

**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 Audit of     )     Case Nos. INS 03-09-018  
  )       
CASCADE CUSTOMS, LTD                             )     **REVISED**  
  )     **PROPOSED ORDER**

**HISTORY OF THE CASE**

The employer, Cascade Customs, Ltd (Cascade Customs or petitioner), appeals its final premium audit billing for the period of May 1, 2002 to May 1, 2003 (audit period). Petitioner timely filed a request for hearing challenging the final premium audit billing for the audit period within 60 days from receipt of the billing as required by ORS 737.505. Therefore, the Department of Consumer and Business Services (the department) has jurisdiction to hear this appeal.

On September 29, 2003, the department referred the matter to the Office of Administrative Hearings (OAH) to conduct a contested case hearing. On January 21, 2004, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Pursuant to OAR 137-003-0555, corporate president Larry Pfister represented the petitioner without benefit of counsel. Assistant Attorney General David B. Hatton represented the responding insurer SAIF Corporation (SAIF or insurer). Pfister testified on petitioner’s behalf and the record closed following the hearing.

On January 29, 2004, I issued a Proposed Order determining that insurer’s final premium audit for the audit period was correct and payable. On September 7, 2004, the department referred the matter back to OAH for further hearing concerning the second and third issues listed below. On February 10, 2005, I conducted further hearing to address the issues raised by the department. Petitioner failed to appear. Assistant Attorney General David B. Hatton again represented the responding insurer.

**ISSUES**

1. Whether the insurer incorrectly assessed premium on payments made to workers who are allegedly exempt subject workers pursuant to ORS 656.027(7).
2. Whether an individual who performs construction services for remuneration can qualify as an independent contractor, and thus be a nonsubject worker under ORS 656.027, without being licensed by the Construction Contractors Board.
3. Whether the “right to control” and “nature of the work” tests are applicable to this case in light of *Rublcaba v. Nagaki Farms, Inc.*, 333 Or 614 (2002).

## 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 RULINGS

The record consists of petitioner's Exhibits A and C through G and insurer's Exhibits R1<sup>1</sup> through R24, which were admitted into the record without objection. I sustained insurer's relevance objection to petitioner's Exhibits B. Also, I sustained insurer's objection to Exhibit H pursuant to OAR 137-003-0570(10).

## FINDINGS OF FACT

- 1) Cascade Customs Ltd is a residential construction business that subcontracts with general contractors to perform various construction tasks including framing, decking, roofing, siding and building stairs. (Testimony of Pfister.)
- 2) During the audit period, Pfister solicited bids from workers to perform these tasks. The workers verbally represented that they were licensed with the Construction Contractors Board but Pfister did not obtain documentation to verify this fact. (Testimony of Pfister.)
- 3) Pfister did not inquire whether the workers carried workers' compensation insurance. He paid the workers the bid amount upon completion of the task. (Exs. A7, A8; testimony of Pfister.)

## CONCLUSIONS OF LAW

1. Insurer correctly assessed premium on payments made to workers who are not exempt subject workers pursuant to ORS 656.027(7).
2. An individual who performs construction services for remuneration cannot qualify as an independent contractor, and thus cannot be a nonsubject worker under ORS 656.027, without being licensed by the Construction Contractors Board.

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<sup>1</sup> I renumbered insurer's exhibits with an "R" for respondent.

3. The “right to control” and “nature of the work” tests are not applicable to this case in light of *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614 (2002).

## OPINION

Inasmuch as petitioner is the party seeking redress before the department concerning the final premium audit billing, it has the burden to prove its position on the issue by a preponderance of the evidence. 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).

### 1. Assessed Premium

Petitioner contends that insurer incorrectly assessed premium on payments made to disputed workers because they were exempt subject workers under ORS 656.027(7). ORS 656.027 provides in relevant part:

**All workers** are subject to this chapter except those nonsubject workers described in the following subsections:

\* \* \* \* \*

(7)(a) Sole proprietors, **except those described in paragraph (b) of this subsection**. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

(b) Sole proprietors **actively registered under ORS 671.525<sup>2</sup> or licensed under ORS 701.035<sup>3</sup>**. When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005(30)<sup>4</sup>, the sole proprietor must qualify as an independent contractor. Any sole proprietor registered under ORS 671.525 or licensed under ORS 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

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<sup>2</sup> Landscape Contractor Board.

<sup>3</sup> Construction Contractor Board.

<sup>4</sup> ORS 656.005(30) provides:

“Worker” means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer and include salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an inmate or ward of a state institution or as part of the eligibility requirements for a general or public assistance grant.

(Emphasis added).

Petitioner argues that the disputed workers are conclusively presumed to be independent contractors and nonsubject workers because it exerted no control over their activities in performing construction tasks. In response, insurer argues that they would qualify as independent contractors and nonsubject workers only if they were actively licensed with the Construction Contractors Board. I agree.

In order to qualify as an independent contractor performing construction tasks, a worker is required by ORS 656.027(7)(a) and (b) to hold an active CCB license. Petitioner bears the burden of proving these facts and the record contains no evidence that the disputed workers held CCB licenses during the audit period. Consequently, I conclude that petitioner has failed to meet his burden of proving that the disputed workers were exempt subject workers under ORS 656.027 during the audit periods. Accordingly, SAIF's final premium audit billing for the audit period is affirmed.

In reaching this conclusion, I note that petitioner relies on ORS 670.600 for the definition of "independent contractor." However, inasmuch as I find that the disputed workers do not qualify as independent contractors and nonsubject workers under ORS 656.027, I do not reach ORS 670.600. Furthermore, ORS 670.600(6)<sup>5</sup> contains the same requirement of CCB licensure on which petitioner's case fails.

## 2. CCB Licensure

ORS 656.027 provides in pertinent part:

All workers are subject to this chapter except those nonsubject workers described in the following subsections:

(7)(a) Sole proprietors, except those described in paragraph (b) of this subsection. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

(b) Sole proprietors actively registered under ORS 671.525<sup>6</sup> or licensed under ORS 701.035.<sup>7</sup> When labor or services

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<sup>5</sup> ORS 670.600 provides in pertinent part:

As used in various provisions of ORS chapters 316, 448, 656, 657, 671 and 701, an individual or business entity that performs labor or services for remuneration shall be considered to perform the labor or services as an "independent contractor" if the standards of this section are met:

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(6) The individual or business entity providing labor or services is licensed under ORS chapter 701, if the individual or business entity provides labor or services for which licensure is required;

<sup>6</sup> Landscape Contractor Board

<sup>7</sup>Construction Contractor Board

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are performed under contract for remuneration, **notwithstanding ORS 656.005(30)**,<sup>8</sup> the sole proprietor must qualify as an independent contractor. Any sole proprietor registered under ORS 671.525 or licensed under ORS 701.035 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(Emphasis added.)

In order to qualify as a nonsubject worker under the workers' compensation definition of "subject worker" as set forth in ORS 656.027(7)(b), a contractor must be actively registered with the Construction Contractor Board under ORS 701.035. Additionally, ORS 701.035 requires that "[a]n applicant must qualify as an independent contractor under ORS 670.600<sup>9</sup> to be eligible for a license with the Construction

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<sup>8</sup> ORS 656.005(30) provides:

"Worker" means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an inmate or ward of a state institution or as part of the eligibility requirements for a general or public assistance grant. For the purpose of determining entitlement to temporary disability benefits or permanent total disability benefits under this chapter, "worker" does not include a person who has withdrawn from the workforce during the period for which such benefits are sought.

<sup>9</sup> ORS 670.600 provides:

As used in various provisions of ORS chapters 316, 448, 656, 657, 671 and 701, an individual or business entity that performs labor or services for remuneration shall be considered to perform the labor or services as an "independent contractor" if the standards of this section are met:

(1) The individual or business entity providing the labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results;

(2) The individual or business entity providing labor or services is responsible for obtaining all assumed business registrations or professional occupation licenses required by state law or local government ordinances for the individual or business entity to conduct the business;

(3) The individual or business entity providing labor or services furnishes the tools or equipment necessary for performance of the contracted labor or services;

(4) The individual or business entity providing labor or services has the authority to hire and fire employees to perform the labor or services;

(5) Payment for the labor or services is made upon completion of the performance of specific portions of the project or is made on the basis of an annual or periodic retainer;

(6) The individual or business entity providing labor or services is licensed under ORS chapter 701, if the individual or business entity provides labor or services for which licensure is required;

(7) Federal and state income tax returns in the name of the business or a business Schedule C or farm Schedule F as part of the personal income tax return were filed for the previous year if the individual or business entity performed labor or services as an independent contractor in the previous year; and

(8) The individual or business entity represents to the public that the labor or services are to be provided by an independently established business. Except when an individual or business entity files a Schedule F as part of the personal income tax returns and the individual or business entity performs farm labor or services that are reportable on Schedule C, an individual or business entity is considered to be engaged in an independently established business when four or more of the following circumstances exist:

(a) The labor or services are primarily carried out at a location that is separate from the residence of an

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Contractors Board.” Furthermore, ORS 656.027(7)(b) provides that “[w]hen labor or services are performed under contract for remuneration, notwithstanding ORS 656.005(30), the sole proprietor must qualify as an independent contractor.” The “notwithstanding ORS 656.005(30)” language also supports the conclusion that the ORS 656.600 statutory test and not the common law “right to control” test applies.

In order to qualify as an independent contractor under ORS 670.600, an individual must establish that he satisfies all eight subsections. *Liberty Northwest Ins. Corp. v. Potts*, 119 Or App 252 (1998). ORS 656.600(6) requires that “[t]he individual or business entity providing labor or services is licensed under ORS chapter 701, if the individual or business entity provides labor or services for which licensure is required.” Here, the contractors performed construction work but they do not have CCB licenses and accordingly, they do not qualify as independent contractors under ORS 656.600. Similarly, the contractors are not eligible for CCB licenses because they are not independent contractors under ORS 670.600. Thus, the contractors are not nonsubject workers under ORS 656.027(7)(b). Therefore, their payroll is properly included in employer’s premium audit.

### 3. “Right to Control” and “Nature of the Work” Tests

In *Rubalcaba v. Nagaki Farms*, 333 Or 614 (2002), the court considered whether a farm truck driver was a “worker” under ORS 656.005(3) for purposes of workers’ compensation coverage. The court applied the judicially created “right to control” and “nature of the work” tests and concluded that he was entitled to benefits following a work injury. *Rubalcaba* is distinguishable from the present case based on the work activity in question. Whereas *Rubalcaba* involved a farm truck driver, the present case involves construction workers who are required to obtain CCB licensure and failed to do so. Moreover, the statutory scheme explained above requires construction workers but not farm truck drivers to obtain CCB licensure. Thus, the common law tests do not apply.

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individual who performs the labor or services, or are primarily carried out in a specific portion of the residence, which portion is set aside as the location of the business;

(b) Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;

(c) Telephone listing and service are used for the business that is separate from the personal residence listing and service used by an individual who performs the labor or services;

(d) Labor or services are performed only pursuant to written contracts;

(e) Labor or services are performed for two or more different persons within a period of one year; or

(f) The individual or business entity assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided. [Formerly 701.025; 1997 c.398 §2; 1999 c.402 §9]

**REVISED ORDER**

SAIF's final premium audit billing for the audit periods of May 1, 2002 to May 1, 2003 is correct and payable.

/s/ Catherine P. Coburn  
Catherine P. Coburn,  
Administrative Law Judge  
Office of Administrative Hearings

Date issued: March 4, 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  
c/o Mitchel D. Curzon, Chief Enforcement Officer  
Oregon Insurance Division  
350 Winter Street NE Room 440  
Salem, OR 97301-3883