

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Final Premium Audit of)	Case No. INS 02-07-009
)	
E. T. SCHMID TRUCKING INC)	SECOND AMENDED
)	PROPOSED ORDER
an Oregon corporation.)	
)	

HISTORY OF THE CASE

On May 16, 2002, SAIF Corporation (insurer or SAIF) issued a final premium audit billing to employer E. T. Schmid Trucking, Inc. (petitioner or E.T. Schmid) for the period of July 1, 2001 through January 11, 2002 (audit period). Petitioner timely requested a hearing challenging insurer’s billing. The Department of Consumer and Business Services, Insurance Division (the department) referred this matter to the Hearing Officer Panel (Panel), now the Office of Administrative Hearings (OAH),¹ for hearing on July 15, 2002.²

The Panel assigned Administrative Law Judge (ALJ) Ella D. Johnson to conduct the hearing in this matter. ALJ Johnson conducted the hearing on November 13, 2002. Attorney Andrew P. Ositis represented petitioning employer E.T. Schmid Trucking, Inc. (petitioner or E.T. Schmid). Assistant Attorney General David B. Hatton represented the responding insurer, SAIF Corporation (insurer or SAIF). Petitioner called Janice L. Schmid, petitioner’s corporate secretary/treasurer, as a witness. Insurer called no witnesses. The record closed following the hearing.

On February 20, 2003, ALJ Johnson issued a Proposed Order which found that insurer incorrectly assessed premium on payments made to owner/operators who were not “workers” as defined by ORS 656.005(30). On March 21, 2003, SAIF filed exceptions to the Proposed Order alleging *inter alia* that the Proposed Order erred in failing to apply the “relative nature of the work test,” and misapplied the department’s decisions in *Child Truck Line, Inc.* (INS 94-03-003, Final Order June 13, 1996) and *M.T.I. Motor Transport, Inc.* (INS 95-06-010, Final Order July30, 1997). E.T.S. filed no exceptions and did not respond to SAIF’s exceptions.³

¹ The Hearing Officer Panel was renamed the “Office of Administrative Hearings” by House Bill 2625 with the Governor’s signature on May 22, 2003.

² As noted by SAIF in its June 5, 2003 letter, SAIF issued the first final premium audit billing on February 19, 2002 for the audit period of May 7, 2000 to June 30, 2001. Although the department timely received petitioner’s request for hearing, petitioner failed to timely receive petitioner’s petition in case number INS 02-04-008[. By letter dated July 3, 2002, the department notified E. T. Schmid that it was dismissing its request for hearing because it failed to file its petition within 60 days from the date it received the final premium audit billing. (Ex. A27.) Consequently, this audit period is not before me in this matter.

³ The bolded text indicates changes in the Proposed Order by this Amended Proposed Order.

On May 20, 2003, the department referred the matter back to the Panel pursuant to OAR 137-003-0650 to “revise the proposed order as the [ALJ] considers appropriate to address [the] exceptions filed by the insurer.” **On March 15, 2004, I issued an Amended Proposed Order responding to SAIF’s exceptions and affirming and adopting the Proposed Order as supplemented.**

On April 4, 2004, SAIF filed exceptions to the Amended Proposed Order, arguing *inter alia* that the Amended Proposed Order: misapplied the holding in *Child Trucking, Inc.* INS 94-03-003 (Final Order, June 13, 1996) and *M.T.I. Motor Transport, Inc.* INS 95-06-010 (Final Order, July 30, 1997), erred in holding that OAR 740-045-0110 governed the agreement between E.T.S. and the owner/operators, erred in stating that evidence did not establish that Schmid had a fundamental right to control the owner/operators, and failed to apply the “relative nature of the work” test. Petitioner did not file exceptions to the Amended Proposed Order. On July 22, 2004, the department referred this matter back to OAH pursuant to OAR 137-003 –0655 to revise the Amended Proposed Order as it considers appropriate to address the exceptions filed by the insurer, particularly exceptions one, two, three, four and nine.

This Second Amended Proposed Order is written to address SAIF’s exceptions and to correct the Findings of Fact, Conclusions of Law, Opinion and Order accordingly. The changes to the Amended Proposed Order are in bold.

ISSUE

Whether insurer incorrectly assessed premium on payments made to owner/operators who were allegedly not workers as defined by ORS 656.005(30)

OFFICIAL NOTICE

As noted at hearing, I take official notice of the *Basic Manual of Workers' Compensation and Employers Liability Insurance (Basic Manual)*. The *Basic Manual* is a publication of the National Council on Compensation Insurance (NCCI). It includes the rules insurers follow to arrive at the correct class code for a business and the official description for all class codes filed with the department. The *Basic Manual* is a required part of every insurer's audit procedure guide. OAR 836-43-0115(1)(a). I also take official notice of another publication of NCCI, the *Scopes Manual*. The *Scopes Manual* consists of a numerical listing of class codes with descriptive terminology and examples of types of business activities that have been included in class codes in the past.

EVIDENTIARY RULING

Petitioner Exhibits 1 through 7 and 9 through 13 and insurer’s Exhibits A1 through A27 were admitted into the record without objection. Insurer objected to Exhibit 8 based on relevance inasmuch as it consisted of a final premium audit billing outside the audit period. Insurer’s objection was sustained and petitioner’s Exhibit 8 was excluded from the record.

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FINDINGS OF FACT

(1) E. T. Schmid is a for hire trucking company engaged in the business of the “intermodal” transportation of containerized freight from the manufacturers to the rail yards and shipping terminals and from incoming shipments at the rail yards or ship terminals to the freights’ ultimate destination. The business first filed as a corporation in January 1994. Ernest Schmid is the president of the corporation and 50 percent owner. Janice Schmid is owns the remaining 50 percent and is the corporation’s secretary/treasurer. (Ex. A8; test. of Ms. Schmid.)

(2) NCCI is the licensed rating bureau for workers’ compensation insurance in Oregon. NCCI also administers the Oregon Workers’ Compensation Insurance Plan (assigned risk plan). On April 26, 2000, E. T. Schmid applied for workers’ compensation insurance through the assigned risk plan. At all times relevant herein, SAIF provided coverage to E. T. Schmid under the assigned risk plan. (Ex. A6.) The application stated that the corporation was engaged as a contract intermodal carrier for general merchandise, that independent owner/operators made all long hauls and that local hauls of less than a truckload were made by employees. The application identified Philip Cole and Gerald Spencer as driver/employees. It also noted that all of the hauling was done under E. T. Schmid’s hauling authority. (Ex. A1.) SAIF assigned Class Codes 7219 (Trucking NOC & Drivers) and 8810 (Office Clerical) to the policy. (Ex. A2.)⁴

(3) Intermeddle Marketing Companies (IMCs) arrange for trucking companies, such as E. T. Schmid, to haul containers for manufacturers, shippers or the businesses receiving the shipments. When the IMC receives an order, it selects a trucking firm to handle the job and sends a fax to the trucking firm to pick up and deliver the container and trailer. Owner/operators call E. T. Schmid when they are ready to start hauling. Once E. T. Schmid receives the job from the IMC, it contacts the owner/operator who was the first to call and assigns them to pick up and deliver the container and trailer. The containers contain a variety of products from toys to cabinets. E. T. Schmid has contracts with the rail-yard and ship terminal to allow access to their facilities to pick up the containers and to utilize the trailers. Once the container is delivered, the shipper or recipient pays the IMC, the IMC pays E. T. Schmid, and E. T. Schmid pays the owner/operators. (Test. of Ms. Schmid.)

(4) E. T. Schmid owns four trucks, which are operated by exempt officer, Ernest Schmid and employees Philip Cole, Gerald Spencer and Bret Schmid. It also leases 16 or 17 trucks owned by owner/operators who operate under E. T. Schmid’s hauling authority. In order to engage in this business of the intermodal transportation of containerized freight, E. T Schmid is required to follow the Oregon’s Department of Transportation (ODOT) regulations, which specify the relationship between the trucking company and the owner/operators, including the lease agreement between the parties. (Ex. B, Petitioner’s Hearing Memorandum.)

⁴ I note that SAIF also provided E. T. Schmid with a copy of the “Workers’ Compensation Tool Box,” which stated in relevant part that owner/operators were exempt and payroll should not be reported if they “work alone, do not sign lease agreements with you, operate under their own licenses and Public Utility Commission (PUC) authority and qualify as an independent contractor. (Ex. A3.) However, I do not find this to be an accurate statement of the law inasmuch as it contradicts the regulatory agency’s administrative rules, which govern the relationship between trucking companies and their owner/operators. See *infra* at page 5.

(5) The owner/operators could choose whether to accept or decline a hauling job. They registered their own vehicles and maintained their own permits, but E. T. Schmid collected the money and completed the paperwork for them for the convenience of the regulatory agency.⁵ They received bi-monthly settlement checks from the trucking company after the hauling jobs were completed. Owner/operators were responsible for payment of any motor vehicle tickets or violations. They could, but were not required to, purchase bulk fuel through the trucking company's discount program with a company fuel card. If they did, they authorized the company to deduct the cost of the fuel from their settlement checks. The owner/operators paid for all of their own trip expenses. Most, but not all, operated under E. T. Schmid's hauling authority and their trucks had E. T. Schmid's name on their trucks when hauling for the company.⁶ The owner/operators set their own schedule and were not required to provide the company with status reports. They could hire their own employees and use relief drivers without seeking E. T. Schmid's permission. The drivers were required to pass a drug and alcohol test and were automatically terminated if they failed the test. E. T. Schmid did not require owner/operators to take a driver's test, but ODOT did. The owner/operators could lease their trucks to others on trip lease basis, but could not co-mingle loads. They selected their own routes and maintained their own vehicles in accordance with ODOT's safety requirements. E. T. Schmid provided the owner/operators with a copy of ODOT's safety manual and assumed that they would follow the agency's safety requirements. If the owner/operator failed to comply with the safety requirements, they were not dispatched to another job until they did. E. T. Schmid paid for their mileage tax and liability insurance when they were performing a hauling job for the company. If a load was damaged, the trucking company's cargo insurance covered the damage but the owner/operators also maintained their own liability and cargo insurance. The owner/operators did not carry their own workers' compensation insurance. E. T. Schmid did not withhold taxes or social security from the owner/operator's settlement and did not provide them with benefits. It issued owner/operators 1099 tax forms on their settlement earnings at the end of the year. If there were problems with the hauling job, E. T. Schmid dealt directly with the IMC. (Exs. A12, A18, A24; test. of Ms. Schmid.)

(6) All but two of the owner/operators owned their own trucks. The other two, Stephen Caswell and David Horn, had lease/purchase agreements with E. T. Schmid for their trucks. Caswell and Horn were required to pay E. T. Schmid \$5,000 down and \$535 monthly from their settlement amount. The title to the truck would transfer to them once \$19,900 had been paid. The lease/purchase agreement provided that the owner/operator could terminate the agreement at anytime by returning the truck to E. T. Schmid in the same condition as when delivered except for ordinary wear and tear. E. T. Schmid could terminate the agreement upon default with 15 days notice. If terminated by either party, all payments would be forfeited and any damages suffered by E. T. Schmid would be paid by the owner/operator. The agreement required the owner/operator to maintain and repair the truck in accordance with the truck's owner's manual. The owner/operator was responsible for cost of all fuel, oil, maintenance, washing and storage. On August 15, 2001,

⁵ Ms. Schmid testified that ODOT prefers the trucking companies to administer the paperwork with respect to the owner/operators registration and permits because ODOT only has to audit E. T. Schmid and not all 16 or 17 owner/operators.

⁶ Ms. Schmid testified that E. T. Schmid's name on the truck signals the rail and shipping yards that the owner/operators are authorized to drop off and pick up containers and trailers. She also stated that some of the owner/operators operated under their own authority and had their own names on their trucks.

Horn gave notice to E. T. Schmid that he would be returning the truck on September 15, 2001. (Exs. A25 at pages 7-9, A25 at pages 40-42.)

(7) All owner/operators signed transport lease agreements with E. T. Schmid. The lease agreement required the owner/operators to maintain their vehicles in compliance with ODOT's safety requirements. The lease provided that E. T. Schmid could perform a safety inspection of the truck every 30 days. Under the lease, the owner/operators were responsible for payment of all taxes and expenses. They agreed to allow the corporation to withhold from their settlement check the freight and cargo insurance costs. The lease required the owner/operators to have E. T. Schmid's name on their trucks. E. T. Schmid did not negotiate the lease amount with the owner/operators, but agreed to pay the owner/operator a flat rate contained in addendum which set forth the amount that would be paid for specific destinations and additional services which could be performed by the owner/operators, such assistance in unloading which was paid on an hourly basis.⁷ **The addendum to the lease agreement indicated that the owner/operators might be involved in the extra jobs listed at an hourly rate, such as unloading the trailer. These extra jobs were not a routine function of their work and individuals called "lumpers" were usually at the destination to unload the cargo.** The term of the lease was for one month, which was automatically renewed month to month following 120-day probationary period. The owner/operators could terminate the lease agreement at any time. The owner/operators who enter into a lease/option also had transport agreements with E. T. Schmid. (Exs A8, A25 at pages 10-19; test. of Ms. Schmid.)

(8) SAIF initially issued an interim audit for the audit period based on estimated the amounts paid to the owner/operators by dividing the previous year's actual amounts by 52 weeks and multiplying that amount by the shorter audit period of 24 weeks. (Ex. A18.)

(9) SAIF included the following owner/operators in the assessment for the audit period at 25 percent of the amount paid to them by E. T. Schmid: Albert E. Laughlin III (\$17,971), Albert E. Laughlin (\$21,786), Big Dog Trucking (\$2,557), Charles Bazy (\$11,234), Covell Transport, Inc. (\$21,752), Dan Honzon (\$348), David Home (\$11,797), Graceline Trucking, Inc. (\$208), Harry Lee England (\$1,107), Imperial Trucking (\$931), Jeff Ryder (\$6,089), Jeff Stewart (\$430), Joseph Poetzi (\$14,293), Manual Cruz (\$1,248), Mark Uhmacher (\$502), Marvin Drapeau (\$21,199), Tom Wage (\$21,458), P & D Transportation (\$8,263), R & P Thomas (\$3,648), Robert Thompson (\$2,429), Robert Noll (\$2,176), Ron Beyers (\$19,871), Sean Stevens (\$20,614), Shane Oglesbee (\$2,614), Steven Caswell (\$13,731), and William King (\$4,871). (Ex. 9; test. of Ms. Schmid.)

CONCLUSIONS OF LAW

Insurer **correctly** assessed premium on payments made to owner/operators who were not workers as defined by ORS 656.005(30).

OPINION

The issue here is whether SAIF incorrectly assessed premium on payments made to owner/operators who were allegedly not workers as defined by ORS 656.005(30). Inasmuch as E. T.

⁷ Ms. Schmid testified that, although the ODOT regulations required the lease to have a price per mile, E. T. Schmid paid its owner/operators pursuant to the addendum instead of the 70 cents per mile set forth in the lease agreement.

Schmid is the party seeking redress before the department concerning its final premium audit billing, it has the burden of proving its position on the issue by a preponderance of the evidence. See ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in an administrative hearing is by a preponderance of the evidence); *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166 (1992), *rev den* 315 Or 643 (1993) (in premium audit cases, burden of proof is on the employer).

“Right to Control” test

In making the determination of whether the owner/operators are subject “workers,” the initial inquiry is whether they are “workers” within the meaning of the workers’ compensation law. *S-W Floor v. Nat’l Council on Comp Ins.*, 318 Or 614, 622 (1994). ORS 656.005(30) provides in pertinent part that a “worker” is “any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *.” There is no dispute that the owner/operators received remuneration for their services. Therefore, my analysis is limited to the question of whether they were subject to the trucking company’s direction and control.

The initial determination of whether the owner/operators were subject to E. T. Schmid’s direction and control is made under the judicially created “right to control” test. *S-W Floor*, 318 Or at 622. The critical question in determining direction and control under the “right to control” test is not the actual exercise of control, but whether the right of control exists. *Id.* The factors to be considered in determining whether the right to control exists are: (1) direct evidence of the right to, or the exercise of, control; (2) the furnishing of tools and equipment; (3) the method of payment; and (4) the right to fire. *Salem Decorating v. Nat’l Council of Comp. Ins.*, 116 Or App 166, 171 (1992) *rev den* 315 Or 643 (1993); *Castle Homes v. Whaite*, 95 Or App 269, 272 (1989). If there is “some evidence suggesting that the employer retained the right to control the method and details” of the owner/operators work, the “relative nature of the work” test must be considered. *Rubalcaba v. Nagaki Farms*, 333 Or 614, 627 (2002).

Direct evidence of the right to control: This factor measures whether the putative employer has the right to control the means and manner of the putative employee’s performance. In at least two previous cases, *Child Truck Line, Inc.*, INS 94-03-003 (Final Order, June 13, 1996) and *M.T.I. Motor Transport, Inc.*, INS 95-06-010 (Final Order, July 30, 1997), the department has applied the right to control test and determined that the owner/operators were not “workers” as defined by the statute. In reaching this conclusion, the department specifically found that the requirements imposed by the regulatory agency on the trucking company did not establish that the company had a right to direct and control the owner/operators.

Here, the evidence establishes that E. T. Schmid’s right to direct and control the owner/operators identified by SAIF at hearing went beyond the those mandated by the state and federal regulatory requirements. In that regard, there are numerous administrative rules which govern and regulate the relationship between the trucking company and the owner/operators.

OAR 740-045-0110, which governs the agreement between the parties, states:

(1) Except as otherwise provided, a vehicle may be operated under lease in for-hire carriage of household goods or passengers in regular route full-service scheduled operations in Oregon intrastate commerce only in accordance with the terms of OAR 740-045-0110 to 740-045-0130 and a written agreement on a form supplied by the Department. The compliance of a lease with the requirements of the rules of the Department pertaining to leasing is the responsibility of the parties to the lease. The filing of the lease with the Department does not constitute approval by the Department of the terms of the lease or the legality of the operations thereunder.

(2) A vehicle lease shall contain all of the terms and conditions of the lease, and shall provide:

(a) The full name and address of each contracting party (lessor and lessee);

(b) A complete description of the vehicle;

(c) That the lessee has the right to exclusive possession, use and control of the leased vehicle, with the exception that the lessor may use the leased vehicle for personal noncommercial uses with the permission of the lessee;

(d) A detailed statement of the compensation to be paid for the use of the vehicle while under lease;

(e) A statement of the terms of renewal, if any;

(f) That during the period of the lease:

(A) The lessee shall assume full and sole responsibility for payment of all Oregon highway use taxes, fees and penalties arising from operation of the vehicle, except to the extent lessee is relieved of such responsibility by OAR 740-045-0150 and shall not be reimbursed by the lessor for such taxes, fees and penalties, directly or indirectly;

(B) The lessee will bear all risk of loss or damage to property or injury to persons incident to the operation of the vehicle and shall be responsible to maintain cargo and liability insurance covering all operations of the vehicle under the lease. In fulfilling this requirement, it is permissible for the lessor to name the lessee as an insured on the lessor's insurance policy;

(C) The lessee assumes full responsibility for compliance with the rules of the Department, and in particular, OAR 740-045-0110 to 740-045-0130, relating to leasing, and the laws of the State of Oregon applicable to the operation of motor vehicles.

(3) The lessee shall exercise exclusive supervision and control of a leased vehicle during the period of the lease, except for the personal uses of the lessor referred to in subsection (2)(c) of this rule. Furthermore, neither the lessor, nor a driver furnished or arranged for by the lessor, shall participate in any of the following activities:

(a) The dispatching of traffic;

(b) The billing and collection of freight charges for transportation performed by the vehicle; and

(c) The solicitation of shipments other than that which takes place in conjunction with the pickup or delivery of freight at a shipper's place of business.

(4) If the lessor provides a driver to a lessee who is a for-hire carrier of household goods or passengers in regular route full-service scheduled operations, and any party to the lease has been found by order of the Department to have violated ORS 825.100, ORS 825.950, OAR 740-045-0170, OAR 740-045-0110, or OAR 740-045-0120 through a leasing arrangement within the preceding two years of the effective date of the lease, the lessee shall include the driver on the payroll of the lessee if lease compensation for the use of the vehicle is based on a division of revenues. "Payroll," as used in sections (4) and (6) of this rule, means that with respect to the compensation paid the driver, the lessee's records reflect that the lessee has included the driver as one of its employees in reports of employment to governmental agencies.

(5) The lessee shall be solely responsible for the safe operation of the vehicle. The parties may agree that, as between themselves, the lessor may maintain the vehicle and assume such other costs of vehicle maintenance, including fuel costs, as are specifically listed in the lease. If not included as part of the compensation for the use of the vehicle, the terms of compensation for maintenance shall be E.T. Schmid stated in the lease.

(6) If the transportation to be performed under the lease is private carriage, the lessee must actually include the driver on the payroll of the lessee and treat such driver as an employee of the lessee in all respects as it does any regular employee.⁸

(7) Within 90 days from the date of any transportation performed, the lessee shall pay to the lessor all compensation, which the lessor has earned

⁸ The evidence establishes that E. T. Schmid is a for-hire carrier, not a private carrier. In its Hearing Memorandum, Petitioner argues that pursuant to the legal principle of *inclusio unis est exclusio alterius* (the inclusion of one is the exclusion of the other), for-hire carriers are not required under the rule to include owner/operators of leased vehicles as employees. I agree.

under the lease. The payment shall be in settlement of all obligations, which have accrued under the lease, after deduction of just credits and offsets. The lessee shall prepare an itemized record of the settlement, including credits and deductions, and shall maintain such record for a period of three years after the termination of the lease.

At hearing, SAIF argued that E. T. Schmid's right under the lease to perform safety inspections and to decline to dispatch the owner/operator if the equipment did not comply was strong evidence that the trucking company had the right to control the owner/operators. I agree. The safety inspection and the refusal to dispatch if the equipment does not comply provisions, to the extent that they go beyond the regulatory requirements, establish that E.T. Schmid had a right to control the owner/operator's work.

Additionally, SAIF argues that the evidence establishes that, under *Salem Decorating*, E. T. Schmid had a fundamental right to control the owner/operators because it procured the contract with the IMC, selected the owner/operator to perform the work, directly paid the owner/operator and dispatched them to the job. I agree. E. T. Schmid selected the owner/operators when the dispatcher offered the job to the owner/operator. As noted in SAIF's exceptions, the issue is not the actual exercise of control but the right to control. The dispatcher could have just as easily declined to give the job to the owner/operator because there was no contractual guarantee that owner/operators would be given so many job. Notwithstanding the fact that the owner/operator performed the work with no instructions from E. T. Schmid, could accept or decline the job, select their own routes, maintain their own vehicles in accordance safety regulations, were liable for motor vehicle tickets and violations, paid for all of their own trip expenses, set their own schedule, were not required to provide status reports, and maintained their own liability and cargo insurance, E.T. Schmid had the right to fundamentally control the work of the owner/operators. The company did so by procuring the contract with the IMC, selecting who would perform the work through dispatch, and paying the owner/.operator directly. On the other hand, E. T. Schmid did not withhold taxes or social security from the owner/operator's settlement, did not provide benefits, issued 1099 tax forms reporting their settlement earnings at the end of the year. Additionally, the owner/operators could engage in trip leases and work for others while the trucks were leased to E. T. Schmid; the small amounts paid to the some owner/operators hauled loads for others.

However, the indicia of E. T. Schmid's fundamental control as set forth in *Salem Decorating* establish that the company did have the right to direct and control the means and manner of the owner/operators performance. Accordingly, I find that this factor indicates employee status.

Furnishing of tools and equipment: There is no question, and SAIF concedes, that this factor indicates independent contractor status inasmuch as the owner/operators furnished their own trucks. The only exception was the two owner/operators who had lease/purchase agreements with E. T. Schmid. However, even the lease/purchase agreements indicated an arm-length transaction. Caswell and Horn were required to pay E. T. Schmid \$5,000 down and \$535 monthly from their settlement amount. The title to the truck would transfer to them only when \$19,900 had been paid. The lease/purchase agreement provided that the owner/operator could terminate the agreement at anytime by returning the truck. E. T. Schmid could also terminate the agreement upon default with

15 days notice. If terminated by either party, the agreement provided for liquidated damages in the form of forfeited payments plus any damages suffered. The agreement required the owner/operator to maintain and repair the truck in accordance with the truck's owner's manual. The owner/operator was responsible for cost of all fuel, oil, maintenance, washing and storage. Therefore, even for the lease/option operators, this factor indicates independent contractor status.

Method of payment: "When payment is by quantity or percentage, the method of payment test largely becomes neutral. To the extent that it indicates continuing service, it suggests employment; to the extent that it lessens an employer's interest in the details of how the employee spends (their) time, it has been said to suggest an independent contractor relationship." *Henn v. SAIF*, 60 Or App at 592. On the other hand, payment by a unit of time is strong evidence of employee status. 1B Larson, *Workmen's Compensation Law* 8–107, § 44.33(a) (1993). The evidence establishes that the owner/operators were primarily paid a flat fee based upon the destination pursuant to the addendum attached to the truck lease and were not paid until the job was completed.

SAIF argued in its exceptions that the owner/operators were also paid by the hour so this factor would be neutral. The addendum to the lease agreement indicates that the owner/operators might be involved in the extra jobs listed at an hourly rate, such as unloading the trailer. However, the evidence establishes that these extra jobs were not a routine function of their work. Ms. Schmid credibly testified that individuals called "lumpers" were usually at the destination and they were the ones who unload the cargo. (See Transcript at page 40). Consequently, I conclude that the method of payment factor is neutral.

Right to fire: **The right to terminate the relationship at any time without liability is strong evidences that the contract was one of employment. *Bowser v. State Indus. Accident Comm.*, 182 Or 42, 54 (1947). The right to control whether further work would be done is also indicative of the right to fire. *Cy Inv. Inc. v. Nat'l Council on Comp. Ins.*, 128 Or App 579, 584 (1994). Under the lease agreement, E. T. Schmid had a month to month lease with the owner/operators, which could be terminated by either party with 30 days notice. There was no liquidated damages provision in the lease. However, inasmuch as E.T. Schmidt had the right to control whether the owner/operator was offered additional work, I find that this factor indicates employee status.**

Applying the "right to control" test here, two of the four factors indicate that E. T. Schmid's relationship with the owner/operators was that of employee-employer. One is neutral and one indicates independent contractor status. Consequently, because there is some evidence that E.T. Schmid exercised some control over the work of the owner/operators, I conclude that it is necessary to consider the "relative nature of the work" test under *Rubalcaba*

"Relative Nature of the Work" Test

The "relative nature of the work" test involves an examination of:

"The character of the claimant's work or business – how skilled it is, how much a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden * * * its relation to the employer's business, that is how much it is a regular 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 distinguished for the completion of a particular job. *Woody v. Waibel*, [276 Or 189, 195 (1976)], quoting 1A Larson's *Workmen's Compensation Law*, section 43.51 (1973)

Before the court's decision in *Rubalcaba*, the test was only applied when the right to control test was inconclusive. See *Oregon Drywall Systems, Inc. v. Nat'l Council on Comp. Ins.*, 153 Or App 662 (1998) (if the right to control is inconclusive, the relative nature of the work test may be applied.) In *Rubalcaba*, the Oregon Supreme Court reversed the Court of Appeals and the Workers' Compensation Board because both the court and the board failed to apply the relative nature of the work test when there was "some evidence" that the employer retained the right to control. 333 Or at 627. Here I find that, inasmuch as two of the factors of the right to control test indicate an employment relationship, there is "some evidence" that the employer retained the right to control the work of the owner/operators. Accordingly, I apply relative nature of the work test.

The work of the owner/operators was unskilled because their jobs involve the type of skills and expertise gained through experience rather than through years of education or specialized training. The work of the owner/operators was not a separate business. E.T. Schmid is engaged in the business of "intermodal" transportation of containerized freight from the manufacturers to the rail yards and shipping terminals and from incoming shipments at the rail yards or ship terminals to the freights' ultimate destination. Without the owner/operators to haul the loads, E.T. Schmid could not operate its business. Therefore, I find that the owner/operators were a regular and integral part of E.T. Schmid' business as opposed to a separate and distinct business.

The work of the owner/operators was also continuous and of sufficient duration to amount to the hiring of continuous services rather than the contracting for the completion of a specific job. They did not deliver one cargo load; they delivered many. Some of the owner/operators had been hauling for E.T. Schmid for years.

Finally, because E.T. Schmid negotiated the contract with the IMC, E.T. Schmid was in a better position to bear the cost of injuries to the owner/operators. Consequently, I find based on the analysis set forth in the relative nature of the work test, that the owner/operators are "workers" under the Oregon workers' compensation statutory scheme.

Exceptions

In its exceptions, SAIF argues that the ALJ erred in holding that the "relative nature of the work" test applies only when the "right to control" test is inconclusive. I agree and have changed the Proposed Order accordingly.

SAIF next argues that the ALJ erred in applying the holdings in *Child Truck Line INS 94-03-003* (Final Order June 13, 1996) and *M.T.I Motor Transport, Inc. INS 95-06-010* (Final Order July 30, 1997) by what SAIF contends is a change in the standard adopted by those cases. I agree that neither case explicitly excludes "indicia of [petitioner's] right to control that

flow from the regulatory agency's requirements or the nature of the work itself' and this does modify the holding of the cases. Consequently, I have changed the Proposed Order accordingly to delete the "flows from" language.

ORDER

ACCORDINGLY, I PROPOSE THAT THE DEPARTMENT ISSUE THE FOLLOWING FINAL ORDER:

SAIF's final premium audit billing for the audit period of July 1, 2001 through January 11, 2002 is correct and payable.

IT IS SO ORDERED.

Dated this 11th day of August 2004 in Salem, Oregon.

/s/ Ella D. Johnson
Ella D. Johnson, Administrative Law Judge
Office of Administrative Hearings

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this proposed order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to:

Mitchel D. Curzon
Chief Enforcement Officer
Oregon Insurance Division
350 Winter Street NE, Room 440
Salem OR 97301-4351

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