



the detail and repair personnel as employees, and did not use independent contractors or subcontractors. (Ex. A1). SAIF insured True Colors, effective October 28, 2005. (Ex. A3).

2. In 2006, True Colors changed its name to ALG Auto Services, Inc. (ALG). At some point between October 2005 and November 2006, the ownership of the company was split evenly between Ed Campbell and Charles Dalby. The company continued sending repair persons to the automotive lots, but also began to develop a multi-level marketing aspect to the company by allowing the repair persons to sponsor other repair persons under them, earning a part of their billings on an ongoing basis. (Test. of Dalby).

3. In early 2006, ALG began treating the repair persons as subcontractors instead of employees. ALG's workers, called "techs," would go to a car lot, take a look at the vehicles and note any repair work needed, then approach the used car manager to offer the tech's services repairing the vehicle. Techs would specialize, meaning that some repaired paint chips and scratches, some worked on bumpers, and some did interior work. If a tech had too much work on the car lot, he would call ALG to send someone else. The work performed by the techs was invoiced on ALG forms, and the car lot paid ALG for the services. (Test. of Torres).

4. David Campbell (Campbell) was a tech for ALG. He is also the son of Ed Campbell, one of the owners of the company before his death. Campbell did paint touchup on new and used vehicles, operating as a mobile service. He paid his own expenses and provided his own equipment (previously given to him by his father). He also performed "side work," meaning he did the same work but did not bill it through ALG. When ALG began its multi-level marketing aspect, Campbell sponsored another tech into the business and received a monthly commission from that tech's earnings in the business. Campbell's commission rate on his own work for ALG was 55 percent. Campbell set his own price for his work, but ALG would occasionally increase the amount when it billed the car lot. (Test. of Campbell).

5. Dalby and Ed Campbell began the multi-level business because they wanted to see the techs develop their own businesses and succeed. ALG is no longer in operation in the aftermath of Ed Campbell's death.

6. When a tech wanted to come to work with ALG, he would fill out an application that had been developed in June 2006. By policy, techs coming into the business were expected to avoid encroaching on the already existing relationships between other techs and car lots. ALG prepared a Policies and Procedures Manual that made several requirements of techs and distributors:

- Contractors were required to use ALG advertising and promotional materials, and could not use their own without approval of ALG (p 2);
- All websites were required to be approved by ALG (p 2-3);
- Contractors could not respond to media questions about ALG, but were required to refer all such questions to ALG's Public Relations Department;

- Contractors were required to abide by any unilateral changes to the contractor agreement, but had no right to change the agreement themselves (p 3-4);
- Distributors were required to attend all trainings, sell all products at retail, always dress in business attire, and answer all questions for their “downline” contractors (p 5);
- ALG retained the right to “intercede” if it considered a contractor’s actions unethical, and required distributors in a dispute with one another to resolve the disputes through ALG’s Director Advisory Board (p 7);
- Contractors were not allowed to purchase more “product” than could be used in a month (p 9);
- Contractors were not allowed to perform side jobs and had to do all of their work through ALG (p 10);
- ALG retained the right to use the contractor’s name and testimonials in its business advertisement without permission;
- Contractors could not use the Internet for inappropriate purposes (p 15).

(Ex. A16).

7. In practice, ALG did not observe all of the requirements prescribed by the Policies and Procedures Manual. Techs like Campbell would do some work for themselves, not billed through ALG. ALG’s attorney advised that the non-competition clause might not have power in Oregon, so the company did not attempt to enforce that provision. (Test. of Dalby).

8. Between January and April 2007, SAIF premium auditor Dave Murrieta audited ALG’s business to determine if changes were needed in their workers’ compensation coverage. Murrieta contacted ALG and received information from Sherry Givens, one of the managers of the company. Givens filled out a questionnaire at SAIF’s request. Based upon that response and Murrieta’s review of the information, SAIF determined that ALG’s contractors were subject and that premium was owed to insure them. On May 16, 2007, SAIF sent the Final Premium Audit Billing (for the period of October 28, 2005 through October 31, 2006) to ALG. (Ex. A9).

### CONCLUSIONS OF LAW

The Final Premium Audit Billing is correct.

### OPINION

Employer contests the Final Premium Audit Billing in this case because it disagrees with SAIF’s conclusion that its techs on the various car lots were subject employees. SAIF contends that the techs remain within the direction and control of ALG. ALG has the burden of proof to establish that the insurer’s premium audit is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). It must establish what it seeks to prove—that the techs are independent

contractors—by a preponderance of the evidence. In other words, ALG must show that it is more likely than not that the techs are contractors. *Cook v. Employment Div.*, 47 Or App 437 (1982).

The analysis of the nature of the relationship between ALG and its techs must start with the definition of “worker” found in ORS 656.005(30). The statute defines a worker 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.<sup>2</sup>

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. 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,

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<sup>2</sup> By definition, an “employer” is one who has “the right to direct and control the services of any person.” ORS 656.005(13)(a).

the employment relationship is established. Conversely, if there is evidence suggesting an independent contractor relationship, it is only mildly persuasive.

If the right to control test establishes the employment relationship, the analysis is complete. 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).<sup>3</sup> 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, I examine the evidence of the relationship between ALG and its techs to determine if there is a right of control or the actual exercise of control by ALG. The courts have distinguished between two different types of control. “Control over the method of performance” indicates that there is an employment relationship, while “control over the result to be achieved” may be consistent with an independent contractor relationship. *Trabosh v. Washington County*, 140 Or App 159, 165 (1996). In this case, the issue is how much control ALG asserts, or has the right to assert, over its techs.

Although ALG contends that its techs are not subject to its direction and control, the evidence shows that ALG continued to exercise control over the method of performance in the work the techs did. Exhibit A16 (ALG’s Policies and Procedures Manual) shows the amount of direction and control that ALG retained over the techs:

- Contractors were required to use ALG advertising and promotional materials, and could not use their own without approval of ALG (p 2);
- All tech websites had to be approved by ALG (p 2-3);
- Contractors could not respond to media questions about ALG, but were required to refer all such questions to ALG’s Public Relations Department;
- Contractors were required to abide by any unilateral changes to the contractor agreement, but had no right to change the agreement themselves (p 3-4);
- Distributors were required to attend all trainings, sell all products at retail, always dress in business attire, and answer all questions for their “downline” contractors (p 5);
- ALG retained the right to “intercede” if it considered a contractor’s actions unethical, and required distributors in a dispute with one another to resolve the disputes through ALG’s Director Advisory Board (p 7);
- Contractors were not allowed to purchase more “product” than could be used in a month (p 9);

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<sup>3</sup> 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.

- Contractors were not allowed to perform side jobs and had to do all of their work through ALG (p 10);
- ALG retained the right to use the contractor's name and testimonials in its business advertisement without permission;
- Contractors could not use the Internet for inappropriate purposes (p 15).

These factors are strong evidence of ALG's direction and control of its contractors. Certain of these requirements quite clearly demonstrate ALG's control over the techs. Techs must wear specific clothing (business attire) and were not allowed to perform side jobs. ALG controlled their advertising and their use of the computer. Equally as important, the contract allows ALG to make unilateral changes but allows the tech to make no changes to the terms of the contract. This uneven bargaining position defeats any notion of an actual contract between two businesses at arms length.

ALG argues that many of the provisions included in the Policies and Procedures Manual were either not implemented or were ignored. For instance, the document contains a non-competition clause that ALG's attorney apparently did not consider binding. (Ex. A16 at 10; Test. of Dalby). In addition, despite the language of the manual, techs such as Campbell apparently ran a side business with ALG's knowledge. (Test. of Campbell). However, the standard is not the actual exercise of control but the *right* of control. Even if ALG did not follow through on all of these policies and procedures, their existence is very strong evidence of ALG's intent to direct and control the techs.

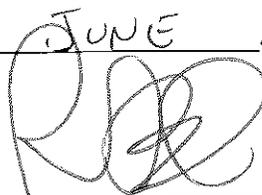
Having found strong evidence of both actual and intended control being exercised by ALG, it is not necessary to analyze the case under the "nature of the work" test. *Rubalcaba, supra*. However, if I were to do so, I would conclude that the work of the techs was an integral part of ALG's business and could not be reasonably separated from it. In other words, I would conclude that the nature of the work test also supports the conclusion that the techs were subject workers, and that the SAIF Final Premium Audit Billing should be affirmed.

### PROPOSED ORDER

I propose that the department issue the following final order:

That the May 16, 2007 Final Premium Audit Billing be AFFIRMED.

DATED this 4<sup>th</sup> day of JUNE.



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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

CERTIFICATE OF SERVICE

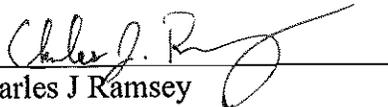
On the 4th day of June 2008, I mailed the foregoing Proposed Order in Reference No. 0708018.

BY FIRST CLASS MAIL:

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