

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

In the Matter of **Cascade Customs Ltd.**

) **FINAL ORDER**
) Case No. INS 03-09-018

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d) and 737.505(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 (insurer) to Cascade Customs Ltd. (employer).

History of the Proceeding

On 8/4/03, the employer received from the insurer a billing dated 7/29/03 for the audit period from 5/1/02 to 4/30/03. The billing informed the employer that it may request a hearing by sending to the director a written request for a hearing so that the director receives the request within 60 days after the employer received the billing. See ORS 737.318(3)(d), ORS 737.505(4), and OAR 836-043-0170(1).

On 9/19/03, the director timely received from the employer a written request for a hearing.

On 9/22/03, the director mailed to the employer a letter and a petition form. The letter informed the employer that it must complete the petition and return it to the director so that director receives it within 60 days after the director received the request for a hearing, otherwise the director will dismiss the employer's request for a hearing. See OAR 836-043-0170(2)-(3) & (9).

On 9/25/03, the director timely received from the employer the completed petition.

On 9/29/03, the director referred the request to the Office of Administrative Hearings (OAH).

On 10/17/03, OAH scheduled a hearing to be held on 1/21/04.

On 12/18/03, OAH received from the insurer a request to issue an order compelling the employer to produce documents.

On 1/2/04, OAH issued an order compelling production.

On 1/2/04, OAH issued an order granting 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, pursuant to OAR 836-043-0170(5).

On 1/21/04, OAH held a hearing. The hearing was conducted by Catherine P. Coburn, an administrative law judge of OAH. The employer appeared and was represented at the hearing by Larry Pfister, as the employer's authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer called Larry Pfister as its only witness. The employer offered Exhibits A to H as documentary evidence. All of the employer's exhibits, except B and H, 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 R1 to R24 as documentary evidence. All of the insurer's exhibits were admitted into the record.

On 1/29/04, OAH issued a proposed order. The order informed the employer and insurer that they could file with the director written exceptions to the order within 30 days after the order was served on the employer and insurer.

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

On 9/7/04, the director requested OAH to conduct further hearing if necessary pursuant to OAR 137-003-0655(2), and issue a revised proposed order pursuant to OAR 137-003-0650(3) to address certain issues.¹

On 12/8/04, OAH scheduled another hearing to be held on 2/10/05.

¹ The issues were (1) 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; and (2) whether the "right to control" and "nature of the work" tests were applicable to this case. See footnote 3 hereinafter.

On 2/10/05, OAH held another hearing. The hearing was conducted by Catherine P. Coburn, an administrative law judge of OAH. The employer did not appear. The insurer appeared and was represented at the hearing by David B. Hatton, an Assistant Attorney General assigned to represent the insurer. No additional evidence was admitted into the record, although the insurer submitted a memorandum dated 2/10/05.

On 3/4/05, OAH issued a revised proposed order. The order informed the employer and insurer that they could file with the director written exceptions to the order within 30 days after the order was served on the employer and insurer.

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

On 7/26/05, the director requested OAH to schedule and conduct another hearing and issue a second revised proposed order to address certain issues.²

On 10/3/05, OAH scheduled another hearing to be held on 12/1/05.

On 12/1/05, OAH held another hearing. The employer did not appear. The insurer appeared and was represented at the hearing by David B. Hatton, an Assistant Attorney General assigned to represent the insurer.

On 1/20/06, OAH issued a second revised proposed order. The sole issue was whether the insurer correctly billed the employer for workers' compensation insurance premium based on compensation paid by the employer to nine persons who the employer had hired to perform various construction tasks. The order concluded that the persons were "workers" as defined by ORS 656.005(30) after applying both the judicially developed "right to control" and "nature of the work" tests³, were "subject workers" as defined by ORS 656.005(28), and were not

² The issues were (1) whether each of the nine persons that the employer paid compensation to during the audit period from 5/1/02 to 4/30/03 were actually and properly licensed by the Oregon Construction Contractors Board during the audit period; and (2) whether each of the nine persons were subject workers for purposes of Oregon workers' compensation law during the audit period as determined by applying the judicially created "right to control" and, if necessary, "nature of the work" tests.

³ In *Woody v. Waibel*, 276 Or 189 (1976), the Oregon Supreme Court established a "right to control" test and a "nature of the work" test to determine whether a person is a "worker" under Oregon's workers' compensation law. In *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002), the court explained that "*Woody* establishes that, in situations in which there is some evidence suggesting

“nonsubject workers” because ORS 656.027(7) and ORS 670.600 apply to “sole proprietors ... licensed under ORS 701.035” by the Construction Contractors Board but the persons either were not licensed or there was no evidence that they were licensed. The order recommended that the director affirm the billing. The order informed the employer and insurer that they could file with the director written exceptions to the order within 30 days after the order was served on 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.

Notice of Right to Judicial Review

A party has the right to appeal this final order to the Oregon Court of Appeals pursuant to ORS 183.480 and 183.482. A party may institute a proceeding for judicial review by filing with the court a petition for judicial review 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

that an employer retained the right to control the method and details of a claimant’s work, a conclusion about the claimant’s status depends on the analytical factors relevant to both tests.” The court noted that the “[f]actors relevant to the right to control test have included, for example, whether the employer retains the right to control the details of the method of performance, the extent of the employer’s control over work schedules, whether the employer has power to discharge the person without liability for breach of contract, and payment of wages. [S-W Floor Cover Shop v. Nat’l. Council on Comp. Ins., 318 Or 614, 622, 872 P.2d 1 \(1994\)](#).” *Id.* at 618 n 1. The court also noted that “[f]actors relevant to the ‘nature of the work’ test have included considerations such as whether the work done is an integral part of the employer’s regular business and whether the individual, in relation to the employer’s business, is in a business or profession of his or her own. *See Woody v. Waibel, 276 Or 189, 197-98, 554 P.2d 492 (1976)*.” *Id.* at 619 n 2.

mailed to the party, not the day the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

Dated October 12, 2006

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

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