

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

IN THE MATTER OF: ) **CORRECTED PROPOSED ORDER<sup>1</sup>**  
 )  
**DON GLERUP LOGGING, INC** ) OAH Case No.: 1402001  
 ) Agency Case No.: INS 14-02-001

**HISTORY OF THE CASE**

On January 10, 2014, Don Glerup Logging, Inc. (Appellant) received an Oregon Final Premium Audit Billing (premium audit) issued by SAIF Corporation (SAIF or insurer) on January 7, 2014, indicating Appellant owed an additional \$34,839.46 in premiums for its workers compensation coverage. The premium audit covered the period September 1, 2012 through August 31, 2013. On or about February 14, 2014, Appellant requested a hearing. On or about March 11, 2014, Appellant filed a petition for review of the audit and to stay collection of the premiums pending a contested case hearing.

On February 19, 2014, the Division referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing. On March 13, 2014, SAIF issued a second premium audit billing covering the period September 1, 2013 through January 17, 2014.<sup>2</sup> The second premium audit indicated Appellant owed an additional \$8,605.65 in workers compensation premiums.

Senior ALJ Allen convened a prehearing conference on April 1, 2014. The purpose of the prehearing conference was to establish issues for hearing and set a schedule for prehearing procedures as well as a hearing date. Holly O'Dell, Attorney at Law, participated on behalf of the insurer. Don Glerup participated on behalf of Appellant. At the prehearing conference, the parties notified the ALJ of the second premium audit and indicated the desire to have both audits consolidated for hearing.<sup>3</sup> On April 4, 2014, Appellant requested a hearing on the second premium audit.<sup>4</sup> The OAH consolidated the two matters for hearing purposes.<sup>5</sup>

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<sup>1</sup> The Proposed Order issued July 9, 2014, contained erroneous analysis based on an inapplicable administrative rule (OAR 471-031-0181) and statute (ORS 670.600) applied to the evidence of independent contractor status. While applicable to a determination of independent contractor status under Employment Department statutes and rules, the specified administrative rule is inapplicable to determinations in worker's compensation premium audit cases. Accordingly, this Corrected Proposed Order omits the irrelevant discussion. This omission makes no material difference to the determination of independent contractor status as it pertains to John Mabe in Section 3 of this order.

<sup>2</sup> The period September 1, 2012 through January 17, 2014 is referred to throughout this order as the period in issue.

<sup>3</sup> Appellant received the second premium audit on or about April 1, 2014.

<sup>4</sup> On this date, Appellant filed a second petition for review of additional premiums. However, Appellant erroneously failed to request a stay of those premiums listed in the second audit. On March 11, 2014, Appellant requested a stay via email to Mitchell Curzon at DCBS.

A hearing was held on May 21, 2014, in Tualatin, Oregon. Mr. Glerup appeared without counsel and testified on behalf of Appellant. Ms. O'Dell represented the insurer. Testifying on behalf of SAIF were Eric Williams. The record closed at the conclusion of the hearing on May 21, 2014.

## **ISSUE**

Whether the insurer's Final Premium Audits, dated January 7, 2014 and March 13, 2014, are correct.

## **EVIDENTIARY RULING**

Exhibits A1 through A27, offered by SAIF, were admitted into the record without objection. Exhibits R1 through R7, offered by Appellant, were admitted into the record without objection. Exhibit R8 was admitted into the record over the SAIF's objection. The ALJ sustained SAIF's objections to Exhibits R9 and R10 and excluded those documents.

## **FINDINGS OF FACT**

1. Appellant operates logging operations using traditional and mechanical loggers, as well as timber cruisers, yarders, chokers, and chasers. (Test of Glerup and Williams.)

2. To determine appropriate classification codes for subject employees, SAIF Corporation relies on definitions and standards promulgated by the National Council on Compensation Insurance (NCCI) in its *Basic Manual for Workers' Compensation and Employers Liability Insurance*. NCCI defines a logging site as any mapped, tagged, and/or predetermined location. Based on that definition, SAIF determines a "site" to be any single parcel or contiguous parcels of land under active logging operations at the same time. (Test. of Williams; Ex. A4.) For individuals to be determined as logging on separate sites, one or more parcels of land with no active logging operations on it/them must separate the parcel or parcels being logged. (Test. of Williams.)

3. SAIF assigns classification code 2725, mechanical logging, only when all crew on site are contained within the cab of mechanical logging equipment. For traditional/conventional loggers, the insurer assigns classification code 2702. SAIF assigns the highest rate classification, 2702, to all logging employees whenever any traditional logging is taking place at a given site. (Test. of Williams; Exs. A5 and A7.)

4. In order for an employer to qualify for classification code 2725, all activity on a given site must be allocable only to that code. An employer may qualify to split employees' time between 2725 and 2702 only if the employer can demonstrate, through verifiable time records, the employees only engaged in mechanical logging on the site in question, or that the employees

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<sup>5</sup> The issues raised in the Final Premium Audits are substantially similar. The only significant differences are the periods covered and amounts owing in each. As such, it is unnecessary to address each audit separately.

engaged in both traditional logging and mechanical logging operations but at separate times on the site. Time records provided must correlate to a site map and provide sufficient information to allow determination that no traditional logging was conducted on that site during periods claimed as mechanical logging. (Test. of Williams.)

5. Appellant believed it was sufficient to maintain a certain number of tree lengths between mechanical and traditional loggers, in order to qualify for use the mechanical logging classification. Appellant did not maintain verifiable time records that would permit allocation of mechanical logging and traditional logging classification codes on the same site. (Test. of Glerup.) Based on information received and time cards provided by Appellant, SAIF assigned classification code 2702 to all logging employees working on logging sites during the period in issue. (Test. of Williams; Ex. R7.)

6. During the period in issue, Appellant employed John Mabe to perform services as a conventional logger. Appellant paid Mr. Mabe \$11, 267 under the name John Mabe Contracting. Mr. Mabe performed temporary services as a timber feller, or cutter, for a period of three weeks. SAIF found no evidence of a workers compensation policy covering this individual for the period in issue. Mr. Mabe performed services at the same time as other traditional and mechanical loggers employed by Appellant. (Test. of Williams and Glerup.)

7. During that period, Appellant assigned daily tasks to Mr. Mabe including where and when to cut timber. Appellant paid Mr. Mabe for each day he was onsite actively cutting trees. In addition, Appellant retained responsibility for fixing any errors caused by Mr. Mabe. (Test. of Williams.) Appellant assumed Mr. Mabe was an independent contractor during the period in issue. (Test. of Glerup.)

8. Don Glerup provided services to Appellant as a corporate officer. Those services included administrative work (classification code 8810) and timber cruising (classification code 8602). Mr. Glerup also provided occasional coverage for mechanical and traditional logging positions during the period in issue. In addition, Mr. Glerup visited active logging sites for administrative purposes during the period in issue. (Test. of Williams and Glerup.)

9. According to the insurer, once a logging site is active, classification codes 8602 and 8810 cannot be applied to any work done at the site. (Test. of Williams.) Appellant kept no verifiable time records for Mr. Glerup demonstrating how he spent hours on and off site during the period in issue. (Test. of Williams and Glerup.)

10. As a result of a workers compensation claim, the insurer learned Appellant was using mechanical loggers and traditional loggers on the same site and at the same time. This differed from the insurer's previously held understanding of how Appellant conducted logging operations. Accordingly, SAIF issued the final premium audits at issue, allocating classification code 2702, traditional logging, to all loggers working at the active logging sites. (Test. of Williams.)

## CONCLUSION OF LAW

Appellant failed to establish SAIF's Final Premium Audits for the period in issue are incorrect.

## OPINION

In matters challenging a final premium audit, the employer bears the burden of proving the audit is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). To satisfy this burden, Appellant 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).

*1. Appellant failed to show SAIF improperly applied classification codes to one or more groups of employees.*

Appellant contends SAIF incorrectly allocated some or all hours of certain employees to classification code 2702, traditional logging, rather than other less costly classifications. As the proponent of this position, Appellant bears the burden of proof. Specifically, in order to support a finding that the claimed employees should be assigned classification code 2725, mechanical logging, Appellant bears the burden of providing verifiable time records for each employee it proposes to reclassify demonstrating such employees were not working on a site where traditional logging was also taking place. At the hearing, Appellant acknowledged it could not produce such time records to support its claim. Instead, Appellant offered evidence that premium audits for approximately six years prior to those at issue allowed allocation between classification codes 2702 and 2725. *See, Exs. R1 through R6.* The insurer explained that, in prior years, it understood Appellant conducted his operations in such a way that permitted use of classification codes 2702 and 2725. Nonetheless, a recent workers compensation claim revealed traditional logging and mechanical logging were performed simultaneously on the same site. Accordingly, SAIF allocated all logging labor to classification code 2702.

NCCI requires that, in order for employees to be allocated to the mechanical logging classification code, no traditional logging can occur on the same site at the same time. Despite Appellant's assertion that mechanical loggers and traditional loggers were separated by sufficient distance to warrant separate classifications, Appellant admitted mechanical loggers were not operating on site exclusive of traditional loggers as the term "site" is defined by NCCI. Instead, Appellant claims SAIF should classify certain employees to the mechanical rather than traditional logging job classifications based on requirements set forth in by OSHA, rather than NCCI. Nevertheless, NCCI and not OSHA establishes the criteria for specific job classifications.

Appellant failed to meet its burden to demonstrate certain employees should be allocated to the mechanical logging classification code.

2. *Appellant failed to prove SAIF should split classification codes for work performed by Mr. Glerup.*

Next, Appellant argues SAIF should allocate a portion of the time spent by Don Glerup to classification codes other than traditional logging. Appellant argues that, as a corporate officer, Mr. Glerup provides primarily administrative services. In addition, Appellant argued the only significant time Mr. Glerup spent on logging sites during the period in issue was for the purpose of timber cruising.

OAR 836-042-0060 provides conditions for division of payroll of individual employees and provides:

(1) When there is an interchange of labor, the payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, *provided verifiable payroll records maintained by the employer disclose a specific allocation for each such individual employee*, in accordance with the standards for rebilling set forth in OAR 836-043-0190 and this rule.

(2) This rule does not apply to a single employee whose duties vary within exposure areas normally anticipated by the scope of a single classification or who spends only a limited amount of time, on an infrequent or irregular basis, in a classification exposure that is not a normal job function for that employee. As used in this section, "infrequent or irregular" means that the time spent in the classification exposure is limited, is not anticipated in the normal duties of the employee and occurs only randomly.

(3) *When verifiable payroll records are required with respect to a single employee and the employer does not maintain them as required in this rule, the entire payroll of the employee shall be assigned to the highest rated classification exposure* in accordance with the standards for rebilling set forth in OAR 836-043-0190.

(4) For purposes of this rule, payroll records of an employee are verifiable if they have the following characteristics:

(a) The records must establish a time basis, and the time basis must be hourly or a part thereof, daily or part thereof, weekly or part thereof, monthly or part thereof or yearly or part thereof;

(b) For each salaried employee, the records must also include time records in which the salary is converted to an hourly, daily, weekly, monthly or yearly rate and then multiplied by the time spent by the employee in each classification exposure;

(c) The records must include a description of duties performed by the employee, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable; and

(d) The records must be supported by original entries from other records, including but not limited to time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager. Estimated ratios or percentages do not comply with the requirement of this subsection and are not acceptable for verification. Verifiable records must be summarized in the insured employer's accounting records.

(5) The payroll of any individual employee used by an insurer to compute workers' compensation insurance premium must be determined in a manner consistent with the definition of "overtime work" and "payroll" in sections (5) and (6) of OAR 836-042-0055.

(6) The amendments to this rule that are effective July 27, 1995, apply to policies issued on or after July 1, 1991, except that the amendments do not apply with respect to any policy that is or has been subject to judicial review on the issue of division of payroll.

(Emphasis added.)

At the hearing, Appellant admitted it failed to keep verifiable time records that would meet the requirements above. Further, Mr. Glerup admitted he was on site at times during active logging and even provided coverage for certain logging positions when necessary. Appellant failed to meet its burden of proof to demonstrate by the preponderance of the evidence that time spent by Mr. Glerup should be split between different time codes. In addition, because the highest rated classification for Mr. Glerup would match that of other loggers, 2702, the entire payroll for this individual is allocable to that classification.

*3. Appellant failed to demonstrate John Mabe is entitled to independent contractor status.*

Appellant contends John Mabe provided services as an independent contractor, rather than an employee, and thus SAIF incorrectly charged workers' compensation premiums for this individual. The Oregon Supreme Court, in *S-W Floor Cover Shop v. National Council on Compensation Insurance*, 318 Or 614 (1994), provided a framework for determining whether certain individuals are exempt from workers' compensation insurance coverage.<sup>6</sup>

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<sup>6</sup> *S-W Floor* provides, in relevant part:

A determination first is made as to whether one is a "worker" before a determination is made as to whether that "worker" is a "nonsubject" worker pursuant to one of the exemptions of ORS 656.027. The initial determination of whether one is a "worker" under ORS 656.005(28) continues to incorporate the judicially created "right to control" test. One who is not a "worker" under that test is not subject to workers' compensation

ORS 656.017 requires employers to carry workers' compensation coverage for all "subject workers." ORS 656.005 provides definitions applicable to the workers' compensation statute and provides in relevant part:

(13)(a) "Employer" means any person \* \* \* who contracts to pay a remuneration for and secures *the right to direct and control the services* of any person.

\* \* \* \* \*

(28) "Subject worker" means a worker who is subject to this chapter as provided by ORS 656.027.

\* \* \* \* \*

(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* \* \* \*.

(31) "Independent contractor" has the meaning for that term provided in ORS 670.600.

(Emphasis added.)

A "subject worker" then is any worker who is subject to the workers' compensation statutes. All workers are subject workers unless a statutory exception makes them nonsubject workers. ORS 656.005(28); *SAIF v. DCBS, Ins. Div.*, 250 Or App 360, (2012). Whether a person is a "subject worker" depends on whether the person agrees to provide services for remuneration and whether the person's services are subject to the putative employer's direction and control. *RJ Enterprises, LLC v. DCBS*, 255 Or App 439 at 447 (2013), citing *DCBS v. Clements*, 240 Or App 226 at 232 (2010). Accordingly, the primary question to be answered is whether Mr. Mabe was subject to the direction and control of an employer, in this case Appellant. Importantly, the relevant question is not whether the employer exercised actual control over the putative employee. Rather, it is the right to direct and control the activities of the individual that must be determined.

The "right to control" test includes four factors: (1) direct evidence of the right to, or exercise of, control; (2) the furnishing of tools and equipment; (3) the method of payment; and (4) the right to fire. *SAIF v. DCBS*, 250 Or. App. at 364 (2012), citing *Clements*, 240 Or App at 234. The evidence on this issue is sparse, at best. Nonetheless, this does not weigh in

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coverage, and the inquiry ends. The "nonsubject worker" provisions of ORS 656.027 never come into play. If the initial determination made under ORS 656.005(28) is that one is a worker because one is subject to direction and control under the judicially created "right to control" test, then one goes on to determine under ORS 656.027 whether the worker is "nonsubject" under one of the exceptions of that statute. *S-W Floor*, 318 Or at 630-631 (1994).

Appellant's favor. Appellant must present evidence to support a finding that John Mabe was free from its direction and control. At the hearing, Appellant's witness testified that he assumed Mr. Mabe was operating as an independent contractor. The fact that the parties may have believed and operated on the premise that their relationship was that of an independent contractor does not control the outcome of the required analysis under the applicable laws. *Woody v. Waibel*, 276 Or App 189 (1976). Here, a preponderance of the evidence supports SAIF's determination that Mr. Mabe was subject to Appellant's direction and control while on site performing timber cutting services. Appellant exercised direct control over the daily activities of Mr. Mabe by instructing him where and when to cut timber. Further, Appellant paid Mr. Mabe for services each day he was on site cutting timber, rather than paying him a specified amount for completion of the contracted job. These facts indicate Appellant retained and exercised, at least to some extent, the right to control the provision of services by Mr. Mabe. Appellant therefore failed to demonstrate John Mabe was free from its right to direct and control his work. Accordingly, it failed to demonstrate John Mabe was not a subject worker.

In addition, where evidence of direction and control is inconclusive, the courts look to the relative "nature of the work." Under that test, the courts look at the significant factors relevant to the nature of the work test including indicators of how integrated and coordinated a particular individual's activity was in the employer's overall production pattern. *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614 at 619 (2002), citing *Woody*, 276 Or at 198 (1976). In this case, Appellant operates a logging company. John Mabe provided services as a tree cutter. Tree cutting is an integral part of Appellant's logging operation. Therefore, an examination of the relative nature of the work also establishes the necessary relationship to support SAIF's determination.

Next, the determination turns to whether Mr. Mabe qualifies as a nonsubject worker under the statutory scheme. *S-W Floor*, 318 Or at 630-631 (1994). ORS 656.027 identifies nonsubject workers and provides, in relevant part:

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.

At the hearing, Appellant failed to put forth any evidence indicating that Mr. Mabe qualified as a nonsubject worker under any of the provision of ORS 656.027<sup>7</sup>. Accordingly, Mr. Mabe was a worker subject to workers' compensation law and Appellant was required to provide workers' compensation insurance for this individual.

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<sup>7</sup> To the extent Appellant contends that Mr. Mabe was nonsubject by virtue of his alleged status as an independent contractor under ORS 670.600, that argument is foreclosed under the analysis required by *S-W Floor*. Because Mr. Mabe was subject to Appellant's direction and control, he cannot meet the statutory definition of ORS 670.600 which requires that an independent contractor be free from the employer's right to direct and control the means and manner of performing services.

## **ORDER**

I propose the Department of Consumer and Business Services, Insurance Division issue the following order:

SAIF Corporation's Final Premium Audits issued January 7, 2014 and March 13, 2014, covering the audit period September 1, 2012 through January 17, 2014, are **AFFIRMED**.

**Joe L. Allen**

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Senior 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 PO Box 14480, Salem, Oregon 97309-0405; or faxing them to (503) 378-4351; or e-mailing them to [mitchel.d.curzon@state.or.us](mailto: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 15th day of August 2014, I mailed the foregoing Corrected Proposed Order in Reference No. **1402001**.

BY FIRST CLASS MAIL:

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