

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

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| In the Matter of the Final Premium Audit of) | Case No. INS 03-12-006 |
|) | |
| IRVINGTON TRANSFER AND) | PROPOSED ORDER |
| STORAGE CO., INC. dba) | |
| ITS Global Relocation Services,) | |
| an Oregon corporation.) | |

HISTORY OF THE CASE

On September 25, 2003, insurer issued a final premium audit billing to employer for the period of July 1, 2002 to June 30, 2003 (audit period). Employer timely requested a hearing challenging insurer’s billing. On December 26, 2003, the Department of Consumer and Business Services, Insurance Division (the department) referred this matter to the Office of Administrative Hearings (OAH) for hearing.

OAH assigned Administrative Law Judge (ALJ) Ella D. Johnson to conduct the hearing in this matter. ALJ Johnson conducted the hearing on June 2, 2004. James E. (Gene) Doeneka, President of Irvington Transfer and Storage Company dba ITS Global Relocation Services (ITS or petitioner), represented petitioning employer as its authorized representative pursuant to ORS 183.457 and OAR 137-003-055(1)(a). Assistant Attorney General David B. Hatton represented responding insurer SAIF Corporation (SAIF or insurer). Mr. Doeneka testified on behalf of petitioner and called General Manager Dan Smith as a witness. SAIF called no witnesses. The record closed following the hearing on June 2, 2004.

ISSUES

(1) Whether insurer incorrectly assessed premium on payments made to owner/operator Jon H. Allaire who was allegedly not a “worker” as defined by ORS 656.005(30).

(2) Whether insurer is entitled to assess premium under ORS 656.029 because Allaire allegedly had no workers’ compensation coverage and the contract awarded to Mr. Allaire involved the performance of labor by others.

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's Exhibits 1 through 9 and insurer's Exhibits A1 through A26 were admitted into the record without objection.

FINDINGS OF FACT

(1) The National Council on Compensation (NCCI) is the authorized rating organization for the State of Oregon. At all times relevant herein, SAIF provided workers' compensation coverage to ITS. On March 5, 2002, ITS first applied for coverage, noting that it did not use subcontractors in its work. SAIF issued the policy for the audit period on July 1, 2002 and assigned Class Codes 8293 (Furniture Moving/Storage – Dr.), 8742 (Outside Sales/Field Representative), and 8810 (Office Clerical). (Exs. 1, 0A1; A2.)

(2) ITS is an Oregon corporation has engaged in the business of interstate and overseas transportation and storage of household goods since 1926. The company has operating authority in Oregon and Washington. The transportation of the household goods is subject to the regulation by the Interstate Commerce Commission (ICC) and the U.S. Department of Transportation (DOT). ITS has a contract with Global Van Lines to be its sales agent and supply customers and owner/operators with trucks to haul the household goods. Global Van Lines has the right of first refusal on any shipping job that ITS sells. Global Van Lines dispatches the owner/operator. The owner/operator operates under Global Van Lines' transport authority. ITS also has its own employees and interstate transport authority which it uses for federal/military contracts. The employees wore uniforms similar to the owner/operator's uniform supplied by ITS and performed the same work as the owner/operator but were paid hourly and drove ITS's trucks. They were also required to come to work each day and if they were hauling an interstate load, they were paid a per diem. ITS also made the employees' arrangements for unloading the shipment. Allaire was previously employed as an employee driver by ITS. ITS carried Casual Labor Only Coverage through Vanguard during the audit period. The Casual Labor Only policy covered owner/operators for work injury claims while hauling for Global Van Lines outside the state. (Exs. 6, A12, A13; test. of Doeneka.)

(3) On April 25, 2001, ITS and owner/operator Allaire entered into an "Independent Contractor Agreement" (Agreement)¹ wherein ITS contracted for Allaire's services and truck for a term of one year with automatic renewal for one year and thereafter unless the notice of termination is given. Pursuant to ICC regulations, ITS had exclusive possession and control over Allaire's truck while services were being performed under the Agreement. The Agreement prohibited Allaire from leasing his equipment to any other carrier or person during the term of the Agreement without ITS's

¹ Doeneka testified that the Agreement contained boilerplate language that he obtained from another company. He also testified that many of the provisions of the Agreement that may indicate ITS had direction and control over Allaire's work were not followed. SAIF argued that the Agreement stated it was an "integrated" agreement which meant that the Agreement could not be supplemented by other terms. I agree with SAIF's analysis. Consequently, I look to the Agreement to determine whether ITS had the right to control Allaire's work.

express written approval. Allaire was required to warrant *inter alia* that he was an independent contractor. ITS agreed to provide Allaire an initial complement of uniforms with additional uniforms meeting ITS's specifications to be provided at Allaire's expense for himself and his employees. ITS was required to pay Allaire periodic settlements within 30 days of receipt of the driver logs, mileage and fuel reports to secure payment from the shipper. ITS agreed to provide the Allaire with a fully equipped 51 foot trailer. Allaire was to reimburse ITS for any damage to the trailer and to pay ITS \$100.00 per day for any unauthorized retention or use of the trailer. The equipment provided with the trailer included: moving pads, moving skins, straps, hump straps, car straps, decking bars, decking, refer truck, hand truck, 4 wheel dolly, ladder, piano board, piano straps, split boards, deck boards, trailer chains, rug runner, and broom. ITS also paid for maintenance of the trailer. Allaire could not use ITS's trailer to haul goods for others without ITS's permission. (Exs. 9, A11, A 26; test. of Doeneka.)

(4) The Agreement provided that Allaire and any individuals he hired were independent contractors and would not be considered employees of ITS. The Agreement required Allaire to load and unload the equipment, to pack and unpack, and to crate and uncrate the property transported. Allaire was responsible for choosing the routes of travel, and stops for rest and service of equipment. Allaire was solely responsible for the hiring, discharge, training, direction and control, supervision and the payment of all wages, benefits, expenses, tax withholdings, social security and unemployment insurance for any employees he hired. Allaire was required to paint his vehicle with ITS colors, insignia and lettering. However, handwritten next to this section was the statement that "Global paint will not be initially required." Allaire was responsible for payment of all operating expenses, including taxes, licensed, permits, fuel, fees and cargo loss or damage, except for overweight and oversize trailer fines, which were outside his control. Allaire was to maintain a \$2,000 performance reserve in escrow from which ITS could deduct damages attributable to the owner/operator and other sums owed it. Allaire authorized ITS to deduct any expenses from his settlements. ITS agreed to pay interest on the amounts retained in the performance reserve and to provide an accounting of the funds.. Although Allaire was not provided with an ITS credit card for expenses on the road, the Agreement provided that ITS would supply Allaire with a line of credit for his expenses. (Ex. 9, A11; test. of Doeneka.)

(5) Under the Agreement, Allaire was responsible for providing all labor required to pickup, pack, assemble and disassemble, load and unload and deliver the shipment. Allaire was required to carry workers' compensation insurance for all employees with a certification of insurance and a copy of the policy to be provided if requested by ITS and 10 days notice of any change in coverage. Allaire was also required at his expense to maintain \$1,000,000 in bobtail insurance, general and automotive liability insurance, including bodily injury, broad form property damage, contractual liability and personal injury, with 30 days notice of intent to cancel. He was also required to carry 24-hour medical and occupational injury protection or workers' compensation coverage on himself with 10 days notice of any change in coverage. Allaire agreed to complete and submit to ITS transportation documents and reports of fuel consumption, miles driven and other information required by government agencies. The Agreement gave ITS the authority to deduct from his compensation any authorized expense, such as insurance. Allaire was required to comply with all local, state, ICC and DOT safety regulations, and to warrant that his vehicle met all safety regulations. It gave ITS the authority to suspend Allaire's operations to investigate any allegations relating to suspected violations of ICC or DOT regulations and to terminate the Agreement immediately for any safety violations. The Agreement also gave ITS the authority to terminate the

contract without liability upon breach by Allaire of any terms of the Agreement or when Allaire's conduct was injurious to the company's name. At ITS's request, Allaire was required to collect all C.O.D or other monies owed ITS by the customer, to convert the C.O.D. payment into mailable currency and mail the payment with the delivery documents to ITS. The Agreement further set forth specific procedures for the collection of C.O.D. monies. It specified under what circumstances Allaire would receive a chargeback for damages to a shipment and required *inter alia* that all mattresses to be packed in containers. (Exs. 9, A11.)

(6) Under the Agreement, Allaire paid for his own fuel, licensing, permits, and travel expenses. He was paid 55 percent of the adjusted linehaul² for shipments, except shipments with "effective discounts" in excess of 63 percent, which was paid according to Global Van Lines' "Hauling Sliding Scale." He was also paid for additional or accessorial services, such as extra pick-up or delivery, bulky items, appliance services, waiting time, packing or unpacking, and furnishing an additional vehicle. Allaire paid ITS a percentage of his commissions. He could, and often did, refuse a shipment if he did not like the way the shipment was paid. During the audit period, he carried occupational accident coverage through the National Association of Independent Truckers (NAIT) which covered him and his helpers. He also carried through NAIT a Personal Contents Floater, Physical Damage policy, Occupational Compensation Plan and Extended Liability coverage. He paid \$480.25 per year for the coverage. The Occupational Accident Policy's declaration page specifically stated that it did not constitute workers' compensation coverage. (Exs. 5, A23.) ITS provided Allaire, in addition to an equipped trailer, support in helping him to get profitable shipments assigned to him from Global Van Lines and acted as a clearing house for hauling commissions paid by Global Van Lines. Global Van Lines collected the shipping payment from the customer and paid Allaire's commission to ITS as Allaire's agent and ITS paid Allaire his commission. Allaire was guaranteed \$130,000 in gross commissions with ITS making up the difference between the amount earned and the guaranteed amount. Allaire earned approximately \$150,000 in gross commissions per year. In order to receive the entire guaranteed gross commissions, Allaire was required to have a Claim Responsibility Ratio of 2.5 and be in service at least 20 days of each month of the year. (Exs. 7-9, A7, A11, A24, A25; test. of Doeneka.)

(7) SAIF auditor Frank Maloney conducted an audit of ITS's payroll on September 17, 2003. The auditor found that owner/operator Allaire was a worker because ITS had an exclusive agreement with him, dictated the color he must paint his tractor, and the name and PUC permit number he must have on the tractor.³ The audit included 25 percent of the amount paid to the owner/operator as payroll under Class Code 8293, which resulted in additional premium of \$5,559.82 due for the audit period. The audit was subsequently adjusted, which resulted in a credit of \$1,915.41 for a total premium due of \$3,644.41. (Exs. 2, 3, A3- A6.)

² "Adjusted linehaul" is defined as "the distributed linehaul, after discount, if any, and any other adjustments made...calculated by Global Van Lines. (Ex. 11 at 20.)

³ The audit's factual basis for finding that Allaire was a worker were incorrect in that those requirements were all dictated by federal or state regulation. The audit also incorrectly found that ITS was the local agent for Global Van Lines and that ITS paid for all of the owner/operator's fuel and permit cost. (Test. of Doeneke.)

CONCLUSIONS OF LAW

(1) Insurer correctly assessed premium on payments made to owner/operator Jon H. Allaire who was a "worker" as defined by ORS 656.005(30).

(2) Insurer is entitled to assess premium under ORS 656.029 because Allaire had no workers' compensation coverage and the contract awarded to Allaire involved the performance of labor by others to load and unload the shipments.

OPINION

The issues here are whether SAIF incorrectly assessed premium on payments made to owner/operator Jon H. Allaire who was allegedly not a "worker" as defined by ORS 656.005(30) and whether SAIF is entitled to assess premium under ORS 656.029 because Allaire allegedly had no workers' compensation coverage and the contract awarded to him involved the performance of labor by others. Inasmuch as ITS is the party seeking redress before the department concerning its final premium audit billing, it has the burden to prove its position on the issues 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 437 (1982) (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. Nat'l 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). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General contractors v. Tandy Corp.*, 303 Or 390 (1989). I find that petitioner has failed to meet its burden.

"Right to Control" Test

In making the determination of whether Allaire is a subject "worker," the initial inquiry is whether he is a "worker" 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 Allaire received remuneration for his services. Therefore, my analysis is limited to the question of whether he was subject to ITS's direction and control.

The initial determination of whether Allaire was subject to ITS'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).

The "relative nature of the work" test must be considered "if there is some evidence

suggesting the employer retained the right to control the method and details of the [owner/operator's] work." *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002).

Direct evidence of the right to control: Although the contract between the parties here states that Allaire is an independent contractor, the parties' understandings do not determine whether an employee or independent contractor relationship exists. *Woody v. Waibel*, 276 Or 189, 198-99 (1976).

In *Salem Decorating*, the court found *inter alia* that procuring the contract with the customer, selecting the contractor to perform the work, instructing the contractor on the work and maintaining the right to stop using the contractor or remove the contractor if problems arose or the contractor failed to perform the work demonstrated "fundamental control" over the work. 116 Or App at 171. The court also noted that the employer used both employees and contractors who were formerly employees. The court further found that payment directly to the individual by the employer instead of by the customer indicated a right to control. *Id.* at 172. It is not the degree of control by the employer, but the employer's right to control that indicates worker status. *HDG Enterprises v. Nat'l Council on Comp. Ins.*, 121 Or App 513, 518 (1993).

The undisputed evidence here demonstrates that ITS had "fundamental control" over the means and manner of Allaire's work beyond that required by the federal and state regulatory agencies. ITS procured the contract with the customer. The customer paid Global Van Lines; Global Van Lines paid ITS and ITS paid Allaire. ITS also instructed Allaire on how to perform the work through its Agreement. The parties' Agreement stated that mattresses and box springs had to be packed in containers. The Agreement also set forth specific procedures for collecting C.O.D. monies. ITS also had employees that performed essentially the same duties, except they were paid hourly and were required to return to work after the shipment was delivered. Allaire previously worked for ITS as an employee. Under their Agreement, ITS provided Allaire with an initial complement of uniforms with additional uniforms meeting ITS's specifications to be provided at Allaire's expense. Although Allaire was not provided with an ITS credit card for expenses on the road, the Agreement provided that ITS would supply Allaire with a line of credit for his expenses. Like an employee-at-will, Allaire's work could be terminated for any conduct that was injurious to ITS's company name. Consequently, on this record, I find that this first factor indicates an employment relationship.

Furnishing of tools and equipment: It is uncontroverted that Allaire supplied his own power unit or truck and was required to pay for all of the maintenance to operate his truck. However, ITS provided a fully equipped tractor for Allaire's use and specialized equipment for the trailer. It also paid all costs associated with the trailer, including maintenance and repair. Consequently, this factor is neutral *Coghill v. Nat'l Council on Comp. Ins.*, 155 Or App 601, 607 (1998).

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 587, 592 (1982), *rev den*, 294 Or 536 (1983). The evidence establishes that Allaire was paid by a percentage of the gross revenue. He was also guaranteed \$130,000 per year under the Agreement, with ITS making up the difference if the amount fell short of the guaranteed amount.

The guaranteed amount sounds very much like a salary, and at the very least is evidence of a continuing relationship. Consequently, I find that this factor is neutral. *Kaiel v. NCE Cultural Homestay Institute*, 129 Or App 471, 476 (1994).

Right to fire: The right to terminate the relationship at any time without liability is strong evidence 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). The evidence here establishes under the Agreement, ITS had the authority to terminate the contract without liability upon breach by Allaire of any terms of the Agreement or when Allaire's conduct was injurious to the company's name. Additionally, ITS also controlled whether Allaire received a Global Van Lines job. Consequently, I conclude that ITS retained the right to fire Allaire without liability and that this factor indicates an employment relationship.

In sum, the right to control test establishes that two of the factors demonstrate an employment relationship between ITS and Allaire and two factors are neutral. Having found "some evidence" of the right to control, I proceed to the "relative nature of the work" test.

"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 at 195, 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 of control. 333 Or at 627. Accordingly, I apply relative nature of the work test here.

The work performed by Allaire is unskilled because the job involved the type of skills and expertise gained through experience rather than through years of education or specialized training. The work performed by Allaire is not a separate business. ITS is engaged in the interstate and overseas moving of household goods for others. Without Allaire to transport the household goods interstate, ITS could not operate its business. Furthermore, there was no evidence that Allaire hauled household goods for any other company besides Global Van Lines, which ITS did business with

during the audit period. Therefore, I find that the work performed by Allaire was a regular and integral part of ITS's business as opposed to a separate and distinct business.

Allaire's work 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. Allaire did not just deliver one load or deliver household goods to one customer one time. Allaire had worked for ITS as an employee and was now working for the company as an owner/operator.

Finally, because ITS negotiated the contract with the customers and Global Van Lines, ITS was in a better position to bear the cost of injuries to Allaire. Consequently, I find based on the analysis set forth in the relative nature of the work test, that Allaire is a "worker" under the Oregon workers' compensation statutory scheme.

Application of ORS 656.029

SAIF argues that the helpers used by Allaire in loading and unloading the household goods shipment should be include in ITS's final premium audit billing because Allaire did not carry his own workers' compensation coverage.⁴ I agree. ORS 656.029 states:

(1) If a person awards a contract involving the performance of labor where such labor is a normal and customary part or process of the person's trade or business, the person awarding the contract is responsible for providing workers' compensation insurance coverage for all individuals, other than those exempt under ORS 656.027, who perform labor under the contract unless the person to whom the contract is awarded provides such coverage for those individuals before labor under the contract commences. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person who is charged with the responsibility for providing such coverage before labor under the contract commences, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.

* * * * *

(3) As used in this section:

(a) "Person" includes partnerships, joint ventures, associations, corporations, limited liability companies, governmental agencies and sole proprietorships.

⁴ Although ITS carried Casual Labor Only insurance and Mr. Allaire carried Occupational Accident insurance through NAIT that allegedly covered Mr. Allaire and his helpers for the on-the-job injuries, there is no evidence that the company offering the insurance is authorized in Oregon as a workers' compensation carrier or has filed a guaranteed contract with the Department of Consumer and Business Services. Moreover, the Occupational Accident declaration page specifically states that the policy does not constitute workers' compensation coverage.

(b) "Sole proprietorship" means a business entity or individual who performs labor without the assistance of others.

(Emphasis added.)

The work of Allaire and his helpers who loaded and unloaded the trucks were a normal and customary part or process of ITS's trade or business. Consequently, as the "person" awarding the contract, ITS is responsible for providing workers' compensation coverage because Allaire did not carry workers' compensation coverage and is responsible for paying premium on payments made to both Allaire and his helpers. Accordingly, the final premium audit billing for the audit period shall include premium due for the helpers employed by Allaire.

ORDER

I propose that the department issue the following Final Order:

SAIF's final premium audit billing for the audit period of July 1, 2002 to June 30, 2003 is correct and payable with any additional premium assessed for Allaire's helpers under ORS 656.029.

IT IS SO ORDERED.

Dated this 21st day of June 2004 in Salem, Oregon.

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:

Department of Consumer and Business Services
Mitchel D. Curzon, Chief Enforcement Officer
Oregon Insurance Division
350 Winter Street NE, Room 440
Salem, OR 97301-3883