 7). The employer's Oregon clients had to call that state office and explain the date and time of their appointment. (Tr. 7, 27). The state office contacts the employer and sends faxes of the transportation requests to the employer. (Tr. 8, 27-28). The Oregon clients had to meet certain criteria to qualify for transportation and the program was funded by the state of Oregon. (Tr. 28). The employer was paid by the state of Oregon for transporting the clients. (*Id.*) The employer paid claimant an hourly wage. (Tr. 9-10). Claimant testified that the employer's contract with the state of Oregon required the employer to carry Oregon workers' compensation coverage for the Oregon employees. (Tr. 8). Oregon state taxes were deducted from claimant's paycheck. (*Id.*)

When claimant was first hired, the owner of the employer resided in Oregon and operated his business out of his home. The owner relocated to Washington state about two years ago. (Tr. 9, 14, 16, 17, 24). During claimant's employment, the employer's payroll, bookkeeping and taxes have been prepared by an accountant with an office in Milton-Freewater, Oregon. (Tr. 11-14). The accountant also worked for other employers. (Tr. 12).

After the employer received the transportation requests from the state of Oregon, he faxed the work orders to the employees every evening for the next day's work. (Tr. 4, 8, 18, 24, 28, 29). Claimant had a fax machine and a private line at her home for the work orders. (Tr. 4). The phone bill was in her name, but the employer paid the bill. (Tr. 4-5). The other Oregon employees also worked out of their homes and had fax machines. (Tr. 18, 19, 29). Each of the Oregon employees had a company vehicle at his/her home. (Tr. 18-19). The company vehicles were owned, insured, and maintained by the employer. (Tr. 25-26). Claimant had a company credit card for gasoline, which was paid by the employer. (Tr. 26). She kept the company vehicle fueled and made sure it was clean and presentable. (*Id.*)

Claimant had a personal cell phone that she also used for work. (Tr. 21). She was notified by cell phone when she needed to return and pick up a client. (*Id.*) Each evening, claimant would "refax" that day's completed work orders to her employer. (Tr. 24).

Most of claimant's clients lived in Milton-Freewater, Oregon. (Tr. 5, 23). She picked them up from their residences or retirement facilities and took them to medical appointments in Oregon and Washington. (*Id.*) From Milton-Freewater, the closest main hospitals and clinics were in Walla Walla, Washington. (Tr. 23). Claimant crossed the border between Oregon and Washington several times a day. (Tr. 20, 22). She provided transportation only for medical purposes. (Tr. 24).

Claimant injured her left shoulder on December 16, 2008, when she was transporting a client from a dialysis appointment in Washington to his home in Washington. (Tr. 19-22). At the time of claimant's injury, the employer identified its principal place of business as Walla Walla, Washington. (Ex. 4).

On January 21, 2009, SAIF denied the claim on the basis that claimant was not a subject worker under Oregon law at the time of the injury. (Ex. 6). Claimant requested a hearing.

At hearing, the parties agreed that the claim was governed by ORS 656.027(5). The issue was whether claimant was excluded as a subject worker, because she was “engaged in the transportation in interstate commerce of goods, persons or property for hire by rail, water, aircraft or motor vehicle, and whose employer has no fixed place of business in this state.” The parties disagreed as to whether claimant was engaged in “interstate commerce,” whether she was “for hire,” and whether the employer had a “fixed place of business” in Oregon at the time of claimant’s injury.

The ALJ found that claimant was hired in Oregon and began each work day at her home in Oregon. Claimant received the work orders at her home and left from her home in a company vehicle to perform her work for the employer. The ALJ explained that the Oregon workers routinely went into Washington to perform their work, but at times, all the work would be performed in Oregon. Because the Oregon workers were required to receive work orders in Oregon and to use company vehicles to operate out of their Oregon homes, the ALJ concluded that the Oregon employee’s homes fit the definition of “fixed places of business” as that phrase was used in ORS 656.027(5). The ALJ therefore concluded that ORS 656.027(5) did not apply, and set aside SAIF’s denial of claimant’s injury claim.

Generally, 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). Here, however, SAIF is not disputing that claimant was a “worker.” Rather, the only issue on review is whether claimant is a “non-subject” worker pursuant to ORS 656.027(5).

ORS 656.027(5) excludes from coverage a “worker engaged in the transportation in interstate commerce of goods, persons or property for hire by rail, water, aircraft or motor vehicle, and whose employer has no fixed place of business in this state.”

We begin with the issue of whether or not the employer has a “fixed place of business” in Oregon because we find that issue dispositive. SAIF contends that claimant’s receipt of instructions from the employer at her home does not establish her home as a “place of business” for the employer. SAIF argues that the term “fixed place of business” contemplates something more than a place where a worker receives faxes from, and sends faxes to, the employer. SAIF contends that the employer’s business of transporting clients to medical appointments could not be conducted by claimant remaining in her home.

Claimant responds that her home office was a “fixed place of business” for the employer. She further asserts that she was paid pursuant to a contract between the employer and the state of Oregon to serve Oregon patients, and that the employer’s payroll was out of Oregon.

The cases interpreting ORS 656.027(5) have scrutinized the nature of the employer’s business to determine whether or not the employer had a “fixed place of business” in Oregon.

In *Giltner v. Commodore Contract Carriers*, 14 Or App 340 (1973), the claimant owned and operated a truck used exclusively for hauling mobile homes from the employer’s affiliated corporation’s manufacturing plant at Roseburg, Oregon to locations outside of Oregon. The arrangement was under a written agreement by which the claimant provided the truck and leased it to the employer. The claimant lived in Portland. When he made trips in compliance with the lease, he was called by the employer’s dispatcher in Roseburg. The claimant would drive the truck from Portland to Roseburg, haul the mobile home to its destination, and return to his home in Portland to await another call. The claimant was injured as he was driving the truck to Roseburg in response to the dispatcher’s call to pick up a mobile home for delivery.

The employer argued that the lease agreement providing that the lease should be governed by Nebraska law meant that Nebraska workers’ compensation law applied. The court rejected that argument, explaining that ORS 656.027 provided that all workers in Oregon were subject to the workers’ compensation law. The court referred to the exclusion under ORS 656.027(5)¹ and explained that the employer had a fixed place of business in Oregon, *i.e.*, in Roseburg where the employer’s sole Oregon employee, the dispatcher, controlled the distribution of the product manufactured there, and also controlled the claimant and his vehicle. The court said that the Oregon dispatcher was the “nerve center” for the Pacific Northwest for the Nebraska corporation. 14 Or App at 345.

In *Wright v. Industrial Indemnity Co.*, 68 Or App 302 (1984), the claimant was a long-haul truck driver, employed by a trucking company. The claimant filed a claim for hearing loss, as well as for a back injury sustained when he fell from his truck in Washington state. The court applied ORS 656.027(5) and

¹ The version of ORS 656.027(5) applied in *Giltner* was the same as the present statute, except that it referred to a “workman” rather than a “worker.” 14 Or App at 345.

ORS 656.126(1).² With regard to ORS 656.027(5), the court relied on *Giltner* and determined that the employer had a “fixed place of business in this state” under ORS 656.027(5). The court explained that the claimant was hired at the employer’s office in Oregon and that the employer had opened a truck terminal in Brooks, Oregon, where several full-time employees worked. Approximately half of the employer’s 120 drivers started and completed their trips at that terminal. In addition, the employer based a large number of trucks at Brooks, and they were serviced and repaired there. All trips originating in Oregon were dispatched through the Brooks terminal, although they were coordinated with Idaho. Under those circumstances, the court found that the employer had a “fixed place of business” in Oregon. 68 Or App at 305. In addition, the court concluded that the claimant was a “permanent” Oregon employee. *Id.* at 306.

For the following reasons, we agree with the ALJ that claimant’s employer had a “fixed place of business” in Oregon at the time of her injury and, therefore, ORS 656.027(5) does not apply.

Claimant is an Oregon resident, who was hired by the employer in Oregon. 50 percent of the employer’s employees lived in Oregon. Claimant and two other Oregon employees conducted business for the employer out of their homes in Oregon. The employer provided each Oregon employee with a private phone line, which it paid for, and a fax machine. Each Oregon employee has a company vehicle kept at his/her home, and each morning, the trips originated from those homes. The employer notified each employee of transportation assignments via fax machine, and at the end of each day, the employees “refaxed” the completed work orders to the employer. The majority of the claimant’s clients lived in Oregon.

In addition, the employer’s payroll, bookkeeping and taxes were prepared by an accountant with an office in Milton-Freewater, Oregon. Oregon state taxes were deducted from claimant’s paycheck. Furthermore, the employer’s contract with the state of Oregon required the employer to carry Oregon workers’ compensation coverage for the Oregon employees.

² At the time *Wright* was decided, ORS 656.126(1) provided:

“If a worker employed in this state and subject to ORS 656.001 to 656.794 temporarily leaves the state incidental to that employment and receives an accidental injury arising out of and in the course of his employment, he, or his beneficiaries if the injury results in death, is entitled to the benefits of ORS 656.001 to 656.794 as though he were injured within this state.”
68 Or App at 304.

We find that these circumstances establish that the employer had a “fixed place of business” in Oregon. *See Wright*, 68 Or App at 305-06 (the employer had a “fixed place of business” in Oregon where the claimant was hired in Oregon, the employer operated a truck terminal with several employees in Oregon, a large number of trucks were based in Oregon, and all trips originating in Oregon were dispatched through the Oregon terminal); *Giltner*, 14 Or App at 345 (the employer had a “fixed place of business” in Oregon where the employer’s sole Oregon employee controlled the distribution of the product manufactured there and also controlled the claimant and his vehicle); *James R. Burres*, 49 Van Natta 661 (1997) (although the claimant was engaged in interstate transportation of goods by truck for the employer at the time of his injury, he did not qualify as a nonsubject worker under ORS 656.027(5) because the employer had two fixed places of business in Oregon, including employees at those locations).

Moreover, although the employer’s owner worked out of his home in Washington, the record indicates that the sole source of the non-emergency medical transport Oregon clients was from a contract with the state of Oregon, specifically from an office in The Dalles, Oregon. The Oregon clients first contacted the state office with transportation requests. The state office then contacted the employer with the transportation requests. The employer did not obtain any clients directly and was not paid directly by any clients. Rather, the funding from the employer’s non-emergency medical transport operation for Oregon residents came directly from the state of Oregon. These circumstances further establish that the employer had a “fixed place of business” in Oregon. *See Wright*, 68 Or App at 305-06 (the employer had a “fixed place of business” where all trips in Oregon were dispatched through the Oregon terminal); *Giltner*, 14 Or App at 345.

Although SAIF relies on *Hollingsworth v. May Trucking*, 59 Or App 531, *rev den*, 294 Or 212 (1982), we note that there was no mention of ORS 656.027(5) in that case. Rather, the court discussed ORS 656.126(1), which provides that a covered worker permanently employed in Oregon who temporarily leaves the state incidental to employment and who receives an injury arising out of and in the course of employment while out-of-state is entitled to benefits as if he/she had been injured within Oregon. The issue in *Hollingsworth* was whether the claimant was permanently, as opposed to temporarily, employed in Oregon at the time of an out-of-state injury. 59 Or App at 533. Here, in contrast, the parties have not raised any arguments regarding ORS 656.126(1).

SAIF also relies on *Charles R. Fritz*, 43 Van Natta 403 (1991), to argue that claimant is not a subject worker ORS 656.027(5). We find *Fritz* distinguishable.

In *Fritz*, the claimant was a long-haul truck driver, who worked for Czyhold Truck Lines, one of four truck companies doing business under Quality Transportation Services. Czyhold was based in Washington. Czyhold's primary business was in Washington, but it had authority to haul goods on an interstate basis using federal highways in Oregon. Czyhold employed about 80 truck drivers, about 10 of whom lived in Oregon. Czyhold had no base of operation in Oregon, but its trucks received routine maintenance at a leased facility operated by Quality Transportation Services in Portland, where its Oregon drivers also parked their trucks. However, that facility was not operated by Czyhold, and was used by several other sister companies for a similar purpose. The claimant was an Oregon resident and had Washington compensation insurance withheld from his paycheck. The claimant was seriously injured while working in Oregon.

The carrier argued that the claimant was excluded as a subject worker under ORS 656.027(5). The claimant responded that the statute did not apply because the leased facility in Portland was a "fixed place of business in this state." We disagreed with the claimant. We explained that Czyhold had no terminal or full time employees in Oregon. We acknowledged that its trucks received routine maintenance at a facility in Portland, but that facility was not operated by Czyhold. Rather, that facility was operated by Quality Transportation Services. Major maintenance and repair was strictly done in Washington terminal, or under contract at various truck stops in Oregon and Washington. We noted further that, although Czyhold operated about 60 trucks, only four or five were parked at the Portland

facility. We explained that during the course of the claimant's employment, dispatch had been accomplished only through Washington, and he was never dispatched from the state of Oregon. Under these circumstances, we agreed with the carrier that the claimant was not a "subject worker." 43 Or App at 405.

We find the facts in *Fritz* distinguishable. In *Fritz*, the employer had no terminal or full time employees in Oregon. Here, in contrast, 50 percent of the employer's employees lived in Oregon and conducted business for the employer out of their homes. Although the employer in *Fritz* had no base of operation in Oregon, in this case, claimant's employer had three such bases of operation, and the employer's payroll and taxes were prepared by an accountant in Oregon. The employer owned eight vehicles, three of which were at the homes of the Oregon employees. The record indicates that the employer was responsible for

maintaining the company cars, but it is unclear whether the maintenance occurred in Oregon or Washington. Moreover, the employer obtained all its Oregon clients via the contract with the state of Oregon. The facts in this case establish that claimant's employer had a "fixed place of business" in Oregon.

In light of our conclusion that the employer had a "fixed place of business" in Oregon, it is not necessary to address the other elements of ORS 656.027(5). Based on the foregoing reasons, we agree with the ALJ that the exclusion in ORS 656.027(5) does not apply and that claimant was a "subject worker."

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 SAIF. 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 issue, and the value of the interest involved.

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; *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 June 11, 2009 is affirmed. For services on review, claimant's attorney is awarded \$2,500, 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 February 11, 2010