

**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 11-07-011
Audit of)	
)	
Mona Makela, dba)	AMENDED
Heavenly Maid Cleaning Service)	PROPOSED ORDER

HISTORY OF THE CASE

On March 10, 2011, SAIF Corporation (SAIF, or the insurer) issued a Final Premium Audit Billing to **Mona Makela dba Heavenly Maid Cleaning Services, Inc.** (employer). The audit period was from October 13, 2009 through October 1, 2010. Employer appealed the billing on May 3, 2011. The Division received employer's Petition on July 5, 2011 and referred the matter to the Office of Administrative Hearings (OAH) on July 6, 2011. On October 11, 2011, a second Final Premium Audit Billing (for the period of October 1, 2010 through June 6, 2011) was also filed. On November 8, 2011, employer filed another request for hearing and petition, putting that audit billing at issue as well. The two matters were consolidated for hearing.¹

Hearing was held before ALJ Rick Barber on February 21, 2012, in the Salem offices of the OAH.² Employer did not appear. SAIF was represented by Assistant Attorney General Ethan Hasenstein. Audit program analyst DeAnne Hoyt was the insurer representative. No witnesses testified. The record closed on February 21, 2012.

On March 7, 2012, the Proposed Order issued. On April 2, 2012, the Insurance Division requested a "revised" Proposed Order to change the caption used in the Proposed Order and to consider additional information that the Division provided in its letter.³ The letter included information that was not presented as evidence in the case, concerning the employer's various business entities. Although the caption has been changed in accordance with the Division's wishes, the offer of additional evidence is not accepted.

The Division also requested additional findings of fact concerning the dates the employer received the March 10, 2011 Final Premium Audit Billing and the

¹ Employer was originally represented by Attorney Scott Monfils. He withdrew as counsel in November 2011, and employer is currently unrepresented by counsel.

² The hearing was originally scheduled for December 6, 2011, but was rescheduled at the employer's request.

³ All additions in this Amended Order have been provided in bold print, and deletions via strikethrough.

October 11, 2011 Final Premium Audit Billing. However, because this was a default hearing, and the employer did not appear or provide evidence, there is no evidence concerning when the documents were received. Accordingly, there is no basis for that determination to be made in this case.⁴

Finally, the Division has requested that the Proposed Order be dated “rather than only indicating when it was mailed to the parties.” A date line has been added to the Amended Proposed Order, although the date the document is sent to the parties is, in fact, the date of the order.

ISSUES

1. Whether the insurer properly classified the individuals noted in the premium audit as subject workers rather than independent contractors.
2. Whether, if the individuals were subject workers, the Final Premium Audit Billings are correct.

EVIDENTIARY RULINGS

Exhibits A1 through A7, offered by SAIF, were admitted into evidence without objection. 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. Employer is a corporation that hires individuals to provide house cleaning services to employer’s clients, providing light cleaning services in the clients’ homes. When employer hires a person to do the residential cleaning, it provides several documents for the person to review and sign. One states in part:

Independent Contractor Contract Requirements and Policies

As a subcontractor, you will be operating as your own business; however, you will be representing **Heavenly Maid Cleaning Service**. Also referred [to] in this contract as HMCS (Heavenly Maid Cleaning Service). You are required to act accordingly to all HMCS policies and procedures. Work is to be performed to the standards of HMCS.

All contractors are contracted at the will of the company for an indefinite length of time, unless a written contract for a definite period has been established. No statements made in any [of] our company’s policies will

⁴ The Division indicates that the dates of receipt are “crucial to determining whether the employer is entitled to a hearing.” In this default matter, the question whether employer was entitled to a hearing is essentially moot.

alter the at-will relationship. Either party may terminate their work agreement without notice, however a two weeks written notice is appreciated.

* * * * *

SCHEDULING AND MAINTENANCE OF CONTRACTS

You may accept your own clients while subcontracting for HMCS, however, you must maintain a minimum of two contracts to be subcontracting for HMCS. Under no circumstances can HMCS and clients be solicited, or referrals, for your own business.

* * * * *

You are expected to handle all client relations for each contract provided to you. For example, follow-ups, schedule changes, time off, etc. If a client contacts you, you need to contact the client back within 24 business hours. Contact information will be provided to you. It is your responsibility to make the clients happy. If you fail to do so, and it results in the loss of a client, HMCS will research into it to determine who was at fault. If it is determined that you were at fault, a written warning will be issued and a resolution will be set up to see that it does not happen again.

HMCS needs to be notified of all schedule changes. We keep a master schedule, and clients do call for schedule confirmation and inquiries. If the client wants to schedule additional work, please refer them to us so that we may add the time to their schedule.

PAYCHECKS

HMCS makes paychecks available every Friday at 4:30 pm for the work week prior. All client checks and money orders must be received in our office no later than 12:00 noon every Tuesday, as well as your timesheet. If checks and timesheets are not received by Tuesday, your paycheck WILL be delayed until the following week.

* * * * *

INJUNCTIVE RELIEF

Contractor agrees not to work for any referrals of HMCS without company knowledge during employment or after contract termination for any cause whatsoever for a period of one year from the date of said contract termination.

(Ex. A3 at 20-22; emphasis in original). The persons providing cleaning services are paid by the hour, and receive their paychecks at set times. The business relationship may be ended by either side without legal consequences, although employer would like to receive two weeks' notice. (Ex. A4).

2. The employer also provides a "New Hire Letter," also referred to as the "new hire packet," to the persons doing the cleaning. It states in part:

Congratulations, and thanks for choosing Heavenly Maid Cleaning Service, Inc. as your choice of employment. I really appreciate having you here and look forward to working with you.

(Ex. A3 at 16).

3. When employer sought workers' compensation insurance from SAIF Corporation, it reported that there would be workers under two classification codes: 0917 (Domestic Service Contractor – Inside), and 8810 (Office Clerical). (Ex. A1 at 3). However, employer only reported wages under code 8810 (office clerical). Employer did not submit payroll from the residential cleaning staff because employer believed the cleaning staff members were independent contractors, making code 0917 inapplicable. (Ex. A2 at 2).

4. SAIF assigned auditor Chris Williams to audit employer's business. Williams audited employer's payroll on February 17, 2011. During the audit, Williams learned from employer that all of the residential cleaning staff members were considered independent contractors, and the amounts paid to them were not included in the payroll submitted to SAIF. During the audit period of October 13, 2009 through October 1, 2010, the employer reported wages for only one employee, Jennifer, under code 8810, and did not report any of the funds paid to the cleaning staff as wages. The amounts paid to the cleaning staff during the audit period totaled \$100,926. (Ex. A4 at 6, 10).

5. As part of the audit, Williams received a "red folder" of information that employer gave to its cleaners and also to its clients. The documents established that the cleaners were expected to maintain a "weekly job report," keeping track of hours and monies received from clients and forwarded to employer. Also included were instructions for using the electronic scheduling system, general information and cleaning tips for the cleaners, a "new hire" letter, an "Employment and Subcontractor Application," a "Cleaning Contractor Agreement," and a list of requirements and responsibilities for "independent contractors." (Ex. A4).

6. SAIF cancelled the contract of insurance effective June 6, 2011 and performed an additional premium audit of the period from October 1, 2010 to June 6, 2011. During the second period, employer reported wages under code 8810 for two employees, Jennifer and Melissa, and again did not include the amounts paid to the house cleaners. (Ex. A7).

7. Based upon Williams' audit and the information received from the employer, SAIF determined that the cleaning staff members were subject workers rather than independent contractors. On March 10, 2011, SAIF issued its Final Premium Audit Billing for the period October 13, 2009 through October 1, 2010, determining that the corrected Total Audited Payroll was \$119,844, and increasing the premium owed by \$5,739.74 (total premium of \$6,248.87 – previous premium paid of \$509.13 = \$5,739.74). (Ex. A5).

8. On October 11, 2011, SAIF issued a second Final Premium Audit Billing, declaring that employer owed \$3,258.69 for the period from October 1, 2010 to June 6, 2011. (Ex. A7).

CONCLUSIONS OF LAW

1. The insurer properly classified the individuals noted in the premium audit as subject workers rather than independent contractors.

2. The Final Premium Audit Billings are correct.

OPINION

Employer contested SAIF's Final Premium Audit Billings, contending that its cleaning staff members were independent contractors and not subject workers. 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). It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Although employer requested a hearing, no one appeared for the employer at hearing. As a result, SAIF presented its written exhibits and contended that employer had failed in its burden of proof to establish independent contractor status for the cleaning staff. I agree with SAIF, and affirm the premium audit billings for the reasons set forth below.

Direction and Control. ORS 656.017 requires employers to carry workers' compensation coverage for all subject workers. A "worker" is defined in ORS 656.005(30), which states in part:

"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[.]

Under this statute, the key question to be answered is whether the cleaning staff members were “subject to the direction and control” of an employer, in this case HMCS. An “employer,” by definition, is:

any person * * * who contracts to pay a remuneration for and secures the right to direct and control the services of any person.

ORS 656.005(13)(a).

SAIF contends that employer retained direction and control over the cleaning staff, and is an employer for purposes of the workers’ compensation statute. It cites several cases setting forth the criteria used to establish “direction and control” in Oregon, arguing that the courts look to four factors to determine whether there is direction and control:

- Whether there is direct evidence of the right to control;
- Whether the employer furnishes tools and equipment;
- The method of payment; and
- The right to discharge without liability.

Oregon Drywall Systems v. NCCI, 153 Or App 662, 666 (1998). Citing Professor Larson, SAIF further notes that proof of even one of these factors tends to establish conclusively that the supposed contractors were actually subject workers. 1B Larson, *Law of Workmen’s Compensation*, 8-90, §44.31 (1990).

In this case, as noted, employer did not appear at hearing and presented no evidence to establish the independent contractor relationship. The documents in the “red folder,” relied upon by SAIF, actually support the notion that the cleaning staff members were subject workers rather than independent contractors.

Employer’s documents show that it treated each new staff member as a “new hire;” that it required each cleaning staff to keep time records and client contact records; that it issued regular paychecks rather than paying by the job; and that each staff was required to sign a non-competition clause. Finally, the agreement allows either side to end the relationship without any liability. All of these are indicia of direction and control. The record reflects conclusively that employer retained direction and control over the workers.

Relative Nature of the Work. As a secondary test, if the direction and control factors are inconclusive, the courts look to the “relative nature of the work” test. Under that test, the courts look to whether the work the putative contractors are performing is a separate calling or enterprise, or whether it is a regular part of the employer’s business. *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002).

In this case, the direction and control factors conclusively show that the cleaning staff members were employees. However, even if those factors had not established an

employment relationship, the secondary test would have. It is clear that the residential cleaning staff members perform a duty that is an integral and regular part of employer's business.

Final Premium Audit Billings. Again, employer has the burden of proof to show that the premium audit billing is incorrect. *Salem Decorating, supra.* Employer's only apparent disagreement with the premium audit billings concerned the inclusion of the hours for the cleaning staff members. For the reasons set forth above, that issue has been decided against employer. The Final Premium Audit Billings are approved.

PROPOSED ORDER

I propose that the department issue the following final order:

That the Final Premium Audit Billings dated March 10, 2011 and October 11, 2011, be AFFIRMED.

DATED: April 19, 2012



Rick Barber

Administrative Law Judge
Office of Administrative Hearings

Notice of Right to File Exception to Proposed Order

If the proposed order is adverse to a party, then the party has the right to file written exceptions to the order and present written argument concerning those exceptions pursuant to ORS 183.460. A party may file the exceptions and argument by sending them to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing them to P.O. Box 14480, Salem, Oregon 97309-0405; or faxing them to 503-378-4351; or e-mailing them to mitchel.d.curzon@state.or.us. The Insurance Division must receive the exceptions and argument within 30 days from the date this order was sent to the party.

CERTIFICATE OF SERVICE

On the 19th day of April 2012, I mailed the foregoing Amended Proposed Order in Reference No. **1107011**.

BY FIRST CLASS MAIL:

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