



should be granted.

2. Whether Petitioner's tow truck drivers were independent contractors or otherwise excluded from coverage.

3. Whether Petitioner employed an office employee in its tow truck office during the audit period.

4. Whether Petitioner is liable for coverage of employees of its subcontractor, pursuant to ORS 656.029.

### **EVIDENTIARY RULINGS**

SAIF's Exhibits A1 through A23, A25, A29 through A35, A37 through A40 and Petitioner's P1, P6, and P8 were admitted without objection. SAIF's objection to Exhibits P2 through P5 and P7 based on relevance was overruled and they were admitted.

Also admitted without objection are Exhibits H1 through H22, procedural exhibits. After the hearing, Petitioner filed an objection (Ex. H23) to SAIF's additional exhibits and SAIF filed a reply (Ex. H24). These exhibits are also included in the record.

At the second hearing, SAIF was granted the opportunity to offer documents that it subpoenaed from AAA that showed how many tows Petitioner performed for AAA during the audit period and the number of tow trucks it used. Such documents are clearly relevant regarding the extent of service provided by Petitioner's tow truck drivers and is included in the record, pursuant to the duty of the Administrative Law Judge in ORS 183.450(10) to conduct a full and fair inquiry. At the hearing, the AAA records were marked as Exhibit A40. There was already an Exhibit A40, so to avoid confusion in the second hearing record, the former Exhibit A40, is remarked as Exhibit A42. Exhibit A41 is a summary of Exhibit A40 by DeeAnne Hoyt of SAIF. Exhibits A40 and A41 are relevant and are made part of the record. Petitioner was incorrect in asserting that no new evidence could be presented at the second hearing, especially when it offered new evidence at the second hearing.

### **FINDINGS OF FACT**

(1) On June 10, 1999, Hamid Zabeti, Charles Moses, and Bob Noori formed a partnership to provide tow truck services in the Portland, Oregon metropolitan area and registered with the State of Oregon Corporation Division as USA Towing & Recovery, Inc. (Petitioner). (Ex. A42.) On May 21, 2001, Zabeti registered as Petitioner's president and agent. On December 15, 2003, Moses registered as Petitioner's president and agent because Zabeti was going to be out of country. (Ex. A29.) They have never held formal corporation meetings or kept records of the corporate meetings. Petitioner's office and yard is located at 1921 SE Third Avenue in Portland, Oregon. (Test. of Zabeti.)

(2) Zabeti, Moses and Noori have no written documents that define their relationship. During the premium audit period in issue (April 1, 2003, through March 31, 2004), Zabeti was the general manager and the main dispatcher of the tow trucks, except for at least three months when he was out of the country. During that time, Moses was general manager and dispatcher. (Test. of Zabeti and Moses.)

(3) As dispatcher, Zabeti first called Noori, or another driver, Kathryn Booth, to perform the tow. Booth drove one of Moses' two trucks. Noori and Booth had the option to refuse a tow, but in practice, they rarely did. If they did refuse it or there were more than two tows, Zabeti or Moses would sometimes do a tow themselves or they would call what they described as "on-call" drivers. (Test. of Zabeti and Moses.)

(4) Neither Petitioner nor Moses through his own company, X-Press Towing, had a written contract with Booth or the on-call drivers. The tow truck drivers drove one of Petitioner's truck or one of Moses's trucks and earned a percentage of the cost charged to the customer for the tow. The tow trucks bore the names of Petitioner or of X-Press Towing, and the drivers wore uniforms that bore Petitioner's name. (Test. of Zabeti.) The tow truck drivers received their earnings twice per month, either in cash or by check. Petitioner estimates that 60 percent of its tows during the audit period were pursuant to its contract with AAA. Petitioner also has a contract with the City of Portland, which accounted for about 25 percent of the tows. The rest of the calls were from a private citizen requesting a tow. Zabeti and Moses paid themselves by taking money from the business. (Test. of Zabeti and Moses.)

(5) During the audit period, Petitioner performed 10,554 tows for AAA involving seven to 10 different trucks per month, or an average of nine different trucks per month, and an average annual payment of \$35,954 per truck. (Exs. A40 and A41.)

(6) On June 25, 2003, Zabeti filed with SAIF a report of an employee's injury, claiming that an employee named Dennis Colston was injured on June 11, 2003, while he was working as an on-call tow truck driver for Petitioner. Zabeti reported that Colston earned between \$166.16 and \$360 per week from March 5, 2003, until June 11, 2003. Zabeti wrote on the report that he considered Colston's claim of injury false. At that time, Colston's driver's license had been suspended since at least April 15, 2003, with two other suspensions in the preceding two years. (Ex. A39.) Zabeti reported that Colston was hired in March 2003 and had received complaints twice for bad attitude and three times for damage to cars. (Ex. A39 at 7.) SAIF denied Colston's claim for Workers' Compensation. (Ex. A22 at 13.)

(7) Smith, another on-call tow truck driver, filed workers' compensation claims for alleged injuries on March 31, 2004, and on August 28, 2002, while working for Petitioner. On April 4, 2004, an individual in Petitioner's office named Katie O'Brien reported to SAIF that Smith worked for Petitioner until quitting on November 18, 2003 and then again from January 24, 2004, until February 1, 2004. (Ex. A22 at 3.) Regarding Smith's earlier injury, Smith claimed that he injured his knee during a tow for Petitioner. Zabeti told SAIF that Smith worked for another company. Smith later

agreed that he was an independent contractor, so SAIF denied his claim. (Ex. A22 at 11.) Smith was later accused by Zabeti and Moses of burglarizing Petitioner's office on April 17, 2004. (Ex. A31.)

(8) SAIF performed an audit of Petitioner in June 2004. Zabeti met with SAIF's auditor and advised him that all of Petitioner's records were stolen during the burglary on April 17, 2004. (Test. of Mogan.) Zabeti provided a copy of what he called a "subcontract agreement" with Moses, which was prepared that day, but backdated to March 30, 2003. The agreement stated that it can be cancelled by either party at any time without notice, that the service must be above average, that the trucks and employees must be clean at all times, that 80 percent goes to the subcontractor and 20 percent to the contractor (Zabeti), and that the subcontractor (Moses) is a separate business with its own rules and bylaws, but it also must follow the rules of the contractor. (Ex. A15.)

(9) On September 29, 2003, Zabeti submitted an Employer's Payroll Report to SAIF for the period April 1, 2003, through September 30, 2003. The Report is signed by Moses as manager and states payroll of \$22,500 for auto towing, \$28,000 for gas station retail, and \$7,000 for office clerical. (Ex. A9.) Petitioner also owns a gas station in Newberg, which accounts for the reported gas station retail and office clerical payroll. (Test. of Zabeti.)

(10) Moses has been a tow truck driver for many years. He started X-Press Towing about four years ago and is the sole owner. Through X-Press, he is trying to get his own towing contracts with AAA and the City of Portland. The assumed business name was registered with the state, but the registration lapsed in September 2003. His business address is 5830 SE 17<sup>th</sup> in Portland, Oregon, but he mainly works out of Petitioner's business, especially since he started renting a portion of Petitioner's office. Booth did tows only for Moses. Petitioner paid Booth's earnings to Moses, who forwarded them to Booth. Moses had no workers' compensation policy for himself or other workers during the audit period. (Test. of Moses.)

(11) During an audit by SAIF in June 2004, Petitioner had no records of payments to tow truck drivers or to X-Press Towing. SAIF based its estimate for tow truck driving earnings on seven tow trucks and drivers earning \$20,000 per year, the Oregon prevailing wage for tow truck drivers as determined by the Employment Department. On June 4, 2004, O'Brien was behind the counter in Petitioner's office and said that she was the dispatcher for Petitioner and that Petitioner had seven trucks. (Test. of Mogan.) O'Brien was helping Petitioner qualify for other contracts. (Test. of Zabeti.) SAIF estimated Petitioner's wages for clerical worker for the tow trucking company as full-time work at the minimum wage. (Test. of Mogan.)

(12) Petitioner has had workers' compensation coverage at other times for its tow truck drivers. (Ex. A1.)

## CONCLUSIONS OF LAW

1. Petitioner's request for continuance of the first hearing is denied.
2. Petitioner's tow truck drivers were not excluded from coverage.
3. Petitioner employed an office employee at its tow truck office during the audit period.
4. Petitioner has not established that Moses was an independent contractor, so ORS 656.029 is not applicable.

## OPINION

### 1. Request for continuance

At the end of the first hearing, Zabeti requested a continuance on behalf of Petitioner in order to provide testimony from office worker O'Brien and drivers Noori and Booth. He had the opportunity to call them as witnesses when first preparing for the hearing and should have known their testimony would be needed. His request is late, and he has shown no persuasive reason for not calling them as witnesses at the first hearing. Moreover, he has provided second-hand evidence from them and their testimony would not likely add anything.

Zabeti also wanted to provide testimony from Petitioner's accountant, who allegedly would provide evidence of Petitioner's payments to its tow truck drivers and others. Petitioner was ordered to provide such documents to SAIF before the hearing. OAR 137-003-570(11) states that an ALJ may refuse to admit documents that were not produced following an Order to Compel Discovery. All relevant documents should have been provided then. Some of the documents provided by Petitioner were prepared after the fact. The hearing will not be continued for the possibility of such documents for Petitioner was ordered to provide such documents and did not do so.

The new hearing was on April 25, 2006. Petitioner could have called these witnesses at this hearing, but did not attempt to do so.

### 2. Coverage of Petitioner's tow truck drivers

The main issue is whether the tow truck drivers for Petitioner, including Zabeti and Moses, 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 tow truck 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 tow truck 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 tow truck 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 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 only documentary evidence Petitioner provided of the tow truck drivers' alleged freedom from control was a contract between Zabeti and Moses that was prepared after the audit billing period, but backdated to the audit period. Zabeti claimed that there were other contracts with the drivers, but they were stolen in the burglary. The testimony of Zabeti and Moses was inconsistent and contrary in many parts so their testimony was not reliable or credible enough to establish the element of the drivers' freedom from control. Petitioner retained control over its drivers because the drivers had no other employer and relied on Petitioner for work. Petitioner furnished the drivers' tools and equipment. Petitioner had the right to fire and did fire two drivers. Even the alleged contract between Zabeti and Moses said either party could terminate without notice. Finally, Petitioner has had workers' compensation coverage at other times, so Zabeti and Moses in effect conceded that the drivers were employees.

Because Petitioner retained total right to control, there is no need to consider the “relative nature of the work” test stated in *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002), although that test provides further support for the conclusion that Petitioner's tow truck drivers were employees during the audit period.

SAIF computed the payroll for Petitioner's drivers by concluding that Petitioner had seven tow trucks, per the statement of O'Brien in Petitioner's office, and assigning a wage of \$20,000 per year, based on the Oregon prevailing wage for tow truck drivers. This statement by O'Brien may have been puffery because she was helping Petitioner secure other contracts at the time and was interested in projecting an image that Petitioner could take on more work. Nevertheless, SAIF provided persuasive evidence at the hearing that, pursuant to its contract with AAA, Petitioner had an average of nine different trucks during the audit period and the average annual income per truck of \$35,394. (Exs. A40 and 41.) Petitioner's tow truck driver payroll was at least \$180,000,

the amount alleged in the premium audit. Petitioner has not rebutted this amount of payroll.

### **3. Tow truck office employee**

Zabeti denied that Petitioner had an office worker during the premium audit period, claiming that O'Brien "volunteered" in the office only after the audit period. O'Brien was there when SAIF's auditor visited on June 20, 2004 (Ex. A20) and when SAIF called Petitioner on April 6, 2004, regarding a workers' compensation claim of a tow truck driver (Ex. A22 at 3). Zabeti's claim that she started right after the audit period and receives no pay is too coincidental and implausible to be believed, especially without any records and Zabeti's unreliable testimony on other important matters. She probably did work for Petitioner during the audit period, and Petitioner has not met its burden of showing that the assessment was incorrect.

### **4. Coverage of Moses, alleged subcontractor, pursuant to ORS 656.029.**

Petitioner has not established that Moses was an independent contractor, as noted above. This conclusion is especially true when Moses claimed at other times that he was Petitioner's manager and president and clearly could not be an independent contractor at the same time that he was manager and president. Therefore, there is no need to consider ORS 656.029 to determine whether Moses's alleged subcontractors, the drivers working under him, are exempt from coverage.

## **ORDER**

SAIF's Final Premium Audit Billing for the audit period of April 1, 2003 through March 31, 2004 (audit period) issued to USA Towing & Recovery, Inc., on October 22, 2004, is affirmed.

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

MAILED AND ISSUED ON:

### **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