



request for a hearing, otherwise the director will dismiss the employer's request for a hearing. See OAR 836-043-0170(2)-(3) & (9).

On 9/22/06, the director timely received from the employer the completed petition.

On 9/25/06, the director referred the request to the Office of Administrative Hearings (OAH).

On 10/5/06, OAH scheduled a hearing to be conducted on 1/25/07.

On 1/25/07, OAH conducted a hearing. The hearing was conducted by Rick Barber, an administrative law judge of OAH. The employer appeared and was represented at the hearing by Sean Driscoll, an attorney. The employer called Heath Harvey and Anthony Bray (Bray) as its witnesses. The employer offered Exhibits R1 to R5 as its documentary evidence all of which were admitted into the record. The insurer appeared and was represented at the hearing by Shannon N. Rickard, an Assistant Attorney General assigned to represent the insurer. The insurer called Rob Miller as its witness. The insurer offered Exhibits A1 to A8 as its documentary evidence all of which were admitted into the record.

On 2/6/07, OAH received from the employer a request for an extension of time to produce certain documents.

On 2/7/07, OAH granted the employer's request and extended the time to produce documents to 2/19/07.

On 3/26/07, OAH received from the insurer closing arguments.

On 3/28/07, OAH received from the employer a reply to the insurer's closing arguments.

On 5/22/07, OAH issued a proposed order. The proposed order recommended that the director affirm the billing. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed order within 30 days after the proposed order was served on the employer and insurer.

On 6/20/07, the director received written exceptions to the proposed order from the employer but not from the insurer.

On 7/2/07, the director requested OAH to review the exceptions and issue a revised proposed order. See OAR 137-003-0650(3).

On 8/16/07, OAH issued a revised 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 Bray for cutting timber for the employer during the audit period. The employer argued that Bray was not a "worker" as defined in ORS 656.005(30) because Bray was not subject to the control of the employer. The order found that Bray was a "worker" because he provided labor to the employer and the employer paid him for his labor, and was 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" tests, that Bray was subject to the direction and control of the employer because the employer actually controlled some, but not all, aspects of how the person performed his labor when cutting timber, and his labor for the employer was an essential and regular part of the employer's business.<sup>2</sup> The order concluded that the billing was correct by including Bray's compensation, but incorrect by including 80 percent the amount of compensation, and recommended that the director modify the billing by applying a purported "50/50 rule" and including only 50 percent of Bray's compensation. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed

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<sup>2</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).

order within 30 days after the proposed order was served on the employer and insurer.

On 9/13/07, the director received written exceptions to the revised proposed order from the insurer. The insurer asserted that the “50/50 rule” “has no legal basis and is not supported by any evidence in the record.” The director agrees.

The director did not receive written exceptions to the revised proposed order from the employer.

On 12/17/07, the director requested OAH to conduct further hearing, pursuant to OAR 137-003-0655(2), to determine certain factual and legal issues.

On 12/31/07, the director received from the insurer a letter dated 12/28/07 objecting to the director’s request for further hearing by explaining why the insurer believed the existing record was sufficient and any further hearing was unwarranted.

On 1/8/08, the director received from the employer a letter dated 1/7/08 approving of the director’s request for further hearing, and voluntarily responding to each of the issues raised by the director on 12/17/07.

On 2/7/08, the director withdrew the request to conduct further hearing.

Therefore, the director now makes the following final decision in this proceeding.<sup>3</sup>

### **Findings of Fact, Conclusions of Law and Opinion**

The director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and reasoning of revised proposed order as the findings of fact, conclusions of law, and reasoning of this final order, except as follows:

The finding of fact on page two of the revised proposed order that “Heath Harvey is the primary owner of the family-owned corporation at present” is changed to “Heath Harvey is an owner of the family-owned corporation at present.” See hearing recording, part 1, at 11:15, and Exhibit A1 page 6 of 8.

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<sup>3</sup> The director’s decision in this case is based on the record that existed as of 9/13/07 when the director received the insurer’s exceptions.

The portion of the opinion on page nine discussing the “50/50 rule” is deleted for the reasons explained in the insurer’s exceptions dated 9/12/07.

**Order**

The billing is affirmed.

**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.

Dated March 24, 2008

/s/ Scott J. Kipper  
Scott J. Kipper  
Administrator  
Insurance Division  
Department of Consumer and Business Services

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