

**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 06-09-007
)	
)	
HARVEY'S SELECTIVE LOGGING)	REVISED
INC., Petitioner)	PROPOSED ORDER

HISTORY OF THE CASE

On June 22, 2006, SAIF Corporation (SAIF) issued a final premium audit billing to Harvey's Selective Logging, 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 September 22, 2006.

The Department referred the matter to the Office of Administrative Hearings on September 25, 2006. Hearing was scheduled for January 25, 2007.

Hearing was held as scheduled, with Administrative Law Judge Rick Barber presiding. Petitioner appeared through its attorney, Sean Driscoll. Heath Harvey and Anthony Bray testified for Petitioner. SAIF was represented by Shannon Rickard, Assistant Attorney General. Rob Miller testified for SAIF. The record was held open to obtain additional evidence (copies of mill contracts) and to allow for written closing argument. The record closed on March 28, 2007.

A Proposed Order was issued on May 22, 2007. On June 13, 2007, Petitioner filed exceptions to the Proposed Order. On July 2, 2007, the Insurance Division requested that the OAH review the exceptions and issue a Revised Proposed Order addressing the exceptions. All additional language in this revised order is in bold; if any language is deleted, it will be stricken through and left in the document.

ISSUES

Whether Anthony Bray was a subject worker during the audit period.

EVIDENTIARY RULINGS

Exhibits A1 through A7 and R1 through R5 were offered into evidence, and they were admitted without objection. Exhibit A8, the mill contracts received later, are hereby admitted into evidence.

FINDINGS OF FACT

1. Petitioner is a corporation engaged in logging, under written contract with several mills in the area between Eugene and the south central Oregon coast. Petitioner harvests the timber according to the contract with the mill, and contracts with others to go into the sale areas and fall the timber. Petitioner provides all other logging functions, getting the log from the place where it fell to the log truck, on its way to the mill. Heath Harvey is the primary owner of the family-owned corporation at present. The corporation emphasizes hiring family and close friends whenever possible. (Ex. A1 at 6).

2. Anthony Bray is married to Heath Harvey's sister. Bray and his wife live in Creswell, about 15 miles south of Eugene. June Harvey, Heath's mother and the treasurer of the corporation, maintains one of Petitioner's offices in Creswell, on Bray's property, where she also lives. Petitioner has another office in Coos Bay. Bray has his own company, TJ's Big Horse Farm, at the same address in Creswell. TJ's Big Horse Farm raises horses and performs horse logging under contract. (Test. of Bray).

3. At one time several years ago, Bray was an employee of Petitioner's corporation, working as a logger and a supervisor. At that time, Petitioner hired its own timber cutters rather than contracting that job out. Petitioner decided to get out of the timber falling business because of the amount of risk involved. (Test. of Harvey).

4. Both Bray and Petitioner have intended to set up an independent contractor relationship for Bray's business. Bray provides his own tools and transportation when he cuts timber. He does not work with Petitioner's employees, except to occasionally be at the same site. Bray is paid by Petitioner every two weeks. The checks have often been made out to Anthony Bray personally, rather than his company. Heath Harvey is the one who determines the method of payment. (Test. of Bray).

5. Petitioner has four or five cutters or cutting companies who do the timber falling under Petitioner's contracts with the mills. Harvey often selects which cutter he thinks will best be able to do a specific job, and he asks them to come out to the site with him and to give him a bid. The bids are oral. Harvey will tell Bray or the other cutters how he wants the timber to fall. At times, Harvey has told Bray and other cutters that the method of compensation must change, in the middle of a contract, from by the ton or by the load, to hourly. Harvey is intending to be fair to all when he does this. Bray is free to turn down any cutting job, and is free to work the hours he wants to work to get the cutting done. (Test. of Harvey, Bray).

CONCLUSIONS OF LAW

Anthony Bray is a subject worker.

OPINION

The sole issue to be decided in this case is whether Anthony Bray is a subject worker. Petitioner contends that Bray is not a subject worker, that he is an independent contractor who cuts timber for Petitioner. SAIF argues that Bray, who is related by marriage to the Harvey family, remained under the direction and control of Petitioner during the audit period and is a subject worker under case law and statute. To make this determination, I rely upon the procedural approach set forth in the decisions of the Oregon Supreme Court and Court of Appeals.

The proper procedural approach. The analysis in this case must start with the definition of “worker” found in the workers’ compensation statutes:

“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 statute encompasses what is known as the “right to control” test. The question 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.¹ There are several factors to be examined in the “right to control” test. As the Court of Appeals has stated:

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. As Professor Larson described the elements 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).

¹ By definition, an “employer” is one who has “the right to direct and control the services of any person.” ORS 656.005(13)(a).

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

The unspoken message of the case law 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). 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. The initial inquiry, as noted, is whether Bray was subject to the direction and control of Petitioner in the way he performed his timber falling duties.

Direct evidence of the right or exercise of control. When Bray was an employee of Petitioner, the latter exercised the control of an employer over him. Much has changed; Bray now has his own equipment and is one of several “contractors” Petitioner uses to fall timber pursuant to the mill contracts. There is no question in my mind that both Petitioner and Bray have intended that Bray be independent of his former employer; however, whether that intent has been realized is a different question.

SAIF argues that Petitioner exercised direct control over Bray by paying Bray, rather than having the mill pay Bray directly. I respectfully disagree. SAIF relies upon *Salem Decorating* in support of its position, but the facts of that case do not transfer well to the current situation. In *Salem Decorating*, the question whether a floor installer was paid by the employer or by the customer was an important one. If the installer was truly independent, he would be expected to contract directly with the customer; the fact that the employer insisted on having the payment for the install go through it to the installer was an indication of control.

The current situation is different. Petitioner has a contract with various mills to provide trees. Those contracts anticipate the use of some contractors to harvest the timber, (Ex. A8), so it would probably not be a surprise to Menasha, for instance, to find that Petitioner was contracting out the falling of timber. It would be expected that Petitioner would provide the compensation to its contractors for the timber falling. The mill would not, in these circumstances, pay the subcontractor directly. The fact that Petitioner paid Bray does not indicate an exercise of control in this case.

SAIF also argues that Petitioner's use of three or four contractors, instead of throwing the bidding open to the world, is an indication of control. This argument comes closer to the mark. Why would Petitioner limit the number of contractors? Heath Harvey knows the contractors, has worked with them, and even decides which contractor would be the right fit for a specific job. Rather than using an open bid system, even among the few contractors he uses, Harvey appears to select a timber faller, ask if that faller is willing to bid on this project (apparently without competition), takes him out to the site and then accepts the oral bid. This bid process, while retaining some sense of independence (Bray is free to not bid on a project if he desires), still shows evidence of control on Petitioner's part.

Petitioner takes exception to my findings that the bid process was “apparently without competition.” While there may have been times when more than person or company entered into an oral contract with Harvey for the same unit, and while Bray may have testified that he occasionally did not get the contract for a job, I still conclude that the process of contracting between Harvey and Bray was not an open bid process. Harvey testified that he would either meet Bray in the unit, or fax him a map, and then they would negotiate a price. Harvey did the same with the other three or four contractors he worked with. I still consider this some evidence of control on Petitioner's part.

Method of payment. The evidence in this area was the strongest evidence in favor of an employment relationship between Bray and Petitioner. There were two important factors involved. First, Bray was paid every two weeks. Many of the paychecks were paid to Bray personally, rather than to his business account. That factor alone sounds more like employment, with its regular paycheck, than it does a contractor relationship where payment is more often at the end of the contract period, or at contracted-for intervals. There was never a written contract between Bray and Petitioner.

Petitioner argues that regular payments every two weeks do not show an employment relationship because “[t]he undisputed testimony was that HSL was itself receiving payments from mills on a two-week cycle for timber it provided to the mills three and four weeks previously. In other words, HSL was simply paying contractors for completed work for which HSL had itself been paid.” (Exceptions at 3-4).

Petitioner's argument is an “apples and oranges” argument, and is without merit. Exhibit A8 consists of several written contracts between Petitioner and the mills. The contracts differ in the way payment under the contract was to be made. Some payments were made on the 10th of the month, for logs delivered between the 16th and 30th of the previous month, and on the 25th for the logs in the first half of the current month. (*Id.* at 2). Yet Bray's invoices were for different periods, such as March 26 through April 10, April 11 through April 25, etc. (Ex. R1). The connection with the mill contracts Petitioner seeks to make has not been established. More importantly, the point is that a regular payment every two weeks—and one that was sometimes made out to Bray personally rather than to his business

account—is more in keeping with an employment relationship than it is with a contractual relationship, where payment is usually at the completion of the contract.

Petitioner contends that my decision is based upon the fact there is no written contract between Bray and Petitioner. It is a factor I considered but it is not as important as the method of payment and the limited bid process. Still, the lack of a written contract makes it very difficult to pin down the relative rights and responsibilities under the contract.

The lack of a written contract is also important when it comes to Petitioner's argument that there was a right to redress under the contract that supports the presence of a contractor relationship. What right to redress? There is no written contract giving such a right. The evidence is that Harvey, if he wanted to seek redress from his brother-in-law Bray, who lives in the same house as Harvey's sister and his mother, June Harvey, which happens to be the same address as the corporate office for Petitioner, would "consider" suing Bray for breach of contract. It remains my opinion that the closely held nature of this family relationship is not a true contractual relationship.²

The second issue under the method of payment concerns the way Petitioner would change the basis of payment when a problem arose. Harvey testified that he had to change the method of payment from by the load to hourly because he perceived there was a problem with the load count. Although Harvey testified that he "negotiated" this change with the cutters, the situation sounded more like an employment relationship than contract negotiations.

Petitioner takes exception to my conclusion that the "renegotiations" sounded more like an employment relationship than a contractual one. Harvey did testify that the changes in compensation were negotiated, but presented none of the other contractors to describe what the negotiations involved. From Harvey's testimony, the negotiations sounded very one-sided. Bray testified that the method of payment was "up to Heath [Harvey]." Petitioner argues that the statement is out of context because the testimony was about the initial method of payment Harvey wanted on a specific job. If Harvey could dictate the method of payment at the beginning of the process, it would seem more than probable that it would still be "up to Heath" when he would want to renegotiate piece work to hourly work. Again, these were something other than arms length transaction, and suggested employment, not contractor status.

For example, if a contract timber faller had cut enough timber for 20 loads and the general contractor then announced he was going to pay by the hour, that faller has the reasonable option of refusing to accept the change. He could argue, based upon the terms of the contract, that he was entitled to be paid in the agreed upon way. Here, there were

² I reject Petitioner's attempt to provide additional evidence in the footnote on page 8 of the Exceptions. No evidence was presented at hearing about an allegedly acrimonious relationship between family members and Bray.

no such arguments. In fact, when asked about the method of payment, Bray testified it was “up to Heath” how he was paid. Again, this evidence strongly supports the presence of an employment relationship.

Furnishing of tools and equipment. Bray used his own tools and his own equipment while doing the work for Petitioner. SAIF agrees that the factors here favor the independence of Bray.

The right to fire. Although the quotation from *Castle Homes* refers to the right to “fire,” the better statement of the issue is whether there is the right to discharge (i.e. end the performance of services) without liability under a breach of contract theory. If there is a true contractual relationship, the subcontractor has such remedies as specific performance, *quantum meruit*, and other remedies under a breach of contract theory. If it is an employment relationship, the employee works “at will,” and would have no basis to fight his termination.

Given the family relationship between Bray and the Harvey’s, it would be extremely difficult to determine if Petitioner retained a right to fire Bray, and whether Bray would have any recourse. The family is close enough that, even if there was a right to seek redress under the contract, there is a good chance Bray or Harvey would not pursue it—not because of an employment relationship but because of the family relationship. On the other hand, without a written contract it is not possible to determine the relative rights of the parties. I find the right to fire is inconclusive.

To summarize the findings under the right to control test, I conclude there is relatively strong evidence of an employment relationship, even as there is some evidence of an independent contractor relationship. To show how murky the fact situations in this type of case can be, however, it is necessary to look at the facts of two other cases. In *Cy Investments*, quoted above, the owner of Cy’s Parkrose Pub brought in dancers to entertain his customers, and sought to make his dancers independent contractors. Dancers were auditioned; the ones who did the best at auditions were given first choice on the weekly schedule. This was important, since many of the dancers were also dancing in other clubs during the same week. Several actually had booking agents.

Each dancer was paid a fee for the shift worked, and also received tips. Each was provided with a “contract” that she was required to sign every day, as well as providing information about the hours worked. At the end of the year, the pub sent IRS Form 1099 records to all of the dancers. Each dancer could choose their own wardrobe, and the music to be used. The pub did, however, require a certain number of dances in a shift, and it also fined the dancers if they were tardy or failed to complete the shift, among other forbidden conduct.

Based upon these facts, the Department of Insurance and Finance (DIF)³ concluded that Cy’s dancers were not workers under the statute, and should be treated as

³ DIF was the name of the agency before it became the Department of Consumer and Business Services (DCBS).

independent contractors. The Court of Appeals disagreed, finding the same set of facts “inconclusive” under the right to control test. The case was remanded to the Department to address the “nature of the work” test and to make additional findings, if necessary. 128 Or App at 584.

In *Rubalcaba*, a workers’ compensation case, claimant was a harvest truck driver, driving his own truck. Nagaki Farms needed drivers to take loads of vegetables to the processing plant. Rubalcaba picked up loads of vegetables from Nagaki and from other local farmers, and drove them to the intended location. He was free to take a load or not; if he wanted a load, he would get in line behind the other trucks. He was paid by the load.

The Workers’ Compensation Board and the Court of Appeals determined that Rubalcaba was an independent contractor, not a subject worker, and denied his workers’ compensation claim. The Supreme Court disagreed, primarily based upon the nature of the work test.⁴

The facts of *Cy Investments* and *Rubalcaba* are cited because both of those cases, in my opinion, had evidence that supported contractor status and little in the way of an employment relationship. Nevertheless, the courts determined that what little control was present was enough to establish an employment relationship. Similarly, although not conclusive, I find that the indicia of control present under the “right to control” test make it necessary to examine the “nature of the work” test as well.

Petitioner contends that the “lack of direct evidence [of control] in this case is identical to *Oregon Drywall Systems [Inc. v. Nat’l Council on Comp. Ins., 153 Or App 662 (1998).]*” (Exceptions at 3). Even if the facts were identical—they are not, for the reasons involving the method of payment and the bid process—the decision in *Oregon Drywall* was expressly made under the “right to control” test. After *Rubalcaba, supra*, and especially in light of the evidence of control I have addressed above, I conclude that the analysis cannot stop (on these facts) with the right to control test, but must be analyzed under the nature of the work test.

The “nature of the work” test. As noted above, the primary issues to be addressed under this test involve looking at whether the work being performed by Bray is an “essential and regular part” of the Petitioner’s business, and whether the contractor has a viable business outside the relationship with the principal. *Woody v. Waibel*, 276 Or 189 (1976). To put this question in perspective, in *Rubalcaba* the Supreme Court determined that a trucker taking the vegetables to the processor was an essential and regular part of Nagaki Farms’ business of growing vegetables. 333 Or at 625-26.

In the present case, Petitioner contracts with the mills to harvest timber and provide the logs from a specific location to the mill for processing. The question, under

⁴ Until *Rubalcaba* was decided, the general rule was thought to be that one only uses the nature of the work test when the right to control test was inconclusive. In *Rubalcaba*, the court essentially disregarded the right to control test and focused on the nature of the work. 333 Or at 625.

the nature of the work test, is whether a timber faller is an essential and regular part of Petitioner's business. The clear answer is that Petitioner would not have a business of providing logs to the mill if there was not someone to fall the timber. Thus, the work of the timber fallers is an essential and regular part of Petitioner's business.

Petitioner argues that the application of the nature of the work test "leads to the untenable conclusion that a company cannot contract out essential parts of its business without transforming every contractor into an employee." (Exceptions at 9). Petitioner's conclusion is too broad, but its basic argument recognizes part of the difficulty of the nature of the work analysis. However, his argument is with the Supreme Court's analysis in *Rubalcaba, supra*.

Moreover, although Bray has a separate business of horse logging, and may very well be independent in that business, the evidence establishes that his only timber falling work has been done for Petitioner. He has placed some other bids, but none have been accepted.

Therefore, under the nature of the work test, and probably under the right to control test, I must conclude that Bray was a subject worker and not an independent contractor.

Petitioner argues that, if an employment relationship existed as has been concluded in this case, the insurance premiums should be based upon a lower hourly rate of approximately \$25 per hour instead of the amount Bray was paid per hour. Petitioner's argument is logical but the testimony about what Bray would have been paid as an employee is speculative. It is my understanding that insurers will often attribute contract proceeds as 50 percent wages and 50 percent costs of performing a contract, although I have not been given a citation to a specific rule allowing such a designation. I conclude that the portion of premium attributed to wages for Bray in the premium audit billing should be attributed to costs and, therefore, should not be considered wages for the premium audit billing. I propose that it should be determined to be 50 percent of the amounts paid to Bray.

PROPOSED ORDER

I propose that the department issue the following final order:

That the Final Premium Audit Bill be ~~AFFIRMED~~. MODIFIED. The Final Premium Audit Bill shall be decreased to reflect the appropriate split between costs and wages by use of the 50/50 rule.

DATED this 16th day of August, 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