



the director so that director received it by 2/14/05, otherwise the director would dismiss the employer's request for a hearing. See OAR 836-043-0170(2)-(3) & (9).

On 1/31/05, the director timely received from the employer the completed petition.

On 2/3/05, the director referred the request to the Office of Administrative Hearings (OAH).

On 2/25/05, OAH scheduled a hearing to be held on 5/25/05.

On 5/2/05, OAH rescheduled the hearing to be held on 6/21/05.

On 5/31/05, at the request of the insurer, OAH issued to the employer an order compelling discovery.

On 6/21/05, OAH held a hearing but the hearing was not recorded.

On 7/22/05, OAH issued a proposed order dated 7/21/05 recommending that the director affirm the billing, and informing the employer and insurer that they could file with the director written exceptions to the proposed order by 8/22/05.

The director timely received written exceptions to the proposed order from the employer on 8/18/05, and from the insurer on 8/22/05.<sup>2</sup>

On 9/8/05, the director requested OAH to schedule and conduct another hearing because the first hearing on 6/21/05 was not recorded.

On 9/26/05, OAH scheduled a hearing to be held on 12/13/05.

On 2/17/06, OAH rescheduled the hearing to be held on 4/25/06.

On 4/25/06, OAH held a hearing. The hearing was conducted by Lawrence S. Smith, an administrative law judge of OAH. The employer appeared and was represented by Charles Moses, as the employer's authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer called Charles Moses and Hamid Zabeti as it witnesses. The employer offered exhibits P1 to P8 all of which were admitted. The insurer appeared and was represented by David B. Hatton, an Assistant Attorney General assigned to represent the insurer. The

---

<sup>2</sup> Subsequently, on 2/27/06, the director informed the employer and insurer that the director would not consider their exceptions to the proposed order because they would have the opportunity for a second hearing and to file exceptions to the proposed order to be issued by OAH after the second hearing.

insurer called DeAnne Hoyt and Patrick Mogan as its witnesses. The insurer offered exhibits A1 to A23, A25, A29 to A35, A37 to A42, all of which were admitted. Additionally, OAH admitted exhibits H1 to H24 pursuant to ORS 183.450(10).

On 7/25/06, OAH issued an amended proposed order. The primary issue was whether the insurer correctly billed the employer for workers' compensation insurance premium based on compensation paid by the employer to several persons who the employer paid to drive tow trucks owned or used by the employer under towing contracts entered into by the employer during the audit period. The employer argued that the persons were not, while the insurer argued that the persons were, "workers" as defined in ORS 656.005(30). The order found that the persons were "workers" because they (1) provided labor to the employer and the employer paid the persons for their labor, and (2) while performing such labor were subject to the director and control of the employer. The order found that the persons were subject to the director and control of the employer because, after applying the judicially developed "right to control" test, the employer had the right to control the persons' work performance in all respects.<sup>3</sup> The order recommended

---

<sup>3</sup> 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 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. The court explained "when an employer has the right to control a claimant's performance *in some respects but not others*, 'it is essential that we consider the factors which make up the 'nature of work' test' in deciding whether the control that employer retains makes the relationship one of master and servant. *Woody*, 276 Or at 196-97." *Id.* at 627 (emphasis added). Although the case law is not clear, the director understands that when an employer has the right to control a person's work performance in all respects, after applying the "right to control" test, then it is unnecessary to also apply the "nature of the work" test. In this case, the amended proposed order found that the employer had the right to control the persons' work performance in all respects and did not need to apply the "nature of the work" test. Nevertheless, the order added that "[the "nature of the work"] test provides further support for the conclusion that [the employer's] tow truck drivers were employees during the audit period."

that the director affirm the billing. The order also informed the employer and insurer that they could file with the director written exceptions to the amended proposed order by 9/25/06.

On 8/22/06, the director timely received from the employer a letter dated 8/20/06 objecting that some documentary evidence offered by the insurer was admitted at the second hearing that was not offered during the first hearing claiming that the employer did not have an opportunity to review or dispute the new evidence. The employer asked “whether there is a basis for requesting a new hearing in order that we may present a defense against the evidence presented at the April 25 hearing.”

On 9/5/06, the director timely received from the insurer a letter dated 8/31/06 replying to the employer’s objections claiming that the employer offered some new evidence of its own and had an opportunity to review and dispute the new evidence of the insurer but did not do so, and urging the director to affirm the ruling in the amended proposed order admitting the new evidence.

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, and reasoning of amended proposed order as the findings of facts, conclusions, and reasoning of this final order.

#### **Order**

No further hearing shall be conducted in this case.

The billing is affirmed.

#### **Notice of Right to Judicial Review**

An aggrieved party may have 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 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 February 12, 2007

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

//  
//  
//