
In the Matter of the Compensation of
JEANETTE Y. JENSEN, Claimant
WCB Case No. 10-02091
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

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

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Lipton's order that set aside the self-insured employer's denial of claimant's injury claim. On review, the issue is subjectivity.¹ We affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes and supplementation. In the last line on page 2, we change the date to "2010."

We provide the following summary of the relevant facts.

The employer contracts with a warehouse every year for seven to eight weeks to provide a distribution center for the Yellow Books (phonebooks). (Tr. 46). The employer had a temporary office in the warehouse where the books were delivered and the delivery people were hired. (Tr. 46-47). The employer also has employees who were involved in sales, marketing, and management. (Tr. 46). The employees are paid on salary and commission. (Tr. 33). Mr. Helmink, manager of area distribution, was responsible for hiring people to deliver the phonebooks. (*Id.*)

Claimant testified that she was hired at the end of the season, when there were only three weeks left and only a few routes remained. (Tr. 12, 20). On October 12, 2009, claimant signed a "directory distribution contract" with the employer, which provided that her performance of services "shall be that of an independent contractor[.]" (Ex. A).

¹ With its brief, the employer submits a copy of a case from the state of Washington, acknowledging that the case is not controlling, but arguing that the reasoning is persuasive. Claimant objects to the employer's submission. We are not inclined to take administrative notice of that case. See *June J. Holmes*, 57 Van Natta 136, 141 n 4 (2005). In any event, even if we considered the case, it would not alter our ultimate conclusion.

Claimant filed a claim on January 29, 2010, asserting that she injured her left knee on October 15, 2009, when she slipped at the employer's warehouse. (Ex. 1). Claimant sought treatment for low back and left knee complaints on February 16, 2010. (Ex. 2).

The employer denied the claim on the basis that claimant was not a subject worker. (Ex. 3). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

In determining whether claimant was a subject worker, the ALJ applied the "right to control" test, but found that it was not dispositive. Based on the "nature of the work" test, the ALJ determined that claimant's delivery of the Yellow Book was a regular and continuous part of the employer's business and was essential to its success. Therefore, the ALJ found that the "nature of the work" test was satisfied. Thus, the ALJ concluded that claimant was a "subject worker."

On review, the employer argues that claimant was not a "subject worker" under the "right to control" test or the "nature of the work" test. Based on the following reasoning, we disagree.

Claimant has the burden of establishing the existence of an employment relationship between herself and the employer. *Hopkins v. Kobos Co.*, 186 Or App 273, 277 (2003). 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. There is no dispute that claimant was engaged to furnish services for remuneration.

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 v. Nat'l Council on Comp. Ins.*, 318 Or 614, 622 (1994). 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.* 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).

Method of Performance

Under ORS 656.005(30), “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, 627 (2002). “The test of right to control does not refer to the right to control the results of the work but rather to the right to control the manner and means of accomplishing the result.” *Great American Ins. v. General Ins.*, 257 Or 62, 67 (1970). Actual exercise of control by the employer is not necessary; evidence of the employer’s right to control is sufficient. *Dep’t of Consumer & Bus. Services v. Clements*, 240 Or App 226, 234 (2010).

Claimant was not supervised while she performed the deliveries. (Tr. 24, 34). The instructional video explained that the phonebooks delivered to residences were to be placed in plastic bags on the hinged side of the front door. (Tr. 11; Ex. B). The delivery people were not to walk across lawns and the books were not to be left in other locations. (Tr. 11). The phonebooks were to be delivered in good condition. (Tr. 48). If a delivery could not be completed, the delivery people were to document the reason. (Ex. B).

For business deliveries, the employer required signatures from the business to acknowledge receipt of the phonebooks, as well as documentation of the number of books delivered. (Tr. 54; Ex. B). If a delivery could not be completed because of building security problems, the delivery people were to contact a manager. (Tr. 14-15). Claimant was not allowed to leave phonebooks by the front door of a building and could not deliver to a location not on her route. (Tr. 15; Ex. B).

Claimant was allowed to choose her delivery route and whether she wanted a business route or residential route. (Tr. 12). She could have hired other people to help her perform her job. (Tr. 28-29). In that situation, the employer would have paid only claimant, not her helper. (Tr. 28-29; Ex. B). Claimant could have brought her children with her during the deliveries. (Tr. 27). She could stop for lunch when she wanted and could have performed a personal errand during her work hours. (Tr. 27-28). The delivery people could ask managers for suggestions about completing the deliveries. (Tr. 40).

The instructional video explained that the employer provided route information that included which homes or businesses were to receive a phonebook. The video also provided detailed instructions on how each delivery was to be

documented. (Ex. B). After a route was completed, claimant returned to the warehouse with the completed forms and any leftover books or bags. She was required to total the number of stops and books she delivered. (*Id.*) A manager reviewed and signed the forms. (Tr. 17). Claimant had to explain why she had any leftover phonebooks, and had to return the phonebooks and plastic bags at the warehouse. (*Id.*)

Before claimant received payment for a completed delivery route, the employer called each business to verify delivery and randomly verified the residential deliveries. (Tr. 12, 16, 24-26, 34, 39). The employer did not verify whether the books were properly delivered, although occasionally it would receive phone calls regarding delivery problems. (Tr. 39, 40).

Mr. Helmink, claimant's manager, agreed that the delivery people had to deliver the phonebooks in a certain way and in a certain time. (Tr. 41). They were required to deliver only on their scheduled route. (Tr. 42). The delivery people could call a manager and ask if they could deliver to other places. (*Id.*)

We find that the employer had some control over the method and details of a claimant's work. Claimant could choose her delivery routes and set her own hours. But she had to comply with the employer's requirements to deliver phonebooks during daylight and business hours within two to three days of choosing the route. Furthermore, the employer dictated specific locations for deliveries and the placement of the phonebooks. The employer also required detailed documentation of each stop and phonebook delivered, as well as reasons for the lack of delivery. No deliveries were allowed outside the specific routes without management approval. Delivery people were to contact a manager if they had problems with the deliveries. We conclude that the employer's control over the method and details of claimant's work is indicative of a "worker."

Work Schedules

Claimant explained that she had two days on average to finish each route. (Tr. 12, 23-24). The instructional video said that deliveries were to be completed within three business days. (Ex. B). The books were to be delivered during business hours, not at night. (Tr. 15, 27, 34, 43; Ex. B). Claimant set her own hours. (Tr. 27). She could stop for lunch when she wanted and could have done a personal errand while performing her work. (Tr. 27-28).

We find that this factor is inconclusive. Claimant had time frames to complete each delivery route and guidelines of what time of day to deliver the phonebooks, but she had considerable flexibility in setting her schedule.

Discharge Without Liability

The ALJ found that the employer could terminate the contract with claimant with no liability beyond paying her for the deliveries she made.

The contract between the parties provided that it “may not be terminated prior to the Completion Date except that [the employer] may terminate this Contract in the event of failure by Contractor to perform Contractor’s duties hereunder.” (Ex. A). The contract stated that if the contractor “does not finish a delivery route completely, the Contractor is not entitled to payment for such route and payment will not be issued.” (*Id.*)

Mr. Helmink had never terminated a delivery person’s contract. He explained that the employer had deadlines and would need to get the books back if the delivery person could not complete the contract. If there were problems with completing the route, a manager would call the delivery person and notify them of the deadlines. If there was no response, a manager would go to their residence. The employer needed the phonebooks returned if the delivery could not be completed. (Tr. 37-39).

Claimant understood that if she did not perform the job correctly, she would not get paid. (Tr. 12). In her view, “termination” or getting “fired” meant she would not be paid. (Tr. 16, 30-31). Claimant explained that her payment depended on how many books were delivered, when she delivered them, and if she delivered them properly. (Tr. 16).

The record does not indicate that the employer would incur any liability for discharging claimant. In *Rubalcaba*, the court explained that an employer’s right to fire a claimant without incurring contractual liability has been given “great weight” in previous cases as suggesting the existence of “worker” status. 333 Or at 623; *Perry J. Gregg*, 61 Van Natta 1962, 1968 (2009). Here, we find that the employer’s power to discharge claimant without liability is strong evidence of the right to control.

Method of Payment

Claimant was paid for each book she delivered. (Tr. 14). The delivery people also received “bonuses” for rural routes that required more driving and for downtown routes that required parking. (Tr. 15-16, 21, 36-37).

The contract provided that the employer may withhold payment for a reasonable time pending verification of delivery. If claimant was notified of any deliveries that did not comply with the delivery requirements, she was to correct those deliveries before payment was made. If claimant did not finish a route completely, she was not entitled to payment for the route. (Ex. A). Claimant was generally paid about a week after completing a route. (Tr. 29).

The contract also provided that the employer would not withhold taxes or issue a Form W-2. Rather, the employer issued a Form 1099 for amounts paid to delivery people. (Ex. A; Tr. 49-50).

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. Here, we find that the method of payment is neutral.

Furnishing Tools and Equipment

Claimant used her car for the phonebook deliveries. The employer verified that claimant had a driver’s license and car insurance. (Tr. 13, 26-27, 35-36). Claimant did not maintain a separate office and instead worked out of her car. (Tr. 16). The employer provided the phonebooks, plastic bags, route information, and forms. (Tr. 20). The employer also provided route information that explained which homes or businesses were to receive a phonebook. (Ex. B). Claimant was not required to have a business license or business cards. (Tr. 13, 36).

Mr. Helmink testified that the employer did not provide badges, uniforms, or signs for the cars that showed that the delivery people represented the employer. (Tr. 51, 56). However, claimant testified that she was provided with a sign to place in the windshield of her car if she was delivering downtown and there were no parking spaces. (Tr. 52-53). The sign was not displayed all the time, but only in that circumstance. (*Id.*)

We find that this factor is inconclusive. *See Rubalcaba*, 333 Or at 624 (ownership and maintenance of a vehicle are not conclusive factors regarding an employer’s “right to control”); *Henn*, 60 Or App at 592 (“equipment” factor not conclusive where the claimant furnished her own car and notebook samples, but the free gifts and contract forms were supplied by the employer).

We turn to the employer’s argument that the contract identifying claimant as an independent contractor is persuasive evidence of the parties’ intent in forming the relationship.

The “directory distribution contract” provided that claimant’s performance of services “shall be that of an independent contractor[.]” (Ex. A). Claimant testified that she understood that portion of the contract meant that the employer would not be “holding her hand,” but she would be performing the work by herself, under the employer’s rules and terms. (Tr. 23).

We do not defer to the designation and/or the parties’ beliefs regarding “worker” status. *See Woody v. Waibel*, 276 Or 189, 198-199 (1976) (“[t]he 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 Work[ers]’ Compensation Act”); *Gregg*, 61 Van Natta at 1967 (fact that the claimant signed a contract was entitled to little weight in determining whether he was a “worker”).

The employer contends that a critical fact is that claimant could hire her own helpers to deliver phonebooks without the employer’s approval or knowledge. We agree with the employer that claimant’s option to hire helpers without the employer’s knowledge supports an independent contractor relationship.

In summary, we find that the factors supporting an employment relationship are mixed. 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.

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 an 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; *Gregg*, 61 Van Natta at 1970.

Here, after applying the "nature of the work" test, the ALJ determined that claimant's delivery of the Yellow Book was a regular and continuous part of the employer's business and was essential to its success.

The employer contends that the "nature of the work" test does not support an employee-employer relationship. The employer argues that the delivery of phonebooks was not a continuous job and was not integral for the employer's business. The employer contends that it sells advertising and publishes phone books as its primary business and that transporting phonebooks is not part of its regular business. We disagree.

The employer hires delivery people to deliver the phonebooks for seven to eight weeks every year. (Tr. 46). The employer also has employees who are involved in sales, marketing, and management and who are paid on salary and commission. (Tr. 33, 46). The delivery jobs are seasonal, based on the nature of the employer's business.

In *Pease v. Nat'l Council on Comp. Ins.*, 128 Or App 471 (1994), the employer operated an ornamental plant nursery and retail garden store. The "diggers" harvested plants from the ground and prepared the plants for shipping. The court applied the "nature of the work" test and concluded that the "diggers" were employees. The court explained that the diggers' work was seasonal, but was a regular part of employer's business. In addition, the diggers' work was necessary for the employer to pursue her business. *Id.* at 479.

We reach a similar conclusion here. Although the delivery of phonebooks was seasonal, it was a regular part of employer's business. The employer acknowledges that delivery of the phonebooks was necessary to the ultimate success of its business, but it argues that publishing is integral to the business.

We do not agree with the employer's argument that the delivery of the phonebooks is separate from its primary business of advertising and publication. The purpose of the phonebooks is to allow businesses who advertise in the books

to sell their services and products, which necessarily requires someone to purchase those goods and services. The delivery of the phonebooks to residences and businesses is a critical part of that process. Without delivery of the phonebooks, the advertising cannot be effective.

Claimant and Mr. Helmink testified about the short timelines for delivering the phonebooks and the importance of delivering the books to each location. The employer verified the deliveries before it paid the delivery people. Those factors are consistent with our conclusion that the delivery of phonebooks was a critical part of the employer's business.

Furthermore, we find that the character of claimant's work was not that of a separate enterprise. Claimant had a car and provided her own car insurance. She also had a driver's license. However, she did not have any business cards, business license, or a separate place of business. Rather, she worked out of her car. (Tr. 13-15). Although claimant is a licensed driver, the record does not indicate that her work required advanced skills or highly specialized knowledge such that she should not be considered a "worker" under ORS 656.005(30). *See Coghill v. Nat'l Council on Comp. Ins.*, 155 Or App 601, 608, *recons*, 157 Or App 125 (1998), *rev den*, 328 Or 365 (1999) (where majority of the work did not require advanced skills or specialized knowledge, the "nature of the work test" weighed in favor of "worker" status).

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 phonebook business. Under these circumstances, we find that the employer can more effectively distribute the cost of injuries resulting from the hazards of delivering phonebooks. *See Woody*, 276 Or at 198 (finding that employer was in a superior position to distribute the cost of injuries, as compared to the owner/operator hired to haul logs); *Gregg*, 61 Van Natta at 1972 (the employer could more effectively distribute the cost of injuries resulting from the delivery of pharmaceutical supplies). We conclude that the "nature of the work" test establishes that claimant was a subject worker.²

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

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

attorney's services on review is \$1,350, 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 and claimant's counsel's affidavit), 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 the employer. See ORS 656.386(2); OAR 438-015-0019; *Gary E. 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 November 23, 2010 is affirmed. For services on review, claimant's attorney is awarded \$1,350, 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 August 1, 2011

Member Langer, dissenting.

The majority finds that the "right to control test" is not conclusive, and decides that claimant is a "worker" under the "nature of the work" test. Because claimant did not sustain her burden of proving that she is a "worker," I respectfully dissent.

I agree with the majority's description of the "right to control" test. But the majority finds that the factors supporting an employment relationship under the "right to control" test are mixed. In contrast, for the following reasons, I would find that the right to control test establishes that claimant was not a "worker."

The right to control the work refers to the right to control the manner and means of accomplishing the result, not the right to control the details of the desired result. *Oregon Drywall Sys., Inc. v. Nat'l Council on Comp. Ins.*, 153 Or App 662, 667 (1998). The monitoring of progress toward job completion does not amount to the exercise of direction and control over the means and method of doing the work. *Id.*

Here, the employer controlled some details about how the phonebooks should be placed and the number of books delivered. But the employer did not supervise or control the actual delivery of the phonebooks. Claimant was not supervised while she performed the deliveries. (Tr. 24, 34). She was allowed to choose her delivery route and whether she wanted a business route or residential route. (Tr. 12). Claimant could have brought her children with her during the deliveries. (Tr. 27). She could stop for lunch when she wanted and could have performed a personal errand during her work hours. (Tr. 27-28). Claimant's flexibility in setting her schedule is not indicative of employee status. *See Thomas H. Kenschuh*, 48 Van Natta 1079, 1080 (1996).

The employer verified that the phonebooks were delivered, but it did not verify the manner in which they were delivered. Those factors merely evince the right to control the *results* of the work. *See Robert A. Medina*, 62 Van Natta 2734, 2737 (2010) (because the noncomplying employer's right of control was largely limited to control over the result to be reached, and not the method of performance, that factor weighed against an employment relationship). The employer set general parameters regarding the delivery of phonebooks. In light of the significant discretion given to claimant, however, I do not find those factors sufficient to establish the necessary "right to control." *See Schmidt v. Intel*, 199 Or App 618, 624-25 (2005) (right to control the "collateral details" of a specific task did not establish a right to control the method of performance).

Moreover, claimant could have hired other people to assist her in her job. (Tr. 28-29). In that situation, the employer would have paid only claimant, not her helper. (Tr. 28-29; Ex. B). Those factors are consistent with an independent contractor status, not employee status. *See Woody v. Waibel*, 276 Or 189, 192 n 2 (1976) (circumstances supportive of the conclusion that the plaintiff was an independent contractor included the fact that he was allowed to employ assistants and work for other logging companies); *Lockard v. Murphy Co.*, 49 Or App 101, 107 (1980) (fact that the plaintiff could work for others and could hire assistants to without the defendant's consent or approval supported the conclusion that the plaintiff was an independent contractor); *Michael Dunham*, 60 Van Natta 3466, 3472 (2008) (fact that the claimant could hire "lumpers" to help him load and unload weighed against "worker" status). I agree with the employer that the fact that claimant could hire her own helpers to deliver phonebooks without the employer's approval or knowledge is a critical fact.

Regarding the method of payment, claimant was paid for each book she delivered. (Tr. 14). The delivery people also received “bonuses” for rural routes that required more driving and for downtown routes that required parking. (Tr. 15-16, 21, 36-37). The parties’ contract provided that the employer may withhold payment for a reasonable time pending verification of delivery. If claimant was notified of any deliveries that did not comply with the delivery requirements, she was to correct those deliveries before payment was made. If claimant did not finish a route completely, she was not entitled to payment for the route. (Ex. A). Claimant was generally paid about a week after completing a route. (Tr. 30). The contract also provided that the employer would not withhold taxes or issue a Form W-2. Rather, the employer issued a Form 1099 for amounts paid to delivery people. (Ex. A; Tr. 49-50).

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. However, in *Pease v. Nat’l Council on Comp. Ins.*, 128 Or App 471, 478 (1994), the court indicated that the employer’s use of a federal tax form 1099 to report its payments showed an independent contractor relationship. I find that the method of payment is neutral.

The factor of tools and equipment, however, is consistent with independent contractor status. Claimant used her car for the phonebook deliveries. The employer verified that claimant had a driver’s license and car insurance. (Tr. 13, 26-27, 35-36). Mr. Helmink testified that the employer did not provide badges, uniforms, or signs for the cars that showed that the delivery people represented the employer.³ (Tr. 51, 56). The employer also provided route information that explained which homes or businesses were to receive a phonebook. (Ex. B; Tr. 20). Claimant was not required to have a business license or business cards. (Tr. 13, 36). The employer also provided the product itself, *i.e.*, the phonebooks and plastic bags.

In *Rubalcaba*, 333 Or at 624, the court explained that ownership and maintenance of a vehicle are not conclusive factors regarding an employer’s “right to control.” However, in *McQuiggin v. Burr*, 119 Or App 202, 207 (1993), the court explained that the fact the plaintiff furnished the major “tool” of the business

³ Claimant testified that she was provided with a sign to place in the windshield of her car if she was delivering downtown and there were no parking spaces. (Tr. 52-53). She said the sign was not displayed all the time, but only in that circumstance. (*Id.*) However, Mr. Helmink did not know who gave claimant any signs and he testified that the employer did not have any signs. (Tr. 56).

(her car) and was not reimbursed for transportation expenses weighed against the conclusion that she was an employee. *See also Medina*, 62 Van Natta at 2738 (the claimant's primary use of his own equipment weighed against finding that he was a "worker").

Here, I would find that claimant provided the critical "tools and equipment" for the deliveries, *i.e.*, her car, driver's license, and car insurance. This factor is inconsistent with "worker" status.

The majority finds that the record does not indicate that the employer would incur any liability for discharging claimant and concludes that the employer's power to discharge claimant without liability was "strong" evidence of the right to control.

In *Henn*, 60 Or App at 592-93, 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."

In *Reforestation General v. Nat'l Council on Comp. Ins.*, 127 Or App 153, 169, *recons.*, 130 Or App 615 (1994), *rev den.*, 320 Or 749 (1995), the court found nothing in the record to suggest that the petitioner retained an unqualified right to terminate the contracts absent bona fide reasons of dissatisfaction. The court determined that factor was indicative of independent contractor status.

Here, the parties' contract does not indicate that the employer would incur no liability for unlawfully terminating claimant's contract. (Ex. A). Because there is no such evidence, we should not infer that the employer had no such liability. Instead, because the record does not establish whether the employer could have discharged claimant from her services without liability for breach of contract, this factor is neutral concerning an employment relationship. *See Medina*, 62 Van Natta at 2738 (because the record did not establish whether the noncomplying employer could have discharged the claimant from his services without liability for breach of contract, the factor was neutral).

Moreover, the employer is correct that the contract identifying claimant as an independent contractor is persuasive of the parties' intent in forming the relationship. The "directory distribution contract" provided that claimant's performance of services "shall be that of an independent contractor[.]" (Ex. A). Claimant testified that she understood that portion of the contract meant that the employer would not be "holding her hand," but she would be performing the work by herself, under the employer's rules and terms. (Tr. 23).

The fact that the parties considered their relationship to be that of an independent contractor is not necessarily controlling. *Woody*, 276 Or at 198-199. However, in *Henn*, 60 Or App at 592, the court explained that a plain statement that the parties intended an independent contractor relationship should not be disregarded and, in a close case, it may swing the balance. This is not a close case and the parties' contract reinforces the conclusion that claimant was not a "worker."

Although the right to control test conclusively establishes that claimant was not a "worker," I also apply the "nature of the work" test. *See Schmidt*, 199 Or App at 626-27 (the court determined that the plaintiff was not a subject worker under the right to control test, but also considered the nature of the work test "out of an abundance of caution").

As the majority explains, under the "nature of the work" test, we consider: (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. *Trabosh v. Washington County*, 140 Or App 159, 166-67 (1996).

I agree with the employer that the delivery of phonebooks was not of sufficient duration to require the hiring of continuing services, rather than the contracting of workers. The employer hires delivery people to deliver the phonebooks for seven to eight weeks every year. (Tr. 46). The employer also has employees who are involved in sales, marketing, and management and who are paid on salary and commission. (Tr. 33, 46). The delivery jobs are seasonal, based on the nature of the employer's business. However, the record does not indicate that the employer hires the same delivery people from year to year. *Cf. Pease*, 128 Or App at 479 ("diggers" were found to be employees where their work was seasonal and the work was necessary for the employer to pursue her business; the same diggers worked for the employer from year to year).

Even assuming that the delivery of the phonebooks is necessary to the ultimate success of the business, the phonebook delivery was not of sufficient duration to require the hiring of continuing services. *See Trabosh*, 140 Or App at 167 (limited work duration could best be described as hiring for the completion of a particular job).

The record does not indicate that claimant had advanced skills or highly specialized knowledge. However, claimant understood that she was responsible if she was involved in a car accident or caused damage to property. (Tr. 27). The directory distribution contract provided that claimant was “responsible for obtaining and has obtained, appropriate insurance coverage to cover any and all acts or omissions arising out of Contractor’s performance of this Contract, including coverage for any damage to property and/or injury or death of any person in any way arising from the performance of this Contract.” (Ex. A). Furthermore, claimant was allowed to hire helpers without the employer’s knowledge or approval. These factors are indicative of a separate enterprise in which claimant may be expected to carry the burden of accidents.

Based on the “nature of the work” test, the factors reinforce my conclusion that claimant was not a “worker.”⁴ Because claimant has not sustained her burden of establishing the existence of an employment relationship between herself and the employer, I would reverse the ALJ’s order. Because the majority finds otherwise, I dissent.

⁴ Although part of the “nature of work” test are determinations whether the worker possesses advanced skills and specialized knowledge and whether the employer can more effectively distribute the cost of injuries resulting from the hazards of the work, these policy considerations should not be applied mechanically. Another important policy consideration lies in preserving supplemental income opportunities for unskilled labor, including students and parents raising small children, who are exempted from “subject worker” status. *See, e.g.*, ORS 656.027(12) (newspaper carrier); 656.027(18) (a person 19 years of age or older who contracts with a newspaper publishing company or independent newspaper dealer or contract to distribute newspapers to the general public.)