

In the Matter of the Compensation of
GUSTAVO V. BUSTAMANTE, Claimant

WCB Case No. 09-06158

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

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

The insurer requests review of those portions of Administrative Law Judge (ALJ) Mills's order that: (1) found that claimant was an Oregon subject worker; and (2) set aside its denial of claimant's injury claim. On review, the issue is subjectivity. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

The employer, an Oregon trucking company, maintained its office in Oregon. (Exs. 1, 9-4, 10-2, 17-6). The employer's trucks were located in Oregon. (Exs. 13-4, 17-12; Tr. 10, 15, 20). All mail, paperwork, accounting, and administrative functions were performed in Oregon. (Exs. 13-5, 17-6). Employees were paid out of Oregon and had Oregon income taxes withheld. (Ex. 17-6; Tr. 12). The employer had workers' compensation insurance in Oregon. (Ex. 11-1). The employer's trucks were licensed and insured in Oregon, and some trucks had temporary permits for Washington. (Exs. 9-2, 13-2, -4-6).

Claimant previously drove long-haul truck and had a trailer and post office box in Washington. (Tr. 12-13). Claimant stopped living in Washington approximately one year before working for the employer. (Tr. 17, 21).

Claimant was hired by the employer in Oregon on or about September 17, 2009. (Exs. 1, 10-2, 12-1; Tr. 7-8). While working for the employer, claimant lived in an RV on the employer's property in Oregon, which the employer provided to claimant and other workers. (Exs. 12-2, 17-12; Tr. 9, 17, 19, 22-23).

The employer intended to hire claimant as a driver for the duration of harvest season to transport onions and potatoes. (Exs. 13-4, 17-6-11). The onions were farmed in Oregon, and the potatoes in Oregon and Washington. (Ex. 17-7,

-10). The employer brokered its own contracts and, at all relevant times, had contracts with Riverpoint farm (an Oregon farm) to haul onions in Oregon and Agra Northwest farm (a Washington farm) to haul potatoes in Washington. (Exs. 13-2, -4, 17-7, -9-11). The employer also had a contract to haul potatoes with another Oregon farm. (Ex. 17-10). The onion season with Riverpoint farm lasted from September 10, 2009 to October 15, 2009; the potato season with Agra Northwest farm lasted from September 17, 2009 through October 24, 2009. (Ex. 13-3-5).

Claimant received assignments from the employer in Oregon, and all jobs began and ended in Oregon. (Tr. 10-11, 15-16, 20-21). Claimant understood that he was hired to haul onions, but agreed to work wherever work was available, which included Oregon and Washington. (Tr. 9, 12; Ex. 12-1). Because the onion season was slow, and there was little work in Oregon, claimant was first sent to work in Washington to haul potatoes. (Exs. 12-1, 13-4, 17-7).

On September 27, 2009, claimant hauled onions in Oregon for Riverpoint farm. (Exs. 12-1, 13-3, 17-8, -10-11). The next day, on September 28, claimant was injured in a motor vehicle accident while hauling potatoes in Washington for Agra Northwest farm. (Exs. 1 through 10, 13-3, 17-8). The employer anticipated that claimant would have returned to work in Oregon for the remainder of the harvest season had he not been hurt. (Ex. 17-8, -11).

On October 7, 2009, the insurer denied claimant's injury claim on the basis that his out-of-state injury was not covered. (Ex. 11). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Applying the permanent employment relation test, the ALJ determined that claimant was an Oregon subject worker who was injured while temporarily working in Washington and, therefore, was entitled to receive benefits under Oregon law. ORS 656.126(1).

On review, the insurer argues that claimant was not an Oregon worker who had temporarily worked in Washington but, rather, was a Washington worker who had temporarily worked in Oregon. Therefore, according to the insurer, claimant's injury claim is not covered under ORS 656.126(1). For the following reasons, we disagree.

Claimant has the burden of proving that he was a subject worker under ORS 656.126(1).¹ See *Robert Nelson*, 57 Van Natta 2449 (2005), *aff'd*, 212 Or App 627, *rev den*, 343 Or 206 (2007); *Jose Gomez*, 46 Van Natta 2246 (1994), *aff'd without opinion*, 135 Or App 657 (1995). Under ORS 656.126(1), a worker is entitled to benefits under Oregon's workers' compensation act "[i]f a worker employed in this state and subject to this chapter temporarily leaves the state incidental to that employment and receives an accidental injury arising out of and in the course of employment * * *."² The key inquiry is "the extent to which the claimant's work outside the state is temporary." *Hobson v. Ore Dressing, Inc.*, 87 Or App 397, *rev den*, 304 Or 437 (1987).

To determine whether a worker has temporarily left Oregon incidental to Oregon employment, the courts have developed the permanent employment relation test. *Northwest Greentree, Inc. v. Cervantes-Ochoa*, 113 Or App 186 (1992). The test for permanent employment looks at a number of factors, although no one fact is determinative, including: (1) the intent of the employer; (2) the understanding of the employee; (3) the location of the employer and its facilities; (4) the circumstances surrounding the work assignment; (5) the state laws and regulations to which the employer is subject; and (6) the residence of the employees. *Nelson*, 212 Or App at 634-35; *Berkey v. Dep't of Ins. and Finance*, 129 Or App 494, 498 (1994). When employees are transient and work in various locations in more than one state, it is necessary to look at more than simply the sequence of temporary assignments. *Cervantes-Ochoa*, 113 Or App at 190-91; *Power Master, Inc. v. Natl. Council on Compen. Ins.*, 109 Or App 296, 301 (1991).

The parties do not dispute the location of the employer and its facilities, the state laws and regulations to which the employer is subject, or the residence of the employees. That is, claimant was hired by an Oregon employer. The employer's facility and equipment were located in Oregon. All administrative functions were performed in Oregon, and employees had Oregon income taxes withheld. The employer's workers' compensation insurance was in Oregon. Its trucks were licensed and insured in Oregon, although some trucks had *temporary* permits for

¹ "Subject worker" means a worker who is subject to this chapter as provided by ORS 6556.027. ORS 656.005(28). ORS 656.027 provides that "[a]ll workers are subject to this chapter * * *" with certain exceptions not relevant here. See *Northwest Greentree, Inc. v. Cervantes-Ochoa*, 113 Or App 186 (1992).

² There is no dispute that claimant sustained an out-of-state accidental injury arising out of and in the course of employment.

Washington. The employer provided claimant and other workers a place to live on his property. Those factors weigh in favor of a permanent employment relationship in Oregon.

The insurer argues that claimant was permanently employed in Washington because he first worked in Washington hauling potatoes, worked only one day in Oregon hauling onions, and would have continued working in Washington hauling potatoes for the remainder of the potato season (which ended one week after the Oregon onion season) had he not been injured. However, it is undisputed that claimant's work ultimately involved hauling onions and potatoes in both Oregon and Washington. Thus, because his work was transient and involved work in different locations, it is necessary to look at more than simply the sequence of temporary assignments. *Cervantes-Ochoa*, 113 Or App at 190-91; *Power Master*, 109 Or App at 301. Instead, we focus on other factors, such as the location of various supervisory and administrative activities, as well as the intent of the parties, to determine the permanency of the employment relation. *Id.*

As noted above, the employer's administrative activities were performed in Oregon. Claimant received assignments directly from the employer in Oregon. He picked up the employer's truck at, and returned it to, the employer's yard in Oregon regardless of the location of his assignment. Thus, employer's various supervisory and administrative activities were performed in Oregon.

The insurer argues that neither claimant nor the employer intended or understood that claimant was hired to permanently work in Oregon. It also contends that claimant's work outside of Oregon was permanent, rather than temporary, because he would have continued working in Washington (rather than in Oregon) had he not been injured. For the following reasons, we disagree.

The employer hired claimant to work as a driver for the duration of the onion and potato harvest seasons. (Exs. 13-4, 17-6-11). The onion and potato harvest seasons sometimes occurred at the same time. (Ex. 17-10). The employer's contract with Riverpoint farm for the onion season involved hauling onions in Oregon from September 10, 2009 to approximately October 15, 2009. (Ex. 13-4). The contract with Agra Northwest farm for the potato season involved transporting potatoes in Washington from September 17, 2009 to October 24, 2009. (Ex. 13-3, -5). The employer also had contracts with an Oregon company to haul potatoes in Oregon. (Ex. 17-7, -10).

Claimant understood that he was hired to haul onions for the employer but, because the onion season was slow, he was sent to work in Washington hauling potatoes. (Ex. 12-1). Claimant agreed that he would work wherever the employer assigned him. (Tr. 9, 12).

We acknowledge that the employer relies, in part, on claimant's wife's testimony to establish that claimant was hired to haul potatoes, which involved work in Washington.³ (Tr. 19). However, under the permanent employment relation test, we consider the understanding of *the employee* (i.e., claimant), not the understanding of other employees. *See Nelson*, 212 Or App at 634-35. Moreover, even if claimant's wife's testimony established that claimant was hired to haul only potatoes, the employer had contracts to haul potatoes in both Oregon and Washington. (Ex. 17-7, -10). Therefore, claimant's wife's testimony is not dispositive.⁴

Although the onion season with Riverpoint farm in Oregon ended before the end of the potato season with Agra Northwest in Washington, we do not find that one fact to be dispositive in determining whether claimant's out-of-state work was temporary. The employer anticipated that claimant would have returned to work in Oregon for the remainder of the harvest season had he not been injured. (Ex. 17-8, -11). Moreover, the employer continued to haul products in Oregon after the potato season with Agra Northwest farm in Washington ended. (Ex. 13-5). Thus, the employer's intent, claimant's understanding, and the circumstances of the work assignments also weigh in favor of a permanent employment relationship. *See Berkey*, 129 Or App at 498-99; *see also Cervantes-Ochoa*, 113 Or App at 191.

³ Claimant's wife was also hired by the employer to work as a truck driver. (Ex. 12-4; Tr. 19).

⁴ Furthermore, based on the following exchange at hearing, it is unclear whether claimant's wife's testimony concerned her understanding of what *she* was hired to do, or what *she* and *claimant* were hired to do:

Claimant's attorney: “* * * Were you present when your husband and you became employed by [the employer]?”

“A. Yes, I was.”

“Q. And what was the understanding that you were to do for [the employer]? What were you going to be doing?”

“A. Potatoes. I understood potatoes. But I guess -- but like I said, [claimant], on that Sunday -- usually on Sundays we -- we were off, or something. Take a day off. And so he didn't want to sit around and do nothing. I was tired, so he -- he said he would just do onions for that day -- on Sunday. * * *” (Tr. 18-19).

On these particular facts, after considering all of the circumstances pertinent to the permanent employment relation test, we find that claimant was permanently employed in Oregon and was injured while temporarily working in Washington incidental to that employment. ORS 656.126(1). Consequently, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). In accordance with OAR 438-015-0010(4), we consider the following factors in reaching our determination of a reasonable attorney fee: (1) the time devoted to the case; (2) the complexity of the issues involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; and (8) the assertion of frivolous issues or defenses.

Applying those factors to this particular record, we reach the following conclusions. Based on cases generally litigated before this appellate forum, the subject worker dispute (including application of the permanent employment test) presented a challenging legal issue at a complexity level greater than that normally argued before us. Although admittedly concise, claimant's counsel's respondent's brief addressed the topical cases, as well as the insurer's argument, demonstrating that counsel expended time to research the controlling law, review the record, and apply those principles to the facts presented in this record.⁵ Claimant's head and facial injuries have required surgery, with the potential of future surgeries for orbital and nasal bones anticipated. (Exs. 3-8, 4, 6, 7, 8). Thus, the value of the interest involved (temporary and, potentially, permanent disability benefits, as well as medical services) and the benefit secured by this represented party are substantial. Counsel for both parties are experienced litigators, who presented their respective positions in a skillful and professional manner. Based on the arguments presented by the insurer in defense of its denial, there was a tangible risk that claimant's counsel might go uncompensated for his services in this particular case.⁶

After considering the aforementioned factors and applying them to this particular record, we find that a reasonable attorney fee award for claimant's counsel's services on review is \$3,000, to be paid by the insurer.

⁵ In any event, time devoted to a case is only one of the factors to be considered in determining a reasonable attorney fee award. See *Larry G. Gosnell*, 60 Van Natta 1881, 1883 (2008); *Cheryl Mohrbacher, Dcd*, 50 Van Natta 1826 (1998).

⁶ Finally, we note that claimant's counsel's representation seeking a \$3,000 attorney fee award has not been contested. Although not a "request" under OAR 438-015-0029, we may consider this "representation" in reaching our determination of a reasonable attorney fee award. See *Randell D. Plummer*, 63 Van Natta 594, 599 (2011).

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 insurer. *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 September 8, 2010 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, payable by the insurer. 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 insurer.

Entered at Salem, Oregon on May 6, 2011

Member Langer dissenting in part.

I agree with the majority's conclusion that claimant's claim is compensable. However, I disagree with the majority's \$3,000 attorney fee award for services on review.⁷

I acknowledge a significant benefit secured for claimant. Nonetheless, that is only one factor to be considered under OAR 438-015-0010(4). Moreover, claimant's attorney may be compensated only for legal services performed on behalf of claimant. OAR 438-015-0005(4). Here, as reflected by this record, the legal services performed on review are very limited.⁸ Based on the aforementioned reasons, and considering all the factors set forth in OAR 438-015-0010(4), including the time devoted to the case (as represented by claimant's brief) and the benefit secured for claimant, I find that a \$3,000 attorney fee for services on review is unreasonable and excessive. Consequently, I respectfully dissent in part.

⁷ Because claimant's counsel's "representation" that a \$3,000 attorney fee is reasonable does not comply with OAR 438-015-0029, it "shall not be considered" as a "request." OAR 438-015-0029(4); *Randell D. Plummer*, 63 Van Natta 594, 599 (2011). Consequently, I accord little weight to such a "representation," even if it is uncontested. *See Randall M. Wells*, 63 Van Natta ___ (May 3, 2011).

⁸ I acknowledge that claimant's brief addresses, to some degree, the insurer's argument on review. Nonetheless, considering the brevity and substance of that response, I submit that an attorney fee award of \$3,000 is not commensurate with the services from claimant's counsel as documented on review.