

**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 08-03-001
)
)
NORTHWEST CHILDRENS THEATRE)
and SCHOOL, INC.)
An Oregon Corporation) **REVISED¹ PROPOSED ORDER**

HISTORY OF THE CASE

On December 11, 2007, Northwest Childrens Theatre (NWCT) received from SAIF Corporation (SAIF) a Final Premium Audit Billing for the period July 1, 2006 to July 1, 2007. NWCT timely requested a hearing on the final premium audit billings, and submitted a Petition to the Department of Consumer and Business Services (Department) on February 19, 2008.

The matter was referred to the Office of Administrative Hearings (OAH). NWCT requested a Stay of Collection which was granted by Administrative Law Judge (ALJ) Lata on March 10, 2008. On March 11, 2009, SAIF submitted a Supplemental Premium Audit Billing.

The hearing was rescheduled several times and ultimately reassigned to ALJ Susan E. Teppola. The hearing was held on March 12, 2009 at the OAH Offices in Salem, Oregon. NWCT appeared through its Managing Director, Judy Kafoury. NWCT was represented by William H. Repogle. SAIF Corporation appeared through Premium Audit Program Analyst DeAnne Hoyt and was represented by Assistant Attorney General Ethan Hasenstein.

Judy Kafoury testified on NWCT's behalf. DeAnne Hoyt and SAIF Field Auditor Linda Surgenor testified on SAIF's behalf. The record remained open until Wednesday, March 18, 2009 for receipt of contracts for instructors and staff support and closed upon their receipt as set forth below.

SAIF filed Exceptions to the Proposed Order, which were received by the Division on April 28, 2009. Petitioner also filed Exceptions which were mailed to the Division on April 24, 2009.

¹ Additions to the Proposed Order are made in **bold type**. Deletions are noted by ~~strike through~~. Where no changes were made, arguments made in the Exceptions were considered, but rejected by the ALJ.

ISSUES

Whether, for the premium audit billing for the policy period of July 1, 2006 to July 1, 2007, SAIF correctly determined that:

1. Instructors who taught classes at NWCT were subject workers for which premiums should have been paid.
2. Support staff who assisted instructors at NWCT were subject workers for which premiums should have been paid.
3. **Guest directors, designers and musicians, assistant choreographers, assistant costume designers, assistant directors, assistant house managers, assistant stage managers, audio describers, carpenters, choreographers, composers, sound designers, costume designers, costume shop managers, cover and poster illustrators, electricians, fight choreographers, fight directors, follow-spot operators, graphic artists, graphic designers, lighting designers, marketing assistant, music director, painters, parent liaison, photographers, printers, prop designers, properties designer, properties master, puppets, scenic artists, set designers, sound board operators, sound technicians, stagehands, stitchers, wardrobe masters, welders, wig, prosthetic, and makeup designer, who worked on a per play produced basis (other than those already on staff as employees or administrative staff) ~~etc.~~ at NWCT** were subject workers for which premiums should have been paid.
4. Actors and child actors who were cast in the plays produced by NWCT were subject workers for which premiums should have been paid.

EVIDENTIARY RULINGS

1. NWCT's Exhibits P1 through P31 were admitted without objection. The record was left open for NWCT to provide copies of contracts for instructors and support staff. Received within the time allotted were Exhibits P32 through P35, which are instructor contracts covering the period of time in question. They are admitted into the record. No support staff contracts were received or admitted.
2. SAIF's Exhibits A1 through A11 were admitted into evidence without objection. Exhibit A12 was outside the audit period in question and was excluded as irrelevant.
3. **NWCT's Petition to review DCBS's Premium Audit, Notice of Administrative Law Judge Re-Assignment and Notice of Rescheduled hearing were admitted as Record documents R1 through R3. SAIF's Exceptions and NWCT's Exceptions are admitted as Record documents R4 and R5.**

FINDINGS OF FACT

1. Northwest Childrens Theatre and School, Inc. (NWCT) is a charitable corporation founded in 1993. It is a semi-professional theater and school whose mission is to “educate, entertain and enrich the lives of young audiences.” (Test. of Kafoury.)

2. A semi-professional theater is distinguished from an equity theater. There are only a few equity theaters in Oregon. Portland Center Stage and the Oregon Shakespeare Theater are two examples. People who work at equity theaters are members of the union, Actors Equity. They receive benefits, such as retirement benefits, and taxes are deducted from their paychecks. There are approximately 200 semi-professional theaters in the Portland Theater Alliance. People who work at semi-professional theaters are not union members. The remuneration actors and designers at semi-professional theaters receive is a small honorarium or stipend at the end of a run of a particular play, or when their particular part of the staging of a play is complete. During the audit in question, NWCT produced six plays. (Test. of Kafoury.)

3. In addition to producing plays, NWCT operated a school. School consisted of three terms (Fall, Winter, Spring), and summer camps, which were one to two weeks in duration. NWCT rented space in the Northwest Community Center. Rented space included four classrooms. In the summer, NWCT rented additional space for summer camp classrooms. During the terms, classes took place after academic school was over or on weekends. Children usually took one to two NWCT school classes at a time. Children paid tuition to NWCT. Some children paid reduced tuition because NWCT accepted tasks performed by parents in partial exchange for tuition. (Test. of Kafoury.)

4. Approximately 75 percent of NWCT’s revenue came from tuition and ticket sales. The balance came from donations, contributions, sponsorships and grants. (Test. of Kafoury.)

5. During the audit period, NWCT had the following employees: An office manager and office staff who answered the phone, sold tickets, took tuition from students and did other general officer work, such as filing; two development and marketing employees who raised money through soliciting contributions, grant writing, passing out marketing material at other events, and writing public relations materials; a stage manager, whose job it was to attend the rehearsals and make sure the play was executed to the play director’s vision after the director completed his or her work. (After the opening performance, the director leaves. He or she is not present during the remaining run of the play); an artistic director (producer) **Sarah Jane Hardy**, who selected the six plays for the season, wrote the budget and got it passed by the board, and then passed the budget for each play along to the directors and designers that were working on that play; a technical director who built the sets after receiving plans from the set designer; and an education director, who ran the school. The education director determined which of the school’s classrooms would be used for which classes and what classes to offer each term. There were a few other unidentified employees. In all there were approximately 12 to 13 employees during the audit period. (Test. of Kafoury.) [During the audit period, the](#)

employees who were identified, and for whom a premium was paid are Joseph Bolenbaugh, Erica Cafazzo, Wendy Reznicek, Cynthia Simpson, Roger Monroe, Patricia Hanson, Rebecca Miller, Michael Stirling, Melody Bridges, Cyndthia Kinder, Carolyn Newsom, Paul Brown and Sarah Jane Hardy(Sanders). (Exs. A5 and A9.)

6. The budget for the employees mentioned above was approximately \$260,000 for the audit year. All of the employees mentioned were salaried, paid monthly, had deductions taken from their pay and received some employee benefits. Their income was reported to them on W-2 forms at the end of the year. All above listed employees were included as subject workers in the Supplemental Premium Audit and NWCT did not disagree with the determination that those individuals were employees for which a premium should be due. (Ex. A10 and Test. of Kafoury, Hoyt and Surgenor.)

7. In addition to full time paid employees, NWCT used instructors to teach classes in the school. After the NWCT education director selected the classes to be offered for any particular term or camp, (such as classical, contemporary, comedy or acting skills classes), the education director selected instructors, most of whom are also actors. (Test, of Kafoury.) NWCT also published a newsletter in which it announced upcoming classes. (Ex. P7.)

8. NWCT competed for instructors with other acting schools, such as Oregon Childrens' Theater. The instructors may have been teaching different classes at different schools at the same time. The instructors may also have been appearing in stage productions at various other semi-professional theaters while teaching. Once an instructor contracted to teach a particular class, the selection of the play, the script, theme, skills and method of teaching the class, playlab or workshop was up to the instructor. NWCT did not provide a curriculum or lesson plans. NWCT had costumes and props which were available to be used by the students. But the instructor brought supplies and students brought materials to class as well. NWCT's education director observed what the instructor was doing and if it was a lab class, she watched the production at the end of the lab, but she did not interfere or intervene in the way the class was being taught. Instructors were not fired and the managing director did not believe they could be fired unless the instructor committed a crime. If the instructor did not fulfill his or her contract, he or she did not get paid at the end of the class. If the education director was not satisfied with what the instructor did for a particular class, she did not contract with them to instruct a class again. (Test. of Kafoury.)

9. Instructors signed contracts which provided in pertinent part as follows:

Instructor Contract

This contract is entered into between Northwest Childrens Theater and School, Inc. and _____(instructor), wherein the latter will perform the duties and responsibilities of theater instructor, subject to minimum class enrollment, for the following classes:

The work to be performed includes all services agreed upon by Education Director and Instructor, including, but not limited to, time of class and performance.

The parties agree that the Instructor is responsible for:

- A. Conducting the class as agreed upon
- B. Beginning and ending the class as agreed upon times
- C. Providing class equipment and supplies
- D. Securing and paying professional guests
- E. Securing and paying substitute instructors, if necessary
- F. Reporting and paying all of Instructor's own taxes and insurance required by any city, county, state and/or federal government
- G. Informing NWCT Education Director of absences, substitutes, guests and other problems/schedule changes/ that might affect the quality of the class.

Payment

Northwest Childrens Theater and School will pay the Instructor the sum of \$_____ upon completion of the contract, on the date or dates recorded above.

Terms

This agreement may be terminated by Northwest Childrens Theater and School at any time prior to the end of the class or classes, for any reason deemed in good faith sufficient by NWCT.

Relationship of the Parties

The parties intend that an independent contractor relationship will be created by this contract. Instructor is not an employee of NWCT. Theater agrees not to exclusively use Instructor's services. Instructor may engage in his or her profession for other person or organizations during period she Instructor is not performing under the contact with NWCT.

* * * * *

(Exs. P32 through P35.)

10. During the audit year, NWCT used a total of 33 instructors. NWCT had a core group of eleven instructors, or one third of the total, who taught five or more classes: Tiffany Rowland was paid 17 times; Marjorie Tatum 8 times; Shelly Lipkin 13 times,

Aimee Ankeny 5 times, Linda Walker 7 times, John Ellingsen 18 times, Elizabeth Hayden 8 times, Paul Viggiano 6 times, and Matt Haynes 6 times. Eight instructors taught two to four times. Fourteen taught only once. (Exs. A2 and A11.)

11. Instructors were assisted in the classroom by support staff. Support staff consisted primarily of older students at the school, who were good mentors for the younger students. Support staff was paid a stipend one time at the end of the class, lab or workshop. (Test. of Kafoury.)

12. During the audit year, NWCT used a total of 34 support staff. Fourteen of them assisted in four or more classes. Eleven of the support staff had also been used to instruct one or more classes. Of the latter group, three instructors who had each taught classes more than eight times (Elizabeth Gibbs, John Ellingsen and Tiffany Rowland), also acted as support staff in another class. (Ex. A2 and A11.)

13. As for the theater side of the business, in addition to full time salaried employees, NWCT used directors, actors, designers and musicians in the production of plays. (Test. of Kafoury.)

14. After the artistic director selected the plays for the season and the budget for the season was adopted by the board of directors, she selected directors for each play and told the director what the budget was for that particular production. The director was in charge of casting, finding the musicians and stage hands, setting a vision for the production and keeping the cost within the budget. Once the director was chosen, NWCT took no part in interfering with what the director did to get the play on the stage, except that the contract with the directors provided that the directors were responsible to:

Allow the *Artistic Director* input on artistic decisions (including, but not exclusive to casting, design, concept, textual changes, staging and interpretation). *Artistic Director* may conduct and/or assist with casting if necessary. Final casting must be approved by the *Artistic Director*, who will negotiate performer contracts.

(Test. of Kafoury and Ex. P13, italics in original.)

15. In three out of the six plays for the audited period the artistic director, **Sarah Jane Hardy**, chose herself as the director for a particular play. **Ms. Hardy did not receive additional compensation for the plays she directed. Her efforts as a director were paid as a part of her regular employee compensation.** She was supposed to be the director for a fourth, but was in Europe and someone filled in for her. Two of the plays were directed by guest directors. NWCT paid a guest director \$2000 for directing *Beauty and the Beast* and another guest director \$1500 for directing *Junie B. Jones*. (Test of Kafoury and Ex. A2.)

16. Whether the play was directed by the artistic director of NWCT acting in her second capacity as play director or by a guest director, all the actors, musicians,

stagehands, and designers worked under the **control guidance** of the director for that particular play. (Test. of Kafoury.)

17. Directors found set designers, costume designers, prop designers, sound designers, and lighting designers. Designers, some of whom did not live in the Portland Metro area, met with the director to obtain the concept for the play. Designers then worked off site at their own studios or homes to develop plans for the set, the plot for the lights, the sounds to be set into a computer, and the patterns for the costumes and so forth. Once their product was delivered to the theater and any adjustments made, they were paid and had no further involvement with the play. (Test. of Kafoury².)

18. Directors also contracted with choreographers, fight choreographers, and fight directors. Those professionals came to the theater to teach a dance or fight scene. After the scene was choreographed and taught, they were paid and had no further involvement with the play. (Test. of Kafoury.)

19. Some plays also required the director to find musicians and musical directors to direct musicians. Musicians practiced the music at home and brought their own instruments to the theater (except for the piano.) The music director directed the musicians and taught the actors any pieces that needed to be sung. In the event that a musician could not make it to the play, the musician was responsible for finding his or her replacement. (Test. of Kafoury.)

20. All six plays required the director to cast actors to play roles in the plays. Adult actors were solicited in the NWCT newsletter, the Oregonian, and on PDX.live. (Ex. P25.) NWCT also sponsored auditions and many actors were known to the directors through auditions and previous performances. (Ex. P26.) The actors learned their lines from a script provided by NWCT and worked collaboratively with the director, the designers, the musicians, etc. to bring the director's vision for the play to the stage. If an actor was not available for a performance, a second actor in the cast would play the part, or the director could be called back to the theater to walk the part for that performance. (Test. of Kafoury.)

21. All six plays required the director to cast young actors, between age 10 and age 18, most of whom had taken classes at NWCT, for roles in the productions which were geared for young audiences. Young actors also took guidance from the play director to get the play developed to the director's satisfaction. (Test. of Kafoury.)

22. Guest directors, designers, choreographers, musicians, musical directors, actors and young actors all signed contracts. The contracts varied slightly depending on the task, but all of them required the contracted to work with the director, artistic director, production manager and designers. All were required to meet deadlines and attend specified meetings or rehearsals. All were required to observe the rules of the building

² Although Kafoury did not testify specifically regarding painters, stitchers, carpenters and other crafts people, I took her testimony about professionals that work on a per play produced basis as being representative of that entire group mentioned in issue number three above.

and NWCT management. In cases of disagreement, all were directed to either go to the stage manager or the production manager and, if the dispute was not resolved, to go to the producer or artistic director. Each contract concluded with the following language:

This contract may be rewritten and/or renegotiated only with full consent of both parties and can be terminated at no cost by NWCT if the Contracted is unable to unwilling to fulfill commitment as requested. The parties agree that the Contracted is an independent contractor and solely responsible for the manner in which the work is to be performed as well as any applicable employer obligations required by statute. Final payment is dependent upon the performer providing support materials to validate independent contractor status.

(Exs. P9, P10, P12, P13, P14, P15, P16, P18, P19, P20, P21, P28 and P29.)

23. For young actors, in addition to having the actor sign the contract, NWCT had the child's parent, or guardian, also sign the contract. (Test. of Kafoury and Exs. P9, P20 and P21.)

24. During the audit period, NWCT used 99 actors. Eighty six out of 99 actors had no instructor or support staff relationship with NWCT during the audit period. Thirteen of them had other relationships with NWCT: Six were instructors that had been support staff at least one additional time (and one of those, John Ellingson, had a part in four out of NWCT's six productions) and seven additional actors had been support staff for at least one class. (Ex. A2 and A11.)

25. Guest directors, designers, choreographers, musicians, musical directors, actors and young actors all received federally required 1099 Miscellaneous Income forms at the end of a calendar year if he or she was paid in excess of \$600. (Exs. P9, P10, P12, P13, P14, P15, P16, P18, P19, P20, and P21 and Test. of Kafoury.)

26. NWCT did not believe it had the authority to fire designers, directors, choreographers, musicians, musical directors, actors and young actors once they were chosen by the play's director and contracted. If it was reported to NWCT management by the director or stage manager that someone under contract had not fulfilled the contract, then NWCT would not pay them the contractual amount. (Test. of Kafoury.)

27. All designers, directors, choreographers, musicians, musical directors, actors and young actors brought their specific talent and skill set to the production of the plays. All may have been working on other stages in other productions while under contract for a play at NWCT. (Test. of Kafoury.)

28. In 1995, NWCT was audited by the Social Security Administration. In 1997, it was audited by the Oregon Employment Department. Both audits concluded that, based on the theater industry's practices, the instructors, support staffs, designers,

directors, choreographers, musicians, musical directors, actors and young actors were not employees of NWCT. (Test. of Kafoury.)

CONCLUSIONS

For the premium audit billing for the policy period July 1, 2006 to July 1, 2007, SAIF correctly determined that:

1. People who taught classes at NWCT were subject workers for which premiums should have been paid.
2. Support staff who assisted instructors at NWCT were subject workers for which premiums should have been paid.

For the premium audit billing for the policy period July 1, 2006 to July 1, 2007, SAIF incorrectly determined that:

3. **Guest** directors, designers and musicians, assistant choreographers, assistant costume designers, assistant directors, assistant house managers, assistant stage managers, audio describers, carpenters, choreographers, composers, sound designers, costume designers, costume shop managers, cover and poster illustrators, electricians, fight choreographers, fight directors, follow-spot operators, graphic artists, graphic designers, lighting designers, marketing assistant, music director, painters, parent liaison, photographers, printers, prop designers, properties designer, properties master, puppets, scenic artists, set designers, sound board operators, sound technicians, stagehands, stitchers, wardrobe masters, welders, wig, prosthetic, and makeup designer, who worked on a per play produced basis (other than those already on staff as employees or administrative staff) etc.-at NWCT were subject workers for which premiums should have been paid.

4. Actors and child actors who were cast in the plays produced by NWCT were subject workers for which premiums should have been paid.

OPINION

NWCT contests the Supplemental Premium Audit Billing in this case, because it disagrees with SAIF's conclusions that the instructors, support staff, designers, directors, choreographers, musicians, musical directors, actors and young actors are workers subject to the payment of premium.

Burden of Proof

In premium audit cases, the 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). In this case, NWCT must show that it is more likely than not

the above listed workers are independent subcontractors. *Cook v. Employment Div.*, 47 Or App 437 (1982).

Subject Worker Status

The analysis of whether the artists and instructors are workers subject to the payment of a premium begins with the definition of “worker” found in ORS 656.005(30).

“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[.]

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.³

There are several factors to be examined in the “right to control” test. As the Court of Appeals 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).

There has been debate as to which of the four factors noted above is entitled to the greatest weight. “On only one point as to the relative weight of various tests is there an accepted rule of law: It is constantly said that the right to control the details of the work is the primary test.” *Larson’s Workers’ Compensation Law*, Sec. 60.03.

The other test that is applicable to these matters is the “nature of the work” test. The factors of importance in that test include whether the work being done by the putative contractor is skilled or unskilled, performed as a separate calling, an integral part of the employer’s regular business, the contractor is in business for himself outside the relationship with the employer, the work is continuous or intermittent and whether the work is a continuing service or by the job. *Woody v. Waibel*, 276 Or 189, 197-98 (1976) and *Oregon Drywall Systems v. NCCI and SAIF Corporation*, 153 Or App 662 (1998).

³ By definition, an “employer” is one who has “the right to direct and control the services of any person.” ORS 656.005(13)(a).

In *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614 (200), the Court gave further instruction as to what it meant in *Woody v. Waibel*, 276 Or 189 (1976) regarding the use of the “right to control test” and the “nature of the work test.”

Woody makes clear that the phrase, “subject to the direction and control of employer,” requires that an employer retain some control over the method and details of a claimant’s work if that claimant is to be classified as a “worker” under the workers’ compensation statutes. (citation omitted.) However, when an employer has the right to control a claimant’s performance in some respects, but not in others, “it is essential that we consider the factors which make up the ‘nature of the work’ test” in deciding whether the control that employer retains makes the relationship one of master and servant. (citation omitted.)

In other words, *Woody* does not stand for the proposition that the right to control and nature of the work tests are independent of one another and should be applied hierarchically, or that the nature of the work factors are relevant only in situations in which a claimant’s status cannot be determined through the application of the right to control test. Rather, *Woody* establishes that, in situations in which there is some evidence suggesting that an employer retained the right to control the method and details of a claimant’s work, a conclusion about the claimant’s status depends on the analytical factors relevant to both tests.

Rubalcaba at 627.

In the matter at hand, there are four discreet groups to which the “right to control” and “nature of the work” tests should be applied: (1) the instructors, (2) support staff, (3) designers, directors, and musicians, and (4) actors, including child actors.

Further complicating the analysis in this case is the fact that three out of the four groups had contracts with NWCT. The fact that there are contracts that declare the contracted to be an independent contractor is not dispositive, although it may have some persuasive effect. Cases in which the parties have contracted fall into two categories: Cases in which the worker chose to be an entrepreneur without compensation protection, and cases where employers characterized workers as independent contractors to avoid paying workers’ compensation premiums.

The decided cases give a fairly clear clue to the considerations which will determine when a contract passes over from the first to the second category. The tests appear to be chiefly these two: (a) Did the contract (and the parties’ subsequent conduct in carrying it out) establish the underlying rights of the contractor relationship as distinguished from the legal forms and names? And (b) Was the nature of the work such that it might normally be done by independent contractors?

Larson's Workers' Compensation Law, Sec. 63.01.

Instructors

The audit determined that instructors at the school were employees for purposes of workers' compensation insurance. NWCT's education director controlled the classes that were offered and she controlled which instructor was chosen for the class, playlab or workshop. NWCT had props and costumes that the students could use. The function of teaching the classes was integral to one part of NWCT's mission, which is to teach children. NWCT could terminate the contract for any reason it deemed to be in good faith sufficient cause. Therefore, NWCT retained the right to fire the instructor, even though the Managing Director did not think NWCT could, and apparently did not, fire instructors. Nevertheless the right to fire was held by NWCT. NWCT had a core group of teachers who taught classes. Two of them either taught 17 or 18 times and both of those instructors also acted as support staff for at least one other class. Because many instructors taught multiple times, they were paid multiple times in accordance with the contracts providing that they would be paid at the end of the class. All these factors weigh in favor of an employer/part-time employee relationship.

On the other hand, the contract provided that the instructor was to provide the equipment and supplies for the class. The instructor was also to arrange and pay for guest instructors and to arrange and pay for substitutes if he or she was absent. They did not work exclusively for NWCT. They were free to engage in teaching and acting at other venues. Although the education director selected the main idea for the class, the instructor was responsible for the actual content of the class and the method by which it was taught.

On balance, the fact that NWCT could fire instructors for any reason NWCT deemed to be sufficient gave it more right to control the details of how the work was performed than it might have been actually exercising. I found more factors weighing in favor of an employment relationship than an independent contractor relationship. Despite the language of the contract, NWCT did not establish by a preponderance of credible evidence that a true independent contact relationship existed with the instructors.

Support Staff

The audit also included classroom support staff as workers subject to payment of premium. There is little in the record to explain the scope of work performed by the support staff, most of whom were older students at NWCT, except to say that the support staff assisted the instructors and were good mentors for the younger children taking the classes.

A review of the ledger showed that NWCT used 34 support staff during the audit year. There was substantial cross-over between instructors and support staff. Of the 34 support staff, 11 had also been instructors for one or more classes. Fourteen support staff were used at least 4 times. If the support staff were paid at the end of each class, many of

them were paid multiple times. Apparently, support staff were not working under written contracts as the record was left open for receipt of examples of such and none were provided. If there is no contract, their employment would be “at will.”

As noted above, I found above that the instructors themselves were employees. It would be logical that the support staff assisting the instructors were also employees. In any case, NWCT had the burden to establish that the support staff were independent contractors and it did not meet its burden on that point.

Directors, Designers, Musicians, Musical Directors, etc.

The audit determined that this group of providers should have been subject workers and that workers’ compensation premiums should have been paid.

However, NWCT retained no right to control the details of the work produced by this group of professionals. Play directors hired people who had specialized skills needed in the theatrical world to provide such things such as costume design, light plot to be programmed into the computer, the sounds to be heard during the play, the blocking for where people were to stand, directions for how a song should be sung or a fight should be choreographed. In large part, the designers and musicians provided their own equipment and studios and worked off site on their productions.

In almost all cases, this group was paid one time at the conclusion of the contract when the requested plan or directions were provided. In at least one instance, a contracted costume designer did not live in the metro area. The specialists were not working exclusively for NWCT. After delivering their product and receiving payment, they had no further involvement with the play or NWCT. The relationship was intermittent and based on the delivery of a particular product as opposed to an ongoing relationship that repeated over time.

With respect to the right to alter or terminate the contract, the contract provided, “This contract may be rewritten and/or renegotiated only with full consent of both parties and can be terminated at no cost by NWCT if the Contracted is unable to unwilling to fulfill commitment as requested.” Thus, the only one means by which the contract could be terminated was if the contracted party was either unable or unwilling to fulfill the commitment he or she had made. That is a far narrower retention of authority than what the contract for instructors provided, which was that NWCT could terminate the contract for any reason it deemed to a good faith sufficient reason.

SAIF pointed to the fact that the director contracts required the contracted to allow the artistic director, who was a NWCT employee, input. The contracts also required the contracted to observe the rules of the building and NWCT management, appear at rehearsals, *etc.* And, in case of unresolved disputes, the contracted was referred to a NWCT employee for resolution. SAIF argued that these were sufficient indicia of right to control that the directors, designers and musicians were employees of NWCT.

Although NWCT had some right to control behavior and attendance, there is no evidence that they retained any control over the details of how the contracted met his or her obligations under the contract. There were almost no indicia of an employer and employee relationship with this group of providers. I found that NWCT carried its burden to establish that directors, designers, musicians, etc. were not employees during the audit period.

Actors and Young Actors

The final category included in the audit were actors who performed in NWCT productions. It was argued that in at least half the plays produced during the audit year the artistic director, who was an employee of NWCT, appointed herself as a play's director. Therefore, because the actors worked under the guidance of the director, in effect they were subject workers of NWCT.

However, that reasoning does not apply the "right to control" and "nature of the work" tests noted above. Those tests are what courts have held should be applied to determine what was the essential nature of the relationship between the entities.

Actors, regardless of age, are artists. Although there was some cross-over between the instructors/support staff at the school and the theater, 86 out of 99 actors, or 87 percent of them, had no relationship to NWCT except to appear as an actor in one or more productions.

Directors could ask the actor to portray a certain emotion, but the details of how the actor actually went about doing that was completely up to the actor. NWCT had no right to control the details of how the work was accomplished by an actor. Actors were paid one time, at the end of all the performances for that particular play.

SAIF argued that the actors brought no tools to the job, so that factor was neutral. I disagree. Their tools are their unique talents and skills, which the actors alone could bring to the job. NWCT retained the right to terminate the contract only if the actor was unable or unwilling to perform, which was far more limited than what it retained to control its instructors.

The contract evidenced a desire to create an independent contractor relationship. The manner in which the contract was carried out the contract was consistent with that relationship. The work performed was highly skilled.

The business of NWCT is the production of plays in general. That encompasses many professions, of which acting is only one. Acting is a calling separate from play production. Actors are in business for themselves outside of their work for NWCT. The actors did not work for NWCT on an ongoing basis, rather they worked on a project basis. This is the type of work that one would expect to be performed by a talented, skilled independent contractor.

Much was made of the fact that in each play, actors between the ages of 10 and 18 played roles. It was argued that children inherently need more supervision, hence they must be employees of NWCT. Even if children need more supervision, that does not automatically create a relationship of employment. Minors have capacity to contract. The contracts are not void, they are voidable by the minor. In this instance, NWCT also had the parent or guardian of the child sign the contract.

Having examined the work performed by the actors from many angles, I concluded that they are not employees of NWCT and NWCT carried its burden on that point as well.

Conclusion

A preponderance of credible evidence established that the audit was incorrect in two of the four particulars:

For all of the above reasons, I propose that the department issue the following order:

REVISED PROPOSED ORDER

That the March 11, 2009 Supplemental Premium Audit Billing be AFFIRMED in part and DISAFFIRMED in part. The conclusion that NWCT is subject to the payment of premium for instructors and support staff is AFFIRMED. The conclusion that NWCT is subject to the payment of premium for designers, directors, musicians, (*etc.*) and actors is DISAFFIRMED.

DATED this 18th day of August.

/s/ Susan E. Teppola
Susan E. Teppola, 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