
In the Matter of the Compensation of
MARK PILLING, Claimant
WCB Case No. 14-00270
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

The insurer requests review of Administrative Law Judge (ALJ) Otto's order that: (1) found that claimant was a subject worker; and (2) set aside its denial of claimant's injury claim arising from a motor vehicle accident (MVA). On review, the issue is subjectivity. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized below.

Since at least 2005, claimant and his wife operated a business called Always Connected Technologies Mobile Emergency Support Systems (ACTMESS), which specialized in the sales, service and installation of satellite communication systems. (Tr. 6, 13).

Claimant provided the technical knowledge and labor to install the systems and integrate them with communication systems. (Tr. 6-8). His wife handled the paperwork, performed clerical/bookkeeping tasks, communicated with clients, and relayed their specifications to claimant. (Tr. 8, 9). Claimant and his wife shared driving duties to the job sites. (Tr. 8).

Neither claimant nor anyone else received paychecks from ACTMESS. (Tr. 7). Instead, proceeds were used to pay expenses, and any remainder was merged into the family's finances. (*Id.*)

In 2013, claimant and his wife filed joint income taxes reporting a loss from ACTMESS during fiscal year 2012. (Ex. 35-4).

In August 2012, ACTMESS applied for workers' compensation coverage in order to qualify for an installation job. (Tr. 9; Exs. 17, 18). The application did not identify claimant as a partner, officer, or relative to be included in coverage. (Ex. 17-1). However, the application included the following statement:

“EMPLOYEE [claimant] HAS BEEN COMPUTER TECH FOR OVER 15 YEARS AND IN THIS LINE OF BUSINESS SINCE 1970. [Claimant’s wife] IS A SMALL BUSINESS CONSULTANT. THEY HAVE EXPERIENCE RUNNING OWN BUSINESS FOR OVER 20 YEARS, NO EMPLOYEES.” (Ex. 18-2).

The resulting policy did not include an endorsement electing coverage of any nonsubject workers. (Ex. 20-2, -4, -5). Claimant’s wife did not intend to obtain coverage for herself, though she did intend to obtain a policy covering claimant. (Tr. 10).

In December 2012, claimant and his wife travelled from their La Grande home to Portland for an installation job. (Ex. 85-3). Claimant completed most of the work between December 17, 2012 and December 21, 2012. (*Id.*) On December 22, 2012, while on his way to the job site, claimant was involved in a MVA and sustained multiple injuries. (Tr. 24).

In November 2013, claimant filed an injury claim. (Ex. 75).

In January 2014, the insurer denied the claim. (Ex. 80). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ applied the “right to control” test to determine whether claimant was a “worker” under ORS 656.005(30). *See S-W Floor Cover Shop*, 318 Or 614, 630-31 (1994). Finding the test to be inconclusive, the ALJ proceeded to apply the “nature of the work” test and concluded that claimant was a “worker.” *See Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002). Consequently, the ALJ set aside the insurer’s denial.

On review, the insurer contends that claimant is not a worker, because during the “2012 coverage year,” his services did not result in remuneration. Alternatively, the insurer argues that claimant is a partner of ACTMESS and, therefore, a nonsubject worker under ORS 656.027(8).¹

¹ The insurer concedes that, if claimant was a subject worker, his injury claim is compensable. Claimant does not contend that there was an election of coverage for claimant as a partner. *See* ORS 656.039 and ORS 656.128 (establishing procedures for election of coverage of certain nonsubject workers).

We conclude that claimant is a partner of ACTMESS, and therefore, a nonsubject worker.² See ORS 656.027(8) (nonsubject workers include partners, except as provided in ORS 656.027(23) and partners engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto); cf. *Roy D. Hodgkin*, 49 Van Natta 1279, 1280 (1997) (where the claimant was secretary of the corporation whose ownership was vested elsewhere, he was not considered to be an exempt corporate officer with substantial ownership interest); *Charles J. Fields*, 43 Van Natta 263, 265 (1991) (where the claimant did not share in the usual risks or investments of a partnership, he was not an exempt partner under ORS 656.027(8)). We reason as follows.

Because “partner” is not defined in Chapter 656, we look to Chapter 67, which defines “partnership” as a form of business association and provides criteria for determining whether a “partnership” has been created.³ ORS 67.055(1)

² We adopt the ALJ’s “worker” analysis under ORS 656.005(30).

³ ORS 67.055 provides:

“(1) Except as otherwise provided in subsection (3) of this section, the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership.

“* * * * *

“(4) In determining whether a partnership is created, the following rules apply:

“(a) Factors indicating that persons have created a partnership include:

“(A) Their receipt of or right to receive a share of profits of the business;

“(B) Their expression of an intent to be partners in the business;

“(C) Their participation or right to participate in control of the business;

“(D) Their sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and

“(E) Their contributing or agreeing to contribute money or property to the business.

* * * * *

provides that a partnership is an “association of two or more persons to carry on as co-owners a business for profit,” whether or not the creation of a partnership is intended or not. The statute provides criteria for determining the existence of a partnership, including the sharing, or right to share, profits of the business, and as the sharing, or agreement to share, business losses. *See* ORS 67.055(4)(a)(A), (D). Moreover, a person’s receipt of a share of profits of a business generally creates a rebuttable presumption that they are a partner in the business. *See* ORS 67.055(4)(a)(d).

Here, claimant’s wife testified that she and claimant ran the business as a partnership for one year, but later filed their business registration as a sole proprietorship under her name in 2005. (Tr. 14). However, a partnership can exist “whether or not” two or more persons intended to create it. *See* ORS 67.055(1).

Claimant’s wife confirmed that she and claimant shared the profits of the business after its expenses were paid, and that they never had a payroll. (Tr. 7). Claimant was never paid a wage from the business. (Tr. 16; Ex. 35-3). Rather, his wife testified that after expenses were paid, claimant simply “shared in whatever [claimant’s wife] had.” (Tr. 19). Claimant’s share in the profits, instead of a wage, strongly implies the existence of a partnership. ORS 67.055(4)(A), (D).

“(d) It is a rebuttable presumption that a person who receives a share of the profits of a business is a partner in the business, unless the profits were received in payment of:

“(A) A debt by installments or otherwise;

“(B) Wages or other compensation to an employee or independent contractor;

“(C) Rent;

“(D) Amounts owing to a former partner, a beneficiary, representative or designee of a deceased partner or a partner with a disability, or a transferee of a partnership interest;

“(E) Interest or other charge on a loan, whether or not the amount of payment varies with the profits of the business, and whether or not the loan agreement or instrument includes a direct or indirect present or future ownership interest in collateral or rights to income, proceeds or increase in value derived from collateral; or

“(F) Consideration for the sale of a business, including goodwill, or other property by installments or otherwise.”

Finally, consideration of the remaining factors under ORS 67.055(4) provides no compelling rebuttal to the presumption (based on claimant's share in business profits) that he and his wife were in business together as partners.

Therefore, based on the aforementioned reasoning, we consider claimant to be a partner and, as such, a nonsubject worker under ORS 656.027(8). Consequently, because no election of coverage of nonsubject worker under ORS 656.039 or ORS 656.128 was made, the insurer's denial must be upheld. *See Robert W. Sprauer, 57 Van Natta 146, 147 (2005)* (where a nonsubject corporate officer did not make a written election of coverage under ORS 656.039, payment of premium based on his wages did not result in coverage). Accordingly, we reverse.

ORDER

The ALJ's order dated May 21, 2015 is reversed. The insurer's denial is reinstated and upheld. The ALJ's \$6,000 attorney fee and costs awards are also reversed.

Entered at Salem, Oregon on February 4, 2016