

b. In its determination that Rick Barrett Drywall was required to provide workers' compensation to R & K Drywall employees who were not exempt under ORS 656.029, and

b.c. In its determination that tile work, landscaping, gardening, and carpentry performed at 9743 SE Tenino Court in Portland, Oregon was not exempt from workers' compensation insurance.

EVIDENTIARY RULINGS

Record documents 1 through 4 were admitted. SAIF's Exhibits A1 through A21 were admitted into evidence. Employer's Exhibits A through F were also admitted.

SAIF's Exceptions to the Proposed Order and Petitioner's Response to SAIF's Exceptions are added to the record as Record documents 5 and 6.

FINDINGS OF FACT

1. At all times relevant to this determination, Rick Barrett Drywall was a sole proprietorship. He started his business in 1988. He has never had any employees. He purchased workers' compensation insurance from SAIF, because it was necessary to present proof of workers' compensation insurance to a general contractor for a job he intended to bid on. (Test. of Barrett.)

2. Barrett's method of business was to receive calls from residential and commercial customers who wanted drywall work done. Barrett then referred the case to one of several subcontractors with which he has worked. All the companies Barrett used are separate independent businesses and, to his knowledge, were licensed by the Construction Contractors' Board (CCB) and insured by workers' compensation insurance. The subcontractors looked at the job and gave Barrett a bid, to which he generally did not object, as he knew roughly what it would cost to get a particular job done. With some subcontractors Barrett also provided the materials. The subcontractors provided their own tools, set their own hours and hired their own employees. Barrett paid the subcontractors. He charged the customers his cost for the subcontractor and materials (if applicable), plus 25% over the cost. (Test. of Barrett.)

3. One of the entities Barrett utilized was R & K Drywall Corporation, which was owned by Raymundo Rodriguez and his now ex-wife, Kathy Rodriguez. The business address for R & K Drywall was the same as the principal parties' residence address, which is not Barrett's address. Raymundo performed the labor for R & K Drywall and Kathy took care of the office and books. R & K Drywall had been licensed by CCB from February 17, 1998 to January 19, 2003, and from November 3, 2004 to November 3, 2006. But unbeknownst to Raymundo or Barrett, R & K's CCB license lapsed on the November 3, 2006. Raymundo believes that it lapsed during the period of time that his wife was ill and they were getting a divorce. R & K obtained its CCB license again on

October 12, 2007, and it is licensed until October 12, 2009. (Ex. A17 and Test. of Barrett and Rodriguez.)

4. During the audit period, Barrett used **awarded contracts to R & K Drywall**, especially for residential projects where people were living in the home where drywall work was being performed. Barrett found that R & K was more sensitive to the needs of the occupants to keep the job clean and to clean up the worksite when they left. (Test. of Barrett.)

5. During the audit period, Barrett also used Alex Ruiz, Jorge Perez, Juan Jasso and others as subcontractors. Those subcontractors were paid at various times in varying amounts. Collectively, the other subcontractors received about \$61,000 in compensation. (Ex. 12.) R & K Drywall received over \$109,000 from Barrett as compensation for jobs it had worked on. (Test. of Grove and Ex. 12.) In all cases, subcontractors who did work for Barrett were generally paid in round figures. (Ex. 12.)

6. Barrett has worked with R & K Drywall for many years. There are no written contracts between Barrett and R & K. Barrett provided R & K the address for the job. R & K Drywall gave Barrett a bid calculated on the hours necessary to perform the work or the square footage of the job. The method by which R & K estimated the job was up to R & K. (Test. of Barrett and Rodriguez.)

7. As with the other subcontractors, Barrett did not tell R & K Drywall how to do the work. He did not tell them when to arrive at the job site or when to leave. Barrett did not check up on the work as it was being performed or direct its completion. Barrett considered R & K to be his equal. R & K sometimes used an additional worker. Barrett did not select, manage, or control who R & K used to perform the work. Barrett provided R & K Drywall with materials, but they brought their own tools. If R & K Drywall did not want to bid on a certain job, it was not required to. Barrett would find another subcontractor. Had R & K performed in an unsatisfactory manner, Barrett would not have invited it to bid on another job. Had R & K failed to perform a certain job in a satisfactory manner, Barrett would have considered that a breach of contract. (Test. of Barrett.)

8. While R & K Drywall was working for Barrett, it was free to work for others as well. The amounts paid to R & K Drywall by Barrett during the audit period, approximately \$109,000 (Ex. A18.), were not the only, or even the majority, of the revenue received by R & K Drywall. (Test. of Rodriguez.)

9. ~~Whether Barrett provided materials to the other subcontractors or not, SAIF accepted them all as legitimate subcontractors. Because all of the other subcontractors were licensed by CCB during~~ Hence, for the audit period, they were not subject worker's that would be required to be covered by Barrett's worker's' compensation insurance. R & K Drywall, however, was considered to be a subject worker, because its CCB license had lapsed and it did not have **workers' compensation** insurance. The auditor also found the frequency of payment to R & K to be significant. (Test. of Grove.)

10. In spring 2006, Barrett rented a home at 9743 SE Tenino Court, Portland, Oregon. His intention was to purchase the home and remodel it as his principal residence. (Test. of Barrett.) He purchased the home on December 29, 2006, and began an extensive home remodel. Eventually, the nature of the remodel caused him to move out for a time. The remodel was complete in the summer of 2008 and Barrett moved back in to the home. (Test. of Barrett.)

11. Barrett paid his brother, Mike, \$1500 to assist him with tearing out things at the residence. Barrett withdrew cash from his business account to pay for materials and labor at the residence. Barrett had tile work done in the bathrooms at the residence and he extensively renovated the landscaping, which was overgrown. In all, during the audit period, Barrett paid over \$26,000² for labor on his personal residence to carpenters, tile installers, hardwood floor installers, furnace installers, carpet installers, landscapers, gardeners and others who performed work on the remodel. (Test. of Barrett and Ex. D.)

12. Barrett's sister, who became his bookkeeper after the audit period was over, but before the audit was complete, referred to the residence that Barrett purchased as his "personal investment." She said that in the context of trying to explain why funds for the residential remodel were taken from the Rick Barrett Drywall's business account. (Test. of Grove and Ex. A10.)

CONCLUSIONS OF LAW

The Final Premium Audit Billing dated August 4, 2008, is: ~~not correct in the following particulars:~~

- a. **Not correct** in its determination that employees of R & K Drywall were subject workers of employer; and
- b. **Is correct** in its determination that Rick Barrett Drywall was required to provide workers' compensation to R & K Drywall employees who were not exempt under ORS 656.029, and
- b.c. **Not correct** in its determination that tile work, landscaping, gardening, and carpentry performed at 9743 SE Tenino Court in Portland, Oregon was not exempt from workers' compensation insurance.

OPINION

Employer contests the Final Premium Audit Billing in this case because it disagrees with SAIF's conclusions that R & K Drywall, Inc. should be subject to the payment of premium and that the work performed on the residence on Tenino Court is not exempt from subject payroll.

² At hearing, the ALJ did not understand SAIF to question the amount spent on the Tenino house, but rather whether the amount spent was exempt from workers' compensation coverage.

Burden of Proof

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 R & K Drywall, Inc. is an independent subcontractor and that it is more likely than not that work performed at the residence on Tenino Court is exempt from subject payroll. *Cook v. Employment Div.*, 47 Or App 437 (1982).

A. Subject Worker Status

To resolve the first issue, an analysis of the nature of the relationship between employer and the other corporation 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[.]

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 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).

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 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).

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.

The Tests

As noted, there are four factors relating to the right of control test. 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.

There are several other factors involved in the “nature of the work” test. They are:

1. Whether the work is skilled or unskilled;
2. Whether the work is performed as a separate calling or enterprise;

3. Whether the work at issue is a regular part of the employer's business;
4. Whether the work is continuous or intermittent;
5. Whether the duration of the work is such that it qualifies as hiring for a continuing service or as contracting for the completion of a particular job.

Oregon Drywall Systems v. NCCI and SAIF Corporation, 153 Or App 662 (1998).

Oregon Drywall is of particular significance to the analysis of this case. The court noted in *Rubalcaba*, where it has provided guidance in case law regarding the meaning of the statutory phrase "subject to the direction and control of the employer" in analogous situations, the Workers' Compensation Board, or in this case, the administrative law judge, should pay attention to that guidance.

In *Oregon Drywall*, the employer hired subcontractors when it had too much work. There were not written contracts between them. Subcontractors bid the job by the square foot or by the hour. Subcontractors billed at the end of the job and payment was made by lump sum 30 days afterward. Oregon Drywall did not question the subcontractor's bids and did not presume to tell them what to do, as he regarded them as equals.

Applying only the "right to control" test, the court found:

All direct evidence of a right to control shows that the relationship of Oregon Drywall and its subcontractors was not one of employment: subcontractors could accept or refuse a job; they could set their own hours within the time frame of the general contractor; they could use their own methods to reach the intended result; and they were not subject to monitoring in the method of doing their work, but only in their progress. The right to control the work refers to the right to control the manner and means of accomplishing the result, not the right to control the details of the desired result. *Reforestation General v. NCCI*, 127 Or App 167 * * * (1994). As we held in *Cy Investment, Inc. v. NCCI*, 128 Or App 579 * * * (1994), the monitoring of progress toward job completion does not amount to the exercise of direction and control over the means and method of doing the work. The testimony of Peterman and the subcontractors indicates that in drywalling there are many acceptable methods and techniques for reaching the same desired result and that subcontractors were not instructed as to the details of how to complete the job. *Compare HGD Enterprises v. NCCI*, 121 Or App 513, 518-19 * * * (1993) (carpet installers were provided with suggested positions for seams and other details of installing.) We conclude that the evidence shows that Oregon Drywall had no right to control the methods chosen by the subcontractors.

The method of payment also indicates a nonemployment relationship. Subcontractors submitted bids and billings based on a square footage or hours, depending on *their own assessment* of the job, its difficulty and the time involved. Oregon Drywall did not dispute billings and did not question bids that were within the range of acceptable charges for the nature and size of the job. Subcontractors were paid for each job within 30 days of completion, rather than by a regular pay schedule, also indicating that the relationship was not one of employment.

The record shows that drywall installers used their own tools for their work whether they were employed by someone else or self-employed. Thus, although it might otherwise be indicative of a non-employment relationship, the furnishing of tools factor does not weigh on either the side of the equation.

With regard to the right to terminate, the record shows that, although Oregon Drywall could choose not to enter into a new contract with a particular drywaller without liability to the subcontractor, the termination of a subcontract mid-job without good reason would be regarded by all parties as a breach of contract.

Oregon Drywall at 667-8.

The relevant factors, therefore, established conclusively that no employment relationship existed between Oregon Drywall and its subcontractors.

There are a few apparent differences between Oregon Drywall and Rick Barrett Drywall. All of Oregon Drywall's subcontractors were licensed by CCB and carried their own insurance. Secondly, they billed Oregon Drywall at the end of the job and Oregon Drywall paid in 30 days. Third, Oregon Drywall was also itself in the business of drywall contracting.

Here, R & K previously held a CCB license, but unbeknownst to Barrett, the CCB license lapsed. Secondly, the record does not reflect whether R & K was paid only at the conclusion of a job. Rick Barrett Drywall was acting as a broker of drywall installations, not making drywall installations himself. He found customers, got bids from a subcontractor as to how much it would cost to get the customer's job done, paid the subcontractor and sometimes paid for materials, then billed his customers whatever his cost was plus 25%.

The question is whether those differences between Oregon Drywall and Rick Barrett Drywall are of sufficient significance to ignore the holding of *Oregon Drywall*.

For the purposes of answering that question, I turned to the “nature of the work” test. The work that R & K performed was skilled work. SAIF concluded that all the other contractors that performed the same work were not employees. The work was a separate calling. R & K had its own office and its own books. It worked to Rick Barrett Drywall, but not exclusively. Employer’s business was brokering drywall installations. R & K’s business was actually performing drywall work. The work was intermittent. Rick Barrett used R & K on residential projects where people were living in their homes during construction. R & K was paid by the job, not for continuing service.

The differences between Oregon Drywall and Rick Barrett Drywall are insufficient to deviate from the holding of *Oregon Drywall*. R & K was non-compliant with the statutes and rules of CCB and workers’ compensation. But that factor did not make it subject to the direction and control of Rick Barrett Drywall. Payments to R & K were paid to a subcontractor, not to a worker subject to Barrett’s right to control.

B. Obligation of Person Awarding Contract

Nevertheless, SAIF argued that under ORS 656.029(1), Rick Barrett Drywall was required to carry workers’ compensation coverage for R & K Drywall. That statute provides, in pertinent 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.

Rick Barrett Drywall was in the business of brokering drywall work on both commercial and residential projects. He often awarded the contracts to R & K Drywall. Because R & K Drywall did not provide workers’ compensation insurance coverage, Rick Barrett Drywall was responsible for providing such insurance for all individuals other than those that were exempt under ORS 656.027.

C. Work Performed at the Residence on Tenino Court

The second issue in this case involved work performed at a residence on Tenino Court. The SAIF audit found that payments to workers who labored at the residence are subject wages.

Under ORS 656.027, all workers are workers subject to the workers’ compensation laws unless excluded as a nonsubject worker. Nonsubject workers include:

A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker.

[and]

(a) A worker whose employment is casual and either:

(A) The employment is not in the course of the trade, business or profession of the employer; or

(B) The employment is in the course of the trade, business or profession of a nonsubject employer.

(b) For the purpose of this subsection, "casual" refers only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than \$500.

ORS 656.027(2)(3).

In *Belvins v. Mitchell*, 138 Or App 29 (1985) the court explained the purpose of the household exemption.

[T]he householder exemption is premised on the principle that workers' compensation insurance is intended to spread to consumers of goods and services the cost of workplace injuries, by making the cost of the insurance a cost that can be reflected in the price of those goods and services. (citations omitted.) For the principle to work as intended, the employer who is required to obtain that insurance must be someone whose covered employees are producing goods or services for a market. Otherwise, the cost of the insurance will be borne by the employer and not by consumers, because there will be no consumers to whom the cost of insurance can be passed. Under that regime, a householder who employs people to work on her home is not someone who is required to obtain worker's compensation insurance for those employees, because she is not a producer of goods or services. Rather, she is a consumer of goods and services who will not be able to pass the cost of workers' compensation insurance for her employees to others.

Belvins at 32.

Here, Barrett purchased the Tenino Court home for the purpose of remodeling it and moving into it. The remodel took two years and he moved in last summer. There is no evidence in the record to establish that it is not his private residence.

The insurer points to the fact that Mr. Barrett's sister referred to the residence as Barrett's "personal investment." The fact that it is a personal investment does not mean that it is not also a private residence. Owning a home is an investment.

The fact that money for the labor to remodel the home came from Rick Barrett Drywall's business account is of no consequence in this particular case. At the time in question, Rick Barrett Drywall was an assumed business name for Rick Barrett. The business was a sole proprietorship and there was no legal distinction between him and his business. ~~While it may have been a bad business practice to take money directly out of the business account to pay for work on the private residence, it was not illegal.~~

Finally, it was pointed out that none of the facts about the residence were made known to the auditor at the time. But the question for hearing is what did a preponderance of credible evidence admitted into the record prove now? It proved that the Tenino Court house is a private residence and the labor performed there is exempt.

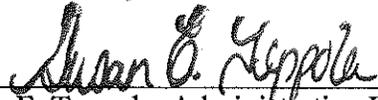
Conclusion

A preponderance of credible evidence established that the audit was incorrect in two particulars: R & K Drywall was not a subject worker and the labor performed on the Tenino Court personal residence was exempt. For all of the above reasons, I propose that the department issue the following order:

PROPOSED ORDER

That the August 4, 2008 Final Premium Audit Billing be DISAFFIRMED. The conclusion that R & K Drywall is subject to the payment of premium is DISAFFIRMED, as is the conclusion that money expended for labor at the Tenino Court residence is not exempt.

DATED this 13th day of July, 2009.



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 **revised** 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 July 2009, I mailed the foregoing Revised Proposed Order in Reference No. 0811007.

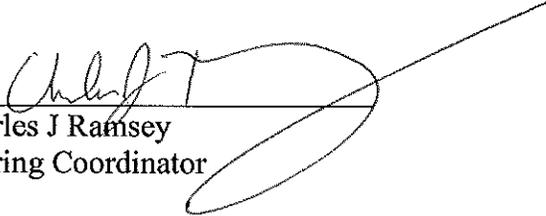
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