

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Petition of)	Case No. INS 06-07-002
)	
PACIFICAB COMPANY, INC.)	
An Oregon Corporation)	PROPOSED ORDER

HISTORY OF THE CASE

On March 28, 2006, SAIF Corporation (SAIF) issued a final premium audit billing to Pacificab Company, Inc. (Petitioner). Petitioner timely requested a hearing on the final premium audit billing, and submitted a Petition to the Department of Consumer and Business Services (Department) on July 7, 2006. The Department referred the matter to the Office of Administrative Hearings on July 10, 2006, and hearing was initially scheduled for November 1, 2006.¹

Hearing was rescheduled for February 15, 2007, with Administrative Law Judge Rick Barber presiding. Before the scheduled date, the parties agreed to submit the case on the record, based upon stipulated facts, exhibits, and written closing arguments. The record closed on May 1, 2007, following receipt of Pacificab's Reply Brief.

At the time the Reply Brief was received, Pacificab requested an opportunity to submit additional evidence and SAIF Corporation objected. I informed counsel (via email), that the request was denied. The parties had agreed to a record of stipulated facts, and any additional evidence offered by one party (and objected to by the other) would not be a stipulated fact. It would conceivably open the door to rebuttal evidence, cross examination of witnesses, and a full-blown hearing. I denied the motion in keeping with the stipulation made by the parties months earlier.

ISSUES

1. Whether Pacificab's drivers are "workers" under ORS 656.005(30).
2. Whether, if the drivers are workers, they are non-subject because of the taxicab exemption in ORS 656.027(15)(c).
3. Whether, if the drivers are workers, they are non-subject because of the independent contractor statute, ORS 670.600.

¹ Hearing was set over at the request of SAIF Corporation.

EVIDENTIARY RULINGS

Joint Exhibits 1 through 8 were offered by the parties and are hereby admitted into evidence. In addition, although not evidence, I am designating the following documents as part of the documentary record of this proceeding: Joint Stipulation of Facts (including attachments of the Rogue Valley Transportation District case and the Sherry Valadas Opinion & Order); Memorandum in Support of Reduced Coverage; Supplemental Memorandum in Support of Reduced Coverage; SAIF Corporation's Hearing Memorandum; Pacificab's Reply; and Pacificab's Petition.

STIPULATED FINDINGS OF FACT

The following Findings of Fact are taken directly from the Joint Stipulation of Facts agreed to by the parties. The footnotes within the Findings of Fact are original (although automatically renumbered to conform to this document), and refer to the exhibits submitted along with the stipulated facts:

1. Pacificab Company, Inc. (Pacificab) is an Oregon corporation headquartered [at] 4183 SE Witch Hazel Road, Hillsboro, Oregon.
2. SAIF Corporation (SAIF) performed an audit of Pacificab for the policy period from July 1, 2004 to June 30, 2005.
3. During the audit, Pacificab informed SAIF that Pacificab had 22 vehicles, and SAIF based its assessed premium on that number of vehicles using the NCCI assumed value per vehicle as set forth in the 2004 Oregon rate pages under miscellaneous values for leased or rented vehicles.²
4. Pacificab has a "lease-to-own" program on some of its vehicles, where Pacificab allows drivers to make payments toward purchasing a vehicle. By the end of the audit period, approximately four of the twenty-two vehicles were owned by drivers and other vehicles were subject to the lease-to-own program.
5. Pacificab provides non-emergency medical transportation (NEMT) under Pacificab's Blanket Purchase Agreement (BPA) with Tri-Met,³ and other contracts with hospitals, care facilities, foster care homes and school districts. This type of work is designated as "account" work by Pacificab.
6. Ninety (90) percent of Pacificab's business during the audit period was "account" work.
7. SAIF's premium audit bill assessed exposure for all of Pacificab's work, but waived ninety (90) percent of that amount for Pacificab's NEMT work, because

² A copy of the audit is attached and marked as Joint Exhibit 1.

³ A copy of the BPA between Pacificab and Tri-Met is attached and marked as Joint Exhibit 2.

SAIF's prior premium audit report identified the contract with Tri-Met but did not advise Pacificab of the exposure.

8. Pacificab operates in Portland and in Portland's western suburbs.

9. Pacificab obtained Limited Passenger Transportation (LPT) permits for Portland non-emergency medical transportation and other "account" work. The City of Portland issues LPT permits to companies rather than individual drivers.

10. Most of Pacificab's drivers signed a "Passenger Carrier Agreement", which provides that its drivers are independent contractors and not "employee[s], agent[s], joint venture[s] or partner[s] of Pacificab."⁴

11. During 2004, Pacificab had forty-two drivers, and during 2005, Pacificab had 37 drivers.

12. Pacificab appended the "Passenger Carrier Agreement" with its drivers with various appendices: Appendix A, which identifies the vehicle, and the lease rate for day or night shift; Appendix B and Appendix C, identifying "Dues" and "Rates and Charges", a Driver Rates page, and a Driver Dues Structure page, all of which identify the various rate schedules and charges Pacificab has established with its drivers.⁵

13. During the relevant audit period, Pacificab provided a document to its drivers titled "Per Contracts", which provides, in part, that drivers must do door to door transports for every client – no honking or waiting for clients to come out, drivers must ensure that passengers under 16 sit in the back seat and wear a seat belt, that children under 6 are in a car seat, drivers must not set up pickup times or trips without dispatch approval, if the driver is involved in an accident and the driver is at fault, the deductible is \$500, but if the accident is not the driver's fault, no deductible is required, all vehicles must be cleaned, vacuumed and full of gas when drivers turn the vehicle in at the end of their shift, and drivers are encouraged to get their own business clients, and there are no dues taken out of trips that do not get dispatched by Pacificab.⁶ Pacificab issues this document to its drivers in an attempt to ensure compliance with requirements imposed by its contract with Tri-Met and other similar contracts.

14. As required by the Federal Transportation regulations, Pacificab provided its drivers with a document titled "Summary of Pacificab Company Drug-Free Workplace Policy for Company Safety For [C]ompliance with Federal Drug & Alcohol

⁴ A copy of Pacificab's Passenger Carrier Agreement is attached and marked as Joint Exhibit 3. This copy is representative of the agreement signed by other Pacificab drivers.

⁵ Copies of these appendices are attached and marked as Joint Exhibit 4.

⁶ A copy of the "Per Contracts" document is attached and marked as Joint Exhibit 5. This copy is representative of that provided to all drivers.

Testing Regulations”, outlining, among other things, the federal requirements for driver drug and alcohol testing.⁷

15. Pacificab provided its drivers with a document titled “Pacificab Company Drug and Alcohol Policy”, which outlines Pacificab’s policy on drugs and alcohol, and provides, in part, that “all drivers will be tested for drugs/alcohol, prior to receiving assignments”, random testing is done throughout the year, post-accident tests are required where the accident involved injuries, fatalities or vehicle damage, drivers who test positive for drugs or alcohol may be allowed to return to work, but will be subject to “unannounced testing for a minimum of 6 tests during the year. Another positive test during this period would result in termination of drivers employment with Pacificab”, and drivers who refuse to submit to a request for drug or alcohol tests will be removed from service.⁸ Pacificab issued this policy to comply with its contractual obligations under its contract with Tri-Met.

16. Pacificab drivers were paid by Pacificab weekly for “account” work and collected cash fares at the completion of each cash ride.

17. Each of Pacificab’s drivers was required to sign Pacificab’s contracts in order to drive for Pacificab.

18. Drivers paid a weekly rental fee to Pacificab to use Pacificab’s vehicles.

19. Pacificab provided its drivers with a document titled “Appendix A”, identified in paragraph 12, above,⁹ which provides a place to enter the year, make, model, VIN number, license number, “lease” rate for day or night shift, permit and insurance information for a particular vehicle. Pacificab prefers that a particular driver use the vehicle identified in the Appendix A issued to that driver, however, drivers do use other vehicles if the identified vehicle is in the shop, is needed for another shift, or is otherwise unavailable.

20. Pacificab logos appear on all vehicles. City of Portland regulations require company identification on the vehicle and that all lettering is of a minimum height, with the company name and phone number.

21. Pacificab receives a 25%-40% fleet discount on insurance that it offers to its drivers. During the audit period, all drivers paid Pacificab \$100 per week to be insured under Pacificab’s fleet insurance policy.

⁷ A copy the “Summary of Pacificab Company Drug-Free Workplace Policy for Company Safety For compliance with Federal Drug & Alcohol Testing Regulations” is attached and marked as Joint Exhibit 6. This copy is representative of that provided to all drivers.

⁸ A copy of the “Pacificab Company Drug and Alcohol Policy” is attached and marked as Joint Exhibit 7. This copy is representative of that provided to all drivers.

⁹ See paragraph 12, above, which also references this document. A copy of this document is part of Joint Exhibit 4.

22. The Passenger Carrier Agreement referenced in paragraph 10, above, states that Pacificab's drivers "shall maintain all equipment in good repair and conditions".

23. When repairs are necessary, Pacificab repairs the vehicles in its own shop or sends the vehicles to an outside auto shop for repair. Drivers pay Pacificab \$50 per week for future repairs and maintenance.

24. Drivers pay for gasoline for the vehicle they are driving on any particular day or shift.

25. Pacificab makes "Nextel" radios available to communicate with dispatch and the driver pays Pacificab \$10 per week for use of this radio.¹⁰ Drivers can purchase their own Nextel radio rather than leasing the radio from Pacificab. Two drivers use their own cellular telephones to communicate with dispatch[.]

26. The BPA referenced in paragraph 5, above, provides, in part, that Pacificab is responsible for ensuring that the provisions of the BPA and its Attachment A are met. Section II provides that the contractor may set prices, but disallows charging Tri-Met for specified charges, and prohibits billing a client directly for any charges, and limits the amount of reimbursement to the most reasonably direct route, and provides that Pacificab must maintain workers' compensation insurance and provide a certificate of coverage, and that Pacificab shall supervise and direct contract performance using its best skill, and that Pacificab must implement and enforce all of Tri-Met's safety requirements. Attachment A, Brokerage Dispatch Provider Standards, requires, in part, that Pacificab ensure interior vehicle cleanliness, safety equipment, communication equipment and a vehicle record file of specific information. Pacificab is required to provide its drivers with training and to document dates and types of training and to inform drivers of their job duties and responsibilities. Drivers must be reliable, able to drive safely, wear photo identification, and be familiar with the geographical area in which they driver. The service provision section of Attachment A sets forth the wait time and late time requirements, as well as schedule parameters. Pacificab must establish procedures for the drivers to deal with emergency care situations. Drivers are required to pick up and deliver clients to locations assigned by Tri-Met only and must use reasonably direct routes and cannot allow indirect routes or shared rides. Pacificab provides workers' compensation coverage for its office staff.

27. Rates for NEMT work are set under the BPA, which provides for payment based on the mileage driven. Tri-Met paid Pacificab \$1.80 per mile, of which Pacificab retained \$0.15 per mile, and Pacificab paid the remainder to the driver. Pacificab then withheld and retained and additional thirty (30) percent from any amount over \$800.

28. Pacificab's drivers do not contract directly with Tri-Met.

¹⁰ A copy of the Nextel Radio Agreement is attached and marked as Joint Exhibit 8.

29. Pacificab's dispatch assigns rides on a first-come, first-served basis, and directs the drivers to the assigned pick-up area and notifies the driver of the name of the assigned passenger(s). Drivers can exercise the option to decline a dispatch call.

30. Ninety (90) to ninety-five (95) percent of all calls come through Pacificab's dispatch.

31. Drivers usually return vehicles to Pacificab's premises at the end of their shift.

32. Pacificab has varying payment agreements with its drivers, where Pacificab retains a percentage of total driver fare amounts based on the respective agreement with each driver.¹¹

33. Drivers submit weekly ride sheets to Pacificab to document fares, and Pacificab pays the drivers based on the totals obtained from these sheets. Pacificab drivers' total compensation is determined based on the extent of transportation services they render.

34. Pacificab does not withhold taxes from paychecks. Lease and insurance payments are deducted from the gross fare amount. Pacificab provides its drivers with 1099s for purposes of filing a Schedule C with their personal income tax returns.

35. If a driver is involved in an accident where the driver is at fault, the driver is responsible for paying the insurance deductible. If a driver is involved in an accident where the driver is not at fault, the driver has no financial responsibility for any payments associated with the accident.

36. Pacificab drivers are responsible for maintaining a valid Oregon driver license.

37. During the relevant audit period, SAIF received a claim (number 7941433F) from one of Pacificab's drivers, Sherry Valadas. On December 21, 2004, SAIF denied the claim based on Pacificab's statement that the driver was an independent contractor and the Passenger Carrier Agreement between Valadas and Pacificab. SAIF's claim denial was overturned by an April 1, 2005 Department of Consumer and Business Services, Hearings Division Opinion and Order, which held that Valadas was a subject worker. SAIF was required to pay the claim.¹²

¹¹ Samples of the payment agreements Pacificab has with its drivers are evidenced by Appendix B, Appendix C, the Driver Rates Page, and the Dues Structure page. These documents are referenced in paragraph 12, above, and attached and marked as Joint Exhibit 4.

¹² A copy of the referenced Opinion and Order is attached for your convenience and is marked as Attachment 1.

CONCLUSIONS OF LAW

1. Pacificab's drivers are "workers" while performing NEMT work for Pacificab.
2. The drivers are not exempt under ORS 656.027(15)(c).
3. The general independent contractor statute does not apply.

OPINION

The positions of the parties are clear in this case. Pacificab contends that the drivers are independent contractors for whom workers' compensation coverage is not required, either because they are not workers or because they are statutorily exempt. SAIF, no doubt at least in part because of Judge Pardington's Opinion & Order finding one of Pacificab's drivers an employee with a compensable injury, contends that there is an employment relationship requiring the payment of premiums.

The parties have presented well-written briefs covering both the "right to control" and "nature of the work" tests, and I will address both tests in my analysis. However, the facts of the case make the decision and the analysis, in my opinion, quite straightforward. Looking specifically at the NEMT work which comprises 90 percent of Pacificab's business, the evidence strongly demonstrates both a right to control and actual control of the drivers by Pacificab.

Summary of Legal Analysis

The analysis of the nature of the relationship between Pacificab and its drivers must start with the definition of "worker" found in ORS 656.005(30). As SAIF notes, there is no question the drivers were engaged to furnish services for a remuneration. Thus, only the control issue needs to be determined. (Hearing Memo at 3). The statute addresses control as follows:

"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[.]

ORS 656.005(30). This statutory definition encompasses what is known as the right to control test. The question under this test is whether the person is "subject to the direction and control" of another; if so, he is a subject worker and the one with the right to control him is an employer.¹³

There are several factors to be examined in the "right to control" test. As the Court of Appeals has stated:

¹³ By definition, an "employer" is one who has "the right to direct and control the services of any person." ORS 656.005(13)(a).

We have held that the principal factors in applying the right to control test are:

“(1) direct evidence of the right to, or the exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire.” *Castle Homes, Inc. v. Whaite*, 95 Or App 269, 272, 769 P2d 215 (1989).

Salem Decorating v. NCCI, 116 Or App 166, 171 (1992).

This is not a simple balancing test, as such. Professor Larson, author of a renowned treatise on workers’ compensation law, described the impact of the right to control test:

“For the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, on the opposite direction, contrary evidence as to any one factor is at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all.” 1B Larson, *Law of Workmen’s Compensation* 8-90, § 44.31 (1990).

Cy Investment v. NCCI, 128 Or App 579, 584 (1994)(quoted with approval). In other words, if there is evidence of a right to control or actual control by the putative employer, the employment relationship is established. Conversely, if there is evidence suggesting an independent contractor relationship, it is only mildly persuasive.

The implication of the case law in Oregon seems to be that the courts (like Professor Larson) favor the employment relationship because of the protection it affords, and will only find a person to be an independent contractor if none of the indicia of employment are present.

If the right to control test establishes the employment relationship, the inquiry stops. If the test is inconclusive, then I must apply the “nature of the work” test as the final step in the analysis. *Nagaki Farms v. Rubalcaba*, 333 Or 614, 619 (2002).¹⁴ The factors of importance in this second test include whether the work being done by the putative contractor is an integral part of the employer’s regular business and whether the contractor is in business for himself outside the relationship with the employer. *Woody v. Waibel*, 276 Or 189, 197-98 (1976).

The Right to Control Test

Looking first to the right to control test, evidence of the relationship between Pacificab and its drivers is examined to determine if there is a right of control or the

¹⁴ Certain passages in *Rubalcaba* suggest that the nature of the work test is to be applied in every case where the right to control test does not conclusively preclude an employment relationship.

actual exercise of control by Pacificab. The courts have distinguished between two different types of control. “Control over the method of performance” is an indication that there is an employment relationship, while “control over the result to be achieved” is consistent with an independent contractor relationship. *Trabosh v. Washington County*, 140 Or App 159, 165 (1996). This distinction is helpful when looking at the drivers’ duties in this case.

To demonstrate the difference between the two, consider two plumbers, both of whom obtain their work through a plumbing supply store. Plumber A has a contract with the store, whereby his name is given to customers to install plumbing fixtures. The contract requires A to install the fixtures to code, and to do a professional job, and allows for termination of the contract if A violates those provisions. In such a contract, the store has contracted for the right to control the outcome—it wants to make sure that the plumber does a good job, for obvious business reasons.

Plumber B is sent to install a sink for a store customer. The store tells B that it must be completed within 24 hours, that he is to use the plastic, not the copper pipe, that he is not to talk to the customers while he is there, and that he should take the store’s toolbox because it has special tools he might need for this type of sink. In this instance, the store is seeking to control the method of performance, an indication of an employment relationship.

Direct evidence of the right or exercise of control. This distinction is vividly seen in the facts of the present case. When performing NEMT work, the drivers were regulated in the following ways:

- They must transport every client from door to door, with no honking of the horn or waiting for the client; they must place every passenger under age 16 in the back seat of the cab and must place every child under age 6 in a car seat; they must obtain dispatch approval to set pickup times and trips (FOF 13; Ex. 5);
- They must take the client from point to point, without any deviation even if the client wants to go elsewhere (FOF 26);
- They must submit to drug and alcohol testing according to Tri-Met’s standards (FOF 15);
- They must carry Pacificab’s logo on the vehicle, with Pacificab’s phone number (FOF 20);
- The drivers must return the vehicle at the end of the shift, cleaned and vacuumed out and with the tank full of gasoline (Ex. 5);
- They do not collect a fare from the client/passenger, but are paid on a regular basis by PacifiCab;

These are several of the factors by which Pacificab exercises actual control over its drivers on a daily basis. Between the particulars of the BPA between TriMet and PacifiCab, as well as the “Per Contracts,” drivers were expected to perform all of the

above tasks, and others as well. To use the *Trabosh* distinctions, Pacificab is clearly controlling the method of performance and not just the result to be achieved.

Much of Pacificab’s argument against having a right to control (or evidence of actual control) consists of pointing out that the restrictions—the controls—on the drivers come from the TriMet contract and not from Pacificab. Pacificab argues that it is not exercising control over the drivers; rather, it is requiring them to comply with TriMet’s contract, which it considers regulatory matters analogous to “uniform building code[s] or zoning regulations[.]” (Pacificab Reply at 4).

Pacificab is partially correct. There is no question that the majority of the control issues between Pacificab and its drivers are based on the TriMet contract with Pacificab—and, presumably, the other similar contracts with other account work providers. However, that does not answer the question of whether there is a right to control or the actual exercise of control of the drivers.

The contract between Pacificab and TriMet and (indirectly) the Department of Human Services is binding on all signators. The requirements under that contract are not just TriMet’s requirements; once Pacificab signed the contract, the requirements contractually became its responsibility.

Pacificab is a company, a corporation, so it could not be a “worker” for workers’ compensation purposes.¹⁵ However, if a human person, a sole practitioner, were to agree to the contractual responsibilities set forth in the BPA and “Per Contracts”, one would conclude there was strong evidence of the *right* to control (in the contractual language), and *actual* control (in the numerous controls on the manner of doing business). One would reasonably conclude that the driver was a subject worker for purposes of workers’ compensation, no matter what title the person carried.

The analysis is roughly the same in the present case, with one addition. Instead of a contract between a sole practitioner and TriMet, the contract is between the driver and Pacificab. It does not matter why Pacificab places the controls on its drivers. By contract, Pacificab must require its drivers to follow the TriMet rules when providing NEMT services. The exact same amount of control is exerted over the driver—and it is the control on the driver that is important here. A worker is one who is “subject to the direction and control” of another. ORS 656.005(30). The drivers performing NEMT services are workers under that definition.

Since the TriMet contractual requirements are now the responsibility of Pacificab to monitor, and since Pacificab has passed on the same requirements to its drivers, it is now the “employer” of the drivers. ORS 656.005(13)(a). Under the right to control test, Pacificab’s drivers are workers, subject to the exemption analysis below.

¹⁵ It is a reasonable inference from the Workers’ Compensation statutes (ORS Chapter 656), that the law applies to the medical and psychological injuries of humans and not other types of “persons,” such as non-human legal entities.

Other Right to Control criteria. Under the right to control test, there are three other criteria to be examined. However, since the actual evidence of control is clear in this case, I will not address the others in any detail. I will, however, make brief comments about each.

Method of Payment. The evidence indicates that pay for the NEMT work filters from TriMet through Pacificab and is paid to the drivers on a weekly basis. The regular check would be indicative of an employment relationship. *Trabosh, supra.* Pacificab does not take out taxes, and sends 1099s to the drivers at the end of the year. These are indicia of a contractor relationship—something which I have no doubt Pacificab has believed, in good faith, that it had with its drivers. The evidence regarding payment is equivocal, with evidence going both ways.

Furnishing Equipment. Pacificab provides the vehicle for its drivers to use, but has a lease-to-own provision that an unknown percentage of the drivers are participating in. Four of the drivers own their vehicles outright, apparently after paying sufficient lease payments. (FOF 4). Drivers also pay a monthly fee to employer for a Nextel phone to use in the course of business, or purchase their own Nextel or use a cell phone. (FOF 25). The evidence indicates that Pacificab furnishes the equipment for its drivers, and there is a lack of evidence about whether the leases are at “arm’s length.” There is evidence showing that Pacificab still exerts control over the vehicles, requiring them to be returned at the end of the shift and apparently requiring all repairs to be done through Pacificab or through mechanics to whom Pacificab takes the vehicle.

If this were a true contractor relationship, one would expect the driver/owner to fix his or her own vehicle, to provide a means of communication, and to use the vehicle in whatever fashion the driver chose. There is no evidence of such freedom in this case; in fact, the evidence indicates control by Pacificab.

Right to Fire. Both Pacificab and the driver have remedies under the BPA and the Carrier agreement in the event of termination of the contract. That is some evidence of a contractor relationship, although it is unclear just what remedies the driver would have if Pacificab (or TriMet) ended the relationship. I consider the “right to fire” issue neutral in this case.

In summary, under the right to control test the evidence establishes both the right to, and the exercise of actual control by Pacificab over its drivers. The evidence demonstrates that the drivers are “workers” for purposes of ORS 656.005(30).

Nature of the Work Test

Having determined that the drivers were workers under the first test, it is probably unnecessary to address the nature of the work test. However, in the event that a reviewing body might disagree with my assessment under the right to control test, I will briefly address the secondary test.

As noted, the nature of the work test focuses upon whether the work being done by the putative contractor is an integral part of the employer's regular business and whether the contractor is in business for himself outside the relationship with the employer. *Woody v. Waibel, supra*. Again looking just at the NEMT work performed by the drivers, their part of the labor is virtually the entirety of that part of Pacificab's business. One would assume that Pacificab has some administrative staff working on the NEMT contracts, although the evidence on that point is not clear.

The evidence does show that the NEMT work is 90 percent of the *entirety* of Pacificab's business. I conclude that the work of the drivers, the putative contractors, is an integral part of Pacificab's business. The evidence also shows that at least some of the drivers also perform regular taxicab work, but the amount of that work is unknown (beyond the fact that any of the work taken through Pacificab would not exceed ten percent of the company's business).

Thus, under the nature of the work test as well, Pacificab's drivers are workers and the company is their employer.

Subjectivity: The Taxicab Exemption

Having determined that the drivers were workers (and, correspondingly, that Pacificab was their "employer" under the statute), the next question is whether they are *subject* workers for workers' compensation purposes. Pacificab presents two basic arguments on that point. First, it contends they are exempt under the taxicab exemption in ORS 656.027(15)(c). Second, it contends they are exempt as independent contractors under ORS 670.600.

Independent Contractor Statute. I will not spend any time on the argument concerning the independent contractor statute because, ultimately, that statute has been interpreted to mirror the analysis just presented in this order. *S-W Floor Cover Shop v. NCCI*, 318 Or 614 (1994); *Trabosh* 140 Or App at 163 ("*S-W Floor Cover Shop* * * * made the criteria of ORS 670.600 essentially irrelevant to determining whether a person is a worker under the Workers' Compensation Law.>").

The Taxicab Exemption. Instead, I will focus on the taxicab exemption, which states:

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

* * * * *

(15) A person who has an ownership or leasehold interest in equipment and who furnishes, maintains and operates the equipment. As used in this subsection "equipment" means:

* * * * *

(c) A motor vehicle operated as a taxicab as defined in ORS 825.017.

ORS 656.027.

The definition of “taxicab,” as noted, is found elsewhere in the statutes:

(2) Vehicles being used in a taxicab operation if the vehicle:

(a) Is a passenger vehicle with a passenger seating capacity that does not exceed five;

(b) Carries passengers for hire *where the destination and route traveled may be controlled by a passenger* and the fare is calculated on the basis of any combination of an initial fee, distance traveled or waiting time; and

(c) Is transporting persons or property, or both, between points in Oregon.

ORS 825.017(2)(emphasis added).

There are two issues that arise from these statutes, both of which lead SAIF to contend that the vehicles are not taxicabs while doing the NEMT work, and possibly even at other times. First, SAIF argues that the lack of passenger control of the destination and route, noted in the emphasized portion of the statute quoted above precludes PacifiCab’s vehicles from being considered taxicabs when performing NEMT work. (SAIF Memo at 20). I agree with SAIF on this point. The evidence shows that the TriMet dispatcher, not the passenger, determines the destination and the fare, and the contract determines the route. There can be no deviations; if the client/passenger wanted to stop to pick up a prescription or groceries, or decided to go to a friend’s house for a few minutes, the NEMT driver would have to refuse such a side trip. (Ex. 2 at 15).

Secondly, SAIF argues that the drivers do not really have a leasehold interest in the vehicles and do not furnish or maintain the vehicle. (SAIF Memo at 12). While certain of the drivers apparently have some sort of leasehold interests in the vehicles, and four apparently own the vehicles that they drive, the evidence is not clear as to whether the leasehold interests are substantial enough to meet the statutory requirement. Moreover, the parties seem to be using a different definition of “furnish” in their arguments. Pacificab argues that the drivers “furnish” their own vehicles, but do not really address the fact that it is Pacificab, and not the drivers, who *provide* (perhaps a clearer word that “furnish”) the vehicle. While some of the drivers may get to the place where they own, or have a valid leasehold interest in the vehicle, every one of them starts out using Pacificab’s vehicle to perform the duties. I do not have evidence to show the breakdown of which is which. I do not need to decide that issue, having concluded that the vehicles were not taxicabs while being used in NEMT work.

The evidence also indicates that Pacificab is the one that maintains the vehicles, collecting a fee from the drivers each week to cover the costs. If the relationship was at arm’s length, the driver would be free to maintain his own vehicle, or he could make arrangements with his own mechanic to repair it. Here, there is once again strong evidence of control.

With regard to NEMT work, I find that the vehicles are not taxicabs under the statute. The exemption in ORS 656.027(15)(c) does not apply. I have no doubt that some of the other work performed by the drivers—non NEMT work—comes closer to being exempt. However, even there the issue of who maintains the vehicle probably defeats the exemption. I must conclude that Pacificab has failed to establish its case. The premium audit must be affirmed.

PROPOSED ORDER

I propose that the department issue the following final order:

That the Final Premium Audit Bill be **AFFIRMED**.

DATED this 10th day of July, 2007.

/s/ Rick Barber
Rick Barber, 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:

Mitchel D. Curzon
Chief Enforcement Officer
Oregon Insurance Division
PO Box 14480
Salem, OR 97309-0405