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

Reviewing Panel: Members Lanning and Curey.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Jacobson's order that: (1) found that claimant timely filed his injury claim for a left shoulder condition; (2) found that claimant was a subject worker; and (3) set aside its denial of claimant's injury claim. On review, the issues are timeliness of claim filing, subjectivity, and compensability. We reverse.

FINDINGS OF FACT

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

The alleged employer, Howells Custom Cabinets, Inc., was owned by David and Barbara Howells. The business made and installed custom cabinets. (Tr. 29-31). The Howells also owned Howells Investments, LLC, a business which managed the Howells' rental properties. (Tr. 29, 30). One of the commercial rental properties, known as "The Annex," was located approximately one and a half blocks from the cabinet property. (Tr. 31-32). Howells Investments, LLC, leased buildings at The Annex to different businesses. (Tr. 29-32).

In February 2010, claimant entered into a lease agreement with the employer and "David Howells" to rent shop space in one of employer's buildings from March 1, 2010 through February 28, 2011. (Ex. 7a). The parties do not dispute that claimant also leased the shop space from March 1, 2011 through February 28, 2012, as evidenced by the employer's deposit ledger. (Ex. 74). In February 2012, claimant entered into a second lease agreement with "Howells Investments LLC" and "Barbara Howells" to rent the shop space from March 1, 2012 through February 28, 2013. (Ex. 52a).¹ The agreements indicated that the leased premise

¹ Mr. Howells passed away in August 2011, and the second lease agreement was renewed by Mrs. Howells. (Tr. 32-33).

was to be used as a “shop to be used for working on projects.” (Ex. 7a-2). The shop space was located in the cabinet business building on the property of alleged employer. (Exs. 7a, 52a; Tr. 10, 35).

As early as 2010, claimant was homeless and did odd jobs such as trash hauling, cleanup work, and repairing items. (Tr. 17-19, 21-23). He would negotiate a deal to perform a job in exchange for a fixed price, getting paid by the job. (Tr. 19). Claimant’s odd jobs also included fixing broken items and reselling them. (Tr. 19, 20). He advertised his services on Craigslist, and estimated that he performed odd jobs for “a few hundred” people each year in 2010, 2011, and 2012. (Tr. 19-22).

Claimant leased the shop space from the alleged employer to store tools and materials, spare parts, and a utility trailer, and for working on projects. (Tr. 23). He never constructed cabinets for the alleged employer. (Tr. 26).

Some time before March 3, 2011, claimant and Mr. Howells entered into a verbal contract wherein claimant would perform the labor to erect a structure (a building that came as a “kit”) at The Annex 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 a similar one that he had built. (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). Claimant testified that, after returning from the hospital, he told Mr. Howells that he had injured his shoulder and would not be working for a few days. (Tr. 8, 9, 27). He did not work for three days. (Tr. 9).

Claimant sought treatment for his left shoulder again on September 2, 2011. (Exs. 14, 15). He received medical treatment for his left shoulder from January through April 2012. (*See* Exs. 16, 61). He also 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). The contemporaneous medical records do not document claimant’s left shoulder injury as a work injury.

On January 9, 2013, claimant, through his attorney, 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.²

CONCLUSIONS OF LAW AND OPINION

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.” Relying on claimant’s testimony that he gave timely notice of his injury to the employer, which the ALJ determined to be credible based on his demeanor, 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.

On review, the employer argues that claimant’s claim was untimely filed. It also contends that claimant was not a “worker,” and that, in addition to the “right to control” test, the ALJ should have applied the “nature of the work” test. Alternatively, the employer argues that claimant was a “nonsubject” worker under ORS 656.027(7)(a) and (3). Based on the following reasoning, we uphold the employer’s denial.

Subjectivity

Claimant has the burden of establishing the employment relationship. ORS 656.266(1); *Hopkins v. Kobos*, 186 Or App 273, 277 (2003). We first determine whether an individual is a “worker” before determining whether that “worker” is a “nonsubject” worker pursuant to one of the exemptions under ORS 656.027. See *S-W Floor Cover Shop v. Natl. Council on Comp. Ins.*, 318 Or 614, 630 (1994).

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. This definition contains two elements: an agreement between the claimant and the employer that the employer will provide remuneration for the

² At hearing, the employer also asserted that claimant’s claim was untimely filed. (Tr. 2, 3).

claimant's services, and the employer's right to direct and control the services the claimant provides. *Liberty Northwest Ins. Corp. v. Church*, 106 Or App 477, 481, *rev den*, 312 Or 16 (1991); *Janeé Mendoza*, 63 Van Natta 383, 383-84 (2011).

Here, there is no dispute that claimant and Mr. Howells entered into a verbal contract wherein claimant would perform the labor to erect a structure (a building that came as a "kit") at The Annex, the commercial rental property managed by Howells Investments, in exchange for two months free rent on the shop space leased by claimant. (Tr. 11, 24). Therefore, the element that there was an agreement that the alleged employer would provide remuneration for claimant's services has been satisfied.

Next, we must determine whether the alleged employer had a right to control claimant under the judicially created "right to control" test. *S-W Floor Cover Shop*, 318 Or at 630-31; *Matthew S. Applegate*, 58 Van Natta 2253, 2256 (2006). "[W]hen an employer has the right to control a claimant's performance in some respects but not others, 'it is essential that we consider the factors [that] make up the "nature of the work" test' in deciding whether the control that [the] employer retains makes the relationship one of master and servant." *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002).

"The test for determining 'control' in the workers' compensation context 'is based not on the actual exercise of control by the employer, but on the right to control.'" *S-W Floor Cover Shop*, 318 Or at 622. Factors considered in determining whether a "right to control" establishes an employment relationship include: (1) whether the employer retains the right to control the details of the method of performance; (2) the extent of the employer's control over work schedules; (3) whether the employer can discharge the individual without liability for breach of contract; (4) the furnishing of equipment; and (5) the method of payment. *Id.*; *Michael R. Dunham*, 60 Van Natta 3466, 3470 (2008). 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 (1984).

We first determine whether the alleged employer retained the right to control the details and the method of claimant's service in erecting the structure. This factor 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. *Cy Inv.*, 128 Or App at 583. 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, claimant testified that, while working on erecting the structure, Mr. Howells would come by the jobsite “[p]robably four to a dozen times” on an average day. (Tr. 12). According to claimant, Mr. Howells would see how claimant was doing, “making sure that things were getting done the way that he wanted them done[,]” and that he “tended to micromanage a lot.” (Tr. 13, 27). Other times, claimant would call Mr. Howells to ask his advice on how he wanted something to be done. (Tr. 13). Because the structure was built on a slope and attached to another building, the building “kit” had to be modified. (*Id.*) Claimant testified that, in deciding how to make modifications to the “kit,” he and Mr. Howells would make suggestions, and they “kind of figured out together how it should be done.” (*Id.*)

Although the alleged employer and claimant discussed how to modify the structure, the record does not indicate that the alleged employer ultimately had the right to control the means and method of erecting the structure. We also note that claimant testified 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). Overall, we find that 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 method and manner of accomplishing result, not the right to control the details of the desired result). Accordingly, we find that this first factor weighs against an employment relationship.

We next consider the extent of the alleged employer’s control over claimant’s work schedule. Claimant testified that he did not have any set hours that he was required to work on constructing the structure, and he had the flexibility to do so when he chose. (Tr. 26-27). According to claimant, Mr. Howells did not tell him to start or end at a particular time. (Tr. 27). Because the record supports a conclusion that the alleged employer did not have control over claimant’s work schedule, this factor weighs heavily against an employment relationship.

We next evaluate whether the alleged employer could have discharged claimant from his services without liability for breach of contract. In *Henn v. SAIF*, 60 Or App 587, 593 (1982), 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.”

Here, claimant testified that he “suppose[d] that [Mr. Howells] could have fired me if he wanted to.” (Tr. 14). However, we find this testimony insufficient to establish whether the alleged employer could have discharged claimant from his services without liability for breach of contract. Furthermore, there is no evidence that the alleged employer could discharge claimant for other than unsatisfactory work. We find 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. Therefore, this factor weighs against an employment relationship. See *Thomas H. Kenschuh*, 48 Van Natta 1079, 1080 (1996) (the absence of evidence on whether the alleged employer could discharge the claimant for other than unsatisfactory work insufficient to establish a “right to fire” indicative of an employer-employee relationship).

We next turn to the furnishing of equipment. The alleged employer ordered and supplied the building “kit” structure, as well as the extra materials for the modifications. (Tr. 13-14). Claimant testified that the tools needed to erect the structure were a cutoff saw, welder, forklift, and a cordless drill/screw gun. (Tr. 11-12). Claimant provided his own measuring instruments and the cordless drill/screw gun, and Mr. Howells provided the other equipment. (*Id.*) On balance, we find that this factor weighs in favor of “worker” status.

Lastly, we evaluate the method of payment. The court has previously noted that, to the extent that the method of payment lessens an employer’s interest in the details of how the worker spends his or her time, it suggests an independent contractor relationship; to the extent that it indicates continuing service, it suggests employment. *Henn*, 60 Or App at 592. When payment is by quantity, the method of payment factor in the “right to control” test is considered largely neutral. *Id.*; *Jerry R. Vorce*, 48 Van Natta 480, 481 (1996).

Here, claimant received two months of free rent on his shop space for erecting the structure. (Tr. 11, 24). 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.

Moreover, 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 Christopher Howells (the Howells's son) testified that they did not consider claimant to be an employee. (Tr. 42, 51, 55). Further, 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 was paid by the piece of work produced.

Under these particular circumstances, we consider the method of payment factor to weigh heavily against an employment relationship. See *Robert A. Medina*, 62 Van Natta 2734, 2738 (2010) (method of payment weighed against an employment relationship where a DJ was paid a flat rate for the nights he provided DJ services); *Vorce*, 48 Van Natta at 481 (method of payment considered largely neutral where the claimant was paid by the piece of work produced).

Based on the foregoing reasons, we conclude that a preponderance of the evidence does not establish that the alleged employer had a right to control claimant in the performance of his job. Nevertheless, because we have found that the "furnishing of equipment" factor of the "right to control" test supports a "worker" status, we also consider the factors that make up the "nature of the work" test. *Rubalcaba*, 333 Or at 627; *Medina*, 62 Van Natta at 2728. As explained below, this test supports our determination that claimant was not a "worker."

The purpose of the "nature of the work" test is to consider factors that are relevant to the workers' compensation system rather than to the common law issues that the right to control test describes. *Trabosh v. Washington County*, 140 Or App 159, 166 (1996). Under the "nature of the work" test, we consider: (1) the character of the claimant's work; *i.e.*, how skilled it is, how much of a separate calling it is, and the extent to which it may be expected to carry its own accident burden; and (2) the relationship of the claimant's work to the employer's business; *i.e.*, how much of it is a part of the employer's regular business, whether it is continuous or intermittent, and whether the duration is sufficient to be the hiring of continuous services, rather than contracting for a particular job. *Medina*, 62 Van Natta at 2738-39.

Here, 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's work for the alleged employer was to erect a

structure (a building “kit”) at The Annex. (Tr. 11, 24). The kit did not come with instructions, but claimant explained that he knew how to put the structure together because he had previously constructed a similar one. (Tr. 24-25). 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.*) In their role as a rental property business and as a cabinetry business, the Howells had previously used a particular company to construct additional buildings on the alleged employer’s property. (Tr. 43-44). On 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 *See Medina*, 62 Van Natta at 2739.

Finally, we find that claimant’s job of erecting a structure at The Annex, one of the 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). (Tr. 29-31). The Howells’s separate business, Howells Investments, LLC, managed The Annex, which was located one and a half blocks from property of the alleged employer, and leased buildings to different businesses. (*Id.*) Although claimant understood that the structure would be used as another shop space for commercial rental, Mrs. Howells testified that the structure was actually built for personal use (*i.e.*, storage for the Howells’s car, four-wheeler, and other “boxes of junk”), and was never used for the alleged employer’s business. (Tr. 10, 45). Further, claimant’s service was to erect the structure at The Annex in exchange for two months of free rent on his shop. (Tr. 11, 24). That arrangement indicates that claimant and the alleged employer contracted to perform a particular job, not that claimant’s work was of a continuous nature or for continuing services.

In sum, having applied both the “right to control” and the “nature of the work” tests, we are persuaded that claimant has not established his status as a “worker” under ORS 656.005(30). Consequently, we reverse those portions of the ALJ’s order that found claimant to be a “worker” and a “subject worker.”⁴

³ We 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. Moreover, considering the other factors, as discussed above, we find that the character of claimant’s work weighs against an “employer-employee” relationship.

⁴ Because we have found that claimant was not a “worker,” we do not address the employer’s arguments that claimant was a “nonsubject” worker.

Timeliness

We need not decide the “timeliness” issue because, even if the claim was not time barred, we find that claimant was not a subject worker, as explained above.

ORDER

The ALJ’s order dated August 27, 2014 is reversed. The employer’s denial of claimant’s left shoulder injury claim is reinstated and upheld. The ALJ’s \$7,500 attorney fee and cost awards are also reversed.

Entered at Salem, Oregon on April 8, 2015