

FINDINGS OF FACT

(1) Dimitry Martinov (Petitioner) has been in business for about three years. His initial business was as a mason, laying stone in new homes. He incorporated his business as Westshore Homes, Inc., with him as the only stockholder and employee. This year, he switched to building homes. On January 11, 2005, his business became Westshore Homes LLC. He has since dissolved the LLC and is now the sole proprietor. (Test. of Petitioner.)

(2) On December 11, 2003, Petitioner was notified that his application for workers' compensation insurance was assigned to SAIF through the assigned risk pool. (Ex. A1.) The policy period was from November 23, 2003, to October 1, 2004. (Ex. A2 at 1.) He sought workers compensation insurance for his business because around that time, he had contracted with a general contractor to do the masonry work on a "Street of Dreams" home and needed to hire other masonry workers besides himself for the job. The general contractor suggested to Petitioner that he secure workers' compensation "to be on the safe side." (Test. of Petitioner.)

(3) On April 15, 2004, Petitioner visited SAIF's office to pay his premiums for the periods November 23, 2003, through December 31, 2003 (Ex. A5), and January 1, 2004, through March 31, 2004 (Ex. A6). He complained about the high cost of the premiums and was referred to a representative. He told the representative that he did not think he wanted the insurance anymore, but he did not request cancellation in writing. He withheld payment of the premiums because of the high cost. (Test. of Petitioner.) SAIF has no record of a prior contact by Petitioner. (Ex. A16.)

(4) On June 9, 2004, SAIF sent a certified letter to Petitioner, stating that his insurance policy would be cancelled in 30 days unless he paid the premiums. He received the letter. (Ex. A7.)

(5) Petitioner did not pay or contact SAIF by July 8, 2004, so SAIF cancelled his insurance policy. (Ex. A16 at 3). On July 20, 2004, SAIF sent notice of the cancellation to Petitioner. (Ex. A8.)

(6) On September 20, 2004, Petitioner called SAIF and asked to cancel his insurance for anytime after March 2004. He was told that he could not back date his cancellation. He was also told a final audit needed to be scheduled. He called again on November 3, 2004, to cancel his insurance. (Ex. A16 at 2-3; Test. of Marco.)

(7) On December 28, 2004, Petitioner again called SAIF and asked for cancellation of his insurance as of April 1, 2004. He was told that he had not submitted his final payroll. He was asked to bring in his pay records. (Ex. A16 at 2; Test. of Hamilton.)

(8) On January 10, 2005, Petitioner visited SAIF with his pay records. An investigator for SAIF prepared an audit and concluded that all the payments to individuals for work was taxable payroll because Petitioner provided no evidence that the individuals were licensed by the Construction Contractors Board (CCB) or were otherwise independent contractors. (Ex. A12.) The investigator checked with the CCB to see if any of the individuals were licensed and learned the following:

--Four of the individuals who worked for Petitioner formed an LLC that was first licensed by CCB on April 12, 2005, after the audit period (Ex. A14); and

--One of the other workers was a member of an LLC that was CCB licensed as of January 14, 2003, and even though the license lapsed, the bond continued to December 7, 2004. This individual was paid in his own name and not in the name of the LLC. (Ex. A15.)

CONCLUSIONS OF LAW

1. Petitioner did not cancel his insurance policy from SAIF earlier than July 9, 2004.
2. Petitioner has not established that the individuals listed in the audit were independent contractors.

OPINION

1. Cancellation date

Petitioner claimed in his Petition (Ex. P1) that he asked to cancel his insurance policy with SAIF after he thought the policy ended on December 31, 2003. At the hearing, he claimed he contacted SAIF in March. Based on dates stamped on his quarterly billing (Exhibits A5 and A6), he admitted that he probably did not visit SAIF until April 15, 2004, to request cancellation of his policy. He expressed dissatisfaction with the cost of his premiums, but never filled out paperwork to cancel. His policy was eventually cancelled on July 9, 2004, due to lack of payment of premiums.

Cancellation of an insurance policy by an employer is controlled by ORS 656.423, which provides in relevant part:

Cancellation of coverage by employer; notice required. (1) An insured employer may cancel coverage with the insurer by giving the insurer at least 30 days' written notice, unless a shorter period is permitted by subsection (3) of this section.

- (2) Cancellation of coverage is effective at 12 midnight 30 days after the date the cancellation notice is received by an authorized representative of the insurer, unless a later date is specified.
- (3) An employer may cancel coverage effective less than 30

days after written notice is received by an agent of the insurer by providing other coverage or by becoming a self-insured employer. A cancellation under this subsection is effective immediately upon the effective date of the other coverage or the effective date of certification as a self-insured employer.

ORS 656.423(1) requires Petitioner to provide written notice that he wished to cancel his insurance policy with SAIF. He never provided such written notice. Even if he did provide such notice on April 15, 2004, his policy would not have been cancelled for 30 days unless he provided proof of other coverage or self-insurance. Petitioner's testimony varied. He admitted that he did not have a good recall of what happened over a year ago. He claimed that he repeatedly asked SAIF to cancel his insurance, but such calls were later, when he asked to back date the cancellation after his insurance was already cancelled. He probably did not make it clear on April 15, 2004, that he wanted to cancel his insurance. Therefore, he has not established that SAIF should have cancelled his insurance. There is no reliable evidence that he contacted SAIF again before September 20, 2004, long after his insurance policy was cancelled. He has not established any grounds for canceling his insurance earlier than the cancellation date of July 9, 2004. Therefore, SAIF has the authority to assess premiums through that date.

2. Coverage of Petitioner's individuals

Petitioner at times claimed that the individuals paid on the Westshores Homes, Inc. accounts were independent contractors, but at other times, he agreed to pay premiums on their wages paid through March 31, 2004. The issue is whether these individuals were "workers" as defined by the Oregon Workers' Compensation Law. Petitioner has the burden of proving that SAIF's final premium audit billing for the audit period is incorrect. ORS 183.450(2); *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).

In making the determination of whether these individuals 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 remuneration, subject to the direction and control of an employer * * *." The individuals who worked for Petitioner received remuneration for their services, so the real question is whether they were subject to Petitioner's direction and control.

The initial determination of whether these individuals were subject to Petitioner'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 at 171; *Castle Homes v. Whaite*, 95 Or App 269, 272 (1989).

Petitioner has the burden of showing that the individuals were free from his direction and control. He provided no evidence of such freedom. He had no written contracts with the individuals in the audit. SAIF would grant an exclusion if the individuals had a CCB license, but Petitioner has provided no evidence that the individuals were licensed by CCB as contractors. One of the individuals was part of an LLC that was bonded during the time of payment, but this individual was not paid through the LLC, so the individual's wages are correctly included in the premium assessment. Petitioner has not established that the individuals were independent contractors.

ORDER

SAIF's Final Premium Audit Billing issued on January 20, 2005, to Westshores Homes, Inc., for the period of November 24, 2003, through July 9, 2004, is affirmed.

/s/ Lawrence S. Smith
Lawrence S. Smith
Administrative Law Judge
Office of Administrative Hearings

MAILED AND ISSUED ON: September 1, 2005

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
Insurance Division
PO Box 14480
Salem OR 97309-0405