

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD L. DAYMENT and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Sitka, AK

*Docket No. 01-1846; Oral Argument Held October 8, 2002;
Issued January 21, 2003*

Appearances: *Donald L. Dayment, pro se; Miriam D. Ozur, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant was an employee of the United States under 5 U.S.C. § 8101(1) at the time of his injury on October 22, 1996.

On January 22, 1999 appellant filed a notice of traumatic injury and claim for compensation, alleging that he sustained injuries on October 22, 1996 while attempting to fell a large tree. According to a description of the incident prepared by an employing establishment investigator, appellant was attempting to fell a tree, when the tree broke off the stump and fell backward against another tree, then slid over the front of the stump and struck appellant. The medical evidence submitted revealed that on October 22, 1996 appellant sustained severe fractures of the right leg.

By decision dated April 12, 1999, the Office of Workers' Compensation Programs denied the claim, finding that the evidence was insufficient to establish that appellant was an employee of the United States at the time of injury. In a decision dated December 1, 1999, an Office hearing representative affirmed the April 12, 1999 decision. By decision dated March 28, 2001, the Office reviewed the case on its merits and denied modification.

The Board finds that appellant was not an employee of the United States at the time of injury on October 22, 1996.

A prerequisite to entitlement to benefits under the Federal Employees' Compensation Act¹ is that the claimant, or the individual in whose name benefits are claimed, be an employee

¹ 5 U.S.C. §§ 8101-8193.

of the United States under 5 U.S.C. § 8101(1).² A claimant seeking benefits under the Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of the Act.³

With regard to whether a claimant is a federal employee for the purposes of the Act, the Board has noted that such a determination must be made considering the particular facts and circumstances surrounding the employment.⁴ The question of whether a person is an employee or an independent contractor is a question of fact to be decided on an individual basis in the particular case.⁵

In the present case, the record indicates that appellant owned and operated a business known as Southeast Tree Services. Appellant had performed work for the employing establishment as an independent contractor in the past, and on October 22, 1996 he was finishing work on a brush clearing contract with the employing establishment. At approximately 11:30 a.m. on October 22, 1996, a District Ranger with the employing establishment, Paul Matter, telephoned appellant at his home and told him that they needed someone to fell a tree as a safety precaution. Mr. Matter explained that a barrier was needed on Blue Lake Road, which had become potentially dangerous due to a recent landslide. The employing establishment and the city of Sitka, Alaska, had a cooperative agreement to maintain the road. Appellant accepted the offer of work; the nature and amount of payment were not discussed. According to Mr. Matter, he did not discuss payment because he had worked with appellant previously, and believed that appellant would submit a reasonable bill for work performed. Appellant stated that he believed that he would be paid an hourly wage by the employing establishment. Once at the Blue Lake road site, there was a discussion between Mr. Matter, appellant and a representative of the city, as to which tree should be felled. Appellant indicated that he disagreed with the final choice, but after examining the tree he did begin to fell the tree, and was subsequently injured.

In Larson’s, *The Law of Workers’ Compensation*, it is noted that the determination of whether an individual is an employee is often based on factors regarding right of control:

“The traditional test of the employer-employee relation is the right of the employer to control the details of the work. It is the ultimate right of control, under the agreement with the employee, not the overt exercise of that right, which is decisive. If the right of control of details goes no further than is necessary to ensure a satisfactory end result, it does not establish employment. The principle factors showing right of control are[:] (1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire.”⁶

² *James A. Lynch*, 32 ECAB 216 (1980).

³ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Carl R. Clover*, 41 ECAB 625 (1990).

⁵ *Id.*

⁶ 3A. Larson, *The Law of Workers’ Compensation* § 61.

The Board has recognized that the right to control work activities is an important factor in determining an employer relationship.⁷ It appears that in this case that it was appellant, not the employing establishment, that provided the tree cutting equipment. With respect to direct evidence of control, the employing establishment did exercise some control over the work. The selection of the specific tree was made by Mr. Matter. Appellant has also stated that he was told by Mr. Matter not to worry about flagmen or other details, as that would be taken care of by the employing establishment. As noted above, however, exercising such control as is necessary to ensure a satisfactory end result does not itself establish an employer-employee relationship. In a March 15, 1999 statement, Mr. Matter asserted that it was appellant who ultimately had the final decision to determine if the tree selected could safely be felled, and it was appellant who controlled the method and manner of the tree felling.

Applying the traditional right of control analysis to the facts of this case, the Board does not find evidence that the Forest Service exercised such control over the work that an employer-employee relationship was created at the time of appellant's injury.

In addition to the right to control factors, courts have also looked to the nature of the work performed in determining whether a worker is an employee or an independent contractor. Larson describes the issue as follows:

“The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service.”⁸

Applying this test to the present facts clearly indicates that the employing establishment was not an employer in this case. Although maintaining national forests is an integral part of the employing establishment's mission, it is not in the business of felling trees to provide road barriers. Mr. Matter stated that Southeast Tree Services had the only brush chipper in the Sitka area, and appellant was considered the best tree cutter advertising his services in the area. Appellant had been hired as an independent contractor by the employing establishment in the past. The record therefore indicates that work such as tree felling in the Sitka, Alaska, area was not an integral part of the employing establishment's business and that such work was generally contracted out. Moreover, appellant owned and operated an independent business that provided a professional service. Appellant was in the business of providing such services as tree felling, and he was hired by the employing establishment to provide such service. The “nature of the work” indicates that appellant was an independent contractor hired to perform a professional service.

The Board therefore finds that under the “control” and “nature of the work” tests, appellant was not an employee of the employing establishment on October 22, 1996 when he was injured. He was performing work as an independent contractor and therefore he is not an

⁷ See *Kasane Sawyer (Wallace B. Sawyer, Jr.)*, 40 ECAB 1332 (1989).

⁸ 3A. Larson, *The Law of Workers' Compensation* § 62.

employee of the United States under 5 U.S.C. § 8101(1), and is not entitled to compensation benefits under the Act.

The decision of the Office of Workers' Compensation Programs dated March 28, 2001 is affirmed.

Dated, Washington, DC
January 21, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member