
In the Matter of the Compensation of
PETRA LORENZEN, Claimant
WCB Case No. 16-00815
ORDER ON REVIEW
Ransom Gilbertson Martin et al, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Woodford, Lanning, and Wold. Member Lanning dissents.

Claimant requests review of Administrative Law Judge (ALJ) Lipton’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 cardiac condition. On review, the issue is subjectivity.¹ We affirm.

¹ Claimant has submitted an amended reply brief, which included a “post-ALJ order” Workers’ Compensation Division’s (WCD’s) nonsubjectivity determination regarding the parents, as well as a “post-ALJ order” WCD investigation report regarding claimant’s claim against the parents. Noting that claimant previously filed her reply brief, SAIF moves to strike her amended reply brief. We deny SAIF’s motion. Our reasoning follows.

After receiving an extension of time within which to file her reply brief, the due date for claimant’s brief was set as November 22, 2017. Claimant’s reply brief and amended reply brief were mailed to the Board on November 20, 2017, and November 21, 2017, respectively. Because the amended reply brief was filed within the filing period for her reply brief, the amended brief was timely. Therefore, it will be considered.

Furthermore, because the WCD nonsubjectivity determination represents an agency decision, we may take administrative notice of its issuance. *See Johanna L. Southard*, 69 Van Natta 500, 502 (2017); *Claude E. Harris*, 43 Van Natta 492, 494 (1991) (administrative notice of agency orders permissible when facts are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”). However, because the WCD’s investigative report does not constitute an agency decision, we decline to take administrative notice of that document. *See Gabriele Reinertsen*, 62 Van Natta 1652, 1653 n 1 (2010) (a Department of Consumer and Business Services (DCBS) statistical report about case outcomes did not represent an agency decision or order and, as such, was not subject to administrative notice).

Finally, because consideration of the WCD’s report concerning whether the parents are subject employers is not reasonably likely to affect the outcome of whether claimant was a subject worker with regard to SAIF’s insured, this case has not been improperly, incompletely, or otherwise insufficiently developed. Therefore, we find no compelling reason to remand this case to the ALJ. *See* ORS 656.295(5); *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986); *SAIF v. Avery*, 167 Or App 327, 333-34 (2000); *Maria S. Chiritescu*, 69 Van Natta 1715, 1717 n 2 (2017) (finding no compelling reason to remand where the submitted material would not be reasonably likely to affect the outcome of the case).

FINDINGS OF FACT

SAIF's insured, a surrogacy center ("the Center"), was organized to provide "services to intended parents and gestational carriers."² (Ex. 63-2).

In August 2013, claimant applied to become a gestational carrier. (Ex. 3). She promised to work exclusively with the Center (for six months) in searching for a match with intended parents. (Ex. 13). In screening claimant's qualifications, the Center requested a criminal background check, medical records review, and psychological evaluation. (Exs. 8, 17, 24-1).

In October 2013, the intended parents retained the Center to assist them in obtaining the services of a gestational carrier and managing the surrogacy process. (Ex. 26-1, -2). The intended parents agreed to pay the Center's fee for services that it would provide, as well as the fees and expenses to be charged by the gestational carrier for her services.³ (Ex. 26-2, -3; Tr. 71).

In November 2013, the Center directed claimant to apply for a health insurance plan that would cover the surrogacy. (Ex. 32). The Center paid the premiums from a general account, to which all intended parents under contract with the Center contributed for initial screening and insurance costs. (Tr. 87).

In December 2013, the Center introduced claimant and the intended parents. (Exs. 36, 41). When they decided to proceed, an attorney for the Center drafted a surrogacy contract. (Exs. 46, 48; Tr. 122). The attorney arranged for separate legal counsel to represent claimant and the parents in reviewing the draft and negotiating the final contract. (Exs. 49, 51).

² The "intended parents" create a child through in vitro fertilization/embryo transfer to a "gestational carrier," who agrees to carry the child and, upon delivery, transfer custody to the parents. (Ex. 63-2).

³ The agreement provided that the intended parents would pay the Center a specified sum to interview and screen potential gestational carriers, conduct introductory meetings, prepare a draft surrogacy agreement, make arrangements for in vitro fertilization, manage an escrow account and make disbursements to the gestational carrier, medical providers, and others, assist with the parents' relationship with the gestational carrier throughout the pregnancy, and perform other listed services. (Ex. 26-1, -2). The agreement further provided that, after the parents were matched with a gestational carrier, they would deposit an additional specified amount (approximately 1/6 of the first sum) to cover her initial expenses. (Ex. 26-3). The parents agreed to deposit additional amounts after the surrogacy contract was signed, based on the Center's estimate of the gestational carrier's total fees and expenses. (*Id.*)

Claimant and the parents signed the surrogacy contract in February 2014. (Exs. 61, 63). Claimant agreed to carry embryos created from each of the parents, pursuant to specific terms.⁴ (Ex. 63-2). The parents agreed to pay claimant's compensation and expenses pursuant to specific terms.⁵ The parents agreed to place sufficient funds to cover claimant's initial compensation and expenses in a trust account with the Center before she began taking injectable medication, and to replenish the trust account within 10 days of the Center's written request. (Ex. 61-7). The Center was not a party to that contract. (Exs. 61-2, 63-2).

After the surrogacy contract was signed, the Center estimated claimant's compensation and expenses. (Ex. 67-2). The parents transferred the estimated funds to the Center, which began to make disbursements as provided in the February 2014 contract. (Exs. 80, 83). The Center directed claimant to arrange for a home visit, schedule an appointment with the fertility clinic,⁶ and apply for life insurance. (Exs. 68, 71).

The embryos were transferred to claimant in June 2014. (Ex. 102). When an ultrasound confirmed her pregnancy in July 2014, the Center asked claimant and the parents to sign a separate agreement establishing a disbursement account

⁴ Claimant agreed that all physical examinations, testing, and medical procedures used to achieve pregnancy had been, or would be, performed by a specific clinic and that the clinic would be her treating physicians during the first several weeks of her pregnancy. (Ex. 63-3). According to the agreement, upon being released from the clinic's care, she would treat with a board-certified obstetrician, approved by the parents, and deliver the child at a hospital approved by her obstetrician and the parents. (*Id.*) The parents could attend her prenatal appointments and be present at the birth. (*Id.*) She agreed to notify the parents of the dates and times of her medical appointments and her delivery date, as well as any medical complication or emergency that put the health of the fetus at risk. (*Id.*) The parents were permitted to consult with her medical providers. (Ex. 63-4). Claimant agreed to follow all medical instructions and to submit to any medical test or procedure deemed necessary or advisable by her physician or requested by the parents or the Center, including drug, alcohol, and nicotine testing. (Ex. 63-5). She was required to notify the parents before taking any medication or supplement. (*Id.*) Finally, she was obliged to restrict her sexual activity, strenuous activity, travel, and residency during the surrogacy. (Ex. 63-5, -6).

⁵ The parents agreed to pay claimant stated sums for "base compensation," "mock cycle," taking injectable medication, and the embryo transfer. (Ex. 61-8, -9). The "base compensation" was to be paid in monthly increments that began when pregnancy was confirmed, with the balance due at birth. (*Id.*) There were additional payments in the event of a cancelled cycle, cesarean section delivery, invasive procedures, and loss of uterus. (Ex. 61-9, -10, -11). The parents would also pay claimant for maternity clothing expenses and monthly miscellaneous expenses, and provide reimbursement for her medical expenses, lost income, and childcare/housekeeping expenses. (Ex. 61-10, -13, -14, -15). Finally, the parents were required to pay claimant's premiums for a term life insurance policy and medical insurance, as well as particular amounts for counseling and attorney fees. (Ex. 61-11).

⁶ The parents chose the clinic to perform the in vitro fertilization procedures. (Tr. 100).

with a third-party escrow agent to manage her base compensation according to the February 2014 contract and as directed by the Center. (Ex. 112-2). Pursuant to the July 2014 agreement, the Center sent the escrow agent a check from the funds provided by the parents for the “base compensation” amount and the agent’s management fee. (Ex. 117). The escrow agent then began disbursing payments to claimant according to the February 2014 agreement and the Center’s confirmation/direction. (Ex. 120; Tr. 96, 97).

Although the Center assisted claimant and the parents in exchanging contact information so that they could communicate directly about appointments and other matters, the Center continued to assist and support their communication, as anticipated by the October 2013 agreement. (Exs. 26-2, 71). For instance, in July 2014, the Center asked claimant if she wanted the parents to release the maternity clothing allowance early and contacted the parents for authorization to release the money. (Exs. 124-1, 125). Similarly, the Center asked the parents if they wished claimant to undergo a “first trimester” screening and contacted claimant about that issue. (Exs. 125, 126, 128). When claimant asked the parents whether she should submit medical bills for a cough she developed during fertility treatment to the surrogacy insurance or her personal insurance, the parents sought the Center’s assistance. (Exs. 130, 131). In August 2014, the parents asked the Center to help them obtain information from claimant about her medical visits, particularly the “first trimester” screening. (Exs. 134, 137). The Center subsequently sent claimant appointment reminders and asked for updates, which they shared with the parents. (Exs. 138, 139, 140).

After giving birth on January 10, 2015, claimant was diagnosed with peripartum cardiomyopathy. (Exs. 250, 382-2). She filed a claim against SAIF (the Center’s workers’ compensation insurer) for “an on-the-job injury suffered on or about January 2015.” (Ex. 376). SAIF denied the claim, contending that claimant was not a subject worker of the Center. (Exs. 376, 380). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that claimant was not a “worker” under ORS 656.005(30). In doing so, the ALJ determined that, while there was some evidence of “direction and control” and claimant’s participation was essential to the business of the Center, it did not provide remuneration for claimant’s services. Accordingly, the ALJ upheld SAIF’s denial.

On review, claimant contends that the “right to control” test establishes that she was a “worker” for the Center. She also asserts that, under the “nature of the work” test, the Center should bear the cost of workers’ compensation insurance for her services as a surrogate. For the following reasons, we disagree with claimant’s contentions.

ORS 656.005(30) defines a “worker” as “any person, * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *.” The definition has two components: (1) the employer will provide remuneration for the claimant’s services; and (2) the employer has the right to direct and control the services that the claimant provides. *See Hopkins v. Kobos Co.*, 186 Or App 273, 277 (2003). The employment relationship may be based on either an express or implied contract. *Oremus v. Oregonian Publ’g Co.*, 11 Or App 444, 446 (1972); *Ashley A. Rehfeld*, 63 Van Natta 2515, 2517 (2011). Claimant has the burden of establishing the existence of an employment relationship between herself and the alleged employer. *Hopkins*, 186 Or App at 277.

We turn to the first element of the definition; *i.e.*, that the employer agrees to provide remuneration for the claimant’s services. For the following reasons, we conclude that the Center did not agree to provide, or provide, remuneration for claimant’s services.

Claimant, the parents, and the Center entered into three agreements regarding the anticipated surrogacy. In September 2013, claimant agreed to work exclusively with the Center for six months in finding a match for the surrogacy services she wished to provide. (Ex. 13). That agreement anticipated that the Center would incur substantial expense in completing her screening and finding a match. (*Id.*) In October 2013, the Center agreed to perform various services to assist the parents in selecting and obtaining the services of a surrogate for which the parents agreed to pay the Center a specified sum. (Ex. 26-1, -2, -3). The parents also agreed to deposit with the Center the anticipated fees and expenses for the surrogate’s services. (Ex. 26-3). In February 2014, claimant agreed to serve as a gestational carrier for the parents and the parents agreed to pay the fees and expenses for her services, including the psychological evaluation and medical screenings. (Exs. 61-2, -3, -10 through -14, 63-2, -3, -10 through -14).

In sum, the *parents* agreed to compensate claimant for her services. There was no agreement that the *Center* would provide such compensation.

Notwithstanding these agreements, claimant argues that the Center “sold a surrogacy product” to the parents, the proceeds of which were used to remunerate her for her services. For the following reasons, we disagree with claimant’s assertion.

Pursuant to the October 2013 agreement, the parents agreed to pay the Center’s agency fee for the services listed therein. Those services included interviewing and screening potential gestational carriers, conducting introductory meetings, preparing a draft surrogacy agreement, arranging for in vitro fertilization procedures, arranging for legal representation for the gestational carrier, assisting with medical and life insurance for the gestational carrier, managing an escrow account, assisting with the relationship between the parents and the gestational carrier, and assisting the gestational carrier throughout the pregnancy. (Ex. 26-1, -2).

Pursuant to the February 2014 agreement, the parents agreed to pay claimant’s compensation and expenses. Her compensation included specified amounts for her base compensation, injectable medication, and the embryo transfer. (Ex. 63-9). The parents also agreed to pay claimant a monthly sum for miscellaneous expenses, as well as various other amounts for maternity clothing, life insurance, medical insurance, counseling, attorney fees, lost income, child care, and the like. (Ex. 63-10-16). Claimant was not obligated to proceed under the February 2014 agreement until the parents deposited the initial estimated compensation and expenses. (Ex. 63-7). If claimant breached the agreement, the parents had sole discretion to cease their payment obligations and pursue legal/equitable remedies. (Exs. 61-22, 63-22).

Pursuant to the February 2014 agreement, the parents transferred the specified funds to the Center, which placed the monies in a trust account and began making disbursements as required by the agreement, including paying, or reimbursing itself, for attorney fees, the psychological evaluation, home visits, and health insurance premiums. (Exs. 80, 83). In disbursing the funds, the Center adhered to the February 2014 agreement between claimant and the parents. For instance, when claimant requested disbursement of the maternity clothing allowance earlier than contemplated in the agreement, the Center asked the parents for authorization before releasing the funds. (Exs. 124, 125; Tr. 61).

After reviewing these agreements and the Center’s administration of the escrow account, we are persuaded that the parents separately compensated the Center (for the services it provided pursuant to their October 2013 agreement)

and claimant (for the services she provided pursuant to their February 2014 agreement). In other words, the *Center* did not agree to pay, or pay, claimant for her surrogacy services.

Accordingly, based on the aforementioned reasoning, the first element of the definition of a “worker” under ORS 656.005(30) has not been satisfied. *See Hopkins*, 186 Or App at 277 (the claimant was not a “worker” under ORS 656.005(30) because he was not remunerated for his services by the alleged employer nor did he expect such remuneration); *Janee Mendoza*, 63 Van Natta 383, 384 (2011) (the claimant was not a “worker” under ORS 656.005(30) because she was remunerated by her clients, not by the hair salon where she rented the use of a chair); *cf. Gadalean v. SAIF*, 286 Or App 277, 231, *rev allowed*, 362 Or 94 (2017) (where the employer required the claimant to perform a delivery as part of his application for a truck driving position, and the employer was compensated for the claimant’s work, the law implied an obligation to pay him remuneration).⁷

Turning to the second component of the statutory definition of a “worker,” we conclude that even if the *Center* agreed to remunerate claimant for her services, it did not have “direction and control” of those services. Our reasoning follows.

There are two tests that are used to determine whether a person is “subject to the direction and control of an employer.” ORS 656.005(30). Those tests are the “right to control” test and the “nature of the work” test. *See Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002) (when the employer has retained the right to control a claimant’s performance in some respects, the nature of the claimant’s work for the employer must also be considered in deciding whether the control that the employer retains makes the relationship one of master and servant); *Robert A. Medina*, 62 Van Natta 2734, 2736 (2010) (same).

We begin with the “right to control” test, the principal factors of which are: (1) direct evidence of the right to, or the exercise of, control over the method of performance; (2) method of payment; (3) furnishing of equipment; and (4) right to terminate employment. *Stamp v. DCBS*, 169 Or App 354, 357 (2000). None of these factors is dispositive; rather, they are viewed in their totality. *Cy Inv., Inc. v. Nat’l Counsel on Comp. Ins.*, 128 Or App 579, 583 (1994).

⁷ Here, as opposed to the circumstances in *Gadalean*, the parents did not pay the *Center* for claimant’s surrogacy services. Rather, the parents separately compensated the *Center* for the services that it performed for them and claimant for the services that she provided to them.

Claimant argues that the Center had the right to exercise, and exercised, control over “every aspect” of her pregnancy. SAIF responds that the Center only performed screening and administrative services. For the following reasons, we conclude that application of the “right to control” test does not support an employment relationship.

After claimant agreed to work exclusively with the Center, it agreed to complete her screening and find a match with intended parents. (Ex. 13). Consequently, the Center posted claimant’s biography on its website, sent her medical records to the fertility clinic, and referred her for a psychological evaluation. (Exs. 14-3, 17, 24). Upon learning that her health insurance would not cover a surrogacy, the Center directed her to apply for another health insurance policy. (Ex. 32).

In December 2014, the Center sent the parents information about claimant and one other potential surrogate. (Ex. 39). The parents expressed interest in claimant and asked the Center to provide additional information about her husband’s background and her potential health risks. (*Id.*) Upon receiving that information, the parents asked the Center to share their information with claimant. (Exs. 40-1, 41). When claimant indicated that she was receptive to a meeting, the Center arranged for her to meet the parents. (Ex. 43). Following that meeting and a decision to proceed, the Center directed claimant to schedule a home visit. (Ex. 47-1). The Center also directed claimant to send a copy of the new health insurance policy to the parents, who had asked to review it. (Ex. 47-2).

We do not consider the Center’s performance of these preliminary activities to be evidence of the right to, or the exercise of, control over claimant’s performance of the services she was offering. These activities were designed to gauge claimant’s qualifications or prepare her for undertaking a surrogacy. *See Dykes v. SAIF*, 47 Or App 187, 190 (1980) (the claimant did not become a “worker” by taking a pre-employment test designed to gauge his qualifications for a position). Moreover, claimant was not injured while attempting to qualify for a surrogacy; rather, she was injured in the course of bearing children, after she entered into the February 2014 agreement with the parents.

As summarized above, the February 2014 agreement addressed claimant’s performance in significant detail. For instance, claimant represented that she had undergone/would undergo a psychological evaluation and allowed the parents and the Center to obtain the results. (Ex. 63-3). She agreed that all physical examinations, testing for sexually transmitted diseases, and medical procedures to achieve pregnancy, had been/would be performed by the specified clinic and that

she would treat with the clinic during the first weeks of pregnancy. (*Id.*) She agreed that, after being released by the clinic, she would treat with a board-certified obstetrician approved by the parents and deliver the baby at a hospital approved by the parents. (*Id.*) The agreement provided that she would notify the parents of the dates and times of her prenatal appointments and when her labor began or a delivery date was scheduled so that they could attend. (*Id.*)

In the event of medical complication or emergency, the agreement provided that the parents had the right to consult with her medical providers. (Ex. 63-4). Claimant would follow all medical instructions regarding sexual activity, prenatal vitamins, medical examination schedule, eating a healthy diet, using vitamins and caffeine, and would submit to any medical test/procedure advised by her physician or requested by the parents or the Center, including drug, alcohol, and nicotine testing. (Ex. 63-5). She would notify the parents of any prescription medication or supplement that she was given by her obstetrician or any other physician. (*Id.*) She was obligated to follow her physician's instructions regarding activity/exercise/travel and not participate in dangerous sports/activities or knowingly place herself or the baby in dangerous situations. (Ex. 63-6). She would remain within 100 miles of the hospital after a certain point in the pregnancy, not travel to Washington, and continue to reside in Oregon. (*Id.*) She agreed to maintain the new health insurance coverage, and use her best efforts to obtain replacement insurance if necessary.⁸ (Ex. 63-12, -13).

As previously noted, the Center was not a party to the February 2014 agreement. The Center was mentioned in the agreement, in reference to providing the services described in its October 2013 agreement with the parents, including managing the escrow account/making disbursements, assisting with the relationship between claimant and the parents, and assisting claimant throughout the pregnancy. (Ex. 26-2). Accordingly, claimant authorized the parents and the Center to receive medical information. (Ex. 63-4, -10, -17). Claimant agreed to submit to medical tests/procedures requested by the parents and the Center. (Ex. 63-6). Claimant agreed to notify the parents and the Center if there was any change in her medical insurance. (Ex. 63-12). The Center was authorized to receive funds from the parents and open an escrow account, to cover the agreed upon payments, and claimant was directed to provide expense receipts to/request reimbursement from the Center. (Ex. 63-7, -13, -15, -16). Both parties agreed to notify the Center and

⁸ In December 2014, claimant's health insurer stopped insuring surrogacy. (Tr. 108). The Center helped her apply for a different health insurance policy. (Ex. 217).

each other of any material change in their circumstances, including change of address, illness or death, loss of employment, change in marital status, or exposure to communicable disease. (Ex. 63-21).

After the parties signed the February 2014 agreement, they continued to communicate through the Center. Thus, in July 2014, when the Center asked claimant if she had spoken with the parents about a first trimester screening, she directed the Center to contact the parents to determine if they wished her to undergo the screening.⁹ (Ex. 128-2). When the parents subsequently noted that claimant was not reporting her medical visits, and asked the Center to help them manage her medical care, it sent claimant reminders about appointments and asked her to provide updates. (Exs. 134, 137, 138, 139, 149). Although the Center hoped that the communication between claimant and the parents would improve, the parents continued to ask it for help in managing claimant's care. (Exs. 149, 156, 158-3, 165).

After considering the terms of the February 2014 agreement, we are not persuaded that claimant's activities were subject to the direction and control of the Center. Instead, pursuant to the contract, the parents had sole discretion to stop the prescribed payments and pursue legal/equitable remedies if claimant was not in compliance. (Exs. 61-22, 63-22).

As to the "method of payment," claimant was not paid an hourly wage (which would have suggested worker status) or a fixed sum for a particular project (which would have suggested nonworker status). *See DCBS v. Clements*, 240 Or App 226, 235 (2010). Rather, the February 2014 agreement provided that the parents would pay her base compensation and other specified sums at particular times. (Ex. 63-8). Claimant was also paid agreed amounts when she began taking injectable medications, after the embryo transfer, and for monthly miscellaneous expenses. (Ex. 61-9, -10). We find this method of payment to be a neutral factor in determining the right to control. *Michael R. Dunham*, 60 Van Natta 3466, 3472-73 (2008) (where a truck driver was paid a flat rate for shorter routes and paid by the mile for longer routes, the method of payment was a neutral factor).

⁹ Claimant asserts that the Center initiated the idea of a first trimester screening. However, the Center's founder testified that the parents were interested in having certain screenings done and made it very clear that they wanted the Center to make sure those screenings occurred. (Tr. 102, 103). He also stated that the parents wanted to micromanage the pregnancy and the Center agreed to convey their wishes to claimant. (Tr. 104, 107).

Regarding “furnishing equipment,” claimant argues that the Center provided her maternity clothing and health insurance. Even if these items were considered to be “tools/equipment,” the February 2014 agreement required the *parents* to pay for claimant’s maternity clothing and health insurance. (Ex. 61-10, -12). The Center’s request for disbursement of these monies from the escrow account was pursuant to the contract or the parents’ direction and does not establish that the Center furnished these items.

Lastly, regarding the “right to fire,” claimant contends that the Center could have declined her surrogacy application. We do not consider this option to demonstrate an employment relationship. Moreover, as previously discussed, the *parents* had sole discretion under the February 2014 agreement, to cease payments and pursue legal/equitable remedies if claimant breached the agreement. (Exs. 61-22, 63-22). That agreement also described other events that could result in termination of the contract without liability. For instance, if pregnancy testing showed that the child was genetically related to claimant or her husband, the parents’ obligations under the agreement would cease immediately. (Exs. 61-6, 63-6). Similarly, the agreement provided for its termination if claimant was found to be incapable of carrying a child. (Ex. 63-7). Of most importance, the Center was without authority to enforce/terminate the agreement or to “fire” claimant. (Tr. 128).

In sum, for the foregoing reasons, we are not persuaded that the Center had the right to control, or exercised control over, claimant’s performance. Nevertheless, we turn to claimant’s argument regarding the “nature of the work” test.

Referring to *SAIF v. DCBS*, 250 Or App 360 (2012), claimant argues that the Center should bear the cost of her claim. Yet, in that case, the court remanded to DCBS to apply the “nature of the work” and “right to control” tests in determining whether various individuals were “workers” for whom the employer was required to provide workers’ compensation insurance. Consequently, we do not find the court’s decision, which did not decide whether the individuals in question were “workers,” particularly helpful in resolving the present dispute.

In any event, the “nature of the work” test considers: (1) the character of the claimant’s work or business; that is, how skilled it is, how much of a separate calling or enterprise it is, and to what extent it may be expected to carry its own accident burden; and (2) the relation of the claimant’s work to the alleged employer’s business; in other words, how much it is a part of the employer’s regular work, whether it is continuous or intermittent, and whether the duration is

sufficient to amount to the hiring of continuing services as opposed to contracting for the completion of a particular job. *See Woody v. Waibel*, 276 Or 189, 195 (1976); *Gary D. Davis*, 61 Van Natta 2309, 2311-12 (2009).

Here, claimant's agreements with the Center and the parents anticipated one pregnancy, rather than ongoing services for an undefined period. (Exs. 13, 63-17). Moreover, in signing the February 2014 agreement, claimant acknowledged and expressly assumed the medical, psychological, financial, and legal risks of fertility treatment, pregnancy, childbirth, and postpartum complications and was provided health and life insurance as well as compensation for disability-related wage loss, childcare/housekeeping expenses, surrogacy counseling, and loss of reproductive capacity. (Ex. 63-11, -20). Claimant had legal counsel and the opportunity to negotiate the terms of the contract. After reviewing the document, we conclude that she voluntarily entered into an agreement with the parents for the completion of a particular assignment that carried its own "accident burden."

Under such circumstances, after considering this particular arrangement (including claimant's February 2014 agreement with the parents), we conclude that application of the "nature of the work" test does not support an employment relationship.

Therefore, for these additional reasons, as well as those provided in the ALJ's order, we conclude that the record does not establish that claimant was a "worker" with regard to the Center. Accordingly, we affirm.

ORDER

The ALJ's order dated April 18, 2017 is affirmed.

Entered at Salem, Oregon on August 9, 2018

Member Lanning dissenting.

The majority determines that claimant was not a "worker" for the Center. Because I disagree with that determination and find that consideration of all components of the subjectivity determination support claimant's contention that she is a subject worker, I respectfully dissent.

ORS 656.005(30) defines a “worker” as “any person, * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *.” The definition has two components: (1) the employer will provide remuneration for the claimant’s services; and (2) the employer has the right to direct and control the services that the claimant provides. *See Hopkins v. Kobos Co.*, 186 Or App 273, 277 (2003). The employment relationship may be based on either an express or implied contract. *Oremus v. Oregonian Publ’g Co.*, 11 Or App 444, 446 (1972); *Ashley A. Rehfeld*, 63 Van Natta 2515, 2517 (2011). Claimant has the burden of establishing the existence of an employment relationship between herself and the alleged employer. *Hopkins*, 186 Or App at 277.

Here, regarding the remuneration component, the Center set the amount, advertised the amount, and, using a bookkeeping system, collected the entire amount from the parents and disbursed it under the terms of the contracts that it drafted for claimant and the parents. Specifically, the Center’s promotional materials represented that, in addition to receiving a base compensation of \$30,000 to \$40,000, all of its surrogates should expect to receive specified fixed sums, as well as variable payments for lost wages, childcare, and housekeeping. (Ex. 1-17). The Center also paid for claimant’s health insurance from a general account, funded by all intended parents under contract with the Center. (Tr. 87). The Center’s materials promised that, while payment structures could vary, a surrogate would receive “regular payments throughout the pregnancy, with a balance paid after the baby is born” as well as “a [specific] monthly allowance for miscellaneous expenses beginning when [she] sign[ed] the contract[.]” (Ex. 1-18). The Center assured potential surrogates that, as part of the bookkeeping system, it would deliver their payments via a trust account set up by the Center and funded by the parents.¹⁰ (Ex. 1-20).

The parents paid the Center to manage and coordinate all aspects of the surrogacy. (Ex. 26-1, -2). The Center’s services included screening potential carriers, suggesting an appropriate carrier and arranging the introductory meeting, preparing a draft surrogacy agreement and arranging for the carrier’s legal representation, arranging for in vitro fertilization, obtaining a life insurance policy, ensuring that the carrier had appropriate medical insurance, assisting with the relationship between the carrier and the parents, assisting the carrier with follow up and support throughout the pregnancy, and disbursing the funds in escrow in regular monthly payments to claimant. (*Id.*)

¹⁰ Claimant received checks from the Center’s “trust account,” which listed the Center’s address and telephone number. (Ex. 286A).

After claimant and the parents signed the surrogacy contract prepared by the Center (which specified claimant's remuneration and regular payments), the Center directed the parents to pay the specified sums. (Exs. 67-2, 73-1). The parents wired the requested monies to the Center, which established the trust accounts and began disbursing the funds as provided in the surrogacy contract. (Exs. 80, 81, 83). Thus, even though it was not a signer on the contract, the Center drafted the contract as an integral part of its business in conjunction with its established bookkeeping/accounting system.

The Center also directed claimant to schedule appointments with the fertility clinic and other professionals. (Ex. 71; Tr. 44). Finally, the Center hired and assigned a caseworker employee to work with claimant in completing all required medical procedures and check-ups. (Tr. 44)

In sum, the Center provided claimant's services to the parents, much like a "worker leasing company" or a "temporary service provider,"¹¹ and was compensated for doing so. Under these circumstances, I view the Center as providing the remuneration for claimant's services.

I turn to the second component of the definition of a "worker" under ORS 656.005(30); *i.e.*, the employer's right to direct and control the services that the claimant provides. There are two tests that are used to make this determination, the "right to control" test and the "nature of the work" test. *See Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002) (when the employer has retained the right to control a claimant's performance in some respects, we must also consider the nature of the claimant's work for the employer in deciding whether the control that the employer retains makes the relationship one of master and servant); *Robert A. Medina*, 62 Van Natta 2734, 2736 (2010) (same).

The principal factors in the "right to control" test are: (1) direct evidence of the right to, or the exercise of, control over the work; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. *Stamp v. DCBS*, 169 Or App 354, 357 (2000). None of these factors is dispositive; rather, they are viewed

¹¹ ORS 656.850(1)(a) defines a "worker leasing company" as "a person who provides workers, by contract and for a fee, to work for a client but does not include a person who provides workers to a client on a temporary basis." ORS 656.850(1)(c) defines a "temporary service provider" as "a person who provides workers, by contract and for a fee, to a client on a temporary basis." Under ORS 656.850(1)(b), the definition of "temporary basis" includes "special assignments and projects with the expectation that the position or positions will be terminated upon completion of the special situation."

in their totality. *Cy Inv., Inc. v. Nat'l Counsel on Comp. Ins.*, 128 Or App 579, 583 (1994). The right to control the work refers to the right to control the manner and means of accomplishing the result as opposed to the details of the desired result. *See Oregon Drywall Sys. v. Nat'l Council on Comp. Ins.*, 153 Or App 662, 667 (1998).

For the following reasons, I conclude that the Center had the right to, and exercised, control over claimant's surrogacy services.

Here, the Center exercised control over the method and means of accomplishing the desired result (a healthy baby) in the following ways. It required a psychological evaluation and chose the psychologist.¹² (Ex. 24). It chose claimant's health insurance. (Ex. 24; Tr. 45). It required a home visit and chose the social worker. (Ex. 47-1). It forbade claimant from having any contact with the father of her eldest child. (Tr. 23). Claimant was also required to abstain from sexual intercourse with her husband for a certain period. (Ex. 63-5). The Center drafted the surrogacy agreement, which addressed claimant's performance in significant detail. (Ex. 52). Although claimant was directed to separate legal counsel recommended by the Center for representation in reviewing and negotiating the final contract, the record does not show that any changes were made to the provisions regarding claimant's performance. (Exs. 49, 52, 63).

After the February 2014 agreement was signed, the Center assigned a caseworker, who chose claimant's pharmacy and "let [her] know what appointment was next and what needed to be done." (Tr. 35, 44). The caseworker was in constant contact with claimant to assist in assuring all medical appointments and procedures were met in a timely fashion to complete the task of delivering a healthy baby.

Under these circumstances, I conclude that the Center exercised control over more than just the desired result.¹³ It sought to control the manner of claimant's performance. *See Jeanette Y. Jensen*, 63 Van Natta 1542 (2011) (the employer had

¹² The Center also provided a time period in which the appointment needed to occur and required that claimant's husband attend. (Tr. 22).

¹³ The Center also required claimant to sign a six-month noncompetition agreement, wherein she agreed to work exclusively with the Center. In my opinion, the noncompetition agreement indicates an employment relationship. Pursuant to ORS 653.295(1)(a), a noncompetition agreement between an employer and employee is not enforceable unless the employer informs the employee, at least two weeks before the first day of employment, that a noncompetition agreement is a condition of employment or upon subsequent "bona fide" advancement. The inclusion of such a contractual provision further confirms the formality of the Center's "direction/control" over claimant's activities.

some control over the method and details of a claimant's work where she could choose her delivery routes and set her own hours, but had to comply with certain delivery and documentation requirements).

The "method of payment" also supports an employment relationship. After claimant signed the February 2014 agreement, she was paid a monthly expense allowance and, during her pregnancy, monthly "base compensation" installments. (Ex. 63-8, -9, -10; Tr. 64, 65).

Third, the Center provided all of the health care "tools/equipment" needed for a healthy delivery. It arranged for and coordinated the clinic/medical professionals for fertilizing the eggs, implanting the embryos, and injecting medication, as well as regular medical follow-up appointments.

Last, the right to terminate, for the most part, applied during the screening process, when about 45 percent of the applicants were rejected. (Tr. 83). Additionally, the relationship could be terminated if the agreement was not followed. (Exs. 61-22, 63-22). For instance, if pregnancy testing showed that the child was genetically related to claimant or her husband, the agreement with the Center and intended parents would cease immediately. (Exs. 61-6, 63-6). Similarly, if claimant was found to be incapable of carrying a child, the agreement would end. (Exs. 61-7, 63-7).

For the foregoing reasons, I am persuaded that the factors for determining the "right to control" show that the Center had significant control over claimant's performance. Thus, the "right to control" test favors an employment relationship.

I next turn to the "nature of the work" test, which considers: (1) the character of the claimant's work; *i.e.*, how skilled it is, how much of a separate calling or enterprise 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 it is a part of the employer's regular business, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as opposed to contracting for the completion of a particular job. *See Woody v. Waibel*, 276 Or 189, 195 (1976) (citing Larson's 1A Workmen's Compensation Law §43.42); *Michael R. Dunham*, 60 Van Natta 3466 (2008).

Here, the February 2014 agreement purported to carry its own accident burden.¹⁴ However, that agreement is not controlling in applying ORS 656.005(30). *See Woody*, 276 Or at 198-99 (the fact that the parties mistakenly considered their relationship to be that of employer-independent contractor was not controlling in applying the statutory definition of a “worker”); *Coghill v. Nat’l Council on Comp. Ins.*, 155 Or App 601, 607 n 6, *recons*, 157 Or App 125 (1998), *rev den*, 328 Or 365 (1999) (because “worker” status is determined by statute, the fact that installers signed documents declaring themselves independent contractors was not legally dispositive).

The Center was organized as a for-profit entity for the sole purpose of operating a surrogacy business. All of the financial resources for the business originated from the intended parents. The services that claimant provided were an integral part of the Center’s business. The Center advertised and recruited surrogates and intended parents and provided/coordinated nearly all of the services needed to accomplish its business purpose. The Center worked with multiple gestational carriers simultaneously. (Ex. 142). The Center’s founder estimated that it worked with about 90 gestational carriers, each generating significant parent-paid fees, during the year that it worked with claimant. (Tr. 71). The Center required claimant to sign a six-month noncompetition agreement. (Ex. 13). Under these circumstances, the Center can more effectively distribute the cost of injuries resulting from the risks of childbearing.

Consequently, under the “nature of the work” test, I find that this particular arrangement favors an employment relationship between claimant and the Center.

Accordingly, based on the aforementioned reasoning, I would find that claimant has clearly met her burden to establish the requisite employment relationship at the time of her injury such that she was a “worker” under the definition provided by ORS 656.005(30). Because the majority reaches a different conclusion, I respectfully dissent.

¹⁴ The February 2014 agreement, prepared by the Center, stated that claimant acknowledged and assumed the medical, psychological, financial, and legal risks of fertility treatment, pregnancy, childbirth, and postpartum complications, and provided health and life insurance to protect against those risks. (Ex. 63-11, -20).