

**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                    ) Case No: INS 04-04-010  
Audit Billing of    )  
  ) **PROPOSED ORDER**  
WILL DO CONSTRUCTION GENERAL                 ) **ON DEFAULT**  
CONTRACTOR, LLC,                                     )  
an Oregon Limited Liability Company.            )

**HISTORY OF CASE**

Petitioning employer Will Do Construction General Contractor, LLC (Will Do or petitioner) timely appeals a final premium audit billing issued by responding insurer SAIF Corporation (insurer or SAIF) on March 9, 2004 for the period of March 29, 2003 to December 26, 2003 (audit period). The Department of Consumer and Business Services, Insurance Division (the department) referred this matter to the Office of Administrative Hearings (OAH) on June 7, 2004.

On September 22, 2004, OAH Administrative Law Judge Ella D. Johnson conducted a hearing in this matter. Assistant Attorney General David P. Hatton represented the insurer. Petitioner failed to appear at the hearing after being properly notified of the time and place of the hearing. The record closed on September 22, 2004.

**OFFICIAL NOTICE**

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.

**ISSUE**

Whether the insurer incorrectly assessed premium on payments made to contract laborers who were allegedly not “workers” as defined by ORS 656.005(30).

## EVIDENTIARY RULINGS

SAIF's Exhibits A1 through A18 are received into the agency's record.

## FINDINGS OF FACT

(1) Will Do was engaged in performing the business of general contractor. The business operated out of one of the principals' residences in Beaverton, Oregon. (Ex. A4.)

(2) On March 29, 2003, SAIF became the assigned carrier for Will Do's workers' compensation the Oregon Workers' Compensation Insurance Plan (assigned risk pool) for the policy period of March 29, 2003 to March 29, 2004. (Ex. A1.) SAIF assigned Codes 5403 (Carpentry- NOC- Nonresidential Carpentry), 5645 (Carpentry – Detached 1 or 2 Family Dwellings) and Code 5651 (Multiple Family Dwelling/1-3 Story). Code 5645 is the highest rated of the three classifications. (Exs. A-3, A9, A10.)

(3) Will Do reported no payroll for the audit period, but a SAIF audit conducted on March 2, 2004 determined that there was \$3,504 in payroll that should have been reported. The auditor also discovered that there was payroll totaling \$1,538 made to contract laborers that should have been included because they did not qualify as independent contractors. (Ex. A4.)

(4) The contract laborers were Sean Fields, George Helmick and an individual named "Kent." <sup>1</sup> They were paid by the square, which indicated that they were performing roofing work. Will Do reported no payroll during the audit period and an accountant note stated that the work was "all the same class." Class Code 5551 (Roofing – All Kinds-Drivers) was added to the policy.

## CONCLUSIONS OF LAW

The insurer correctly assessed premium on payments made to contract laborers who were "workers" as defined by ORS 656.005(30).

## OPINION

The issue to be resolved in this premium audit case is whether insurer incorrectly assessed premium on contract laborers who were allegedly not "workers" as defined by ORS 656.005(30). In this regard, petitioner has the burden of proving its position on the issue by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the 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 administrative hearings is preponderance of the evidence). 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*

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<sup>1</sup> Sean Fields previously held a Construction Contractor Board (CCB) license but it had lapsed. George Helmick did not have a CCB license. (Ex. 18).

*Corp.*, 303 Or 390 (1989).

In making the determination of whether the contract laborers providing roofing services for Will Do 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 contract laborers received remuneration for their services, therefore, my analysis is limited to the question of whether they were subject to employer’s direction and control.

The initial determination of whether the contract laborers were subject to Will Do'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 [contract drivers’] work.” *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002).

Where, as here, petitioner fails to appear at hearing after being duly notified of the time of the hearing, and the failure to appear is not due to circumstances beyond its reasonable control, I may issue default order upon a showing of a *prima facie* case made upon the record. OAR 137-003-0670. In this case, petitioner was notified by mail of the hearing date, failed to appear and subsequently offered no explanation of any circumstances that might excuse the failure to appear. Consequently, pursuant to the Notice of Hearing served on petitioner on June 24, 2004, the agency file that includes the exhibits offered by SAIF and admitted into the record, is designated as the record. On this record, I find that petitioner has failed to meet its burden. I further find based on this record that the contract laborers were “workers” as defined by ORS 656.005(30) and that SAIF’s audit is correct. Accordingly, I conclude that a Proposed Order on Default is appropriate and uphold SAIF’s final premium audit billing for the audit period.

## **ORDER**

SAIF's final premium audit for the audit period of March 29, 2003 to December 26, 2003 is correct and payable.

**IT IS SO ORDERED.**

Dated this 22<sup>nd</sup> day of October 2004.

/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:

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