
In the Matter of the Compensation of
MARY K. MEYERS, Claimant
WCB Case No. 13-03794
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) found that claimant was not a subject worker; and (2) upheld the SAIF Corporation's denial of claimant's injury claim for a right hip fracture. On review, the issue is subjectivity.

We adopt and affirm the ALJ's order with the following supplementation.

In January 2013, claimant applied for a telemarketing position with SAIF's insured. (Ex.1; Tr. 8). She completed a written application and an interview. (Tr. 8). She called to inquire about her application and was then invited to attend an "orientation and paid training" to take place on January 21, 2013. (Ex. 6; Tr. 37-38). The orientation required presentation of photo identification and a Social Security card, completion of I-9 and W-2 federal forms, followed by a review and agreement to the employer's "rules of the office," including its productivity expectations and dress code. (Tr. 26, 34-35, 53).

On the day of the orientation and training, claimant walked through the office building lobby toward the employer's offices where she had previously interviewed. (Tr.11-12). She went to the door to take the stairs to the mezzanine level where the office was located. (*Id.*) As she approached the door, one of the employer's workers came through and opened the door, which struck claimant and caused her to fall. (*Id.*)

Claimant suffered an acute right hip fracture. SAIF denied the claim, (Ex. 7), prompting claimant's hearing request.

Claimant testified that she came to the employer's premises understanding that she would participate in the first day of paid training at nine dollars per hour. (Tr. 9-10).

The employer testified that claimant would have been required to complete the orientation paperwork before participating in paid training. (Tr. 37). The employer denied ever promising claimant any kind of remuneration. Instead, the employer told her that if she completed the orientation paperwork she would have the opportunity to do paid training. (*Id.*) It was the employer's understanding that, until the orientation paperwork was filled out, the person would not be considered an employee. (Tr. 26).

The ALJ determined that claimant was not a subject worker because, at the time of her injury, she only had the possibility of future employment, rather than an agreement with the employer to provide services for remuneration.¹ The ALJ reasoned that the employer required prospective employees to review and agree to a set of workplace policies including the employer's productivity expectations, wages and hours, and dress code, as well as presenting photo identification, a Social Security card, and completing I-9 and W-2 federal forms. Accordingly, the ALJ concluded that, without claimant's agreement to such policies and completion of the forms, her employment had yet to begin when she sustained her injury.²

Claimant argues that the employer's expectation of the completion of I-9 and W-2 forms constituted an acknowledgment that she was considered "hired" by the employer because such forms are not completed until after the hiring of an employee. Further, she contends that the fact that she was directed to attend the orientation and paid training established the employer's direction and control over her. Based on the following reasoning, we disagree.

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 v. Kobos Co.*, 186 Or App 273, 277 (2003); *Janee Mendoza*, 63 Van Natta 383, 383-84 (2011). Claimant bears the burden of establishing the existence of an employment relationship. *See Hopkins*, 186 Or App at 277; *Stanley V. Burch*, 63 Van Natta 1732 (2011).

¹ At hearing, SAIF amended its denial to include only the contention that claimant was not a subject worker because she was not an employee under ORS 656.005(30). (Tr. 2).

² The ALJ further determined that the employer exercised no control over claimant, though she had been directed to attend the orientation and training. In doing so, the ALJ noted the employer's testimony that many prospective employees failed to attend the orientation and training, which did not result in any disciplinary action against them. (Tr. 26).

A contract for hire that satisfies the agreement 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). Here, because there is no “express” agreement, we consider whether the conduct of the parties created an “implied” agreement. Based on the following reasoning, the record does not support the existence of such an agreement.

In *Audencia Montez*, 54 Van Natta 155 (2002), we considered whether an implied contract of employment existed when an employee did not complete the employer’s pre-employment requirements, but still worked and received payment. Finding that the employer assented to the claimant continuing to work, as well as directed her activities, we found sufficient evidence that an implied contract existed such that the claimant was a subject worker. *Id.* at 158.

In *Montez*, the claimant had actually performed services for the employer and received payment for six or seven days of work though she had not completed some of the employer’s pre-employment requirements. In contrast, here, claimant performed no services for the employer, and received no remuneration from the employer. Under such circumstances, claimant’s unilateral understanding that she had fulfilled the employer’s preconditions does not establish the existence of an implied contract, particularly given the employer’s contrary testimony that claimant would not be allowed to participate in paid training until completing the orientation process. See *Hix v. SAIF*, 34 Or App 819, 824, *rev den.*, 284 Or 1 (1978) (finding that the claimant’s expectation of payment for incidental chores/services was more of a “reasonable hope” based on the “mutual goodwill between the parties” rather than an implicit contractual relationship).

This claim is more analogous to the facts of *Burch*, where the claimant was reapplying for a position with the employer after being laid off. One of the conditions of re-employment was the successful completion of a physical fitness test. During the course of the test, the claimant ruptured his Achilles tendon. We found that the claimant was not a subject worker at the time of his injury because he had not yet furnished services for remuneration. 63 Van Natta at 1735. In doing so, we reasoned that participation in pre-employment screening did not establish an entitlement to work, but rather was a necessary precondition for the possibility of employment.

Here, similar to the claimant in *Burch*, claimant came to the orientation to further the possibility of employment, rather than acting at the employer's direction pursuant to a contract of employment. As established by the employer's testimony, claimant's position was contingent on her completing the pre-employment requirements of the orientation process. (Tr. 26, 37).

Thus, as the ALJ reasoned, the orientation was not a mere formality because it included signing paperwork expressly agreeing to the conditions of employment. The record does not persuasively establish that claimant had been advised of, or agreed to, all of the employment conditions before her injury. In the absence of such an agreement, there was no contract of employment. *See Beall v. Foster*, 95 Or 39, 42-43 (1920) (where parties have not agreed on all terms and conditions there is no contract). Furthermore, the employer required verification of claimant's eligibility to work in the form of completion of I-9 forms and presentation of a Social Security card before being hired for paid training. (Tr. 26, 34-35). This formal evaluation process had not been initiated when claimant sustained her injury.

In conclusion, based on the aforementioned reasoning, claimant has not presented persuasive evidence sufficient to rebut the employer's assertion that the employment relationship was not formed until completion of the orientation process. Consequently, the record does not persuasively establish that claimant was a subject worker under ORS 656.005(30). *See* ORS 656.266(1). Therefore, we affirm the ALJ's order.

ORDER

The ALJ's order dated December 8, 2014 is affirmed.

Entered at Salem, Oregon on September 25, 2015

Member Weddell dissenting.

The majority concludes that claimant did not establish the existence of an implied contract with the employer to engage in paid training.³ Because I would interpret the conduct of the parties to establish such an agreement, I respectfully dissent.

³ At hearing, SAIF defended the claim solely on the basis of subjectivity, waiving any issues regarding whether claimant, assuming she was a subject worker, was within the course and scope of her employment. (Tr. 2-3).

The ALJ compared the claim to *Stanley V. Burch*, 63 Van Natta 1732 (2011). The claimant in *Burch* was reapplying for a position with the employer after being laid off. One of the conditions of re-employment was the successful completion of a physical fitness test. During the course of the test the claimant ruptured his Achilles tendon. We found that the claimant was not a subject worker at the time of his injury because he had not yet furnished services for remuneration. 63 Van Natta at 1735. His participation in pre-employment screening did not establish an entitlement to work, but was a necessary condition for the possibility of employment.

Here, there are important factual differences that distinguish this case from *Burch*. For instance, the employer explained to claimant regarding the orientation that “if she were to come down and fill out the paperwork and go through the various-- go through the process, that she would be—that she would have the opportunity to go through a training program,” but that “[s]he had to go through the orientation process before she could go through training.” (Tr. 37).

The employer gave examples of people who came for the orientation, but did not complete it because they could not, or would not, comply with the employer’s policies and expectations. (Tr. 42). However, the employer also admitted that “more than likely, most of the people that come down to go through the orientation process are offered a job.” (*Id.*) Furthermore, specific to claimant, the employer stated that “I wouldn’t expect that there would have been a problem with [claimant] being hired, but until the orientation process went through * * * it wasn’t a done deal.” (Tr. 44). The employer explained that, after all of the paperwork is explained and when everything is agreed on, the person is hired. (Tr. 33).

Thus, in contrast to *Burch*, the employer’s description of the orientation process does not establish that it was actually an extension of the application process whereby the qualifications of the applicants are assessed and considered. Rather the employer’s description indicated that the orientation process was simply the first requirement for a new employee. As the employer explained, the orientation process was “not a complicated process, so it’s not something that we really spend a lot of time... thinking about.” (Tr. 47).

Given the lack of any substantive evaluation of applicant qualifications during the “orientation,” I would find that an implied contract of employment was created by the conduct of the parties prior to the “orientation.” *See Montez v. Roloff Farms, Inc.*, 175 Or App 532, 536 (2001) (implied in fact contract may be

based on the conduct of the parties). In addition to the lack of further substantive evaluation of qualifications, I note that claimant was told to come early to do paperwork before participating in the paid training. That is to say, she came to the employer's premises with every expectation of participating in paid training, and the employer did not communicate any concern as to whether she would be allowed to participate. (See Tr. 9, 10, 37, 44). Furthermore, in contrast to *Burch*, where the claimant did not even have a starting date for the prospective employment, here, claimant's starting date was the date of the paid training she arrived to attend on January 21, 2013. (See Ex. 6).⁴

Accordingly, I would find that claimant was "engaged to furnish services for a remuneration" meaning that there "was an agreement between [her] and the employer that the employer will provide remuneration for [her] services." *Burch*, 63 Van Natta at 1735 (citing *DCBS v. Clements*, 240 Or App 226, 232 (2010), and *Hopkins v. Kobos Co.*, 186 Or App 273, 276-77 (2003)). Such an agreement satisfies the requirement that a subject worker engage to furnish services for a remuneration. See ORS 656.005(30); *Oremus*, 11 Or App at 446 (employment relationship arises in contract, either express or implied).

To conclude, there is no contention that claimant arrived at the employer's premises for any other purpose than to engage in paid training. The employer's description of the "orientation" process convinces me that the sole reason claimant did not participate in training on that day was the occurrence of her injury. I cannot agree that such an occurrence should be deemed a valid defense to coverage. Therefore, I respectfully dissent.

⁴ Exhibit 6 is the 801 form, in which the employer indicates that claimant's hire date was January 21, 2013.