

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Final Premium Audit of)	Case No.	INS 08-02-001
)		INS 08-06-005
)		
RJ Enterprises LLC of Oregon,)	SECOND REVISED	
Petitioner)	PROPOSED ORDER	

HISTORY OF THE CASE

On November 17, 2007, insurer SAIF Corporation (SAIF) issued a final premium audit billing for the audit period January 13, 2006 through January 31, 2007 (first audit period) to RJ Enterprises, LLC of Oregon (RJ). On May 12, 2008, SAIF issued another final premium audit billing for the audit period February 1, 2007 through January 31, 2008 (second audit period) to RJ. RJ timely requested a hearing from the Department of Consumer and Business Services, Insurance Division (Division) challenging the billing for both the audit periods.

The Division referred the matter to the Office of Administrative Hearings (OAH) on February 14, 2008 for the first audit period and June 12, 2008 for the second audit period. On June 12, 008, OAH issued an order granting request for consolidation of the appeals.

On June 24, and June 30, 2008, Administrative Law Judge (ALJ) Rohini Lata conducted a hearing in this matter. RJ appeared through its attorney, Matthew Wand. Bruce Russell and Joshua Kollar testified for RJ. SAIF was represented by Ethan Hasenstein, Assistant Attorney General. Audit Program Analyst Teresa Smith and Auditors Ed Dolfay and Ed Grove testified for SAIF. The ALJ closed the record at the conclusion of the hearing on June 30, 2008.

OAH issued a Proposed Order issued on August 8, 2008. SAIF filed exceptions to the Proposed Order on August 12, 2008. Petitioner filed exceptions to the Proposed Order on September 4, 2008. SAIF filed a response to Petitioner's exceptions on September 25, 2008.

On September 24, 2008, the Division requested that OAH review the exceptions to the Proposed Order and issue a Revised Proposed Order addressing the exceptions.

OAH mailed a revised Proposed Order on October 17, 2008 in which the ALJ took official notice of the Oregon Employment Department's 2006 Wage Guide for driver/sales workers statewide and allowed the parties to file any objections within ten days of the date of the Revised Proposed Order. Petitioner filed an

objection to Exhibit ALJ 1 and a Motion to Strike on October 24, 2008. Petitioner's objection is well-taken. The Motion to Strike is granted.

All language added to this Second Revised Proposed Order is in bold type to make the changes clear. Likewise, any language that is excised from the Second Revised Proposed Order is included, but with a strikethrough. This Second Revised Order incorporates all changes previously included in the first Revised Order.

ISSUES

Whether drivers utilized by RJ are subject workers for whom RJ must pay workers' compensation insurance premiums.

Whether insurer correctly replaced RJ's policy classification code 8291 with classification code 8031.

Whether insurer correctly assessed insurance premiums for RJ's manager under classification code 7380.

EVIDENTIARY RULINGS

Exhibits A1 through A30 and P1 through P11 were admitted into the record without objection. ~~I am taking official notice of the Oregon Employment Department's 2006 Wage Guide for driver/sales workers statewide; a copy is admitted as Exhibit ALJ 1 and is attached. Persons wishing to object to Exhibit ALJ 1 must do so in writing within ten days of the date of this Order. If no such objections are received within that time or if any objections are overruled, Exhibit ALJ 1 will remain admitted.~~

FINDINGS OF FACT

1. RJ Enterprises LLC of Oregon (RJ) applied for workers' compensation coverage with SAIF in 2006. SAIF concluded that RJ's operations included office clerical and storage warehouse - cold. (Ex. A1.) SAIF approved the application and RJ's workers' compensation coverage with SAIF became effective January 13, 2006. (Ex. A2.)

2. RJ is a frozen meat distribution company. RJ purchases frozen, pre-cut, pre-packed meat and seafood (products) from a wholesaler. The wholesaler ships the products to RJ's refrigerated warehouse for sale under RJ's assumed business name "Home Meat Market" (HMM). (Ex. A5 and A7.)

3. RJ maintains a website, HomeMeatmarket.com, listing the products and retail prices for its customers. The website instructs customers that they may order through the website or by phone and products will be delivered to the customer. (Ex. A7 and A8.) Mr. Kollar, RJ's warehouse manager, made deliveries for orders placed through the

website. (Test. of Russell and Kollar.) However, during the audit period, 95 percent of RJ's revenue was derived from the drivers' efforts because RJ's products were predominantly sold by drivers.

4. RJ solicits drivers through various methods, including business opportunity advertisements. (Test of Russell.) An example of the advertisement is as follows:

Here's how our package works:

We provide all the product training.

We lease our fully refrigerated trucks to our contractors at a low daily rate. We consign all products daily without prepayment necessary.

We provide receipts, brochures and product information.

Everything you would have to invest thousands of dollars to get your business started, we provide for you.

(Ex. A4.)

5. Individuals who responded to the business opportunity advertisements were met by Mr. Kollar. Mr. Kollar explained RJ's business model and presented the drivers with RJ's Independent Contractor Agreement (ICA) solely scribed by RJ. (Test. of Kollar.)

6. The parties intended the drivers to operate as independent contractors (contractors). (Ex. A6, paragraphs 1, 4, 5, 6, and test. of Russell.) The ICA states that drivers are applying for contractor status and will act as free agents, self-employed for profit, as purveyors of products consigned on credit by RJ Enterprises. (*Id.* at paragraph 1.) The ICA states that the purpose of the agreement is to enable drivers to purchase products on a consignment basis in accordance with the current price schedule with price determined at sole discretion of Company. (*Id.* at paragraph 2.) The ICA specifically states that the limit of the product credit extended to a contractor will be determined by RJ. (*Id.* at paragraph 7.) RJ determined how much product to consign to a driver based on the driver's credit and the number of boxes of products consigned to the driver. (Test. of Russell.) RJ allowed the drivers to use their own sales pitch regarding the taste, tenderness and wholesomeness of the product, but did not allow them to make any guarantees about the grade. The ICA also prohibited drivers from making any misrepresentations that were fraudulent or that did not comply with all federal, state and local laws, rules, ordinances and regulations pertaining to the selling of the products. (*Id.* at paragraphs 9, 10, 11, 12, and test. of Russell.) Pursuant to the ICA, RJ did not allow the drivers to handle customer complaints but handled them itself. (Ex. A6, page 8.)

7. During the audit period, RJ had at least nine vehicles that were equipped with a freezer and/or generator. The vehicles had HMM logo on them. (Test. of Russell.) RJ

allowed the drivers the option of leasing one of these vehicles with a freezer and/or generator for a 12-hour shift. RJ required the drivers to pay for their own fuel. RJ paid the insurance and maintained and repaired the trucks and equipment. RJ set the lease fee at \$25 per 12 hour shift and advised the drivers that the fee could be increased or decreased at RJ's discretion without any prior notice. (Ex. A6, paragraph 14.) RJ sometimes reduced the lease fee. (Test. of Russell). RJ also waived the lease fees on those occasions when an existing driver took a new driver on a route. (Ex. A18.) Pursuant to the ICA, RJ did not allow the drivers to have any riders in RJ's leased vehicle. (Ex. A6, paragraph 17.) However, to satisfy its insurance provider, RJ allowed riders on the vehicles as long as the riders signed a contract allowing RJ to check their motor vehicles report and determine if they had a valid driver license. RJ reserved the right to terminate the ICA upon the drivers' failure to operate the vehicle in a safe manner and conform with all applicable federal and state laws and city ordinances. (Ex. A6 paragraph 18.) RJ also retained the right to counsel the drivers for two or more moving violations and under "Acceptable Driver Criteria", the ICA specifically states that managers would counsel for violations in any vehicles, not just in RJ's vehicle, and additionally, the driver would lose the option of leasing a vehicle from RJ. (Ex. A6, page 5.)

8. RJ had detailed requirements for check and credit card acceptance. Under "check procedures," among other things, the ICA required all checks to be made out to "Home Meat Market" and/or contractor name and specified that if made out to contractor name it had to be endorsed to Home Meat Market. It further required contractors' initials printed legibly in upper right hand corner of check and gave RJ's manager discretion to accept/not accept the check if not filled out correctly. RJ did not allow counter/starter checks, did not allow checks over \$332, and did not allow personal checks from contractors. Finally, RJ required all checks to be entered on the customer check form nightly before check-in and penalized drivers the face value of the check plus \$50 if the check procedures were not followed. (Ex. A6, page 6.)

9. Similarly, under "customer credit cards", among other requirements, RJ required all credit cards to have contractor's initials printed legibly and to be approved from customers' locations. Again, RJ penalized contractors three percent for not having a copy of a sales receipt and required them to enter all credit cards on the customer credit card form nightly before check-in. (*Id.*)

10. In a section under "RJ Enterprises Money", the ICA indicated that "all moneys for any and all product and services are to be presented to RJ enterprises, at time of check-in. No shortages will be tolerated. Any shortage will constitute theft and will be treated as such. Charges for theft will be pursued and prosecuted to the fullest extent of the law." (Ex. A6, page 7.)

11. The ICA contained a section on "sexual harassment" and advised the drivers that RJ would not tolerate any sexual harassment toward RJ's employees while the drivers were in or on RJ's premises. The section further stated that any violations would result in immediate termination of the ICA. (Ex. A6.)

12. A section on "Escrow Account" required drivers to accumulate an escrow account with a \$250 minimum balance to insure against company losses, due to theft, etc. (Ex. A6.) RJ did not enforce this section of the ICA. (Test. of Russell.)

13. The ICA contained an integration clause providing that "[t]his agreement constitutes the entire agreement between the parties and there are no agreements, understandings, restrictions, warranties or representations between the parties except as set forth herein" (Ex. A6.)

14. RJ did not provide leads, routes or territories and did not require any drivers to appear on any particular day or time. The drivers set their own hours of work and chose their own sales areas. (Test. of Russell.) On a typical day, RJ opened at 8:30 a.m. Drivers started showing up to RJ's location and RJ gave products to the drivers to sell and leased trucks based upon availability, not on the time of the day. Some drivers had their own trucks. Those who did not have their own truck leased from RJ. RJ leased the trucks on a first come first served basis. The drivers notified Mr. Kollar of the number of boxes of product they would take for the day. Mr. Kollar, in his sole discretion, determined whether to fill the order as requested by the driver or to withhold some product due to the driver not having enough credit. If HMM did not have the requested product, HMM offered other product. The drivers were not allowed in RJ's walk-in freezer. Therefore, Mr. Kollar assembled the order and put it on a cart. The drivers did not pay any money up front. The drivers took the cart to their own or leased vehicle and loaded the products on to their vehicle. The drivers then left to make their sales to their customers. (Test. of Russell and Kollar.)

15. Mr. Kollar kept a written record of the number of products taken by the drivers on a consolidated daily sales record. The drivers did not have any control over the consolidated daily sales record. (Test. of Kollar.) Because of the 12-hour lease agreement, RJ required the drivers to pay RJ the full amount payable for the products plus any applicable taxes and charges "no later than close of business the same day the products were received." (Ex. A6, paragraph 8.) However if a driver was out of town, pursuant to prior arrangements made between RJ and the driver, the driver was allowed to keep the leased vehicle beyond the 12-hour shift and settle the account outside of normal business hours. (Test. of Russell.)

16. When the drivers returned to the warehouse at the end of their shift they checked in with Mr. Kollar or Mr. Russell. RJ either restocked the unsold products or the driver purchased and retained the product. If RJ restocked the unsold product, RJ subtracted the unsold products from the products consigned to a driver on the consolidated daily sales record. RJ charged the drivers depending on the number of products the driver took on consignment. RJ settled the account with each driver at the time the driver paid for the consigned products by allowing the driver to keep the difference between the price paid by their customers minus the cost of the product price set by RJ, less the \$25 truck lease fee and other fees, also set by RJ. In instances where the drivers received more in checks and credit card transactions than they owed RJ and

used the checks or credit cards to settle their accounts with RJ, RJ paid them the difference in cash, as opposed to with a check. In those cases where credit card transactions and checks were not sufficient to settle a driver's account, RJ required the drivers to make up the difference in cash. RJ also extended credit to some drivers and kept a record of the credit on a ledger. (Test. of Russell and Kollar.)

17. RJ provided brochures to the drivers when the drivers purchased products. (Ex. A4.) The brochures listed HomeMeatmarket.com as the business with its telephone number and address and had a blank line under which it stated "Authorized Dealer." The brochures had an additional line designated for the area distributor's cell phone number. Additionally, the brochures provided product descriptions and "distributor's special prices." (Ex. A9.) RJ also provided receipts. The receipts also listed HomeMeatmarket.com as the business with its telephone number and address and had a designated line for a distributor's name. (Ex. A23.)

18. One of the drivers, Jason Setera, obtained a business license with his principal place of business at RJ's business address. (Ex. A 15.) Mr. Setera had his own brochures, with the same layout as HMM's brochure, same products, and same product guarantees under the business name of "Your Meat Co." Mr. Setera's price for the products were \$100 more than HMM's "distributor's special prices." (Ex. P10.)

19. SAIF hired contract auditor Ed Dolfay of NW Audit and first audited RJ in 2007. Mr. Dolfay shared his findings with Ed Grove, SAIF auditor, who took over the audit. (Ex. A3; test of Dolfay.) After his audit, Mr. Grove concluded that RJ's drivers were subject workers rather than independent contractors. Mr. Grove also found that Mr. Kollar made deliveries to retail customers and classified him under class code 7380 because Mr. Kollar did not provide any verifiable time records. Finally, Mr. Grove also reassigned class code 8291 to 8031 instead of 8021. In reaching his conclusions, Mr. Grove relied on a prior final order issued by DCBS Insurance Division. The prior order, *In the Matter of the Final Premium Audit of Cattleman's Steak & Seafood Co.*, INS 95-06-009 (1997), was concerning a similar meat marketing business. (Test. of Grove.) [Petitioner made an argument that Mr. Grove's testimony be stricken from the record because of his reliance on *Cattleman's* audit files and summary. The ALJ did not find as facts those portions of Mr. Grove's testimony that relied on *Cattleman's* audit files and summary. The ALJ considered the evidence of this case in making her decision. Thus, the ALJ does not believe any additions or deletions to Finding of Fact 19 are necessary].

20. Mr. Grove assigned the drivers an hourly wage of \$10 and calculated their wages based on a 40 hour work week at 50 weeks of work per year for a total of \$20,000 per driver. Mr. Grove did not conduct any surveys to determine if \$10 per hour was a reasonable rate for delivery drivers. Mr. Grove concluded that RJ had nine drivers at relevant times and multiplied the result by nine for a total of \$180,000 in subject payroll for the January 13, 2006 through January 31, 2007 (first audit period). The audit resulted in an increase of \$10,600.35 to RJ's premium for the first audit period. (Test. of Grove.) RJ did not keep any records of the exact amount of profits made by each driver and did not provide any year end profit statements nor any W-2s or 1099s to the drivers.

21. SAIF subsequently audited RJ for the period February 1, 2007 through January 31, 2008 (second audit period). Mr. Grove made the same conclusions as before. In assigning a dollar amount to the second audit period, SAIF auditors looked at daily consolidated sales record for June 2007, because it was within the audit period, and averaged the difference between the wholesale price that RJ charged the drivers and the retail price the customers paid the drivers which averaged out to \$13.37 per box. SAIF also added the number of boxes of products sold during that time which was 40,261. After allowing for driver truck rental and bookkeeping fees, the auditors increased RJ's subject payroll to \$448,493¹ for the second audit period. (Ex. A 27; Test. of Grove and Smith.) RJ did not re-adjust the premium on the first audit period after this new finding. [The ALJ has considered the exception filed by Petitioner and does not believe any additions or deletions to Finding of Fact 21 are necessary].

CONCLUSIONS OF LAW

SAIF correctly included payments to drivers utilized by RJ during the audit period in the insured's audited payroll.

SAIF correctly replaced RJ's policy classification code 8291 with classification code 8031.

SAIF correctly assessed insurance premiums for RJ's manager under classification code 7380.

OPINION

Petitioner contended that the ALJ omitted several Findings of Fact. The Petitioner has the burden of proving, by a preponderance of the evidence, that the billing is incorrect. Even though Petitioner's testimony was undisputed, it was at odds with the written ICA. Petitioner could have produced any number of drivers to corroborate its testimony but did not do so. Under the circumstances, the ALJ found the ICA more credible than the Petitioner's testimony and found facts in accordance with the ICA. The ALJ has considered the exceptions filed by Petitioner and does not believe any additional additions or deletions to the Findings of Fact are necessary other than those already made.

When an employer contests a premium audit billing, it has the burden of proving, by a preponderance of the evidence, that the billing is incorrect. *Salem Decoration v. NCCI*, 116 Or App 166, 170 (1992), *rev den* 315 Or 643 (1993) (in premium audit cases, burden of proof is on the employer). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v Tandy Corp.*, 303 Or 390 (1989). In order to prevail, RJ must establish that the drivers are not subject workers, that classification code 8031 does

¹ Pursuant to NCCI rule 2 – Premium basis and payroll allocation, not less than 90 percent can be allocated to payroll if the job involves labor only

not apply to RJ's work and that its manager did not engage in interchange of labor or that RJ provided verifiable time records for the manager

DRIVERS

Services

In making the determination whether drivers are subject "workers," the initial inquiry is whether they are "workers" within the meaning of the workers' compensation law. *S-W Floor v. Nat'l Council on Comp Ins.*, 318 Or 614, 622 (1994).

The parties disputed whether the drivers provided services for remuneration. Under ORS 656.017(1), all Oregon employers must provide workers' compensation coverage for their subject workers. ORS 656.005(13)(a) provides, in pertinent part, that an "employer" is "any person * * * who contracts to pay a remuneration for and secures the right to direct and control the services of any person." ORS 656.005(30) provides, in pertinent part, that a "worker" is "any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *."

ORS chapter 656 does not define "services." However, case law, borrowed from common-law principles of master-servant relationships, clearly show services generally include any acts performed for the benefit of another under some agreement whereby such act was to be performed. *See Journal Publishing Co. v State Unemployment Comp. Commn.*, 175 Or 627, 636, 155 P2d 570 (1945) quoting *Creameries of America, Inc v. Industrial Commission*, 98 Utah 571, 102 P2d 300 (1940). Applying that rationale to the work performed by the drivers, the evidence established that the drivers performed services for the benefit of RJ under an ICA whereby they agreed to act as purveyors of products consigned on credit by RJ and pay RJ the full amount for all products, service charges, and applicable sales tax. According to Mr. Russell, 95 percent of RJ's revenue was derived from the drivers' efforts. Therefore, RJ had a strong interest in the amount of products the drivers sold. The record is persuasive that the drivers performed service for RJ's benefit.

Remuneration

[The ALJ has considered the argument made by Petitioner and does not believe any further explanation is necessary].

RJ contended that the relationship between RJ and the drivers was that of a vendor-vendee. However, the facts of this case do not establish a vendor-vendee relationship. In the instant case, drivers did not take title to the products. Any unsold product was restocked for sale and consigned the next day to the same or another driver. The record established that if there was a customer complaint, RJ handled the complaint, by presumably replacing the product without charge to the driver. The substance of the transaction was not that of a vendor-vendee relation and title to the product did not pass in any realistic sense given the ease of returning the product the same day if it did not

sell. Thus, the drivers were in reality commissioned sales people and their remuneration was the difference between the wholesale price and the retail price to customers. See *Journal Publishing Co. v State Unemployment Comp. Commn*, 175 Or 627, 155 P2d 570 (1945); *Kirkpatrick v. Peet*, 247 Or 204, 428 P2d 405 (1967).

RJ argues that the relationship in *Journal Publishing Co. and Kirkpatrick* involved more direction and control than existed in this case. RJ argues that this factual distinction means that the money retained by the drivers was not remuneration. RJ is confusing the issue of whether services were performed and the issue of whether remuneration was paid. Both those two cases established that allowing a person to retain the difference between the wholesale price and the retail price is a form of remuneration. As explained earlier, the relationship in this case also involved drivers performing services. RJ relied on the drivers' efforts for 95 percent of its revenues.

RJ further argues that it did not pay any money to the drivers, but simply made change. However, upon closer examination, the evidence establishes that RJ performed the accounting and kept the consolidated daily sales record. The drivers did not have any control over the consolidated daily sales record. Thus, it did not make a difference, whether RJ took the money and gave the difference to the drivers or drivers gave RJ the difference between the wholesale price and the retail price. The intent of the parties was to compensate the drivers for their efforts by allowing the drivers to take or keep the difference between the wholesale price and the retail price: that was remuneration. How the parties reconciled their accounts or RJ's collection efforts and use of credit does not alter the facts.

Direction and Control

The initial determination of whether the drivers are subject to RJ's direction and control is made under the judicially created "right to control" test. *S-W Floor*, 318 Or at 622. The critical question in determining direction and control under the "right to control" test is not the actual exercise of control, but whether the *right of control* exists. *Id.* The factors to be considered in determining whether the right to control exists are: (1) direct evidence of the right to, or the exercise of, control; (2) the furnishing of tools and equipment; (3) the method of payment; and (4) the right to fire. *Salem Decorating v Nat'l Council of Comp Ins.*, 116 Or App 166, 171 (1992) *rev den* 315 Or 643 (1993); *Castle Homes v Whaite*, 95 Or App 269, 272 (1989).

The "relative nature of the work" test must be considered "if there is some evidence suggesting the employer retained the right to control the method and details of the work." *Rubalcaba v Nagaki Farms, Inc.*, 333 Or 614, 627 (2002).

RJ argued that two cases, *Henn v SAIF*, 60 Or App 587, 654 P2d 1129 (1982), *rev den* 294 Or 536 (1983) and *Schaff v. Ray's Land & Sea Food Co., Inc.*, 334 Or 94, 45 P3d 936, (2002), are directly on point establishing that the relationship between RJ and the drivers was that of independent contractors. Those cases share some similarities with

this case, but are not dispositive on the issue. For example, in *Henn*, the alleged employee furnished her own vehicle, her agreement allowed her to engage in other remunerative endeavors and in that case no evidence was offered to show that the employer could discharge her for other than violations of the agreement. In the instant case, at least nine drivers leased vehicles and equipments from RJ and all the drivers signed an agreement to exclusively sell RJ's products if they leased RJ's vehicle. Furthermore, RJ retained the right to terminate the agreement for a driver's failure to operate *any* vehicles in a safe manner and conform with all applicable federal and state laws and city ordinances (emphasis added). Similarly, in *Schaff*, a vicarious liability case, the driver provided his own vehicle and purchased his own products. The driver picked up products weekly or on as needed basis and had little contact with the putative employer unlike the instant case where RJ had the right to control and controlled the drivers.

The Right to Control Test

Control Issue: RJ argued that because the parties intended the drivers' relationship with RJ to be one of independent contractor, the drivers are independent contractors. If the inquiry was to end at what the parties' intended, this case would be very easy to decide. However, the courts do not stop the inquiry with the intention of the parties even though "a plain statement that the parties intended the relationship of independent contractor and not employee is not always to be disregarded. In a close case, it may swing the balance". *Henn* 60 Or App at 654 quoting 1C Larson, Workmens' Compensation Law section 46.30.

Although the ICA indicated that the parties intended the drivers to be independent contractors, the record disclosed considerable evidence of control. Therefore, it is helpful to consider the right to control test devised by the courts. "Control over the method of performance" is an indication that there is an employment relationship, while "control over the result to be achieved" is consistent with an independent contractor relationship. *Trabosh v. Washington Count*, 140 Or App 159, 165 (1996).

SAIF contended, among other similar factors, that RJ retained the right to control as demonstrated by RJ's sole discretion over how much credit to extend to drivers, RJ's prohibition on drivers guaranteeing USDA grade of meat, and RJ's prohibition on allowing drivers to enter company freezers. RJ had the right to control its property, decide how much risk to take, and decide what work should be done and at what times so as not to disrupt its business. These factors, alone, do not establish direction and control.

It is true that RJ did not provide leads, routes or territories and did not require any drivers to appear on any particular day or time but, as SAIF contended, and the ICA established, there are other factors that indicate RJ's right to control the drivers. Among them are factors such as RJ's sole right to handle customer complaints, to limit any riders in any leased vehicles without RJ's authorization, to counsel drivers for two or more moving violations and the right to require drivers to settle their accounts in cash. In addition, even though RJ did not require customers to make payments to HMM, RJ

required drivers to abide by detailed check and credit card acceptance procedures. Furthermore, the drivers drove vehicles leased from HMM, displaying HMM logo and used HMM brochures and receipts, all bearing HMM's business address and telephone number, which indicates a high degree of control over the drivers and therefore an employment relationship. [The ALJ has considered the argument made by Petitioner and does not believe any further explanation is necessary].

Furnishing of tools and equipment: This factor also weighs in favor of an employment relationship. The drivers were not required to furnish any tools or equipment. They could simply lease RJ's truck and refrigeration unit, at a significantly small fee of \$25 per shift. The evidence established that the fee was waived or reduced when a new driver accompanied an existing driver indicating that the drivers did not have to make any investment in the business. Additionally, RJ retained the right to maintain the vehicles. RJ contended that drivers were to acquire their own tools such as credit card processors, bank accounts, clothing, sunglasses and cold storage. However the ICA does not require the drivers to provide credit card processors and RJ did not show that the drivers needed any special uniform or eyewear. To the contrary, the business opportunity advertisement states that RJ provided everything, including receipts, brochures and product information, and that the drivers did not need to invest thousands of dollars to get their business started. Therefore, this factor indicates an employment relationship. [The ALJ has considered the argument made by Petitioner and does not believe any further explanation is necessary].

Method of payment: "When payment is by quantity or percentage, the method of payment test largely becomes neutral. To the extent that it indicates continuing service, it suggests employment; to the extent that it lessens an employer's interest in the details of how the employee spends (their) time, it has been said to suggest an independent contractor relationship." *Henn v. SAIF*, 60 Or App at 592. The evidence establishes that the drivers received remuneration based on the number of products they sold. Thus, the method of payment was made based on quantity. The practice of settling the account at the end of the shift in itself, made at the end of the drivers' shift, does not indicate a continuing relationship even though some drivers continued their relationship on a regular basis. Finally, RJ did not lessen its interest in the way the drivers spent their time as evidenced by factors previously discussed. After considering all the evidence, the method of payment factor is neutral. [The ALJ has considered the argument made by Petitioner and does not believe any further explanation is necessary].

Right to terminate relationship: The right to terminate the relationship at any time without liability is strong evidence that the contract was one of employment. *Bowser v State Indus Accident Comm.*, 182 Or 42, 54 (1947). The right to control whether further work would be done is also indicative of the right to fire. *Cy Inv. Inc. v Nat'l Council on Comp. Ins.*, 128 Or App 579, 584 (1994). Evidence established that RJ had the right to terminate the relationship without incurring any contractual liability. The courts view the right to terminate the relationship without any contractual liability as strong evidence of employment. This factor also indicates an employment relationship. [The ALJ has

considered the argument made by Petitioner and does not believe any further explanation is necessary].

In sum, RJ's relationship with the drivers did not end when the drivers picked up the products and left RJ's premises. RJ continued to monitor the drivers in several ways which is a strong indication of an employment relationship. However, with one factor being neutral and three factors suggesting an employment relationship, I move to the "relative nature of the work" test.

Relative Nature of the Work Test

Before the court's decision in *Rubalcaba*, the test was applied only when the right to control test was inconclusive. *Oregon Drywall Systems, Inc v Nat'l Council on Comp. Ins*, 153 Or App 662 (1998) (if the right to control is inconclusive, the relative nature of the work test may be applied). In *Rubalcaba*, the Oregon Supreme Court reversed the Court of Appeals and the Workers' Compensation Board because both the court and the board failed to apply the relative nature of the work test when there was "some evidence" that the employer retained the right to control. 333 Or at 627.

The relative nature of the work test involves an examination of:

"The character of the claimant's work or business – how skilled it is, how much a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden * * * its relation to the employer's business, that is how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished for the completion of a particular job.

Woody v. Waibel, [276 Or 189, 195 (1976)], quoting 1A Larson's *Workmen's Compensation Law*, section 43 51 (1973).

Under the relative nature of the work test, "a worker whose services are a regular and continuing part of the cost of a product, and whose method of operation is not so independent that it forms a separate route through which the costs of industrial accident can be channeled, is presumptively a subject worker." *Coghill v. Nail. Council on Comp. Ins*, 155 Or App 601, 609, 964 P2d 1085 (1998).

RJ contended that the drivers operate as independent businesses and Mr Russell testified that the drivers engaged in other business endeavors. However, RJ did not provide any documentary evidence of such activity or produce any drivers as witnesses. Additionally, RJ contended that some drivers obtained business licenses but provided evidence of only one driver who obtained a license under the business name "Your Meat Co" with his principal place of business at RJ's business address. The ICA shows that drivers were required to exclusively conduct business for RJ under the name of Home Meat Market. The leased trucks, the brochures, receipts and the telephone numbers show

the drivers association with RJ and HMM. Finally, RJ contended that drivers could hire their own assistants within their discretion and that RJ did not terminate anyone's relationship. However, the facts do not bear this out. It is hard to imagine RJ not approving the drivers' hiring of assistants when RJ would not allow a rider on leased vehicles and retained the right to terminate the relationship for a driver's failure to operate vehicles in a safe manner and conform with all applicable laws even in the drivers' own vehicles.

The drivers' work formed an essential and regular part of RJ's work. RJ is engaged in business as a retail distributor of meat products. Under its current business model, RJ needs drivers to sell and distribute its products. The drivers provide this service – sell and distribute products. Without the services of these drivers, RJ cannot operate under its current business model unless it hires drivers as employees to do the work or changes its business model. Therefore, the drivers' services were an essential and integral part of RJ's business.

The drivers' services were also continuous and of sufficient duration to amount to the hiring of continuous services rather than the contracting for the completion of a specific job. The drivers were not hired to complete a piece of work. Collectively, they continuously provided services to RJ on a regular basis. Finally, RJ sanctioned training and permitted new drivers to "ride along" with existing drivers. Consequently, based on the analysis set forth in the relative nature of the work test, each driver was a "worker" under the Oregon workers' compensation statutory scheme. [The ALJ has considered the argument made by Petitioner and does not believe any further discussion is necessary]

Classification code 8291 versus classification code 8021 and 8031

The *Basic Manual* sets forth the rules that insurers use in classifying an insured's business for the purpose of assessing premium for workers compensation insurance. Rule 1A2 states that "it is the business of the employer within a state that is classified, not the separate employments, occupations or operations within the business." The *Basic Manual* also states that if "no basic classification clearly describes the business, the classification that most closely describes the business must be assigned." Rule 1D2 at R7.

RJ argued that SAIF improperly classified the work it performed during the audit period from classification code 8291 to classification code 8031. RJ contended that the classification code should be 8021.

The October 2005 *Scopes Manual* describes Code 8021 in relevant part as follows:

**PHRASEOLOGY STORE: MEAT, FISH OR POULTRY DEALER-
WHOLESALE**

* * * * *

OPERATIONS COVERED:

This classification applies to dealers principally engaged in the wholesale distribution of fresh and cured meat, fish or poultry. Some of these dealers cut the meat, fish or poultry into steaks, chops, roasts, fillets or poultry parts for sale to hotels, restaurants, clubs, hospitals, institutions and stores.

Meat, fish or poultry dealers may also distribute a minor and incidental amount of other miscellaneous products such as groceries, dairy products, fresh fruits or vegetables.

* * * * *

Additionally, the October 2005 *Scopes Manual* describes Code 8031 in relevant part as follows:

PHRASEOLOGY STORE: MEAT, FISH OR POULTRY—RETAIL

* * * * *

OPERATIONS COVERED:

This classification applies to stores engaged in retail selling of fresh and cured meats, fish or poultry. When such stores also sell groceries, fresh fruits, vegetables, dairy products, or frozen foods, refer below to Item 1 in "Operations Not Covered."

OPERATIONS NOT COVERED:

1. If a store sells meat, fish or poultry as well as other items such as groceries or vegetables, and the insured's records show that the cost of fresh and cured meats, fish or poultry did not exceed 65% of the total cost of all merchandise purchased by the insured during the policy period, such a store shall be assigned to Code 8033—Meat, Grocery and Provision Stores—Retail.
2. If a meat store under Code 8031 has separate employees engaged exclusively in making sausage, frankfurters, or bologna, such operations shall be assigned to Code 2095—Meat Products Mfg.
3. Slaughtering operations shall be assigned to Code 2081—Slaughtering.
4. Freezing and storing of meats, fruits or vegetables for other than private individuals shall be assigned to Code 8291—Storage Warehouses—Cold.

* * * * *

The evidence clearly established that Code 8291² did not apply to RJ's business. Here the proper classification code is Code 8031 (Store: Meat, Fish or Poultry - Retail) because the drivers are subject workers. The classification code is not 8021 (Store: Meat, Fish or Poultry Dealer - Wholesale) because the drivers are not independent contractors. Thus, SAIF correctly reclassified RJ's business under classification code 8031. Petitioner contends that \$10 per hour is not the correct rate for drivers. ~~In my review of the Oregon Employment Department's 2006 wage guide for driver/sales workers, I found that \$7.83 per hour was in the 10th percentile and \$11.95 was in the 90 percentile for hourly wage for driver/sales workers. Therefore, I find that \$10 per hour is very much within that rate and a reasonable rate for drivers.~~ However, Petitioner offered no evidence of a contrary wage for drivers in Oregon and Petitioner failed to keep reliable records of payments to drivers which could have allowed a more precise calculation. Here, SAIF assigned a wage of \$10 per hour, only slightly more than Oregon's minimum wage. While SAIF did not conduct any studies to determine the average wages paid to Oregon drivers, I am persuaded that SAIF made a good faith approximation of the wages likely earned by the drivers during the relevant period. SAIF is not required to assume that the drivers were paid minimum wage in a case where the employer fails to keep adequate records of actual payments. Additionally, I find that drivers did not provide any of their own materials, and the cost of the gas was an expense. Accordingly, the job involved labor only and SAIF correctly allocated 90 percent to the subject payroll.

Jeff Kollar

The final issue to be resolved here is whether SAIF correctly assessed insurance premiums for RJ's manager under classification code 7380.

ORS 737.310(10) requires the director to prescribe by rule the conditions under which an employer "is permitted" to divide payroll among classifications. Pursuant to that authority, OAR 836-42-0060 provides that:

- (1) When there is an interchange of labor, the payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, provided verifiable payroll records maintained by the employer disclose a specific

² Code 8291 is applied to insured's engaging in operating cold storage warehouses for other concerns that require storage space with refrigeration services. These cold storage firms have no equity in the products they store. The classification contemplates the maintenance of the warehouse and its equipment, and the receiving, safekeeping and the releasing of the products for shipment.

Code 8291 * * * does not include sorting, grading or delivering the products, which are generally taken to and from the warehouse by common carrier, or by the concerns that own the products. If an insured assigned to Code 8291 employs a driver engaged exclusively in pickup or delivery, the driver's payroll would be separately classified under Code 7380—Drivers NOC.

allocation for each such individual employee, in accordance with the standards for rebilling set forth in OAR 836-043-0190 and this rule.

* * * * *

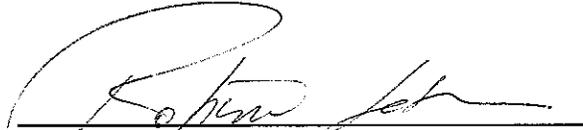
(3) When verifiable payroll records are required with respect to a single employee and the employer does not maintain them as required in this rule, the entire payroll of the employee shall be assigned to the highest rated classification exposure in accordance with the standards for rebilling set forth in OAR 836-043-0190.

On direct testimony, Mr Kollar indicated that he performed duties as an office manager and a driver, even though he could not recall if he made any deliveries during the first audit period. He also indicated that he did not keep verifiable payroll records. Accordingly, where RJ did not maintain verifiable records and Mr. Kollar engaged in interchange of labor, SAIF properly revised the payroll and assigned Mr. Kollar's work in the category that carries the highest authorized premium rate.

PROPOSED ORDER

It is therefore PROPOSED that SAIF's Final Premium Audit Billing for the periods January 13, 2006 through January 31, 2007 and February 1, 2007 through January 31, 2008 to Petitioner be affirmed.

DATED this 07 day of **November**, 2008.



Rohini Lata, 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 17th day of November 2008, I mailed the foregoing SECOND REVISED PROPOSED ORDER in Reference No. **0802001**.

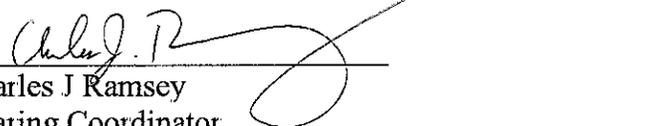
BY FIRST CLASS MAIL:

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Charles J Ramsey
Hearing Coordinator