

**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 07-10-011
)
)
HARVEY'S SELECTIVE LOGGING)
INC., Petitioner) **PROPOSED ORDER**

HISTORY OF THE CASE

On July 11, 2007, SAIF Corporation (SAIF) issued a final premium audit billing to Harvey's Selective Logging, Inc (Petitioner). Petitioner received the billing on July 13, 2007, and timely requested a hearing on the final premium audit billing, then submitted a Petition to the Department of Consumer and Business Services (Department) on October 5, 2007.¹ The Department referred the matter to the Office of Administrative Hearings on October 11, 2007. Hearing was initially scheduled for January 24, 2008, but was reset because the parties were waiting for a Final Order in *In re: Harvey's Selective Logging, Inc.*, INS Case No. 06-09-007 (2008), an earlier matter involving the same parties and the same issues in a different audit period. Hearing was eventually scheduled for June 2, 2008.

Hearing was held as scheduled, with Administrative Law Judge Rick Barber presiding. Petitioner appeared through June Harvey, a principal and officer of the corporation, who testified. Tom Harvey and Sarah Temple also testified for Petitioner. SAIF was represented by Assistant Attorney General Ethan Hasenstein. Karla Pattis and Teresa Smith testified for SAIF. The record closed on June 2, 2008.

ISSUES

1. Whether Anthony Bray was a subject worker during the audit period of April 1, 2006 through March 31, 2007.
2. If Bray is subject, whether the premium amount should be reduced to reflect a lower wage for timber falling.

EVIDENTIARY RULINGS

Exhibits A1 through A11 and E1 through E17 were offered into evidence at hearing. Petitioner objected to Exhibits A1, A3, and A11, but the documents were admitted over the objections.

¹ The Insurance Division received the Petition on October 8, 2007

FINDINGS OF FACT

1. Petitioner is a family-owned corporation engaged in logging, under written contract with several mills in the area between Eugene and the south central Oregon coast. Thomas Harvey, June Harvey, and Heath Harvey are principals of the corporation. 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 and also truck the logs out. Petitioner's employees provide all other logging functions. The corporation emphasizes hiring family and close friends whenever possible. (Ex. A1 at 6).

2. Anthony (Tony) Bray is married to Heath Harvey's sister. Bray and his wife live in Creswell, about 15 miles south of Eugene. June Harvey, Bray's mother-in-law and the treasurer of the corporation, maintains one of Petitioner's offices in Creswell, on Bray's property, where she also lives. (Ex. A11 at 20). 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. (*Id.* at 57). Bray's earnings for falling timber for Petitioner were invoiced by TJ's Big Horse Farm. (Ex. E11).

3. Until approximately 2003, Bray was an employee of Petitioner's corporation, working as a logger and a siderod, a supervisor of a logging crew. (Ex. A11 at 69). Up to that time, Petitioner employed 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. (*Id.* at 13).

4. Both Bray and Petitioner intended that Bray become an independent contractor after his employment with Petitioner ended in 2003. 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. Some of the checks were made out to Anthony Bray personally, rather than to his company. Heath Harvey is the one who determines the method of payment for the contractors, that is, whether they are working by the hour or by the load. (*Id.* at 62).

5. Petitioner has four or five timber fallers who contract to do the falling under Petitioner's contracts with the mills. Heath Harvey would contact Bray and ask him to come out to a unit with him and to give him a bid. (*Id.* at 19, 60). The bids are oral, and Bray would come up with his bid without writing anything down while he was in the woods. Harvey tells Bray or the other cutters how he wants the timber to fall and which trees to fall. Harvey gets his information from the forester and from the contract between Petitioner and the mill. (*Id.* at 78).

6. At times, Harvey has changed the method of compensation 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. The timber fallers give up their own record keeping and agree to

take even shares in those situations. (*Id.* at 37). 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. (*Id.* at 10).

7. Bray obtained workers' compensation insurance for himself in August 2006, and SAIF no longer considered him subject as of that time, because SAIF is only concerned about contractors without workers' compensation insurance. (Test. of Paddis).

8. Timber fallers who are subject workers are placed in classification code 2702. Under that code, any earnings by the faller are reduced by 20 percent to cover saw rentals. (Test. of Paddis).

CONCLUSIONS OF LAW

1. Anthony Bray is a subject worker.
2. The amount of premium may not be reduced.

OPINION

The issues in this case are very similar to the issues in the previous case, except that a different policy period is involved. Petitioner contends that Bray is not a subject worker, that he is an independent contractor who cuts timber for Petitioner. If Bray is subject, Petitioner contends the premium should still be reduced. SAIF argues that Bray, who is related by marriage to the Harvey family, remained under the direction and control of Petitioner during the additional audit period and was a subject worker under case law and statute.

In the Proposed Order in the previous case, as well as in the Division's March 24, 2008 Final Order, Bray was determined to be subject to Petitioner's direction and control and the Final Premium Audit Billing was affirmed. *In re. Harvey's Selective Logging, Inc.*, INS Case No. 06-09-007 (2008).

Petitioner urges me to make a decision in this case that is different from the one affirmed by the Insurance Division, contending I am not bound by the previous decision. The operative facts are not exactly the same in this second case, since the year is different and other factors may be different as well. On the other hand, the analysis and most of the circumstances in the relationship between Bray and Petitioner are the same in the second year as they were in the first. Therefore, although I do not give the decision (the Final Order) in the previous case any preclusive value in this case, I do rely heavily upon the analysis in that case.

The analysis in this case, as in the last case, starts 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.² 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). If any of the factors indicate that there is a right of control, exercised or not, there is probably an employment relationship.³

If the right to control test conclusively 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 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. In this case, the initial inquiry is whether Bray was subject to the direction and control of Petitioner in the way he performed his timber falling duties.

² By definition, an "employer" is one who has "the right to direct and control the services of any person." ORS 656.005(13)(a).

³ 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)

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.

Direct evidence of the right or exercise of control. Before 2003, when Bray was an employee of Petitioner, the latter exercised the control of an employer over him. 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 consider him independent of his former employer. However, it is the right to control test that will be determinative.

As in the previous case, the evidence shows that Bray, and presumably other fallers, were essentially assigned to units for timber falling, based upon Harvey’s conclusions as to who was too busy or not busy enough. Rather than using an open bid system, even among the few contractors he uses, Harvey would take Bray (or another contractor) out to the site, obtain an oral bid from the contractor, and then accept the oral bid. This bid process, while retaining some sense of independence (Bray is free to not bid on a project if he desires), is evidence of Petitioner’s control over the timber fallers.⁴

Furthermore, the additional evidence in the second hearing established that Harvey directed the trees to be cut and even the direction that the trees were to be felled. Petitioner argues, and I do not doubt, that much of this is required by the mill and the foresters for the mill or the forest itself. However, the practical result of that fact is that the timber fallers, including Bray, were subject to direction and control in the performance of their timber falling duties.

Method of payment. As more fully discussed in the earlier decision, the fact that Bray was paid every two weeks, and that some of his checks were paid to Anthony Bray personally, both suggest an employment relationship.

Petitioner contends that the payment every two weeks coincided with the payments from mills on a two-week cycle for timber it provided to the mills three and four weeks previously. However, the contracts between Petitioner and the mills differ in the way payment under the contract was to be made. 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 one difference between this audit period and the last one is that there were some written contracts. However, the only written contracts in the record are for periods in 2007, after Bray purchased insurance. Most of the contracts before that time, if not all of them, were oral. The lack of a written contract makes it very difficult to pin down the relative rights and responsibilities under the contract.

⁴ The evidence establishes that all of the other timber fallers have workers’ compensation coverage in place. Therefore, although the evidence suggests that Harvey exercised the same control over them in the bid process, SAIF will not seek premiums for workers covered by another policy. (Test. of Patis)

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.

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. Bray testified that the method of payment "really is up to Heath [Harvey]" (Ex. A11 at 62). It was still "up to Heath" when he would renegotiate piece work to hourly work. Again, these were something other than arms' length transactions, and they suggest 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 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 that the evidence generally demonstrates Petitioner's right to control Bray, with only some evidence suggesting an independent contractor relationship. There is probably sufficient evidence to find an employment relationship under the right to control test; however, I will also consider 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. There can be no doubt that the timber faller is an essential and regular part of Petitioner's business; in fact, Petitioner is out of business if someone is not falling timber. Thus, the work of the timber fallers is an essential and regular part of Petitioner's business.

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.⁵ He has placed some other bids, but none have been accepted.

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

Reduction in premium is not appropriate. Since Bray has been determined to be a subject worker, Petitioner requests a reduction in the premiums because Bray would have earned less money as an employee than he did as a contractor. However, there are two reasons why this reduction cannot occur.

First, a reduction is already built into the classification code (code 2702) that covers timber fallers. As a result of that code, Petitioner was already given a 20 percent discount for saw rental. (Test. of Pattis).

The second reason for not allowing further reduction is that there is no basis in the law for doing so. In the previous hearing, there was discussion of the remedy that other

⁵ Bray did not testify at the hearing in the second case. His testimony from the first hearing established that he had made other bids but had not worked on any other non-horse-related logging operations from Petitioner's.

agencies have created for determining the value of self-employment income.⁶ While I understand the logic of the agencies' use of that method, it does not apply to these proceedings. Petitioner has not presented a valid basis to allow for a reduction of the premium in this case. The amount of the premium remains as listed in the final premium audit billing, and that billing is affirmed.

PROPOSED ORDER

I propose that the Department issue the following final order:

That the Final Premium Audit Bill be AFFIRMED.

DATED this 12th day of August, 2008.



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

⁶ For instance, the Department of Human Services treats self-employment earnings as 50 percent income and 50 percent costs in the Food Stamp Program. See, OAR 461-145-0930(3)

CERTIFICATE OF SERVICE

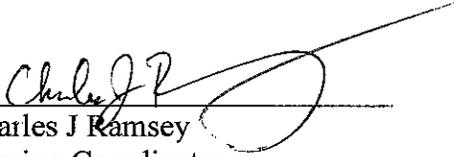
On the 12th day of August 2008, I mailed the foregoing Proposed Order in Reference No. **0710011**.

BY FIRST CLASS MAIL:

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