
In the Matter of the Compensation of
STEVEN VAIDA, Claimant
WCB Case No. 13-00580
ORDER ON RECONSIDERATION
Ransom Gilbertson Martin et al, Claimant Attorneys
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests reconsideration of our April 8, 2015 order that reversed an Administrative Law Judge's (ALJ's) order that found that claimant was a subject worker and set aside the self-insured employer's denial of his injury claim. Citing *Stamp v. DCBS*, 169 Or App 354 (2000), claimant contends that, in determining that he was not a subject worker, we incorrectly applied the "right to control" test when we weighed the various factors relevant to that test. Specifically, claimant argues that one single factor under that test may be sufficient to establish an employment relationship and that, because more than one factor was satisfied, he established that he was a subject worker, not an independent contractor. Having considered claimant's contentions, as well as the employer's response to claimant's reconsideration request, we adhere to our previous decision. We reason as follows.

Before responding to claimant's arguments, we briefly recount the procedural and factual background of the claim. Before his March 3, 2011 injury, claimant and the alleged employer (Mr. Howells) entered into a verbal contract wherein claimant would perform the labor to erect a structure (a building that came as a "kit") in exchange for two months free rent on the shop space rented by claimant. (Tr. 11, 24). Claimant understood that the structure would be used as another shop space for commercial rental. (Tr. 10). Claimant knew how to put the structure together without instructions because he had built a similar one. (Tr. 24-25).

On March 3, 2011, claimant sought treatment for a left shoulder injury from tripping over a rail, landing briefly on his left knee, but primarily on his left shoulder. (Exs. 12, 13; Tr. 6, 7). He underwent a left shoulder rotator cuff repair surgery on January 11, 2012, and a second surgery on February 8, 2012 for a partial failure of the previous rotator cuff repair and wound infection. (Exs. 19, 22, 43).

On January 9, 2013, claimant filed a claim for a left shoulder injury occurring on March 3, 2011. (Ex. 70). On January 23, 2013, the employer denied

the claim on the basis that claimant was not a subject worker. (Ex. 71). Claimant requested a hearing.¹

Applying the “right to control” test, the ALJ determined that claimant was a “worker” within the meaning of ORS 656.005(30). Reasoning that claimant was not a sole proprietor who qualified as an independent contractor pursuant to ORS 656.027(7)(a), and that his employment was not “casual” pursuant to ORS 656.027(3), the ALJ concluded that claimant was a “subject worker.” The ALJ also found that claimant’s injury claim was timely filed under ORS 656.265. Accordingly, the ALJ set aside the employer’s denial of claimant’s left shoulder injury claim.

In reversing the ALJ’s order,² we first applied the “right of control” test and because we found one factor under that test (furnishing of equipment) supported subject worker status, we also considered the “nature of the work” test. After applying that test, we concluded that claimant’s service in erecting a structure was provided as a part of his regular work of performing “odd jobs” that was also made available to others, and that this work would be expected to carry its own accident burden. Finally, we found that claimant’s job of erecting a structure at The Annex, one of Mr. Howells’s commercial rental properties, was not a regular part of the alleged employer’s business (*i.e.*, to make, deliver, and install custom cabinets).

In sum, having applied both the “right to control” and the “nature of the work” tests, we were persuaded that claimant had not established his status as a “worker” under ORS 656.005(30). Consequently, we reversed those portions of the ALJ’s order that found claimant to be a “worker” and a “subject worker.” We now proceed with our analysis of claimant’s arguments on reconsideration.

We acknowledge that, under *Stamp*, a single factor under the “right of control” test indicating an employment relationship may satisfy the test. In *Stamp*, the court determined that an employment relationship existed based on the right to control factor, even though the furnishing of tools and equipment factor indicated independent contractor status, and the method of payment factor and the right to fire factors were neutral. 169 Or App at 363.

¹ At hearing, the employer also asserted that claimant’s claim was untimely filed. (Tr. 2, 3). The ALJ disagreed with that assertion.

² Given our determination on the subjectivity issue, we found it unnecessary to address the “timeliness” issue.

However, after further considering our application of the “right to control” test to the facts of this claim, we remain persuaded that this test supports a conclusion that claimant was an independent contractor, rather than a subject worker. See *Cy Investment, Inc. v. Natl. Council on Comp. Ins.*, 128 Or App 579, 583 (1994) (principal factors of right to control test are viewed in their totality). We further note that, unlike in *Stamp*, the right to control factor here does not indicate an employment relationship. Thus, *Stamp* is distinguishable.

We previously determined that the furnishing of equipment factor favored an employment relationship. Claimant contends that this factor alone should support a determination in his favor. We disagree. While that factor supports an employment relationship, we adhere to our previous conclusion that the other relevant factors in the “right to control” test support a finding that claimant was an independent contractor when injured.

We previously determined that the right to control factor weighed against a finding of an employment relationship. Claimant argues that this factor suggests either an employment relationship or is a neutral factor. He again cites the evidence that the alleged employer “micro-managed” and that he decided how the building project was to be done. Nevertheless, as we reasoned in our prior order, the alleged employer and claimant discussed how to modify the structure, but the record does not indicate that the alleged employer ultimately had the right to control the means and method of erecting the structure. In support of this conclusion, we again note claimant’s testimony that he knew how to put the structure together without instructions because he had built another one, and the kits were similar. (Tr. 24-25). We, therefore, conclude once more that, overall, the alleged employer’s right of control was largely limited to control over the result to be reached, and not the method of performance. See *Oregon Drywall Sys. Inc., v. Nat’l Council on Comp. Ins.*, 153 Or App 662, 667 (1998) (right to control refers to the right to control the method and manner of accomplishing the result, not the right to control the details of the desired result).

Claimant further contests our determinations that the right to fire and method of payment favored independent contractor status. With regard to the right to fire, claimant asserts that there is no evidence that he could pursue contractual liability if the alleged employer had terminated the project, and that the hiring process indicated that the alleged employer hired him as a temporary employee. Claimant notes that he did not submit a bid for a contract to build the structure. We do not find claimant’s contentions persuasive.

Claimant testified that he “suppose[d] that [Mr. Howells] could have fired me if he wanted to.” (Tr. 14). However, we continue to find this testimony insufficient to establish whether the alleged employer could have discharged claimant from his services without liability for breach of contract. We reiterate that the record does not establish that the alleged employer could discharge claimant for reasons other than unsatisfactory work. We, therefore, conclude that claimant and Mr. Howells had a contract that provided that claimant would build the structure kit, and that, based on this evidence, it appears that the alleged employer had a right to terminate the contract for the building, rather than a right to fire claimant indicative of an employer-employee relationship. Therefore, this factor weighs against an employment relationship.

Citing *Richard R. Pate*, 59 Van Natta 1444 (2007), claimant asserts that a rent reduction as a method of payment supports an employment relationship. In *Pate*, the claimant testified that the parties contemplated the value of his housing (\$800) would reflect the value of his time spent caring for the employer’s farm (80 hours of work performed at \$10 per hour). We reasoned that the parties’ contemplation of the hourly value of the claimant’s work suggested an employment relationship. *Id.* at 1448.

By contrast, here, there was no discussion of the hourly value of claimant’s work as it applied to the waiver of his rent. Thus, *Pate* is distinguishable.

Claimant also argues that the “nature of the work” test also favors a finding that he was a subject worker. Citing *Coghill v. Nat’l Council on Comp. Ins.*, 155 Or App 601, *recons*, 157 Or App 125 (1998), claimant notes that the majority of the work he performed did not require advanced skills or specialized knowledge and, thus, weighed in favor of worker status. We disagree.

In *Coghill*, the court upheld a determination that a contractor was required to provide workers’ compensation coverage for certain siding installers in his employ. The installers in *Coghill* performed work that was identical to that performed by the contractor’s employees and were an integral part of its business. The court further noted that the majority of the installers’ work did not require any advanced skills or specialized knowledge. Because the installers were paid by the contractor and because it set the rate of pay, the court reasoned that the installers were not able to pass any increased cost of doing business on to the customer. Therefore, the court concluded that the contractor was in a better position to cover the cost of industrial accidents.

Furthermore, the court determined that, although each job was discrete and of limited duration, the contractor had an ongoing working relationship with the installers. In other words, the same installers worked for petitioner year after year. Some installers previously had been employees of contractor, and some had been hired on as employees by the contractor during the audit period. The court concluded that, based on the record, DCBS properly could conclude that the contractor did not meet its burden of proving that the installers were not employees. 155 Or App at 608.

Here, unlike in *Coghill*, claimant did not perform work that was identical to that performed by Mr. Howells's employees and was not an integral part of Mr. Howells's cabinetry business. Moreover, claimant did not have an ongoing relationship with Mr. Howells. Mr. Howells never asked claimant to do this type of project before, and this was a one-time project. (Tr. 26). It took about two and one-half weeks to erect the building, and another four days to install a special-order door. (Tr. 12). These facts suggest an independent contractor relationship.

Furthermore, the alleged employer hired and paid employees to make, install, and deliver custom cabinets. (Tr. 37-38, 46, 50-52; Ex. 13b). Claimant was not included on the alleged employer's list of employees. (Ex. 13b). Mrs. Howells and the Howells's son testified that they did not consider claimant to be an employee. (Tr. 42, 51, 55). In addition, in both their rental property business and cabinetry business, the Howells always used a specific company to construct additional buildings on the alleged employer's property. (Tr. 43-44).

Finally, claimant's regular work consisted of "odd jobs," which included repairing items, hauling, and fixing and selling items. (Tr. 17-23). He advertised and performed "hundreds" of other odd jobs for different people between 2010 and 2012. (Tr. 19-22). Claimant had not erected a structure for the alleged employer in the past. (Tr. 26). He also had never made custom cabinets for the alleged employer. (*Id.*)

After further considering these particular facts, we find that claimant's service in erecting a structure was provided as a part of his regular work of performing "odd jobs" that was also made available to others, and that this work would be expected to carry its own accident burden.³ Consequently, applying the

³ We continue to acknowledge that the alleged employer was in a superior position to distribute the cost of injuries, as compared to claimant, who was homeless and performed odd jobs, panhandled, and collected cans. (Tr. 17-22). That, however, is not determinative. After once more considering the other factors, as discussed above, we again find that the character of claimant's work weighs against an "employer-employee" relationship.

“nature of the work” test, an employment relationship between claimant and Mr. Howells would not be established.

In conclusion, having applied both the “right to control” and the “nature of the work” tests, we are not persuaded that claimant was a “worker” under ORS 656.005(30).

Accordingly, we withdraw our April 8, 2015 order. On reconsideration, as supplemented herein, we adhere to and republish our April 8, 2015 order. The parties’ appeal rights begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 7, 2015