



On August 9, 2002, OAH issued an order granting a stay of all collection efforts by or on behalf of the insurer of any amount billed in the billing until this proceeding is concluded, pursuant to OAR 836-043-0170(5).

On November 13, 2002, OAH held a hearing. The hearing was conducted by Ella D. Johnson, an administrative law judge of OAH. The employer was represented by Andrew P. Ositis, an attorney. The employer called Janice L. Schmid as its only witness. The employer offered Exhibits 1 to 13 as documentary evidence. The employer's exhibits 1 to 7, and 9 to 13 were admitted into the record. The insurer was represented by David B. Hatton, an Assistant Attorney General. The insurer did not call any witnesses. The insurer offered Exhibits A1 to A27 as documentary evidence. All of the insurer's exhibits were admitted into the record.

On February 20, 2003, OAH issued a proposed order. The sole issue was whether the insurer correctly billed the employer for workers' compensation insurance premium based on compensation paid by the employer to 26 specific persons. Each person owned or leased, and operated, a truck that could transport a freight container. The employer contracted with each person to drive the person's truck and carry freight between various shipping and delivery points. The employer argued that the persons were not, while the insurer argued that the persons were, "workers" as defined in ORS 656.005(30). The proposed order concluded that the persons were not "workers" because all four factors of the "right to control" test indicated that the persons were independent contractors.<sup>3</sup> Therefore, the proposed order recommended that the director modify the billing by deleting the premium charges relating to the 26 persons. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed

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<sup>3</sup> In *Woody v. Waibel*, 276 Or 189, 554 P2d 492 (1976), the Oregon Supreme Court established a "right to control" test and a "nature of work" test to determine whether a person is a "worker" under Oregon's workers' compensation statutes. The proposed order only applied the "right to control" test because it asserted that the "nature of work" test must be applied only "[w]hen the 'right to control' test is inconclusive," Proposed Order, page 5, but in this case initially found "the 'right to control' test [to be] dispositive," Proposed Order, page 10.

order within 30 days after the proposed order was served on the employer and insurer. On the same date, OAH mailed a copy of the proposed order to the employer and insurer.

On March 24, 2003, the director received from the insurer written exceptions to the proposed order. A copy was mailed to the employer.

The director did not receive from the employer any written exceptions to the proposed order or any response to the insurer's exceptions.

On May 19, 2003, the director requested OAH to revise the proposed order as the administrative law judge considered appropriate to address the insurer's exceptions, pursuant to OAR 137-003-0650(3),

On March 15, 2004, OAH issued an amended proposed order. The amended proposed order concluded that the persons were not "workers" because three of the four factors and to some degree also the fourth factor of the "right to control" test indicated that the persons were independent contractors.<sup>4</sup> Therefore, the amended proposed order continued to recommend that the director modify the billing by deleting the premium charges relating to the 26 persons. The amended proposed order informed the employer and insurer that they could file with the director written exceptions to the amended proposed order within 30 days after the amended proposed order was served on the employer and insurer. On the same date, OAH mailed a copy of the amended proposed order to the employer and insurer.

On April 14, 2004, the director received from the insurer written exceptions to the amended proposed order. A copy was mailed to the employer. The director did not receive from the employer any response to the insurer's exceptions.

The director did not receive from the employer any written exceptions to the amended proposed order or any response to the insurer's exceptions.

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<sup>4</sup> The amended proposed order continued apply only the "right to control" test because it continued to assert that "it is unnecessary to consider the 'relative nature of the work' test ...because there is insufficient evident to require application of the second test." Amended Proposed Order, page 10.

On July 22, 2004, the director requested OAH to revise the amended proposed order as the administrative law judge considered appropriate to address the insurer's exceptions, especially exceptions one, two, three, four, and nine.<sup>5</sup>

On August 11, 2004, OAH issued a second amended proposed order. The second amended proposed order concluded that the persons were "workers" because two of the four factors of the "right to control" test<sup>6</sup>, and the "nature of work" test, indicated that the persons were workers. Therefore, the amended proposed order recommended that the director affirm the billing. The amended proposed order informed the employer and insurer that they could file with the director written exceptions to the amended proposed order within 30 days after the amended proposed order was served on the employer and insurer. On the same date, OAH mailed a copy of the amended proposed order to the employer and insurer.

The director did not receive from the employer or insurer any written exceptions to the second amended proposed order.

Therefore, the director now makes the following final decision in this proceeding pursuant to ORS 731.248 and 183.470, and OAR 137-003-0655 and 137-003-0665.

### **Findings of Fact, Conclusions of Law and Opinion**

The director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law<sup>7</sup>, and opinion of the second amended proposed order as the facts, conclusions, and reasoning of this final order.

### **Order**

The billing is affirmed and the stay is withdrawn.

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<sup>5</sup> The insurer's ninth exception to the amended proposed order claimed that the amended proposed order erred in failing to consider the "nature of work" test.

<sup>6</sup> The second amended proposed order found (1) that there was some direct evidence that the employer had the right to control the person's work, and the right to fire the person, both of which indicated that the person's were workers; (2) the furnishing of tools and equipment indicated that the persons were independent contractors; and (3) the method of payment was neutral.

<sup>7</sup> The conclusions of law in the second amended proposed order is corrected to state "Insurer correctly assessed premium on payments made to owner/operators who were workers as defined by ORS 656.005(3)."

**Notice of Right to Judicial Review**

Each party may have the right to appeal this final order to the Oregon Court of Appeals pursuant to ORS 183.480 and 183.482. If a party wants to appeal the order, the party must file a petition for judicial review with the Court of Appeals within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the day the party received the order. If the order was mailed to a party, then the date of service is the day the order was mailed to the party, not the day the party received the order. If a party does not file a petition within the 60-day time period, then the party will lose the right to appeal this order. If a party appeals the order, the party should also send a copy of the petition to the Insurance Division by delivering it to Labor and Industries Building, 350 Winter Street NE, Room 440 (4<sup>th</sup> Floor), Salem, Oregon; or mailing it to PO Box 14480, Salem, OR 97309-0405, or faxing it to 503-378-4351; or e-mailing it to [mitchel.d.curzon@state.or.us](mailto:mitchel.d.curzon@state.or.us)

Dated September 28, 2004

/s/ Joel Ario  
Joel Ario  
Administrator  
Insurance Division  
Department of Consumer and Business Services

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