

**STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of **Lakewood Theatre Company**) **FINAL ORDER**
dba Lakewood Center for the Arts) **ON**
) **RECONSIDERATION**
) Case No. INS 07-03-011

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of Lakewood Theatre Company dba Lakewood Center for the Arts (employer), pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d), ORS 737.505(4), and Oregon Administrative Rules (OAR) 836-043-0101 *et seq.*, to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation (insurer) to the employer.

History of the Proceeding

On 2/26/07, the employer received from the insurer two billings, both dated 2/22/07.¹ The first billing was for the audit period from 10/1/04 to 9/30/05 and the second billing was for the audit period from 10/1/05 to 9/30/06.

On 3/12/07, the director received from the employer a letter dated 3/7/07 requesting a hearing to review the billings.

¹ The proposed order dated 2/18/10, and revised proposed order dated 1/13/09, did not find (1) when the employer received from the insurer the billings, (2) when the director received from the employer a written request for a hearing, and (3) when the director received from the employer a completed petition. Determining if and when these events occurred is critical to determining whether the employer is entitled to a hearing. ORS 737.505(4), OAR 836-043-0110, OAR 836-043-0170. See *Pease v. Natl. Council on Comp. Ins.*, 113 Or App 26, *rev den*, 314 Or 391 (1992). The employer stated in its request for a hearing dated 3/7/07 and petition dated 3/23/07 that the employer received the billings on 2/26/07. The director received the employer's request for a hearing on 3/12/07, and petition on 3/26/07, and stamped the respective date received on the face of each document. The director provided to OAH and the insurer a copy of the employer's request for a hearing and petition when the director referred the case to OAH on 3/27/07. The employer and insurer did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that the employer received the billings on 2/26/07, and the director received the employer's request for a hearing on 3/12/07 and petition on 3/26/07.

On 3/13/07, the director sent to the employer a petition form to complete and return by 5/11/07.

On 3/26/07, the director received from the employer the completed petition dated 3/23/07, which included a request for an order staying all collection efforts by or on behalf of the insurer of any amount billed in the billings as a result of the audits until this proceeding is concluded.

On 3/27/07, the director referred the employer's requests for a hearing and a stay of collection to the Office of Administrative Hearings (OAH).

On 4/5/07, OAH issued an order granting the stay of collection.

On 4/11/07, OAH scheduled a hearing to be conducted on 7/18/07.

On 5/3/07, OAH issued an amended order granting the stay of collection.²

On 7/17/07, OAH received from the employer a letter dated 7/16/07 requesting, on behalf of both the insurer and employer, that the hearing be rescheduled because the insurer was revising the billings based on information that the employer recently provided to the insurer.

On 7/26/07 the employer received from the insurer two supplemental billings both dated 7/25/07.

On 7/31/07, OAH rescheduled the hearing to be conducted on 11/14/07.

On 9/25/07 the director received from the employer an amended petition including the supplemental billings.

On 10/24/07, OAH rescheduled the hearing to be conducted on 1/23/08.

On 1/23/08, OAH conducted a hearing. The hearing was conducted by Rick Barber, an administrative law judge of OAH. The employer appeared and was represented at the hearing by William H. Replogle, an attorney. The employer called Andrew Edwards as its witness. The employer offered Exhibits P1 to P20

² On 4/5/07, OAH issued an initial order granting the stay of collection but only relative to the first billing for the audit period from 10/1/04 to 9/30/05. On 4/23/07, OAH received from the employer a letter dated 4/12/07 requesting OAH to amend the order by granting the stay of collection relative to the first billing for the audit period from 10/1/04 to 9/30/05, and also the second billing for the audit period from 10/1/05 to 9/30/06, as the employer initially requested in the employer's petition dated 3/23/07. On 5/3/07, OAH issued an amended order granting the stay of collection.

(including P11A, P11B, and P14A) as its documentary evidence, all of which were admitted into the record. The insurer appeared and was represented at the hearing by Ethan R. Hasenstein, an Assistant Attorney General assigned to represent the insurer. The insurer called Tracy Meyer and Teresa Smith as its witnesses. The insurer offered Exhibits A1 to A10 as its documentary evidence, all of which were admitted into the record.

On 3/28/08, OAH issued a proposed order. On 4/2/08, the director mailed the proposed order to the parties. The proposed order recommended that the director modify the revised billings.

On 4/28/08, the director sent an e-mail to the parties suspending the due date for filing exceptions to the proposed order until further notice.³

On 4/29/08, the director received from the insurer written exceptions to the proposed order.

On 9/2/08, the director sent to the parties an e-mail informing the parties that exceptions to the proposed order were due by 10/2/08.

³ On 4/1/08, the director received from OAH, OAH's hearing file including the original proposed order dated 3/28/08. The director discovered that the certificate of service of the proposed order, and the compact disc containing the audio recording of the hearing, were not included in the hearing file. The director contacted OAH about the omission. OAH said that it could not find the certificate of service or compact disc. On 4/2/08, the director mailed the proposed order to the parties, and informed them that any exceptions to the proposed order were due by 5/2/08. On 4/15/08, OAH sent an e-mail to the insurer, but not to the employer or director, saying in relevant part "We have not been able to locate the first part of the hearing." From 4/15/08 to 4/28/08, the director, OAH, the employer and insurer, communicated about how to solve the problem of the incomplete record. On 5/7/08, the director sent an e-mail to the parties and OAH. The director requested "the parties to either agree to a narrative statement of the missing part of the recording of the hearing in addition to the existing record (not just the missing testimony of the employer's sole witness [Andrew Edwards]) as provided in [Oregon Rules of Appellate Procedure] ORAP 3.45, or stipulate in writing that the missing part of the recording of the hearing is irrelevant and not to be considered in the disposition of the case." The director requested OAH to send to the director and the parties, "the incomplete recording of the hearing [since it] was not included with the hearing file that [the director] received from OAH on 4/1/08." On 5/9/08, the director received from OAH a compact disc containing the latter portion of the hearing. On 7/2/08, the director received from the employer an e-mail saying that the parties "have agreed ... to stipulate to ALJ Barber's findings of fact, the exhibits already admitted into the record, Teresa Smith's recorded testimony and an affidavit from Andrew Edwards, which we will [send as a] pdf [file] to you today, as the record in this matter." Later the same date, the director received an e-mail from the employer attaching a .pdf file of the affidavit and resume of Andrew Edwards. On 7/7/08, the director contracted with a third party to transcribe the latter portion of the hearing. On 8/28/08, the director received the transcript of the latter portion of the hearing.

On 9/2/08, the director received from the insurer an e-mail saying that the insurer “will not be filing additional exceptions, other than the ones already filed [on 4/29/08].”

On 10/2/08, the director received from the employer written exceptions to the proposed order and a response to the insurer’s exceptions.

On 11/6/08, the director requested OAH to review the exceptions and issue a revised proposed order.

On 1/13/09, OAH issued a revised proposed order and mailed it to the parties.

The issue was whether the revised billings correctly included in the calculation of the premium for workers’ compensation insurance provided by the insurer to the employer during the audit period compensation paid by the employer to the directors of the theatrical productions, the cast and crew of the theatrical productions, the curators and security and maintenance coordinators of the Festival of Arts, Elizabeth Hayden when instructing, and Chris Whitten Design.

The revised proposed order concluded that the revised billings incorrectly included the compensation because the directors, cast and crew, curators, Elizabeth Hayden when instructing, and Chris Whitten Design, were not workers as defined in ORS 656.005(30) further because, after applying the judicially created “right to control” test, they were not subject to the direction and control of the employer.

The revised proposed order recommended that the director modify the revised billings by excluding such compensation.

On 2/12/09, the director received from the insurer written exceptions to the revised proposed order.

On 3/12/09, the director received from the employer written exceptions to the revised proposed order and a response to the insurer’s exceptions.

On 5/21/09, the director requested OAH to review the exceptions and issue a second revised proposed order.

On 6/3/09, OAH declined to issue a second revised proposed order.

The director considered the parties’ exceptions.

On 6/8/10, the director issued a final order.

On 6/22/10, the director received from the insurer a request that the director reconsider the final order. The insurer argued that the final order (1) incorrectly interpreted ORS 656.029(1) in a manner inconsistent with the director's prior decisions, and such interpretation would lead to an absurd result not intended by the state legislature, (2) was based in part on errors of fact regarding Chris Whitten Design, (3) incorrectly concluded that the directors, cast and crew, curators and security and maintenance coordinators of the Festival of Arts, and Chris Whitten Design, were independent contractors because the record lacked substantial evidence, and (4) should have concluded that Elizabeth Hayden was a subject worker in her capacity as a teacher because she was a subject worker in her capacity as a box office employee.

The director granted the request to reconsider the final order.

Therefore, the director now makes the following final decision on reconsideration in this proceeding.

Findings of Fact, Conclusions of Law and Opinion

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

In the findings of fact portion of the order, page 3, at the end of paragraph numbered 4, the following is added. The written contract between Lakewood and the director provided, among other provisions, that "the contractor agrees to perform his/her services conscientiously and to the best of his/her ability," and that "for purposes of this agreement, rehearsals, preview, opening night plus all remaining performances constitute 100% of the fee stipulated below. Non-performance by individual shall invalidate this contract." The contract also provided that the directors were considered independent contractors. (Ex. P1 at 1). The directors did not receive fringe benefits and could not be fired at will. (Test. of Edwards).

In the findings of fact portion of the order, page 4, at the end of paragraph numbered 7, the following is added. The written contract between Lakewood and each cast and crew provided that “the contractor agrees to perform his/her services conscientiously and to the best of his/her ability,” and that “for purposes of this agreement, rehearsals, preview, opening night plus all remaining performances constitute 100% of the fee stipulated below. Non-performance by individual shall invalidate this contract.” The contract provided that the directors were considered independent contractors. (Ex. P1 at 1). Lakewood’s cast and crew did not receive fringe benefits and could not be fired at will. (Test. of Edwards).

In the findings of fact portion of the order, page 5, paragraph numbered 11, the last sentence is corrected to read “SAIF determined that the performance [~~and set up~~]people were not subject workers, but considers the security personnel, set up people, and the curators to be employees of Lakewood. (Test. of Smith; Exhibit A9 pages 1 & 31). See insurer’s exceptions to the proposed order dated 4/28/08, page 11, footnote 1.

In the opinion portion of the order, page 8, the following is added to the discussion of the director. There is nothing in the record to indicate that Lakewood retained an unqualified right to terminate the contract absent violation of the contract terms. *See Reforestation General v. Natl. Council on Comp. Ins.*, 127 Or App 153, 169, *adh’d to on recons*, 130 Or App 615 (1994), *rev den*, 320 Or 749 (1995). “An unqualified right to fire, indicative of an employer-employe[e] relationship, must be distinguished from the right to terminate the contract of an independent contractor for bona fide reasons of dissatisfaction.” *Henn v. SAIF*, 60 Or App 587, 592-593 (1982), *rev den*, 294 Or 536 (1983). The fact that the one-page contract does not provide detailed termination and remedies clauses does not signify that the parties do not have rights in the event of termination. The right to fire factor in this case indicates an independent contractor relationship.

In the opinion portion of the order, pages 9-11 and 12-13, the discussion of ORS 656.029(1)⁴ is excluded because ORS 656.029(1) does not apply to the employer because the directors, not the employer, awarded the contracts to Chris Whitten Design. See revised proposed order, page 4, finding of fact 9.

In the opinion portion of the order, pages 9-11, the following is added to the discussion of the cast and crew. Because the cast and crew are subject to the direction and control of the director, they are not subject to the direction and control of Lakewood. The main consideration is Lakewood's control over the *method* of performance rather than its control over the resulting show. See *Great American Ins. v. General Ins.*, 257 Or 62, 68 (1970). The director controlled the method of performance of the cast and crew, from hiring and firing to the details of play presentation. Lakewood set performance dates to coordinate various plays, and this only implies control over the result to be achieved. See *Trabosh v. Washington County*, 140 Or App 159, 165 (1996). The exercise of control factor in this case indicates an independent contractor relationship.

There is nothing in the record to indicate that Lakewood retained an unqualified right to terminate the contract absent any violation of the contract terms. See *Reforestation General v. Natl. Council on Comp. Ins.*, 127 Or App 153, 169, *adh'd to on recons*, 130 Or App 615 (1994), *rev den*, 320 Or 749 (1995). "An unqualified right to fire, indicative of an employer-employee relationship, must be distinguished from the right to terminate the contract of an independent contractor for bona fide reasons of dissatisfaction." *Henn v. SAIF*, 60 Or App 587, 592-593 (1982), *rev den*, 294 Or 536 (1983). Each cast and crew signed a contract with Lakewood explicitly providing for an independent contractor relationship. Lakewood and the cast and crew's view of nature of their relationship as one of employer and independent

⁴ ORS 656.029(1) states in part:

If a person awards a contract involving the performance of labor where such labor is a normal and customary part or process of the person's trade or business, the person awarding the contract is responsible for providing workers' compensation insurance coverage for all individuals, other than those exempt under ORS 656.027, who perform labor under the contract unless the person to whom the contract is awarded provides such coverage for those individuals before labor under the contract commences.

contractor, although not controlling, is a factor which may swing the balance in a close case. *See McQuiggin v. Burr*, 119 Or App 202, 207 (1993) (citing *Henn*, 60 Or App 587 at 592). The fact that the one-page contract does not provide detailed termination and remedies clauses does not indicate that the parties do not have rights in the event of termination. The right to fire factor in this case indicates an independent contractor relationship.

The equipment used by the cast and crew (set, costumes, music, and lighting) is controlled by the director, while the cast and crew provide talent and preparation. Lakewood's provision of the stage and incidentals (advertising, ticket-taking, places for the audience to sit, etc.) is not the provision of equipment in the ordinary sense. *See Cy Investment, Inc. v. Natl. Council on Comp. Ins.*, 128 Or App 579, 584 (1994) (the stage dancers performed on was not considered equipment, but rather merely a site of the dancers' performance). The furnishing of equipment factor in this case indicates an independent contractor relationship.

In the opinion portion of the order, page 12, last paragraph, regarding Chris Whitten Design, the first sentence is corrected to read "SAIF has included Whitten in the putative payroll for Lakewood not on the basis of his company [~~which SAIF agrees would be an independent contractor~~]but by operation of ORS 656.029...." See transcript of hearing, page 27, lines 5-12 (Teresa Smith, insurer's witness, testified that she "might have looked at that [meaning Chris Whitten Design] as – as, uh, possibly being independent.") See also insurer's exceptions to the proposed order dated 4/28/08, page 13, lines 8-9.⁵

Order

The billings, as revised by the insurer⁶, are reversed in part and affirmed in part. The revised billings are reversed to the extent that they included in calculating the premium for workers' compensation insurance provided by the insurer to the employer during the audit periods compensation paid by the employer to the

⁵ In an e-mail dated 4/28/10, the insurer confirmed that in the insurer's exceptions to the proposed order dated 4/28/08, page 13, lines 8-9, "Lakewood" should be "SAIF."

directors of the theatrical productions, the cast and crew and all others who worked under the direction of the directors of the theatrical productions, the curators and security and maintenance coordinators of the Festival of Arts, Elizabeth Hayden when instructing, and Chris Whitten Design. In all other respects, the revised billings are affirmed.

The stay of collection is terminated.

Notice of Right to Judicial Review

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the date the party received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

Dated August 30, 2010

/s/ Teresa D. Miller
Teresa D. Miller
Administrator
Insurance Division
Department of Consumer and Business Services

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⁶ See employer's amended petition dated 9/20/07, employer's hearing memorandum dated 1/23/08, and the proposed order page 1 footnote 1 and revised proposed order page 1 footnote 1.