



## FINDINGS OF FACT

(1) Rogue Valley Transportation District (Petitioner) provides public transportation in southern Oregon. It provides public bus service on fixed routes, assistance in setting up rideshare and car pooling, and home pickup services, mainly for clients of the Oregon Department of Human Services (DHS) who need transport to medical appointments. This last service is called a “translink brokerage.” (Test. of Brown.)

(2) Petitioner considers its bus drivers on the fixed routes as employees whose wages are subject to premium for workers’ compensation. They wear uniforms provided by Petitioner and drive buses owned by Petitioner. They are paid per hour and are represented by a union. They receive extensive training from Petitioner and have no discretion in choosing routes or work hours. (Test. of Brown.)

(3) Regarding the translink brokerage, Petitioner contracts with individual drivers and/or companies (provider/drivers) to provide rides for non-emergent medical services. The provider/drivers provide their own vehicles, which they maintain, and secure their own liability insurance. Petitioner provides these provider/drivers with some training regarding defensive driving, passenger assistance, and blood-borne pathogens, but much less training than that provided to its bus drivers. These provider/drivers do not have to work certain hours and do not wear uniforms, but are required to wear identification badges. (Test. of Brown.)

(4) These provider/drivers are paid per ride at a rate they set for themselves or their employees and are not paid overtime or receive any other benefits. They provide Petitioner with a bid that sets out the pickup fee and/or mileage fee for local runs and another bid for trips greater than 70 miles. They are paid monthly by DHS through Petitioner under the terms of an Intergovernmental Agreement between DHS and Petitioner. (Ex. A3.) Attachment A to this Agreement states what Petitioner must require of its provider/drivers. Among the requirements are:

--The provider/drivers shall comply with all applicable law, including passenger safety standards, and provide all the necessary equipment.

--The provider/drivers shall carry certain monetary limits of vehicle liability insurance.

--The provider/drivers must keep the interior of their vehicles clean and smoke-free.

--The vehicles must be equipped with specific items to ensure the riders’ safety.

--The vehicles must be in good operating condition, with seatbelts, side and rearview mirrors, horn, and working turn signals, headlights, taillights, and windshield wipers.

--The provider/drivers shall maintain their vehicles within the recommended maintenance schedule of the manufacturer.

--Petitioner shall provide training to the provider/drivers regarding the

transportation program and the geographic area where they will be providing service and require the provider/drivers to complete the National Safety Council Defensive Driving course within six months of date of hire.

--The provider/drivers shall provide verification that they have met the driving standards in the contract, based on prior moving violations and/or accidents.

--The average waiting time for pickup and delivery for pre-scheduled transportation shall not exceed 30 minutes.

--The provider/drivers shall only deliver their riders to the assigned locations. (Ex. A3 at 20-22.) .

(5) During the audit period, Petitioner had its provider/drivers sign a Blanket Purchase Agreement. Some of the relevant terms in the Agreement are:

--Purchase of services is at Petitioner's discretion.

--This is not an exclusive agreement.

--Petitioner did not guarantee a minimum amount of service.

--The provider/drivers must arrive within 15 minutes of pickup time.

--The provider/drivers are independent contractors for all purposes.

--The provider/drivers may subcontract the services with approval of Petitioner.

--Both parties may terminate the Agreement with 30 days' notice.

--Petitioner has the right to immediately terminate or suspend the Agreement for alleged violations of the Agreement.

--The provider/drivers must not have criminal violations that by law would prevent them from transporting DHS clients.

(Ex. P1.)

(6) During the audit period, Petitioner contracted with various provider/drivers and assigned rides based on the type of transportation needed (stretcher, wheelchair, etc), the lowest bid, and the availability of the provider/driver. If a provider/driver's vehicle breaks down during the ride, another driver will be assigned to complete the trip and the first driver will not be paid. The provider/drivers can refuse a ride for any reason, which are called kickbacks. A provider suffers no consequences for consecutive refusals, although after 30 consecutive refusals, Petitioner would contact them about their interest in providing rides. Petitioner has an average of 800 dispatches per day, with five to 10 kicked back. (Test. of Brown.)

(7) Petitioner has told two provider/drivers that they were no longer needed, one after a confrontation with a rider/client and another because the provider did not notify the Petitioner that his insurance had lapsed. Both of these reasons were violations of the contract with the Provider. (Test. of Brown.)

(8) Petitioner currently has 45 provider/drivers—sole provider/drivers, county transit agencies, volunteers, partnerships, and corporations. (Test. of Brown.)

(9) In regards to the Audit, Petitioner has questioned SAIF's inclusion of specific provider/drivers under contract with Petitioner to provide rides to clients. One of the

provider/drivers is City Ride, which has been in business since 2001 to provide transport for persons to and from medical care facilities. The owner of City Ride files state and federal tax returns as an independent contractor. He also provides rides for other entities and private individuals. City Ride has its own business telephone and fax numbers that are separate from the owner's personal numbers. (Ex. P3.)

(10) Another of the provider/drivers is Care Transport LLC, which has been in business since 1999 and since 2002 has contracted with Petitioner to provide transport for persons to and from medical care facilities. The owner of Care Transport files state and federal tax returns as an independent contractor. A substantial part of his business is providing rides for other entities. Care Transport has its own business telephone number that is separate from the owner's personal number. (Ex. P4.)

(11) Another of the provider/drivers is a partnership of a married couple which has been in business since 1999. The partnership files state and federal tax returns as an independent contractor. The partnership started before it had a contract with Petitioner. A substantial part of its business and revenue is from contracts with other entities. The partnership has its own business telephone number that is separate from the owners' personal number. As of October 12, 2004, the partnership has provided workers' compensation for its new employees. (Ex. P5.)

(12) Another of the provider/drivers is R & K Transport, which no longer does business with Petitioner and had business cards, offering its services. (Test. of Brown.)

(13) Another of the provider/drivers is Secured Transportation out of Springfield, Oregon, which has a separate business telephone line and business cards and contracts to provide rides to others. (Test. of Brown.)

(14) Another of the provider/drivers is Sonlight, which no longer contracts with Petitioner, and had business cards, offering its services. (Test. of Brown.)

(15) Another of the provider/drivers is Southern Oregon Shuttle, which is now out of business, and had business cards and contracted with other others to provide rides. (Test. of Brown.)

(16) Another of the provider/drivers is Specialized Care Mobility out of Roseburg, Oregon, which has a separate business telephone line and business cards and contracts with other others to provide rides. (Test. of Brown.)

(17) Petitioner calls a yearly meeting for its provider/drivers to discuss the budget and review contract changes. Attendance is mandatory. (Test. of Brown.)

(18) None of these businesses had workers' compensation coverage during the audit period. (Test. of Brown.)

## CONCLUSION OF LAW

The provider/drivers under contract with Petitioner were workers.

## OPINION

The main issue is whether the provider/drivers for Petitioner during the audit period 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 the provider/drivers 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 \* \* \*." The provider/drivers 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 the provider/drivers 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*, 166 Or App at 171; *Castle Homes v. Whaite*, 95 Or App 269, 272 (1989); *Prem Singh & Associates, Inc. v. Nat'l Council of Comp. Ins.*, 111 Or App 62 (1990).

### **Right to Control Test**

#### Direct evidence of the right to control

SAIF argues that Petitioner had the right to control the provider/drivers because it chose whom to call with each referral and did not guarantee any work to its provider/drivers. In fact, SAIF questioned whether there was actually a contract between Petitioner and the provider/drivers during the audit period because Petitioner is not obligated under the contract to provide any referrals to the provider/drivers. SAIF further alleged that Petitioner retained control of the provider/drivers by dictating the condition of their vehicles, the maintenance schedule of their vehicles, the equipment they were required to carry in their vehicles, the cleanliness of their vehicles, and the prohibition against smoking in the vehicles.

In *Salem Decorating*, the court found, among other factors, that procuring the contract with the customer, selecting the contractors to perform the work, instructing the contractor on the work and maintaining the right to stop using the contractor or remove the contractor if problems arose or the contractor failed to perform the work demonstrated “fundamental control” over the work. 116 Or App at 171. The court also noted that the employer used both employees and contractors who were formerly employees and provided the contractor with a description of the job. The court further found that payment directly to the individual by the employer instead of by the customer indicated a right to control. *Id.* at 172. It is not the degree of control by the employer, but the employer’s right to control that indicates worker status. *HDG Enterprises v. Nat’l Council on Comp. Ins.*, 121 Or App 513, 518 (1993).

The evidence here demonstrates some of the same “fundamental control” over the provider/drivers’ work that was found by the court in *Salem Decorating*. Petitioner negotiated the contracts with its customer, DHS, and selected the contractors. Petitioner reserved the right to stop using the provider/drivers for any reason. If the provider/driver failed to show up for work, Petitioner found another provider/driver to do the job. If the provider/driver was not dependable, Petitioner had the authority to stop giving the provider/driver referrals. Petitioner required provider/drivers to attend training regarding DHS requirements. Petitioner argued that it was DHS that was imposing the restrictions on the provider/drivers and not Petitioner, but under its contract with DHS, Petitioner was required to impose the same restrictions on the provider/drivers and in effect, did impose the restrictions. Petitioner argued that its provider/drivers were very different than the bus drivers it hired as employees, but they performed similar work in transporting DHS clients or customers. Customers contacted Petitioner directly with any complains about provider/drivers. Petitioner required the provider/drivers to wear identification badges. This is evidence of the right to control the means and manner of the provider/drivers’ work. On the other hand, the provider/drivers had some independence because, common employees, they could refuse any referral without any consequences and could work the hours they wanted. They also had considerable discretion in how to transport the customers. Therefore, the evidence leans toward an employment relationship, but the overall factor is considered neutral.

#### Furnishing of tools and equipment

This factor weighs in favor of an independent contractor relationship because Petitioner did not provide any equipment to the provider/drivers except the identification badges.

#### Method of payment

"When payment is by quantity or percentage, the method of payment test largely becomes neutral. To the extent that it indicates continuing service, it suggests employment; to the extent that it lessens an employer's interest in the details of how the employee spends (their) time, it has been said to suggest an independent contractor

relationship." *Henn v. SAIF*, 60 Or App at 592. The evidence establishes that the provider/drivers were paid per pickup and per mile, as stated in their proposals to Petitioner. They were paid monthly, based on the number of trips they performed, rather than after each trip, which is evidence of continuing service and employment. On the other hand, the provider/drivers were paid per trip rather than per time. Therefore, this factor is neutral.

### Right to fire

The right to terminate the relationship at any time without liability is strong evidence that the contract was one of employment. *Bowser v. State Indus. Accident Comm.*, 182 Or 42, 54 (1947). The right to control whether further work would be done is also indicative of the right to fire. *Cy Inv. Inc. v. Nat'l Council on Comp. Ins.*, 128 Or App 579, 584 (1994). The evidence here establishes that Petitioner could terminate its contract with the provider/drivers for any reason with 30 days' notice. Even if it did not terminate the contract, it was also not obligated to offer the provider/drivers any number of referrals, so it reserved the right to stop giving any work to the provider/drivers at any time for any reason. Petitioner had in fact terminated two provider/drivers, one for being rude to a customer, which was a violation of the code of conduct imposed by Petitioner, and the other for not being insured as required by Petitioner. Nowhere in the contract do the parties address any liquidated damages or breach of contract remedies for termination. This evidence establishes that Petitioner could terminate the relationship with a provider/driver without liability or could simply not assign any referrals to them. Therefore, this factor strongly indicates an employment relationship.

Before the court's decision in *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 625 (2002), the "relative nature of work" test was only applied when the right to control test was inconclusive. See *Oregon Drywall Systems, Inc. v. Nat'l Council on Comp. Ins.*, 153 Or App 662 (1998) (if the right to control is inconclusive, the relative nature of the work test may be applied.) In *Rubalcaba*, the Oregon Supreme Court reversed the Court of Appeals and the Workers' Compensation Board because both the court and the board failed to apply the relative nature of the work test when there was "some evidence" that the employer retained the right to control. 333 Or at 627. Here one, if not two, of the factors of the right to control test indicate an employment relationship, so there is "some evidence" that the employer retained the right to control the work of the provider/drivers. Accordingly, the relative nature of the work test must be considered.

### **Relative Nature of the Work Test**

The "relative nature of the work" test involves an examination of "The character of the claimant's work or business – how skilled it is, how much a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden \* \* \* its relation to the employer's business, that is how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished for the completion of a particular job." *Woody v. Waibel*, 276 Or 189, 195 (1976), quoting

1A Larson's *Workmen's Compensation Law*, section 43.51 (1973). Although the contract between the parties here states that the provider/drivers are independent contractors, the parties' understanding is not controlling. *Woody*, 276 Or at 198-99.

The provider/drivers are considered to be unskilled because their jobs involve the type of skills and expertise gained through experience rather than through education or specialized training. The work of the provider/drivers is not a separate business from Petitioner's main business. Petitioner is engaged in the transportation of members of the public. Petitioner was required to provide transportation to people who were unable to take Petitioner's buses to their appointments. The provider/drivers are a regular and integral part of Petitioner's business as opposed to a separate and distinct business.

The work of the provider/drivers was also continuous and of sufficient duration to amount to the hiring of continuous services rather than the contracting for the completion of a specific job. They did not just transport one person on a particular day. Some of the provider/drivers had been transporting Petitioner's customers for years. Moreover, there were significant payments to some of the provider/drivers throughout the audit period, which is also indicative of the provision of continuous services.

Finally, because Petitioner negotiated the contract with DHS, Petitioner was in a better position to bear the cost of injuries to the provider/drivers. Consequently, the provider/drivers are "workers" as defined by ORS 656.005(30) under the relative nature of the work test.

Petitioner argued that the relative nature of work test was not conclusive and that the factors stated in ORS 670.600 must be considered. Because the relative nature of work test was conclusive, the question of whether the factors in ORS 670.600 should be considered is not addressed.

## **ORDER**

SAIF's Final Premium Audit Billing for the audit period of April 1, 2003 through March 31, 2004 issued to Rogue Valley Transportation District, on October 26, 2004, is correct and payable.

Dated this 6<sup>th</sup> day of January, 2006.

/s/ Lawrence S. Smith  
Lawrence S. Smith  
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  
Insurance Division  
PO Box 14480  
Salem OR 97309-0405