



Ethan R. Hasenstein, an Assistant Attorney General assigned to represent the insurer. The insurer called DeAnne Hoyt and Ed Grove as its witnesses. The insurer offered Exhibits A1 to A11 as its documentary evidence all of which were admitted into the record.<sup>1</sup>

On or about 6/1/10, the insurer issued a revised billing dated 6/1/10.<sup>2</sup>

On 8/12/10, OAH issued a proposed order and mailed it to the parties.<sup>3</sup> The proposed order concluded that the billing, both initially and as revised by the insurer, correctly included, pursuant to ORS 656.029(1) and the workers' compensation insurance policy issued by the insurer to the employer effective during the audit period, the payments to Gene Makarenko, Dmitriy Bogatko, and Igor Bogatko, a partnership, doing business as VA Professional Contracting, in calculating the premium for workers' compensation insurance provided by the insurer to the employer during the audit period. The proposed order also concluded that the billing, both initially and as revised by the insurer, incorrectly included a dividend payment of \$5,000 to Ilya Makarenko on 12/25/08 in calculating the premium for workers' compensation insurance provided by the insurer to the employer during the audit period. Therefore, the proposed order recommended that the director modify the billing, as revised by the insurer, to exclude the dividend payment. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed order and the director must receive them within 30 days after the proposed order was mailed to the employer and insurer.

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<sup>1</sup> The proposed order indicated that OAH added to the record the insurer's hearing memorandum dated 5/27/10. It was unnecessary and redundant for OAH to add the document to the record because it is automatically included the record of a case. ORS 183.417(9).

<sup>2</sup> According to the proposed order, OAH held the record open to receive the revised billing dated 6/1/10, OAH received the revised billing on an unknown date, marked it as Exhibit A12, and admitted it into the record.

<sup>3</sup> On 8/12/10, OAH mailed the proposed order to the employer and its attorney, and to the insurer, but not to the insurer's attorney. On 8/23/10, the insurer forwarded a copy of the proposed order to its attorney. As a result, the director extended the due date for exceptions from 9/13/10 to 9/22/10.

On 8/24/10, the director received from the employer written exceptions to the proposed order.

On 8/27/10, the director received from the insurer written exceptions to the proposed order.

The employer objected to the proposed order's conclusion that the billing correctly included payments made by the employer to a subcontractor pursuant to ORS 656.029(1). The insurer argued that the billing incorrectly included payments made by the employer to VA Professional Contracting because VA Professional Contracting was not a "worker" as defined in ORS 656.005(30), and thus could not be a "subject worker" as defined in ORS 656.005(28). The director disagrees. The insurer did not include the payments to VA Professional Contracting as a "worker" and a "subject worker" but rather as an independent subcontractor pursuant to ORS 656.029(1). ORS 656.029 (1) does not require the person performing labor under a contract be a "worker" or "subject worker" of the person awarding the contract in order for the person awarding the contract to be responsible for providing workers' compensation insurance to the person performing labor under the contract. See *Berkey v. Department of Ins. and Finance*, 129 Or App 494, 499 (1994); *Kistner v. BLT Enterprises, Inc.*, 74 Or App 131, 135 (1985); *Love v. Northwest Exploration Co.*, 67 Or App 413, 417 (1984).

The insurer objected to the proposed order's conclusion that the billing incorrectly included a payment made by the employer to a partner of the employer as a dividend. The insurer argued that the evidence presented by the employer was minimal and not reliable, and the employer did not present other evidence that might have been more reliable. Although the evidence presented was minimal and other evidence might have been more reliable, the director disagrees that the administrative law judge's assessment of the evidence presented is clearly incorrect.

Therefore, the director now makes the following final decision 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 proposed order as the findings of fact, conclusions of law, and reasoning of this final order.

### **Order**

The billing, as revised by the insurer, is reversed in part and affirmed in part. The billing is reversed to the extent that it included the dividend payment of \$5,000 to Ilya Makarenko on 12/25/08 in calculating the premium for workers' compensation insurance provided by the insurer to the employer during the audit period. In all other respects, the billing is 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 October 6, 2010

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