

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
INSURANCE DIVISION**

In the Matter of the Final Premium            )           Case No. INS 10-02-004  
    Audit of    )             
  )             
**VA & SONS CONSTRUCTION, an**                 )             
**Oregon Corporation**                             )           **PROPOSED ORDER**

**HISTORY OF THE CASE**

On January 19, 2010, SAIF Corporation (SAIF or insurer) issued a Final Premium Audit Billing to VA & Sons Construction (employer). The audit period was from May 28, 2008 through May 31, 2009. Employer appealed the billing on January 26, 2010. The Division received employer’s Petition along with the hearing request,<sup>1</sup> and referred the matter to the Office of Administrative Hearings (OAH) on February 9, 2010.

Hearing was held before ALJ Rick Barber on May 27, 2010, in the Salem offices of the OAH. Attorney Bill Replogle represented employer in the hearing. SAIF was represented by Assistant Attorney General Ethan Hasenstein. Audit program analyst DeAnne Hoyt was the insurer representative and testified for insurer, along with auditor Ed Grove. Gene Makarenko testified for employer. The record was held open for receipt of a revised premium audit billing dated June 1, 2010, and was closed upon its receipt.

**ISSUES**

1. Whether the \$5000 payment to Ilya Makarenko on December 25, 2008 was a dividend and, therefore, excluded from premium; and
2. Whether payments to VA Professional Contracting were properly included in the payroll subject to premium.<sup>2</sup>

**EVIDENTIARY RULINGS**

Exhibits A1 through A10, offered by SAIF were admitted into evidence without objection. Exhibits P1 through P14, excluding P6, P9 and P11 (which were withdrawn), were admitted without objection. Exhibit P4 page 7(a), an additional page to Exhibit P4, was also offered by employer and admitted without objection. Finally, the record was

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<sup>1</sup> The hearing request and petition were received by the Division on January 27, 2010.

<sup>2</sup> Employer raised other issues but has withdrawn those issues. This Order will focus on the two issues that remain to be decided.

held open to receive the June 1 revised premium audit, which I am marking as Exhibit A11 and admitting into evidence.

SAIF's Hearing Memorandum, provided before the hearing, is also included in the documentary record of the hearing as Document 1 (Doc. 1).

### **FINDINGS OF FACT**

1. VA and Sons Construction (employer) is a family-owned business that has been licensed with the Construction Contractors Board (CCB) since May 7, 1996. Its corporate office is at 1532 Betty Lane SE, Salem, Oregon. The family corporate officers are Andre, Gene, Ilya, Lydia, Sergei, and Viktor Makarenko. (Ex. A4 at 1-2).

2. VA Professional Contracting is an assumed business name for Gene Makarenko, Dmitriy Bogatko, and Igor Bogatko, that was registered with the Corporation Division on March 28, 2008. (Ex. P3 at 3). The Bogatkos were involved in name only, and did not participate in the business. Gene Makarenko is the only person to perform services for VA Professional. (Test. of Makarenko).

3. Gene Makarenko is the primary active member of employer, and during the audit period was exempt from workers' compensation coverage as a corporate officer. (Ex. A2 at 2). Under the structures of that business, all of the family members shared equally in the profits of the corporation but Gene Makarenko performed most of the work. In order to be paid more for the work he performed, Makarenko (as the principal of employer) contracted with VA Professional to perform services. (Test. of Makarenko).

4. During the audit period, VA Professional performed services for employer, and submitted bills totaling \$69,754. Employer paid the amounts when billed. (Test. of Makarenko).

5. SAIF Corporation insured employer during the audit period. It noted the payments to VA Professional and investigated to see whether that entity had workers' compensation coverage. It did not. Auditor Ed Grove also checked to see whether the company was registered with the CCB. Grove discovered that Makarenko had been licensed with the CCB between 2000 and 2002, but VA Professional was not registered during the audit period. (Test. of Grove).

6. Because VA Professional did not have a valid CCB registration, SAIF concluded it was not an independent contractor and, considering ORS 656.029, concluded that employer must provide premium on behalf of VA Professional. SAIF included the \$69,754 as payroll subject to premium. (Ex. A1 at 5-6).

7. VA Professional uses the same address (on Betty Lane) used by employer. Makarenko uses his own tools and transportation on VA Professional's jobs, including on jobs performed for employer. He considers VA Professional a sole proprietorship

because the Bogatkos have never actually been involved in the business. However, he never went back to the Corporation Division to correct the records. (Test. of Makarenko).

8. On December 25, 2008, employer issued a \$5,000 check to Ilya Makarenko as a dividend. The check stub has the word “dividends” marked on it. (Ex. P4 at 7(a)). When Grove did his audit, he included that amount as wages because he “assumed” the amount was not a dividend and that employer was actually paying Ilya for labor. (Ex. A1 at 10). Employer’s CPA, Kurt Hagerman, wrote:

It is my understanding that you are attempting to consider the dividends paid to the above listed company owners/officers as additional payroll. These dividends are, in fact, proper S-Corporation dividends.

(Ex. P14).

### CONCLUSIONS OF LAW

1. The \$5,000 payment to Ilya Makarenko on December 25, 2008 was a dividend and, therefore, excluded from premium.

2. Payments to VA Professional Contracting were properly included in the payroll subject to premium.

### OPINION

Employer has contested SAIF’s Final Premium Audit Billing. 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). Absent a different standard set by statute, the burden is one of preponderance of the evidence. *Metcalf v. AFSD*, 65 Or App 761, 765 (1983). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

**Ilya’s Dividend.** Using the burden of proof shown above, employer must show that the December 25, 2008 payment to Ilya was a dividend. Employer has met that burden. Makarenko testified it was a dividend, and the check stub entry has the word “Dividends” on it. Finally, employer’s accountant has indicated that employer’s dividends were proper Subchapter S dividends.

There is no evidence opposing employer’s evidence. SAIF’s auditor “assumed” it was actually wages and not a dividend because there were no other dividends issued that day. Although the burden of proof (which requires the employer to essentially disprove the assumptions made by the insurer) gives such an assumption some threshold evidentiary value, in this case the assumption has been shown to be incorrect. SAIF may not collect premium on Ilya’s dividend.

**VA Professional.** SAIF contends that employer must pay premium on the amounts paid to VA Professional because it did not have workers' compensation insurance, meaning that employer would be responsible for providing coverage under ORS 656.029, which states:

**656.029 Obligation of person awarding contract to provide coverage for workers under contract; exceptions; effect of failure to provide coverage.** (1) 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. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person who is charged with the responsibility for providing such coverage before labor under the contract commences, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.

(2) If a person to whom the contract is awarded is exempt from coverage under ORS 656.027, and that person engages individuals who are not exempt under ORS 656.027 in the performance of the contract, that person shall provide workers' compensation insurance coverage for all such individuals. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person to whom the contract is awarded, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.

(Emphasis added).

The circumstances of this case demonstrate that the equities are nearly all in favor of finding that employer does not have to pay premium on the amounts paid to VA Professional. Two simple facts point out why this is true. First, the undisputed evidence in the case shows that Gene Makarenko was the only person performing services under the contract with employer. Second, the evidence is also undisputed that Gene Makarenko, the same person, was an exempt officer of employer's corporation.

Because Makarenko was an exempt officer of employer's corporation, he could have performed all of the work (for VA and Sons) and the corporation would not be liable for payment of premiums. Instead, he did the work as part of VA Professional, a company that had no workers' compensation insurance. Equity perhaps indicates that there is no difference, because Gene Makarenko is one person and is actually exempt for any work he does for employer (regardless of the company). However, equity does not apply in the case, and I must conclude that the amounts paid to VA Professional are subject wages.

My analysis starts with the business entity of VA Professional. Although operated as a sole proprietorship by Makarenko, the only formal paperwork in the record shows that the Bogatko brothers remain under the assumed business name. Makarenko testified that they have not been involved in the company and that he operates it himself; I accept his testimony as accurate but that does not change the formal entity from an informal partnership to a sole proprietorship.

Under ORS 656.029 quoted above, there are two primary "persons." First, there is the "person [who] awards a contract involving the performance of labor[.]" In modern parlance, this is the general contractor. Here, this first person is employer. It awarded the contract to VA Professional, which is the second person—the person "who perform[s] labor under the contract." Again, this could be referred to as the subcontractor.

The purpose of the statute is straightforward. The State of Oregon requires all employers to have workers' compensation coverage, and wanted to make sure that the cost of adequate coverage is covered by businesses rather than tax dollars. As a result, the general contractor is required to make sure any subcontractor is covered for workers' compensation. If it does not, ORS 656.029 places the cost of such coverage on the general contractor.

The statute applies to this case unless VA Professional is "exempt from coverage under ORS 656.027." ORS 656.029(2). That statute provides in pertinent part:

**656.027 Who are subject workers.** All workers are subject to this chapter except those nonsubject workers described in the following subsections:

\* \* \* \* \*

(7)(a) Sole proprietors, except those described in paragraph (b) of this subsection. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

(b) Sole proprietors actively licensed under ORS 671.525 or 701.021. When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the sole proprietor must qualify as an independent contractor. Any sole proprietor licensed under ORS 671.525 or 701.021 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(8) Except as provided in subsection (23) of this section, partners who are not engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto. When labor or services are performed under contract, the partnership must qualify as an independent contractor.

(9) Except as provided in subsection (25) of this section, members, including members who are managers, of limited liability companies, regardless of the nature of the work performed. However, members, including members who are managers, of limited liability companies with more than one member, while engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto, are subject workers. When labor or services are performed under contract, the limited liability company must qualify as an independent contractor.

(10) Except as provided in subsection (24) of this section, corporate officers who are directors of the corporation and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed by such officers[;]

\* \* \* \* \*

(23)(a) Partners who are actively licensed under ORS 671.525 or 701.021 and who have a substantial ownership interest in a partnership. If all partners are members of the same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such partners may elect to be nonsubject workers. For all other partnerships licensed under ORS 671.510 to 671.760 or 701.021, the maximum number of exempt partners shall be whichever is the greater of the following:

(A) Two partners; or

(B) One partner for each 10 partnership employees.

(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the partnership qualifies as an independent contractor. Any partnership licensed under ORS 671.525 or 701.021 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(24)(a) Corporate officers who are directors of a corporation actively licensed under ORS 671.525 or 701.021 and who have a substantial

ownership interest in the corporation, regardless of the nature of the work performed. If all officers of the corporation are members of the same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such officers may elect to be nonsubject workers. For all other corporations licensed under ORS 671.510 to 671.760 or 701.021, the maximum number of exempt corporate officers shall be whichever is the greater of the following:

(A) Two corporate officers; or

(B) One corporate officer for each 10 corporate employees.

(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the corporation qualifies as an independent contractor. Any corporation licensed under ORS 671.525 or 701.021 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(Emphasis added).

Under this statute, VA Professional is not exempt. It cannot be viewed as a sole proprietorship because the Bogatko brothers are at least nominally still involved in the company. It is probably a partnership, albeit informal, but partners must file an election to become exempt. Finally, because VA Professional was not registered with the CCB, it cannot take advantage of the conclusive presumption it was an independent contractor. Therefore, VA Professional is not exempt under .027.

Because it was not exempt under ORS 656.027 during the policy period, and because it did not have its own workers' compensation insurance, the requirements of ORS 656.029 require the general contractor (employer) to provide coverage for the subcontractor (VA Professional). Consequently, regardless of the seeming incongruity of requiring the company to pay premiums for the work of an individual who, wearing another hat is exempt, SAIF correctly determined that the amounts payable to VA Professional were subject wages.

**PROPOSED ORDER**

I propose that the department issue the following final order:

That the Final Premium Audit Billing dated January 19, 2010, as revised on June 1, 2010 be MODIFIED. SAIF shall issue a revised premium audit billing that removes the dividend to Ilya Makarenko. Otherwise, the premium audit billing is AFFIRMED.

DATED this 12th day of August 2010.

/s/ Rick Barber  
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 12th day of August 2010, I mailed the foregoing Proposed Order in Reference No. **1002004**.

BY FIRST CLASS MAIL:

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