

On 7/5/06, the director received from the employer an incomplete petition.²

On 7/5/06, the director received from the employer a request for an order staying all collection efforts by or on behalf of the insurer of any amount billed in the billing as a result of the audit until this proceeding is concluded. See OAR 836-043-0170(5).

On 7/7/07, the director timely received from the employer a completed petition.

On 7/10/07, the director referred the request to the Office of Administrative Hearings (OAH).

On 7/12/07, OAH issued an order granting the stay.

On 7/17/06, OAH scheduled a hearing to be held on 11/1/06.

On 11/15/06, OAH rescheduled the hearing to be held on 2/15/07.

On 2/15/07, OAH held a prehearing conference. The parties agreed to submit all evidence and arguments in writing.

Sometime between 2/14/07 and 2/16/07, OAH received the parties' joint stipulation of facts and exhibits dated 2/14/07.

By 5/1/07, OAH received the parties' arguments and closed the record.

On 7/10/07, OAH issued a 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 for driving passenger vehicles owned or used by the employer under contracts between the employer and drivers during the audit period. The employer argued that the drivers were not "workers" as defined in ORS 656.005(30) because they were not subject to the control of the employer, or if they were "workers" then they were not "subject workers" as defined in ORS 656.005(27) because they were excepted from ORS chapter 656 either as a taxi cab driver pursuant to ORS 656.027(15)(c) or independent contractor pursuant to ORS 670.600. The order found that the drivers were "workers" because they provided labor to the employer and the employer paid

² The incomplete petition omitted the date that the employer received the billing. Subsequently, the employer filed a completed petition which indicated that the employer received the billing on or about but not before 3/28/06.

the drivers for their labor, and were subject to the direction and control of the employer while performing such labor. The order found, after applying both the judicially created “right to control” and “nature of the work” tests³, that the drivers were subject to the direction and control of the employer because the employer actually controlled many aspects of how they performed their daily labor when providing non-emergency medical transportation, and their labor for the employer was an essential and regular part of the employer’s business. The order found that that the drivers were not excepted by ORS 656.027(15)(c) because their passengers did not control the route and destination, and the drivers were not responsible for maintaining the vehicles. The order found that the drivers were not excepted by ORS 670.600 because they were subject to the direction and control of the employer. The order concluded that the billing was correct and recommended that the director

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 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). In this case, the proposed order applied the “right to control” test and found that drivers were workers because the employer retained and actually exercised the right to control the driver’s method of performance and furnished the necessary equipment. The order found that the evidence that the employer retained control by the method of payment of compensation and termination was equivocal or neutral. The order believed that “it [was] probably unnecessary” to apply the “nature of the work” test but applied it anyway just in case “a reviewing body might disagree.” Under the “nature of the work” test, the order found that the drivers were workers because the labor they performed for the employer was an essential and regular part of the employer’s business. The director disagrees that it was unnecessary to apply the ‘nature of the work’ test because two of the four considered factors of the “right to control” test did not indicate that the drivers were workers.

affirm the billing.⁴ The order informed the employer and insurer that they could file with the director written exceptions to the order by 8/9/07.

The director did not receive from the parties any exceptions to the proposed order.

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 the proposed order as the findings of fact, conclusions, and reasoning of this final order, except as noted herein.

Order

The billing is affirmed and the stay is withdrawn.

Notice of Right to Judicial Review

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition 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 date the party received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date 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 by delivering it to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing it to PO Box

⁴ The billing applied to all of the employer's business during the audit period. The stipulated facts of the parties referred to the employer's business as either "account work" or "cash rides." "Account work" was providing non-emergency medical transportation under contracts between the employer and various organizations such as TriMet. During the audit period, ninety percent of the employer's business was "account work." Presumably the remaining ten percent of the employer's business was "cash rides." The order expressly concluded that the billing was correct as it related to the "account work" of the employer but did not make any such conclusion as it related to the "cash rides" portion of the employer's business. However, since the order concluded that the entire billing was correct, the order must have implicitly concluded either the billing was also correct as it related to the "cash rides" portion of the employer's business, or the employer did not meet its burden of production and persuasion about the incorrectness of that portion of the billing.

14480, Salem, OR 97309-0405; or faxing it to 503-378-4351; or e-mailing it to mitchel.d.curzon@state.or.us.

Dated October 15, 2007

/s/ Carl N. Lundberg
Carl N. Lundberg
Deputy Administrator
Insurance Division
Department of Consumer and Business Services

//
//
//