
In the Matter of the Compensation of
WILLIAM N. BRUNS, Claimant
WCB Case No. 14-03732, 14-03684, 14-00012NC
ORDER ON REVIEW
Dunn & Roy PC, Claimant Attorneys
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Ogawa's order that upheld the denial by Sedgwick Claims Management Services (Sedgwick), the statutory claim processing agent under ORS 656.054, of claimant's injury claim for his low back condition. First Impression Refinishing LLC (First Impression) cross-requests review of that portion of the ALJ's order that affirmed the Workers' Compensation Division's (WCD's) order finding First Impression to be a noncomplying employer (NCE). On review, the issues are subjectivity and compensability. We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

First Impression was a piano moving and refinishing business created by Ms. Loomis and claimant. In August 2012, First Impression was incorporated as a limited liability company (LLC) with Ms. Loomis designated as the sole member and registered agent. (Ex. 2B). Claimant performed all of the labor and day-to-day work of the refinishing business, while Ms. Loomis provided administrative support. (I-Tr. 78).

On February 28, 2014, claimant and Ms. Loomis had an argument about filing taxes for First Impression. (I-Tr. 25). Thereafter, their relationship ended.¹

On March 21, 2014, claimant presented to the emergency room with complaints of low back pain over the last three weeks. (Ex. 8). A lumbar strain was diagnosed. (Ex. 8-2). Claimant completed an 827 form, alleging a February 25, 2014 injury when he picked up a piano and his lower back popped. (Ex. 9).

¹ In May 2014, Ms. Loomis filed documents dissolving the LLC. (Ex. 2B-2).

On July 25, 2014, Sedgwick denied the claim. (Ex. 24). Claimant requested a hearing.²

The ALJ determined that, based on his demeanor and manner of testifying, claimant's testimony regarding the alleged work incident was not credible and, therefore, was insufficient to establish legal causation of the unwitnessed, alleged work injury.

NCE Order

We affirm the ALJ's reasoning and conclusion regarding WCD's NCE order. However, we base our conclusion on the following reasoning.

WCD determined that First Impression was an NCE. (Ex. 19). As the party who challenged WCD's order, First Impression bears the burden of proving the incorrectness of the order. ORS 656.740(1); *Douglas Fredinburg*, 45 Van Natta 1060, 1061 (1993).

First Impression's burden is to prove that it was not a "subject employer" as defined by ORS 656.023. For the following reasons, we find that First Impression has not met this burden and agree with WCD's determination that it is an NCE.

ORS 656.023 defines a "subject employer" as an "employer employing one or more subject workers in the state * * *." ORS 656.005(30) defines "worker" as "any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer." "Subject workers" are defined as all workers, subject to a number of specified exceptions set forth at ORS 656.027. Thus, if First Impression employed at least one subject worker in the state, it is a "subject employer." For the following reasons, we find that First Impression employed at least one "subject worker."

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. *See S-W Floor Cover Shop v. Natl. Council on Comp. Ins.*, 318 Or 614, 630-631 (1994). If the relationship between the parties cannot be established by the "right to control" test, it is permissible to apply the

² On May 28, 2014, a WCD order found First Impression to be a noncomplying employer. (Ex. 19). First Impression filed a request for hearing challenging WCD's determination. Claimant's and First Impression's requests were consolidated.

“nature of the work” test. *Id.* at 622 n 6. The principal factors considered under the “right to control” test are: (1) direct evidence of the right to, or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. *See Castle Homes, Inc. v. Whaite*, 95 Or App 269, 272 (1989). None of these factors are dispositive; rather, they are viewed in their totality. *See Cy Inv., Inc. v. Natl. Council on Comp. Ins.*, 128 Or App 579, 583 (1994).

Here, the record persuasively establishes that claimant was engaged to furnish services for a remuneration, subject to the right of direction and control of First Impression (an LLC), whose sole member was Ms. Loomis. In reaching this conclusion, we find that, although claimant was provided extensive latitude in performing the day-to-day operations of the organization, he ultimately remained subject to the LLC’s right to direct and control the parameters of his duties. These duties included claimant’s use of First Impression’s debit card for a variety of business-related and personal purposes. While claimant initially used a family member’s equipment, the LLC’s eventual purchase of tools for his use in the business weighs toward an employment relationship. (Tr. 17, 158, 166). Also, while claimant wanted to hire employees to assist in the refinishing work, Ms. Loomis (as the member/registered agent of the LLC) “always told him ‘no.’” (Tr. 49). Finally, as evidenced by claimant’s termination and the LLC’s dissolution, First Impression had the unqualified right to fire claimant. (Ex. 16A; Tr. 58).

Based on such circumstances, we are persuaded that all of the aforementioned factors support an “employee-employer” relationship under the “right to control” test. Nonetheless, even if some of those factors could be interpreted as favoring a partnership or “independent contractor” arrangement, application of the “nature of the work” test establishes that claimant’s activities conformed to pursuing First Impression’s business objectives and that the LLC was more suitably equipped to absorb the liability for any accidents incurred during claimant’s work activities. *Cf. Steven Vaida*, 67 Van Natta 782, 786 (2015) (where the claimant performed separate “odd jobs” for numerous individuals, application of the “nature of the work” test led to the conclusion that the claimant would be expected to carry his own accident burden). Consequently, even if the “right to control” test was not conclusive, application of the “nature of the work” test supports a conclusion that claimant was an employee of First Impression, and therefore, a subject worker.

Compensability

On review, claimant contends that there is no contrary evidence to his assertion of sustaining a work injury while moving a piano on February 25, 2014 and the medical treatment records corroborate the occurrence of such an injury. Additionally, he asserts that his testimony regarding the occurrence of the piano lifting injury was credible. Based on the following reasoning, we affirm the ALJ's decision.

Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003). Whether claimant established legal causation hinges principally on his credibility. In evaluating the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility findings. *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). We are in an equally advantageous position to evaluate credibility when such an evaluation is based on the substance of a witness's testimony, rather than demeanor. *See Coastal Farm Supply v. Hultberg*, 84 Or App, 282, 285 (1987).

Here, claimant's treatment records beginning with an emergency room visit on March 21, 2014, corroborate both the timing and nature of his alleged work injury. However, those records rely on his own reports to his medical providers. (Exs. 8, 9, 10, 13, 14, 15). If a claimant's credibility as a witness is suspect, and the medical evidence supporting the compensability of the denied claim rests on the claimant's version of events, such records alone generally do not support a compensable claim. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977); *Jose Mukul-Yeh*, 65 Van Natta 1887 (2013) (inconsistencies in the claimant's testimony, as well as inconsistencies with the record, raised such doubt that the record did not persuasively establish that he was injured at work).

There is no directly contrary evidence establishing that claimant was not injured in the described "piano moving" incident. However, the ALJ found that claimant's testimony regarding the alleged work injury was not credible based on demeanor. Our review of this record does not provide a persuasive reason not to defer to the ALJ's "demeanor-based" credibility finding. Consequently, we consider neither claimant's testimony, nor his reports to his physicians, sufficient

to persuasively establish that he sustained a work-related injury.³ *See, e.g., Carlos Vazquez*, 58 Van Natta 1306, 1306 (2006) (deferring to the ALJ's demeanor-based credibility finding in concluding that the claimant's testimony did not establish the occurrence of a work-related injury).

Under such circumstances, the record does not persuasively establish that claimant sustained a work-related injury on February 25, 2014, that was a material contributing cause of his disability/need for medical treatment for his low back condition. Consequently, we agree with the ALJ's conclusion that this disputed claim is not compensable.

ORDER

The ALJ's order dated April 30, 2015 is affirmed.

Entered at Salem, Oregon on January 26, 2016

³ While the ALJ's credibility finding included consideration of claimant's history of criminal convictions, our finding is based on the ALJ's evaluation of claimant's demeanor while testifying, in conjunction with the discrepancies in claimant's version of events as detailed in the ALJ's order.