

In the Matter of the Compensation of
WCB Case No. 14-03356
COZMIN I. GADALEAN, Claimant
ORDER ON RECONSIDERATION
Julene Quinn LLC, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell, Curey, and Somers. Member Weddell dissents.

We previously abated our Order on Review that affirmed an Administrative Law Judge's (ALJ's) order that: (1) found claimant was not a subject worker; and (2) upheld the SAIF Corporation's denial of his injury claim for a left hip condition. We took this action to consider claimant's request for reconsideration. Having received the parties' arguments, we proceed with our reconsideration and replace our prior order with the following order.

FINDINGS OF FACT

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

In May 2014, claimant answered an online advertisement for a truck driver position for the employer. (Tr. 5). He applied for the position by email and submitted his resume online. (Tr. 6; Ex. 1). He also completed a drug screen and provided the employer copies of his current CDL, medical card, social security card, and current DMV records. (Tr. 33; Ex. 1-6).

Soon thereafter, the owner of the company, Mr. Van Hyning, had claimant come to his office for an interview, where they discussed his application and the requirements of the job. (Tr. 7, 34). Mr. Van Hyning could not remember what he specifically told claimant at that time. (Tr. 39, 42, 45). However, he explained that it was his usual practice to tell applicants that they would be required to take an unpaid safe driving test as part of the evaluation process. (Tr. 39, 45).

According to Mr. Van Hyning, a safe driving test was required by the Department of Transportation (DOT), and every driver hired by the employer had to take and pass the test. (Tr. 34, 38). The employer's test involved putting the individual in a regular delivery scenario and having them drive in real-world situations with an experienced driver. (Tr. 34, 35). Drivers participating in the safe driving test were not put on any insurance. (Tr. 38, 43, 45). If the individual

passed the test, Mr. Van Hyning would meet with them again to discuss the job in more detail and to see if they were still interested. (Tr. 35). Mr. Van Hyning indicated that individuals driving for the “evaluation” were “doing unpaid work.” (Tr. 42).

On June 4, 2014, claimant met with Mr. Hanson, a truck driver with the employer for six years. (Tr. 48; Ex. 7A-5, -8, -9). Claimant drove one of the employer’s trucks, with Mr. Hanson as a passenger, to a designated delivery location. (Tr. 41, 52; Ex. 7A-5, -9). While disconnecting hoses from the trailer at that location, claimant fell four or five feet from the truck to the ground. (Exs. 2, 5, 6). He landed on his left hip and experienced significant pain. (Ex. 7A-9). He was later diagnosed with a left hip strain. (Ex. 2). That same day, claimant described the accident on an 827 form as “first day in training I was trying to disconnect the hoses from the tractor * * * and fell under the truck and the side walk.” (Ex. 3A).

Because claimant’s injury rendered him unable to drive the truck, Mr. Hanson drove to the next stop where they picked up an empty container before returning to the employer’s premises. (Tr. 52, 53). Mr. Hanson estimated that claimant drove about 30 miles before he was injured. (Tr. 53). Mr. Hanson took a safe driving test before he was hired, and he did not think a driver could be evaluated without doing the “road test.” (Tr. 48-49).

Mr. Van Hyning explained that if claimant had been an employee when he was injured on the delivery, he would have been paid, and that the driver evaluating claimant (Mr. Hanson) did receive pay for his work that day. (Tr. 41, 44). The employer was likely paid for the delivery made during claimant’s test. (Tr. 41). Mr. Van Hyning indicated that, if claimant had not been in the truck, the entire route would have gone the same way--the driver still would have been paid, and a load would still have been delivered and payment received. (Tr. 44). He did not believe the employer received any benefit from claimant’s participation because Mr. Hanson would have been driving the route even if claimant had not been there. (Tr. 45).

Mr. Van Hyning did not ask claimant to come back to finish the driving test, and never told him that he was hired. (Tr. 39, 46). If claimant had been hired, Mr. Van Hyning would have verbally informed him as such and required him to fill out tax forms. (Tr. 43, 46).

On June 10, 2014, claimant filed an 801 injury claim form alleging that he injured himself on June 4, 2014, while working for the employer as a truck driver. (Ex. 6). Under “date worker hired,” the employer wrote “pre-employment driving test.” (*Id.*)

In a recorded interview, claimant stated that he understood that Mr. Van Hyning “want[ed] to evaluate me,” which was why he sent claimant with another driver. (Ex. 7A-5). Claimant did not know if June 4 was considered a training day or a preemployment evaluation day; he did not know “how to call it,” but he drove the truck to the destination and parked it. (*Id.*) As he understood it, the agreement was that Mr. Van Hyning was going to see how he did on June 4, and if he passed, he would “continue working.” (Ex. 7A-6). Claimant did not fill out any employment tax forms. (*Id.*) He did not receive a written job offer. (Ex. 7A-5).

According to claimant, when he first met with Mr. Van Hyning, he was given a description of the job, the schedule, and what the pay would be. (Ex. 7A-8). The following dialog occurred between the investigator and claimant:

“[Investigator]: * * * you said that was kind of an evaluation day. Were you expecting to be paid for that day? What was the agreement?”

“[Claimant]: The agreement he said he going to pay 25% from the gross income the truck brings and I told him I would prefer to have automatic truck and he (...INAUDIBLE...) driver to see, to evaluate me. He, I drove the truck, I (...INAUDIBLE...) the truck and * * *.”

“[Investigator]: ...the agreement on the 4th that was, that was an evaluation to see if you could do the job. Were you earning, were, were you under the impression you’re earning 25% of the gross income from the truck on the day that they were just evaluating you?”

“[Claimant]: Uh, I’m, I’m not sure how, how he decide. He just wanted me to drive (...INAUDIBLE...) I want you to, to drive but we haven’t signed any agreement between me and him.”

“[Investigator]: Okay, and so he didn’t tell you that hey come in to be evaluated and we’re going to pay you for today even though it’s an evaluation period?”

“[Claimant]: No, he just give me the job (...INAUDIBLE...) pay you and he said I want you to start (...INAUDIBLE...) and I’m going to (...INAUDIBLE...).” (Ex. 7A-35-36).

On July 8, 2014, SAIF denied compensability of the claim, asserting that claimant was not a subject worker at the time of injury. (Ex. 8). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Finding that, at the time of his injury, claimant was not hired and did not receive any kind of remuneration or promise of future remuneration, the ALJ concluded that claimant was not a subject worker under ORS 656.005(30) when injured. Therefore, the ALJ upheld SAIF’s denial. On review, we affirmed the ALJ’s order without supplementation.

On reconsideration, claimant raises three issues. First, claimant contends that whether he was injured while in evaluation, training, or employment status is irrelevant because under employment law, he actually performed work, and thus was entitled to at least minimum wage under ORS 653.025. Second, claimant asserts that the employer’s testimony that the DOT requires a driving test is incorrect under the law, and does not exempt it from having to pay a worker for work performed. Finally, claimant challenges the ALJ’s finding that he was not reliable in his testimony due to language difficulties and other inconsistencies. For the following reasons, we continue to conclude that claimant was not a “subject worker” when injured.

First, we continue to concur with the ALJ’s credibility findings regarding claimant and the other witnesses. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder’s credibility assessments); *Coastal Farm Supply v. Hultberg*, 85 Or App 282 (1987) (where the issue of credibility concerns the substance of a claimant’s testimony, we are equally qualified to make our own credibility determination). The ALJ stated that, based on his observations of their attitude, appearance and demeanor at hearing, he found Mr. Van Hyning and

Mr. Hanson to be credible. The ALJ did not make any demeanor-based credibility findings with regard to claimant. However, the ALJ concluded that claimant's testimony was "not reliable," noting inconsistent statements, language difficulties, poor recollection of the facts, and vague or contradictory testimony.

In *Avalos v. Bowyer*, 89 Or App 546, 549 (1988), the claimant argued that the Board erred in affirming the ALJ's (then Referee's) finding that he was not a credible witness. He contended that the ALJ's finding was unduly based on the language barrier (the claimant understood little English and communicated through an interpreter) and his reluctance to answer certain questions. *Id.* The court agreed with the claimant that a credibility finding "should not be based on a claimant's language difficulties." However, it affirmed the ALJ's credibility finding because it "was not based solely on language difficulties. The record also reflects inconsistencies in [the claimant's] testimony." *Id.*

Similarly, here, the ALJ did not rely only on language difficulties, but also determined that claimant's testimony was vague or contradictory. After conducting our review of the record, we conclude that claimant's testimony was vague or contradictory. Therefore, for that particular reason, we share the ALJ's assessment that claimant was not a reliable witness.

Next, we address whether claimant was a "subject worker" when injured. 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). Pursuant to ORS 656.005(30), a "worker" is a person "who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *." The statute thus has two components: (1) "an agreement between the claimant and the employer that the employer will provide remuneration for the claimant's services," and (2) "the employer's right to direct and control the services the claimant provides." *Dep't of Consumer & Bus. Servs. v. Clements*, 240 Or App 226, 232 (2010); *Hopkins*, 186 Or App at 276-77; *Janee Mendoza*, 63 Van Natta 383, 383-84 (2011). 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. Oregonian Publ'g Co.*, 11 Or App 444, 446 (1972). The term "implied contract" can refer either to a contract implied-in-fact or to one implied-in-law. *Montez v. Roloff Farms, Inc.*, 175 Or App 532, 536 (2001).

Thus, an important issue is whether the first element of ORS 656.005(30) has been established; *i.e.*, whether there was an agreement between the claimant and the employer that the employer would provide remuneration for claimant's

services. Here, the record does not support such an agreement, implied or expressed. Rather, the record establishes that claimant was injured during a preemployment test, with merely the possibility of future employment, not the promise of such.¹

This case is analogous to *BBC Brown Boveri v. Lusk*, 108 Or App 623 (1991), *Dykes v. State Acc. Ins. Fund*, 47 Or App 187 (1980), *Mary K. Meyers*, 67 Van Natta 1725 (2015), and *Stanley V. Burch*, 63 Van Natta 1732, 1734 (2011). The common factor in these cases, as in this case, is the lack of evidence establishing an *agreement for remuneration*.

In *Lusk*, the claimant was not providing services for remuneration when he failed a welding test and was subsequently not hired, even though his hearing loss was first discovered during the testing period. 108 Or App at 626-27. In *Dykes*, the court concluded that the claimant was not a worker performing services “for a remuneration” when he broke his leg while taking a mandatory agility test to qualify for the position of deputy sheriff where such test was required of all job applicants, the claimant was not paid to take the test, and there was no promise of employment. The court explained that the mere possibility of future employment did not qualify as “remuneration.” 47 Or App at 190.

In *Burch*, the claimant, who had been laid off due to economic reasons, was contacted by his former employer about coming back to work, and was asked to attend an unpaid physical examination and drug test. During the physical

¹ To the extent receipt of a benefit by the employer from claimant’s action at the time of injury is determinative regarding whether claimant was a “worker” under ORS 656.005(30), such a benefit would only matter when analyzing whether an “implied-in-law” contract existed between claimant and the employer. An “implied-in-law” contract is a remedial device to accomplish substantial justice by preventing unjust enrichment. *Derenco v. Benj. Franklin Fed. Sav. & Loan*, 281 Or 533, *cert den*, 439 US 1051 (1978). The elements of an “implied-in-law” contract are a benefit conferred, awareness by the recipient that a benefit has been received and, under the circumstances, it would be unjust to allow retention of the benefit without requiring the recipient to pay for it. *Jaqua v. Nike, Inc.*, 125 Or App 294, 298 (1993).

Here, the record does not establish the necessary “benefit” element for the existence of an “implied-in-law” contract. Although the employer likely received payment for a delivery on the day claimant was injured, as Mr. Van Hyning explained, Mr. Hanson was paid, in his capacity as a regular, full-time employee, for the delivery performed that day. (Tr. 41, 44). According to Mr. Van Hyning, if claimant had not been in the truck, the entire route would have gone the same way—the driver still would have been paid, and a load would still have been delivered and payment received. (Tr. 44). Mr. Van Hyning specifically stated that the employer did not receive any benefit from claimant’s participation because Mr. Hanson would have been driving the route even if claimant had not been there. (Tr. 45). His testimony in this regard is un rebutted.

examination, the claimant injured his ankle while running. Citing *Lusk* and *Dykes*, we concluded that the remuneration requirement was not established because the claimant was injured in a preemployment physical examination, and there was only a possibility of future employment contingent on the outcome of the test. 63 Van Natta at 1736. Similarly, in *Meyers*, relying on *Burch* by analogy, we concluded that there was no employment agreement where the claimant was injured during a preemployment orientation that was a necessary precondition for the possibility of employment. 67 Van Natta at 1728.

In the above cases, the claimants were participating in preemployment testing or evaluation activities designed to gauge the potential employee's qualifications for a specific position. These cases stand for the proposition that the mere possibility of future employment does not constitute "remuneration." Here, similarly, neither Mr. Van Hyning nor claimant could remember what Mr. Van Hyning specifically told claimant when they met. Mr. Van Hyning stated that it was his usual practice to tell applicants that they would be required to take an unpaid safe driving test as part of the evaluation process. (Tr. 39, 42, 45). Mr. Van Hyning explained that if the individual passed the driving test, he would meet with them again to discuss the job in more detail and to see if they were still interested. (Tr. 35). Every driver hired had to first take and pass the test. (Tr. 34). Mr. Hanson was also required to take a safe driving test before he was hired, and he did not think a driver could be evaluated for hire without doing the "road" test. (Tr. 49).²

Thus, as in the above cases, we conclude that claimant was injured while participating in a preemployment activity to gauge his qualifications for the position. The possibility of future employment (contingent on the outcome of the evaluation) does not constitute "remuneration." *Lusk*, 108 Or App at 626-27; *Dykes*, 47 Or App at 189-90; *Meyers*, 67 Van Natta at 1728; *Burch*, 63 Van Natta at 1736. There is no other persuasive evidence in the record to support an implied or express agreement for remuneration.

Claimant cites to *Raul Ayala-Arroyo*, 47 Van Natta 969 (1995), and *Daniel Muchka*, 46 Van Natta 1090 (1994), as showing the difference between a "pre-employment test and a person who was put to work." However, in *Ayala-Arroyo*, in contrast to this case, the parties had agreed that the claimant was *hired*. 47 Van

² Claimant's testimony that he reached a payment agreement with Mr. Van Hyning for 25 percent of the gross income for a delivery is not otherwise supported by the record. (*See Ex. 7A-35-36*). Moreover, to the extent that statement conflicts with Mr. Van Hyning's testimony, we find Mr. Van Hyning's testimony more reliable.

Natta at 969. Furthermore, while the case at hand is similar to *Muchka* in that both claimants were injured while performing labor for the employer, the cases differ regarding credibility and a remuneration agreement. In *Muchka*, we found that the claimant's testimony was credible and established that he was hired as a painter with a rate of compensation of \$10 per hour. 46 Van Natta at 1091. Here, in contrast, claimant's testimony is not reliable for the reasons expressed above, and the testimony of the employer's witnesses did not otherwise collaborate that claimant was hired or that there was an agreement that claimant would provide services for remuneration, either on the day of injury or at a future time. Therefore, *Muchka* is distinguishable.

We next address claimant's request that we go beyond the confines of ORS Chapter 656 and consider employment law statutes (Chapter 653) in determining whether he was a "worker" when injured. According to claimant, Oregon employment law requires that if a person is put to work, they must be paid at least minimum wage for their work. See ORS 653.010(2), (3); ORS 653.025. Thus, because he performed actual work for the employer, claimant contends he was legally entitled to "minimum wages," which would satisfy the "remuneration" requirement under ORS 656.005(30). Claimant acknowledges that in *Ashley A. Rehfeld*, 66 Van Natta 1198 (2014), we rejected the contention that the temporary total disability rate for an illegally unpaid intern must be based on the dictates of minimum wage law under ORS Chapter 653. However, citing *Amos v. SAIF*, 72 Or App 145 (1985), and *Stiehl v. Timber Prods.*, 115 Or App 651, 653-54 (1992), claimant requests that we reconsider our position that we cannot reach beyond Chapter 656.

Both *Amos* and *Stiehl* involved situations where there was an administrative rule or statute that required existence of a specific factor that was not otherwise defined in Chapter 656 (e.g., *Stiehl* dealt with a rule requiring a "duly licensed" provider, and *Amos* involved a question of paternity). Here, in contrast, Chapter 656 contains its own definition of "worker" for purposes of workers' compensation law. ORS 656.005(30). Thus, under the current situation, it is not appropriate to look outside of Chapter 656 to determine claimant's benefits. See *Rehfeld*, 66 Van Natta at 1198 (declining to look beyond Chapter 656 to the minimum wage laws of Chapter 653 in calculating temporary disability benefits); *Alejandro Estolano*, 53 Van Natta 1585, 1586 (2001) (where the claimant contended that he was entitled to an overtime rate under a BOLI rule, Board was not the proper forum to address that issue and declined to go beyond the confines of Chapter 656 to address the propriety of other employment or labor disputes); *Glenda Jensen*, 50 Van Natta 1074, 1075 n 1 (1998) (no jurisdiction to consider

matters arising outside of Chapter 656, including employment reinstatement disputes under Chapter 659); *see also Dennis Bartow*, 46 Van Natta 712 (1994) (denying remand for inclusion of a BOLI determination that the employer improperly paid the claimant less than minimum wage, where the BOLI document was a “proposed” order, issued as part of a preliminary administrative process prior to a contested case hearing, and was not a “final” order).

In sum, based on this record, claimant has not satisfied the “remuneration agreement” requirement of ORS 656.005(30). Instead, the record only establishes that claimant had a possibility of employment dependent on whether he passed the safe driving test, which he did not. Since claimant was not hired and he did not receive any kind of remuneration or expectation of future remuneration, he was not a subject “worker” under ORS 656.005(30). Therefore, we continue to affirm the ALJ’s order.

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our June 2, 2015 order. The parties’ rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 8, 2016

Member Weddell dissenting.

The majority determines that claimant was not a “worker” when he was completing a commercial delivery on behalf of the employer because he was engaged in a preemployment test and there was no agreement for remuneration for work performed during that test. Because I consider the employer’s receipt of claimant’s services without providing remuneration to be unjust, and, on its face, contrary to Oregon law, I would infer the presence of an implied contract establishing claimant as a subject worker. Because the majority concludes otherwise, I respectfully dissent.³

³ I agree with the majority’s determination that the record does not establish the existence of an express contract between the parties. However, I note that the ALJ did not make a credibility finding specific to claimant. The ALJ found claimant to be unreliable due to perceived inconsistencies and language difficulties. Because my legal analysis relies on undisputed facts, I do not consider the ALJ’s reliability findings regarding the disputed facts to resolve the legal determination of whether claimant was a subject worker at the time of injury.

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). 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.” The statute has two components: (1) “an agreement between the claimant and the employer that the employer will provide remuneration for the claimant’s services;” and (2) “the employer’s right to direct and control the services the claimant provides.” *Dep’t of Consumer & Bus. Servs. v. Clements*, 240 Or App 226, 232 (2010); *Hopkins*, 186 Or App at 276-77; *Janee Mendoza*, 63 Van Natta 383, 383-84 (2011).

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. Oregonian Publ’g Co.*, 11 Or App 444, 446 (1972). The term “implied contract” can refer either to a contract implied-in-fact or to one implied-in-law. *Montez v. Roloff Farms, Inc.*, 175 Or App 532, 536 (2001). In an implied-in-fact contract, the parties’ agreement is inferred, in whole or in part, from their conduct.

Implied-in-law contracts are “created by the law for reasons of justice, without any expression of assent * * *.” *Id.*; see also *Derenco v. Benj. Franklin Fed. Sav. & Loan*, 281 Or 533, 557-59 (1978) (holding that a particular obligation is implied-in-law because, “under all the circumstances of the parties’ relationship, * * * defendant would be unjustly enriched” if the promise were not implied). The elements of an implied-in-law contract are a benefit conferred, awareness by the recipient that a benefit has been received and, under the circumstances, it would be unjust to allow retention of the benefit without requiring the recipient to pay for it. “For an injustice to be found, one of three things must be true: (1) the plaintiff had a reasonable expectation of payment; (2) the defendant should reasonably have expected to pay; or (3) society’s reasonable expectations of security of person and property would be defeated by non-payment.” *Jaqua v. Nike, Inc.*, 125 Or App 294, 298 (1993).

Based on the following reasoning, I would find that the record supports the existence of an implied contract, and in particular, an implied-in-law contract.

The employer, Mr. Van Hying, explained that if claimant had been an “employee” when he was injured on the delivery, he would have been paid, and the other driver evaluating claimant (Mr. Hanson) did receive pay for his work that day. (Tr. 41, 44). Mr. Van Hying was also paid for the delivery completed by

claimant. (Tr. 41). He further agreed that individuals driving for the “evaluation” were “doing unpaid work.” (Tr. 42).

During his recorded statement, claimant stated that he was supposed to “start work” on June 4, 2015. (Ex. 7A-3). He also understood that Mr. Van Hyning “want[ed] to evaluate me,” which was why Mr. Van Hyning sent him with another driver. (Ex. 7A-5). He did not know if June 4 was considered a training day or a preemployment evaluation day, but he drove the truck to the destination and parked it. (*Id.*) As he understood it, the agreement was that Mr. Van Hyning was going to see how he did on June 4, and if he did well, he would “continue working.” (Ex. 7A-6). However, my analysis is not based on different factual findings regarding the perceived discrepancies on which the majority’s opinion relies.

Irrespective of claimant’s testimony and his understanding of the employment arrangement, the parties are in full agreement that claimant was directed to drive the employer’s truck and complete a delivery for which the employee accompanying claimant, as well as the employer, were compensated. The majority acknowledges that claimant was injured in the course of completing those activities. Moreover, it does not reason that claimant was a volunteer or an independent contractor. Neither does the majority find that any exemption under ORS 656.027 is applicable. Instead, the majority concludes that, because the employer did not consider claimant to be “hired,” and the employer did not intend to compensate him for the delivery, claimant did not engage to furnish services for remuneration and is not a “worker” under ORS 656.005(30).

The majority asserts that the instant claim is analogous to *BBC Brown Boveri v. Lusk*, 108 Or App 623 (1991), *Dykes v. State Acc. Ins. Fund*, 47 Or App 187 (1980), *Mary K. Meyers*, 67 Van Natta 1725 (2015), and *Stanley V. Burch*, 63 Van Natta 1732, 1734 (2011). However, those cases did not involve claimants who were injured in the course of doing actual work for which the employer was compensated. *Lusk*, *Dykes*, and *Burch* all involved preemployment testing that was clearly distinguishable from actual work and the employer’s regular business activities, and they did not result in monetary compensation for the employer. Likewise, while I dissented from the result in *Meyers*, the case is otherwise distinguishable because the claimant in *Meyers* had arrived on the employer’s premises to begin training, but she had not engaged in any productive activity for the direct benefit of the employer. 67 Van Natta at 1725-26.

Claimant's circumstances are much more analogous to those described in *Daniel Muchka*, 46 Van Natta 1090 (1994). There, the claimant was injured when he fell while preparing a house for painting on his first day of work. *Id.* at 1091. The carrier argued that the claimant was actually engaged in a preemployment test to verify his qualifications, that he did not receive any remuneration and, therefore, he was not a subject worker. *Id.* at 1092. In *Muchka*, the Board distinguished *Dykes* and *Lusk*, observing that the employer received a direct benefit from the claimant's labor.⁴

The majority acknowledges that the employer was monetarily compensated for the delivery completed by claimant, and yet, concludes that his labor was of no benefit to the employer. In doing so, the majority adopts the employer's reasoning wholesale and concludes that because claimant was accompanied by Mr. Hanson for purposes of the evaluation, had he not driven the truck, Mr. Hanson would have driven and the employer would have been compensated just the same. While such hypotheticals may be of keen interest to managers, employers, or economists in determining staffing costs relative to profits of a business, the Board should not adopt such hypotheticals and calculations of business profit and loss as the legal determinant of whether a worker's labor is a benefit to an employer. Instead, the determinative facts for resolution of claimant's "subject worker" status are that he was directed by the employer to drive the truck and make the delivery, he then did so, and the employer was paid for the delivery. Having directed claimant to accomplish the delivery, and claimant having complied with this direction, it is unjust for the employer to now argue that it received no benefit from claimant's labor.

In determining the existence of an implied-in-law contract, the Supreme Court in *Farmer v. Groves*, 276 Or 563 (1976), cited the First Restatement of Restitution, which describes a "benefit" as follows:

"A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's

⁴ The Board in *Muchka* also found evidence of an express agreement for remuneration of \$10 per hour sufficient to establish an express agreement of remuneration. Nonetheless, I submit that *Muchka* is more analogous than the competing cases cited by the majority, with the exception that an *implied-in-law* contract results in claimant's "subject worker" status here.

security or advantage.” Restatements of the Law 1st, Restitution and Unjust Enrichment §1 (1st ed. 1937).

Likewise, the Restatement in its current version provides:

“Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient’s wealth. Subject to that limitation, the benefit that is the basis of a restitution claim may take any form, direct or indirect. It may consist of services as well as property.” Restatements of the Law 3rd, Restitution and Unjust Enrichment, §1 (3rd ed. 2011).

Here, claimant’s truck delivery was a benefit to the employer whether classified as a “tryout,” “safety test,” or as regular employment. The employer conceded that claimant performed all the activities of a regularly employed driver, and that it was compensated for his delivery. (Tr. 41, 52). I would find that claimant’s provision of actual services as a truck driver, and all of its attendant duties, strongly favors the existence of an implied-in-law contract. Indeed, we have previously found that a claimant’s actual provision of services established an implied contract despite the employer’s contention that she was not an employee because she did not complete preemployment safety requirements. *Audencia Montez*, 54 Van Natta 155, 158 (2002). Thus, regardless of whether the employer considered claimant’s delivery to be an “evaluation,” and regardless of whether he intended to call claimant back to work another day, I would find that claimant’s actual provision of services for the employer establishes the existence of an implied-in-law contract.⁵

Moreover, an expectation of payment is implied/established by law for all Oregon workers as a requirement for employers to provide minimum wages. ORS 653.025. In a similar vein, an employer is considered to “employ” an individual when they “suffer or permit” them to work, excluding volunteer services for charitable and public service organizations. ORS 653.010(2). Likewise, “for purposes of Chapter 653, a person is an ‘employee’ of another if that other ‘employs,’ *i.e.*, ‘suffer[s] or permit[s]’ the person to work.” *Susan C. Steves* 32 BOLI 43, 53 (2012).

⁵ Based on the undisputed facts and the lack of clarity regarding the parties’ actual agreement (or lack thereof) I would also determine that claimant established the existence of an *implied-in-fact* contract. See *Ingram v. Basye*, 67 Or 257 (1913) (a contract to pay is presumed from the acceptance of beneficial labor and the burden to prove a contrary situation is on the beneficiary of the services).

Here, as discussed above, the record establishes that the employer directed claimant to work by instructing him to complete a delivery on its behalf. In so finding, I am not suggesting that Chapter 653 controls the outcome of this case. However, where this agency is obliged to consider whether an implied contract exists for purposes of determining whether a claimant is a subject worker under ORS 656.005(30), it is incumbent on us to consider relevant law that establishes a party's rights insofar as they affect a determination under Chapter 656.

Accordingly, I would find that claimant's rights under ORS 653.025 support the existence of an implied-in-law contract in these specific circumstances.

Based on the aforementioned reasoning, I would find that claimant has met his burden to establish the requisite employment relationship at the time of his injury such that he was a "worker" under the definition provided by ORS 656.005(30). Because the majority reaches a different conclusion, I respectfully dissent.