

**STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of **Irvington Transfer and Storage Co.**) **FINAL ORDER**
dba ITS Global Relocation Services) Case No. INS 03-12-006

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, pursuant to Oregon Revised Statutes (ORS) 731.318(3)(d) and 731.505(4), and Oregon Administrative Rules (OAR) 836-043-0101 *et seq*, to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation to Irvington Transfer and Storage Co. dba ITS Global Relocation Services (employer).

History of the Proceeding

On September 29, 2003, the employer received from the insurer a billing dated September 25, 2003, for the audit period from July 1, 2002 to June 30, 2003. The billing informed the employer that it may request a hearing within 60 days after the employer received the billing.

On October 23, 2003, the employer received from the insurer a supplemental billing dated October 20, 2003.

On November 24, 2003, the director timely received from the employer a written request for a hearing to review the billing, as supplemented.

On December 3, 2003, the director mailed to the employer a petition form for the employer to complete and return so that the director received it by January 23, 2004.

On December 22, 2003, the director timely received from the employer the petition.

On December 26, 2003, the director referred the request to the Office of Administrative Hearings (OAH).

On January 30, 2004, OAH scheduled a hearing to be held on April 5, 2004, and also issued an order granting the employer's request for 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.

On April 6, 2004, OAH rescheduled the hearing to be held on June 2, 2004.

On June 2, 2004, OAH held a hearing. The hearing was conducted by Ella D. Johnson, an administrative law judge of OAH. The employer appeared and was represented at the hearing by James (Gene) E. Doeneka Jr. (Doeneka), as the employer's authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer called Doeneka and Dan Smith as its witnesses. The employer offered Exhibits 1 through 9 as its documentary evidence. All of the employer's exhibits were admitted into the record. The insurer appeared and was represented at the hearing by David B. Hatton, an Assistant Attorney General assigned to represent the insurer. The insurer did not call any witnesses. The insurer offered Exhibits A1 through A26 as its documentary evidence. All of the insurer's exhibits were admitted into the record.

On June 21, 2004, OAH issued a proposed order. The proposed order addressed two issues.

The first issue was whether the insurer correctly billed the employer for workers' compensation insurance premium based on compensation paid by the employer to Jon. H. Allaire (Allaire). The employer contracted with Allaire to use Allaire's truck and the employer's trailer to pickup, pack, transport, unpack, and deliver household goods pursuant to moving contracts sold by the employer. The employer argued that the person was not, while the insurer argued that the person was, a "worker" as defined in ORS 656.005(30). The proposed order applied the "right to control" and "nature of work" tests to the facts of this case and concluded therefrom that the person was a "worker."¹ Therefore, the proposed order recommended that the director affirm the billing, as supplemented.

¹ 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 second issue was whether the insurer is entitled to assess the employer additional premium based on compensation paid by Allaire to persons he hired during the audit period to help load and unload household goods that he transported for the employer. The insurer argued that it is entitled to assess the employer the additional premium because the employer was responsible, pursuant to ORS 656.029, for providing workers' compensation insurance to the persons that Allaire hired because Allaire did not do so himself. The proposed order agreed with the insurer. Therefore, the proposed order also recommended that the director permit the insurer to revise the billing to assess the employer additional premium for compensation paid by Allaire to persons he hired during the audit period to help load and unload household goods that Allaire transported for the employer.

The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed 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.

The director did not receive any exceptions from the employer or the insurer.

Therefore, the director now makes the following final decision in this proceeding.

Findings of Fact, Conclusions of Law and Opinion

The director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and opinion of proposed order as the facts, conclusions, and reasoning of this final order.

Order

The billing is affirmed.

The insurer may revise the billing to assess the employer additional premium based on compensation paid by Jon H. Allaire (Allaire) to persons hired by Allaire during the audit period to help load and unload household goods that Allaire transported for the employer.

The stay is withdrawn.

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 (4th 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

Dated October 5, 2004

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

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