

**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 Nos. INS 08-07-004
)	
)	
WAYNE JOHNSON ENTERPRISES,)	
INC.)	PROPOSED ORDER

HISTORY OF THE CASE

On April 28, 2008, SAIF Corporation (SAIF or insurer) issued a Final Premium Audit Billing to Wayne Johnson Enterprises, Inc. (WJE or employer). The audit period was from January 1, 2007 through December 31, 2007. Employer's May 12, 2008 request for hearing was received by the Insurance Division on May 19, 2008. The Division received employer's Petition on June 17, 2008, and referred the matter to the Office of Administrative Hearings (OAH) on July 14, 2008.

Hearing was held before ALJ Rick Barber on November 17, 2008, in the Salem offices of the OAH, and reconvened on December 4, 2008. Wayne Johnson represented employer in the hearing and testified, along with witnesses Noreen Johnson and Kurt Johnson. SAIF was represented by Ethan Hasenstein, Assistant Attorney General. Audit program analyst Teresa Smith was the insurer representative and testified for insurer, along with auditor Joe Rick of Northwest Audit. The record closed on December 4, 2008 at the end of the hearing.

ISSUE

Whether the Final Premium Audit Billing of April 28, 2008, as revised, is correct in the following particulars:

- a. In its determination that Camo Logging, Inc. and Holdfast Falling LLC were subject workers of employer; and
- b. In its determination that, if Camo and Holdfast are subject, they should be classed at code 2702 instead of 2725.

EVIDENTIARY RULINGS

Exhibits A1 through A15 were admitted into evidence. Employer objected to Exhibit A14 insofar as it refers to the premium charges for two other contractors, Zach Falklander and Harold Lancaster, whose subjectivity are not contested by employer. The objection was overruled because the document in question also addressed the matters still at issue in the hearing, and there was no prejudice to the parties by leaving the other information in the record.

FINDINGS OF FACT

1. WJE is an Oregon corporation engaged in the logging business. It is owned in equal parts by Wayne Johnson and Noreen Johnson, husband and wife. WJE purchased workers' compensation insurance from insurer and explained its business as mechanized logging, with no employees "on the ground," meaning that the work was done entirely by machine and there was no conventional or on the ground logging being done. (Ex. A1).

2. WJE does some business in the State of Washington. In Washington, a very small amount of on the ground work is acceptable while retaining the mechanized logging designation for workers' compensation purposes. (Test. of W. Johnson). In Oregon, any on the ground work would prevent using the classification codes for mechanized logging unless verifiable time records are kept and the mechanized and conventional logging duties are physically separate from each other. (Test. of Smith).

3. Camo Logging, Inc. is a corporation that is owned by Kurt Johnson, Wayne Johnson's brother. Camo does not have workers' compensation coverage. Kurt does some occasional conventional timber falling for other companies. (Test. of K. Johnson). When working on WJE projects, Kurt operates the faller-buncher, a machine that cuts down trees with a diameter of 30 inches or less. The faller-buncher used by Camo is owned by WJE. Wayne Johnson tries to keep his brother "busy" working for WJE. (Test. of W. Johnson).

4. Camo Logging works pursuant to a written contract with WJE, but does not have to bid on projects. Camo is paid by the hour every two weeks, and the hourly rate of pay is \$15. No taxes are withheld by WJE. At the end of the year, WJE sends a 1099 to Camo. (Test. of W. Johnson). 90 percent of the work done by Camo is mechanized logging, and ten percent is conventional (hand) logging. (Test. of K. Johnson).

5. When WJE needs larger trees felled, trees too large for the faller-buncher to cut, it contracts with timber fallers to cut down the trees. One of the fallers, Caveman Cutting, had workers' compensation insurance during the audit year. Two others, Zach Falklander and Holdfast Falling LLC (Holdfast), did not have separate workers' compensation insurance coverage. The principal of Holdfast is Dave McCarty, who has also done business during the audit period as Dave McCarty Cutting Company. (Ex. A9).

WJE requires McCarty and Falklander to always work together for safety reasons. (Test. of W. Johnson).

6. Holdfast is paid by the hour, and receives payment from WJE every two weeks. Holdfast does not have workers' compensation insurance coverage. Holdfast provides its own tools for timber cutting and operates pursuant to a written contract with WJE. (*Id.*). Holdfast is paid hourly and does not submit a bid of any kind to WJE. (Test. of Rick).

7. WJE has contracts with various mills to harvest the timber in specific locations. WJE receives direction and control from the mills concerning where to cut timber, when to cut timber, and how it is to be transported to the mill. WJE must pass those requirements on to his fallers and crew. (Test. of W. Johnson).

8. Joe Rick is an employee of Northwest Audit, a company that contracts with insurer to perform premium audits of workers' compensation policies. Rick was also formerly an employee of insurer and is aware of their policies on premium audits. Rick was asked to perform the audit of WJE, and he did so.

9. During the audit, Rick examined the records of the work performed by Camo Logging, Holdfast, Falklander and a security person named Lancaster. In all cases, Rick reviewed the work under his understanding of the "right to control" test and the "nature of the work" test set by legal precedent. He concluded that all of them were subject, and that workers' compensation premium should be charged for all of them. He made his recommendations to insurer, and the insurer presented a final premium audit billing to WJE on April 28, 2008. (Test. of Rick).

10. Insurer did further research into the work performed by Camo Logging and Holdfast. It had previously assigned classification code 2725 to the mechanized logging work performed by WJE. When it determined that Holdfast utilized exclusively conventional timber falling practices, and that Camo Logging used both mechanized and conventional practices, it determined that the correct classification code was 2702. (Test. of Smith).

CONCLUSIONS OF LAW

The Final Premium Audit Billing of April 28, 2008, as revised, is correct in the following particulars:

- a. In its determination that Camo Logging, Inc. and Holdfast Falling LLC were subject workers of employer; and
- b. In its determination that, if Camo and Holdfast are correctly classed at code 2702 instead of 2725.

OPINION

Employer contests the Final Premium Audit Billing in this case because it disagrees with SAIF's conclusion that Camo Logging and Holdfast should be subject to the payment of premium. Employer 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). Employer must show that it is more likely than not that Camo and Holdfast are contractors and not subject to the workers' compensation law. *Cook v. Employment Div.*, 47 Or App 437 (1982).

In this case, SAIF Corporation also has a burden of proof. It seeks to change the classification code assigned to the premiums for Camo and Holdfast, contending that the 2725 code for mechanized logging does not apply to their work and that 2702 should be applied. As the proponent of that contention, SAIF has the burden of presenting evidence in support of its position. ORS 183.450(2).

Subject Worker Status. The analysis of the nature of the relationship between employer and the other corporations starts 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.¹

There are several factors to be examined in the "right to control" test. As the Court of Appeals has stated:

[T]he 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).

Professor Larson, author of a renowned treatise on workers' compensation law, described the impact of the right to control test:

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).

“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). The right to control test is canted in favor of finding an employment relationship. If there is evidence that any of the right to control factors have been established, the employment relationship is established. Conversely, if there is evidence suggesting an independent contractor relationship, it is not given as much weight.

If the right to control test conclusively 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).² 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. As noted, there are four factors relating to the right of control. They are:

1. Direct evidence of the right to, or the actual exercise of, a right to control;
2. The method of payment;
3. Furnishing of equipment; and
4. The right to fire.

Castle Homes, Inc., supra. When the evidence in this case is examined in light of these control factors, it supports SAIF’s contention that Camo and Holdfast were subject to the payment of workers’ compensation premium.

Camo Logging. In the case of Camo Logging, there is direct evidence of Wayne Johnson’s actual control of the business. Kurt Johnson is Wayne Johnson’s brother, and Wayne testified that he wanted to keep his brother busy. Wayne Johnson controls the means of Camo’s existence as a company because he owns the faller-buncher machine that Camo uses. Ownership establishes the right of control. This control, even if not exercised, is strong evidence of the subjectivity of Camo Logging.

Camo Logging obtains its work from WJE without having to submit a bid. Camo is paid \$15 per hour, and is paid every two weeks after providing an invoice. Although the invoicing method is a factor that could be considered independent, the regular hourly amount is essentially a wage and proves that Camo Logging is not independently

² 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.

determining its risk in a given job. If the company was doing so, the degree of difficulty of specific cutting sites would probably lead to lower or higher bids for specific jobs. The lack of a bid process and the uniformity of the hourly rate suggest an employment relationship.

Kurt Johnson testified that he provides some of his tools for the job, and I do not doubt his testimony. However, it remains true that the most important piece of equipment, the faller-buncher, is owned and controlled by WJE. If there was a break in the relationship between the brothers, Kurt Johnson would not have any means to continue the business using the faller-buncher machine. Again, this evidence strongly supports an employment relationship.

Therefore, the factors under the right to control test conclusively establish that Camo Logging was a subject worker. Under the nature of the work test, I would reach the same conclusion since timber falling is an essential part of employer's logging operation. As Wayne Johnson testified, a logging operation can catch up to a timber faller but can never pass him.

Holdfast Logging. Dave McCarty's company consists of McCarty himself falling timber, usually in the company of Zach Falklander, another contractor whose inclusion in the premium employer does not contest. The only difference between the two is that McCarty formed a business entity to protect his company while Falklander did not. Otherwise, the two men do the same work.

Certainly, the formation of a business entity is some evidence of a separate business. However, that business entity is not determinative of Holdfast's subjectivity under the right to control test.

The evidence concerning Holdfast is rather scarce in this case, and I must count the lack of evidence against the party with the burden of proof. The Johnsons testified that Holdfast had worked for other companies as well, an "outfit on the coast" and "someone in Prineville," but could not identify the companies and did not indicate whether that work was done during this audit period. They described his work as hand, or conventional tree falling, and presented evidence to show that he also was paid every two weeks at a set hourly fee.

There is less evidence of direct control of Holdfast by WJE because Wayne Johnson is not in control of the equipment Holdfast uses. However, WJE tells Holdfast (along with Falklander) where to fall timber and requires them to cut together for safety reasons. There is little evidence to show how Holdfast operates its business. It is unknown what other indicia of an independent business there might be. Since employer has the burden of proof, I must count that lack of evidence against it. Employer has failed to show that Holdfast was an independent contractor under the right to control test.

Furthermore, even if Holdfast was not subject under the right to control test, Holdfast's work falling timber for employer remains essential to employer's business.

Therefore, under the nature of the work test, Holdfast would be subject as well. *Rubalcaba, supra.*

The Proper Classification Code. As noted above, SAIF has the burden of presenting evidence to show that code 2702 is the appropriate one, since the final premium audit had used code 2725. The evidence shows that both Camo and Holdfast were doing conventional logging, which would fall into class 2702.

Code 2725 specifically excludes ground work, including conventional logging in its definition. SAIF's summary of the rule sent to its insured states in part:

Logging operations that are not fully mechanized are to be separately rated as 2702 – Logging. Where large trees are harvested by non-mechanized methods while the mechanized equipment is at the job site, the entire job shall be classified as 2702 – Non-Mechanized Logging.

(Ex. A2 at 2).

Much of Camo's work was mechanized, but Kurt Johnson estimates that ten percent of his work is conventional logging. He did not keep time records separating the two types of logging. Therefore, SAIF is entitled to apply the higher classification code for the Camo contract. The evidence concerning Holdfast is even stronger. There is no indication that any of their logging is mechanized, meaning 2702 is the correct code for that work as well.

PROPOSED ORDER

I propose that the department issue the following final order:

That the April 28, 2008 Final Premium Audit Billing be AFFIRMED AS MODIFIED. The conclusion that Camo Logging and Holdfast are subject to the payment of premium is AFFIRMED, and the appropriate classification code for those amounts of payroll is MODIFIED from 2725 to 2702.

DATED this 13th day of JANUARY, 2009.



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

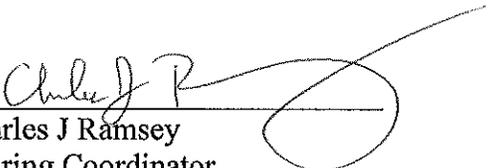
On the 13th day of January 2009, I mailed the foregoing Proposed Order in Reference No. 0807004.

BY FIRST CLASS MAIL:

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