

**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 ) **PROPOSED ORDER**  
PREMIUM AUDIT OF: )  
 ) OAH Case No.: 14-02-002  
**SWIFT COURIERS, INC.** )

**HISTORY OF THE CASE**

On December 6, 2013, SAIF Corporation (SAIF) issued Swift Couriers, Inc. (Swift) a Final Premium Audit Billing for the period July 1, 2012 through July 1, 2013. On December 26, 2013, the Department of Consumer and Business Services (DCBS) received Swift's request for hearing. On February 21, 2014, DCBS received Swift's Petition requesting review of the Final Premium Audit Billing. On February 21, 2014, Swift requested a stay of collection for amounts owed under the Final Premium Audit Billing.

On February 27, 2014, DCBS referred the matter to the Office of Administrative Hearings (OAH). On March 5, 2014, Administrative Law Judge (ALJ) Rick Barber issued an Order Granting Stay of Collection. Subsequently, the OAH re-assigned the matter to ALJ Samantha Fair.

On April 3, 2014, ALJ Fair convened a telephone prehearing conference in the matter. Swift's attorney Dan Howard participated in the conference. SAIF's managing attorney Holly O'Dell participated in the conference. ALJ Fair scheduled the hearing for June 4, 2014 and set deadlines for submission of witness lists and exhibits.

On May 29, 2014, ALJ Fair convened another telephone prehearing conference to clarify the issues for the hearing as Mr. Howard no longer represented Swift. Swift appeared and was represented by Rick Luty, Swift's general manager. SAIF appeared and was represented by Ms. O'Dell.

On June 4, 2014, ALJ Fair convened an in-person hearing in this matter in Salem, Oregon. Swift appeared and was represented by Mr. Luty. SAIF participated and was represented by Ms. O'Dell. During the hearing, SAIF amended its Final Premium Audit Billing to remove mention of the business entity known as Slavic's Express Delivery.<sup>1</sup> During the

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<sup>1</sup> The Final Premium Audit Billing indicated that payments made to 12 business, including Slavic's Express Delivery, were not reported accurately to SAIF. During the hearing, SAIF determined that the inclusion of Slavic's Express Delivery in that list was in error and that any payroll associated with Slavic's Express Delivery had been properly reported.

hearing, Swift stipulated that the Final Premium Audit Billing was correct with three exceptions, which are the identified issues for the hearing.

Testifying on behalf of Swift were: Luty; Miguel Bastidis dba Millonario Transportation Services; Gabriel Laplaceliere dba Mun2express; and LaVonne Lal, office manager for K and K Logistics, LLC (K and K). SAIF called no witnesses. The hearing record closed at the conclusion of the hearing.

### **ISSUE**

Whether SAIF's January 30, 2013 Final Premium Audit Billing<sup>2</sup> correctly billed Swift for the following:

- Payments made to LeClair, Inc. during the period of May 15, 2013 through July 1, 2013;
- Payments made to K and K Logistics, LLC during the period of July 1, 2012 through July 1, 2013; and
- Payments made to Contractor Management Service during the period of May 1, 2013 through July 1, 2013.

ORS 656.027 and 656.029.

### **EVIDENTIARY RULING**

Exhibits A1 through A16, offered by SAIF, were admitted into the record without objection. Exhibits R3 and R6, offered by Swift, were excluded by the ALJ for lack of relevancy. SAIF's objections to Exhibits R1, R2, R4, R5, and R7 through R16, offered by Swift, were overruled, and they were admitted into evidence.

### **FINDINGS OF FACT**

1. Swift Couriers, Inc. is a small package delivery company, which was initially incorporated in 2000. The majority of its business involves the delivery of medical supplies, pharmaceuticals and lab specimens to hospitals, clinics, and laboratories and the delivery of

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<sup>2</sup> Swift stipulated that the only parts of the Premium Audit Billing it disputed were payments made to K and K Logistics, LLC for the entire audit period and payments made to 10 other business entities either directly to the entities or to Contractor Management Services who then paid these entities. These 10 other business entities were: Deep Enterprises, Inc.; Madcap Delivery; Millonario Transportation Services; Mun2 Express; Banks Couriers; Demx Delivery; G&J Transportation; Joe Dodd, Inc.; LC Delivery; and LeClair, Inc.. Swift further stipulated that, pursuant to its agreement with SAIF, it intended to pay SAIF's bill regarding all payments made to these 10 business entities for payroll due prior to May 1, 2013, which would be reflected by all payments made to those companies through May 15, 2013. Of those 10 business entities, Leclair, Inc. was the only business entity to receive a payment directly from Swift after May 15, 2013. As determined during the hearing, Madcap Delivery ceased providing delivery services for Swift in 2012. Therefore, Swift did not dispute its responsibility for the premium adjustment based on payments it made to Madcap Delivery.

mailbags for banks. A smaller portion of their business involves the delivery of office products. (Ex. A7 at 3; test. of Luty.)

2. Swift's corporate headquarters is located in Vancouver, Washington. From that location, it sends large trucks to its hubs to drop off the small packages for local delivery and to pick up any return merchandise. It has hubs in the following Oregon cities: Pendleton, Redmond, Salem, Eugene and Medford. (Test. of Luty.)

3. Originally, Swift had its own employees perform the local deliveries. To perform the local deliveries, the employees report to the hub, enter an access code to enter the building, sort thru the pallets and packages to load the correct packages into the delivery van, verify the number of packages, and then deliver the packages. For the majority of the packages, the employees use an electronic scanner to scan a bar code on the packages, which information is transmitted to Swift and Swift's clients. Upon delivery, the employees obtain signatures confirming the deliveries and bring any return merchandise back to the hub. (Test. of Luty.)

4. Several years ago, because of competition, Swift needed to cut its costs. It began hiring contractors to perform the local deliveries in lieu of its own employees as a cost saving measure. Currently, the majority of the local deliveries are performed by contractors, not employees. None of the contractors are former Swift employees. The contractors follow the same procedures as the former employees to obtain and deliver the packages and pick up any return merchandise. The contractors also use scanners, either purchasing their own scanners or renting scanners from Swift. (Test. of Luty.)

5. The contractors bid on routes that Swift presents to them. Swift packages a group of delivery destinations, or stops, and uses a mapping program to determine the most efficient route to perform the stops. It then presents the route to the contractor for a bid, including additional parameters such as time constraints on deliveries as most of the medical packages require delivery by noon to 1 p.m. and some hospitals require even earlier delivery. The contractor is not required to follow the route mapped by Swift so long as the daily deliveries are completed and any time constraints for those deliveries are met. Bids on routes are based on the number of stops, volume of deliveries, and length of routes with additional prices for special deliveries or weekend deliveries. (Test. of Luty.)

6. Swift requires contractors to provide and maintain their own equipment, such as the delivery vehicles. Swift requires the contractors to use scanners, most of whom rent the scanners from Swift. Swift requires the drivers to wear a shirt that bears a company logo on it. Swift does not require the logo to be Swift's logo. The contractors use their own company logos on their shirts. Swift provides the contractors Swift courier identification badges because some of Swift's clients require such a badge for anyone making a delivery. Swift requires the contractors to perform pre-employment drug screens and background checks on any drivers performing deliveries because Swift's clients require it. If the contractor does not complete these screens and checks, then Swift will not allow the use of the drivers. (Test. of Luty.)

7. The contractors included: Deep Enterprises, Inc.; Millonario Transportation Services; Mun2 Express; Banks Couriers; Demx Delivery; G&J Transportation; Joe Dodd, Inc.; LC

Delivery; and Leclair, Inc. (hereinafter, collectively known as “the Contractors”). Swift was aware that the Drivers did not provide workers’ compensation insurance. (Test. of Luty.)

8. During the period July 1, 2012 through June 30, 2013, Swift had workers’ compensation insurance through SAIF. (Ex. A9 at 1-2.) Pursuant to an agreement with SAIF, it paid premiums on payments made to the Contractors. Swift determined that it would not pay premiums on payments made to K and K or payments made to Contractor Management Services (CMS), a company that began in May 2013 making payments to the Contractors for the delivery services. (Test. of Luty.)

*Relationship with LeClair, Inc.*

9. LeClair performs delivery services for Swift. It performs these services for Swift pursuant to an Independent Contractor Agreement and Terms and Conditions of Transportation Services (Agreement), signed February 6, 2012. (Ex. R1 at 7-11.) The Agreement provides the following:

- LeClair would provide all necessary equipment and persons to complete the services. LeClair was responsible for its taxes and licenses.; (*Id.* at 7, 14.)
- LeClair agreed to abide by any service demands of Swift’s clients, such as uniforms and badges; (*Id.* at 7.)
- LeClair’s failure to satisfactorily complete all delivery work allows Swift to immediately terminate the Agreement; (*Id.*)
- LeClair agreed to maintain commercial auto liability insurance on all delivery vehicles used to perform the services. LeClair will carry liability insurance for any services it performs for Swift in a minimum policy value of \$500,000 with Swift labeled an additional insured; (*Id.* at 7, 10.);
- Swift “engages [LeClair] as an independent contractor,” and not an employee; (*Id.* at 9-10.)
- LeClair is required to provide all delivery tickets or route sheets to Swift on a daily basis; (*Id.* at 9.)
- LeClair is free to perform services for other businesses; (*Id.*)
- Swift may terminate the Agreement at any time with 10 working days’ written notice to LeClair. Swift may immediately terminate the Agreement without notice to LeClair if LeClair is convicted of any crimes, fails to comply with the written policies or reasonable directives of Swift, or materially breaches the Agreement; (*Id.* at 10.)
- LeClair “shall not assign any of [his or her] rights under this Agreement, or delegate the performance of any of [his or her] duties hereunder, without the prior written consent of [Swift].” (*Id.*) LeClair must provide backup personnel and/or vehicles to perform the services so that such services would be completed in a timely manner; (*Id.*)
- Prior to performance of services, LeClair must provide Swift background checks on all personnel and a description of clothing worn by personnel when performing services; (*Id.* at 12.)
- LeClair is paid based on deliveries completed, not hours worked. (*Id.* at 14.)

- LeClair “is not required to wear a company uniform;” and (*Id.*)
- Swift does not specify the order in which deliveries must be made or the physical routes actually taken to perform those deliveries. (*Id.*)

10. Swift also required LeClair’s vehicles to have tinted windows in order to perform the services. (Ex. R1 at 13.) On a separate insurance requirement form, LeClair was required to have automobile liability insurance in the minimum amount of \$300,000 and to have cargo liability insurance to cover cargo loss or damage with specified amounts of minimum coverage. (*Id.* at 4.) Another form further required LeClair to provide an “acceptable driving record” and workers’ compensation insurance for its drivers. (*Id.* at 6.)

11. At the time it entered the Agreement, LeClair performed similar services for other companies. (Ex. R1 at 13.) LeClair hired multiple drivers to complete the deliveries for Swift. (Test. of Luty.) It did not provide workers’ compensation insurance to any of the drivers. (Ex. R1 at 13.)

12. The Contractors’ asset investments typically included a delivery van, a computer, cell phone, a GPS, and a handtruck. They placed their own business logo on the vans. They would either purchase their own scanner or rent one. The business was usually worth less than the combined value of the assets. Swift was usually the main client but the Contractors would perform work for other clients. The Contractors and any of their drivers wore the Contractors’ uniform shirts that had their own business logo on them, rather than Swift’s logo. The Contractors were free to hire and fire its employees. The Contractors chose which of Swift’s routes to accept or reject. The Contractors paid their own taxes and held business licenses. (Test. of Bastidis and Laplaceliere.)

#### *Relationship with K and K Logistics*

13. In November 2011, Swift entered into the same Agreement and additional forms with K and K that it had with LeClair. (Ex. R5.)

14. K and K files its own income taxes, is registered as a business, and holds a business license. It has its own logos and uniforms. It owns and maintains its own vehicles but its employees do not perform any delivery services for Swift. (Test. of Lal.) Instead, K and K contracts with others to perform such work. These other drivers sign Independent Contractor Owner/Operator Agreements with K and K, which label the drivers as independent contractors, not employees. (Ex. R5 at 21-26; test. of Lal.) K and K arranges delivery services for multiple clients, including Swift. K and K is free to hire and fire any of these contractors. It does not provide workers’ compensation insurance for any of the drivers who are actually performing the delivery services for its various clients. Depending upon the route, the drivers are paid by the stop, by items delivered, or a base rate. (Test. of Lal.) Swift is aware that K and K hires these other drives to perform the delivery services for Swift. (Test. of Luty.)

### *Relationship with Contractor Management Services*

15. Swift negotiated with CMS for its involvement with the Drivers, which involvement began in May 2013. (Ex. A10 at 3-4.) Swift's intention was to "no longer manage or have a contractual relationship [with] the independent contractors." (Ex. A15 at 1.) As part of this new arrangement, Swift entered into a Business Process Administration Agreement (Business Agreement) with CMS; CMS executed Membership Application and Agreements (Membership Agreement) with the Contractors; and Swift entered into Owner/Operator Agreements with the Contractors. (Exs. A15 at 1; A16 at 39.)

16. CMS provided an online computer system in which the Contractors enroll if they wish to perform deliveries for Swift. During enrollment, the computer system includes a default payment rate for the routes. The Contractor can either accept that default rate and complete the enrollment or can negotiate a different rate. To negotiate a different rate, the Contractor will live chat with Swift through the computer system. If Swift decides on a different rate, Swift must enter that new rate in the computer system so that the Contractor can accept it and complete the enrollment. (Ex. A10 at 2.)

17. The Business Agreement noted that CMS's role is to provide "business process administration services (BPA) through proprietary Independent Contractor Management (ICM) Technology to assist contracting companies in documenting and managing their relationships with independent contractors (IC)." (Ex. A16 at 7.) As noted in the Business Agreement, CMS' BPA services are the administration and processing of financial transactions. CMS processes "Settlement Payments for [Swift] to ICs with whom [Swift] contracts \* \* \*. "Settlement" or "Settlement Payment" means remuneration due to IC from [Swift] for transportation services provided to, and for customers of [Swift]." (*Id.* at 13.) The ICM Technology provides electronic forms for use by Swift and the Contractors; electronic warehousing; data entry; and advice on the use of the technology. (*Id.* at 7.) The Business Agreement includes the following provisions:

- Swift must "comply with all federal, state and local laws, rules and regulations regarding the classification of ICs as independent contractors;" (*Id.* at 8.)
- "CMS does not have a duty or obligation to verify or confirm any information provided by [Swift] or any IC regarding the status of IC as an independent contractor;" (*Id.*)
- Swift "agrees not to represent that any IC or other person or entity associated with [Swift] is either an employee or an independent contractor of CMS;" (*Id.* at 9.)
- Swift "will use the services of CMS solely as a BPA and the provision of ICM Technology;" (*Id.* at 10.)
- "CMS has no and will have no interest in, nor involvement with the business or affairs of IC;" (*Id.*)
- "CMS is a neutral, non-biased company who does not favor either [Swift] or the ICs who may also retain its services;" and (*Id.*)
- "ICs contract directly with [Swift]. Any and all Settlement Payments to the ICs are governed by the agreement between [Swift] and the ICs." (*Id.* at 14.)

For CMS' services, Swift pays CMS an annual administration fee and a \$1 payment processing fee per Settlement Payment. CMS makes all Settlement Payments from funds forwarded by

Swift to compensate the Contractors pursuant to Swift's Owner/Operator Agreements with the Contractors. (*Id.* at 8, 14-15.)

18. The Contractors apply for membership in CMS by completing the Membership Agreement. In the Membership Agreement, the Contractor asserts that it is a business for profit and is separate from CMS and Swift. (Ex. A16 at 26.) Pursuant to the Membership Agreement, the Contractor pays CMS a minimum of \$5 per Settlement Payment.<sup>3</sup> CMS will issue Settlement Payments to the Contractor upon receipt of a payment from Swift and will provide an occupational accident insurance covering the Contractor, which policy is provided by a third party company. (*Id.* at 27-28.) The Membership Agreement included an acknowledgement by the Contractor that "it does not work for CMS and as a Member it will not be employed by or under the direction of CMS. \* \* \* any services provided by [the Contractors] are not services provided for, or on behalf of, CMS." (*Id.* at 27.)

19. The occupational accident insurance policy, available through CMS' services, is not a workers' compensation insurance policy. (Ex. A16 at 38.)

20. Swift and the Contractors entered into Owner/Operator Agreements which included an assertion that the Contractors "SHALL BE AND REMAIN AT ALL TIMES AN OWNER/OPERATORS IN FACT AND LAW. OWNER/OPERATOR IS NOT AN EMPLOYEE OF [SWIFT]." (Ex. A16 at 39; emphasis in original.) It further provided:

- The Contractor "shall be responsible for the manner and means of securing the end results of the provision of services under this Contract and shall use its own independent judgment and discretion for the most effective and safe manner in conducting pick-up and delivery services. [Swift] shall exercise no direct control over [the Contractors], nor the method or means used by [the Contractor] in the performances of such services, including the selection of routes;" (*Id.*)
- The Contractor "agrees to pick and deliver documents, packages, parcels, merchandise and other shipments subject to the terms and condition set forth herein, as required by [Swift's customers];" (*Id.*)
- If required by Swift's customers, the Contractor will "drug test job applicants, \* \* \* conduct other drug and alcohol testing \* \* \* where there is reasonable suspicion of impairment. \* \* \* conduct random drug screening \* \* \*. \* \* \*[the Contractor] shall submit to any background check" as requested by Swift's customers; (*Id.* at 40.)
- Swift "makes no guarantee to [the Contractor] of a minimum number of shipments;" (*Id.*)
- Swift "neither has, nor reserves, any right or power to exercise any direction, control, or determination over when [the Contractor] shall work;" (*Id.*)
- The Contractor "shall follow all procedures as set forth by [Swift's customers];" (*Id.*)
- The Contractor "may designate a subcontractor or hire its own employee to execute a delivery or pick-up provided that said person (l) meets the same standards \* \* \* as IC \* \*

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<sup>3</sup> The Membership Agreement provides the same definition for "Settlement Payments" as the Business Agreement. (Ex. A16 at 26.)

\* and (ii) is covered by either Occupational Accident Insurance or Worker's Compensation Policy \* \* \*," (*Id.*)

- Swift "shall not dictate the time for performance of [the Contractor's] services. IC \* \* \* agrees delivery instructions and time specified by [Swift's customers] do not constitute direction or control by [Swift];" (*Id.*)
- The Contractor "represents and warrants that [the Contractor] is not presently charged with a criminal offense and that [the Contractor] has not been convicted of a felony within the past seven years;" (*Id.* at 41.)
- The Contractor "agrees that it will not transport or permit in its vehicle(s) passengers that have not met the criteria in this contract \* \* \* while rendering services to [Swift's customers];" (*Id.*)
- The Contractor must wear a shirt that displays a business logo and, for certain deliveries must have an identification badge indicating that the Contractor is an authorized IC for Swift; (*Id.*)
- The Contractor "is solely responsible for filing and paying all necessary \* \* \* taxes \* \* \*. \* \* \* will not be treated as an employee \* \* \*;" (*Id.* at 42.)
- The Contractor must "properly scan all items" and failure to scan 80 percent of the items will be a breach of the contract; (*Id.*)
- The Contractor "shall maintain \* \* \* commercial auto insurance\* \* \*. Such policy shall, at a minimum, have the following coverage limits \* \* \*;" (*Id.* at 43.)
- The Contractor "shall procure and maintain cargo insurance coverage in an aggregated amount as described \* \* \*;" (*Id.*)
- The Contractor "SHALL NOT BE COVERED BY [SWIFT'S] WORKERS' COMPENSATION INSURANCE BECAUSE [THE CONTRACTOR] IS ENGAGED IN AN INDEPENDENTLY ESTABLISHED \* \* \* BUSINESS AND IS NOT AN EMPLOYEE OF [SWIFT]. [THE CONTRACTOR] ASSUMES THE RESPONSIBILITY OF AN EMPLOYER FOR THE PERFORMANCE OF THE SERVICE PERFORMED PURSUANT TO THIS CONTRACT AND WILL PROVIDE WORKERS' COMPENSATION INSURANCE COVERAGE TO [THE CONTRACTOR'S] EMPLOYEES, IF ANY;" (*Id.* at 43-44; emphasis in original.)
- The Contractor "also agrees to obtain and maintain at all times either an Occupational Accident Insurance Policy or Workers' Compensation Insurance on [IC] and all of its subcontractors, approved by [Swift];" (*Id.* at 44.)
- The Contractor must secure delivery items in a locked truck or other secured cargo area of the vehicle. The Contractor cannot transport items in the open bed of a pickup. The Contractor must secure all doors, keep all windows raised, and remove all keys when away from the vehicle and no delivery item or other high value item, such as the scanner, will be left in plain sight within the vehicle. (*Id.* at 49.) The vehicle must have tinted windows; (*Id.* at 53.)
- The Contractor must provide Swift background checks on all its personnel and description of clothing to worn by personnel when on the job before securing any work with Swift; (*Id.* at 50.)
- The Contractor is paid based on completed pickups and deliveries. The Contractor is not paid by the hour or any time period; and (*Id.* at 54.)
- The Contractor may accept or reject routes and may perform deliveries for other companies. (*Id.* at 55.)

The Owner/Operator Agreement provides for immediate termination of the agreement for the Contractor's abandonment of route, failure to complete deliveries, loss of Swift's customers' property, failure to service route as agreed, not complying with alcohol and drug testing, and other similar failures. (*Id.* at 39, 46.) The Contractor is to provide all their own tools, equipment, licenses, and permits to perform the services. The Contractor acknowledges having a "substantial financial investment in the equipment and tools." (*Id.* at 39.)

21. From May 6 through May 13, 2013, Swift entered into the Owner/Operator Agreement with the following companies: Banks Courier Services, DEMX Delivery, G&J Transportation, LC Delivery, Deep Enterprises Inc., Millonario Transportation Services, and Mun2express. (Exs. R9 through R15.)

22. Mun2express, Millonario Transportation Services and Deep Enterprises, Inc. had back-up drivers to perform the delivery services in case of vacations or emergencies. The names of the back-up drivers were included with the Owner/Operator Agreements with Swift. (Exs. R2 at 13; R13 at 14; R14 at 14; R15 at 14.) Swift was aware that the following Contractors: Banks Courier Services; DEMX Delivery; G&J Transportation; Joe Dodd, Inc.; and LC Delivery had multiple drivers regularly performing the deliveries. (Test. of Luty.)

23. Pursuant to CMS' involvement, Swift ceased directly paying the Contractors for their services approximately May 15, 2013. Instead, Swift paid CMS, who then paid the Contractors for their services. At that time, Swift ceased reporting any payroll for the Contractors to SAIF.<sup>4</sup> (Exs. A10 at 2; A11 at 1.)

#### *Premium Audit Billing*

24. On December 6, 2013, SAIF issued to Swift a Final Premium Audit Billing for the period July 1, 2012 to July 1, 2013. The billing showed a total premium of \$82,282.63 of which \$54,990.89 had been previously billed, leaving a difference owed of \$27,291.74. SAIF based the total premium on a payroll of \$1,369,905, which included unreported payments of \$403,394 made to other workers it deemed subject workers, such as the Contractors. (Ex. A16 at 1-5.)

### **CONCLUSION OF LAW**

SAIF correctly billed Swift in its December 6, 2013 Final Premium Audit Billing, and Swift is liable for the adjusted premium.

### **OPINION**

Swift bears the burden to establish that SAIF's premium audit billing is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). To sustain this burden, Swift must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130

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<sup>4</sup> Due to a clerical error, Swift had ceased reporting payroll for the Contractors prior to CMS' involvement. Swift stipulated that it owed SAIF for all payments made to the Contractors prior to CMS' involvement pursuant to a prior agreement with SAIF.

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).

ORS 656.017 through ORS 656.174 are part of a “statutory scheme that seeks to ensure that workers are, in fact, covered by workers’ compensation insurance.” *In the Matter of the Compensation of Sparks*, 171 Or App 65, 69 (2000).<sup>5</sup> *Sparks* further states that the “rule has been that general contractors are responsible for providing coverage to all persons working under the contract.” *Id.*

*Responsibility for Workers’ Compensation Insurance Pursuant to ORS 656.029*

ORS 656.029 provides, in part:

(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.

\* \* \* \* \*

(3) As used in this section:

(a) “Person” includes partnerships, joint ventures, associations, corporations, limited liability companies, governmental agencies and sole proprietorships[.]

Swift argued that because K and K Logistics was the business entity that contracted with drivers to perform the delivery services, Swift is relieved of any responsibility to provide

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<sup>5</sup> *Sparks* involved a general contractor of a construction project who contracted with a subcontractor to perform drywall services. A worker for the subcontractor was injured while performing work on the construction project. *Sparks* at 67.

workers' compensation insurance to those drivers. This same argument was raised by K-Mart Corporation in *K-Mart Corp. v. Claussing*, 162 Or App 558 (1999).

In that case, K-Mart contracted with a sole proprietor to provide janitorial services for its retail locations. Pursuant to the terms of the contract with the sole proprietor, the sole proprietor was to provide workers' compensation insurance for the workers. K-Mart understood that the sole proprietor would be hiring additional workers to perform the janitorial services needed by K-Mart. The Court of Appeals agreed with the Workers' Compensation Board's reasoning that because K-Mart contracted with the sole proprietor with the expectation that the sole proprietor would have additional workers perform the work that the sole proprietor was not "exempt from coverage." *Id.* at 563. Thus, the exemption under ORS 656.027 is only for individual workers, not for those who employ individual workers. *Id.* at 562.

Swift is in the same position as K-Mart. Swift contracted with K and K to perform the delivery services for Swift's clients, and Swift knew that K and K hired other workers, the drivers who by contract were labeled independent contractors, to perform the actual deliveries. These workers performed the labor that is the normal part of Swift's business, i.e. delivery of small packages for Swift's clients. Therefore, Swift was the "person awarding the contract" and was responsible for providing workers' compensation insurance coverage for all the workers who performed the labor. Even if these workers performing the actual delivery services were indeed independent contractors (and therefore exempt from coverage pursuant to ORS 656.027), pursuant to ORS 656.029(1), Swift remains responsible for providing them workers' compensation insurance because K and K, the person awarded Swift's contract, is not a worker "exempt from coverage."

ORS 656.029(1) provides an exception to holding the person awarding the contract responsible for providing the coverage. That exception applies if "the person to whom the contract is awarded provides such coverage." As in *K-Mart*, Swift had a contract requiring K and K, the person to whom the contract was awarded, to provide workers' compensation insurance to the Drivers. However, "the burden is on the [general contractor] to make sure that the [subcontractor] provides the coverage. *Sparks* at 69. As in *K-Mart*, contrary to the terms of the contract, K and K did not provide workers' compensation insurance for the independent contractors. Therefore, Swift remained responsible to provide the coverage for those workers actually performing the services.

Swift also asserted the same argument in regards to CMS: because CMS was the business entity that contracted with the Contractors to perform the delivery services, Swift was relieved of any responsibility for providing workers' compensation insurance to the Contractors. Even if CMS did contract with the Contractors to perform the delivery services, as already explained above, Swift's argument is not persuasive. Swift knew that CMS would not perform the delivery services itself; instead, the services would be performed by other workers, here the Contractors. Therefore, Swift is in the same position with CMS that it is with K and K. Because Swift is the person awarding the contract and CMS is not an exempt worker, Swift remains responsible for providing workers' compensation insurance coverage for the Contractors unless CMS provides such coverage. As with K and K, CMS did not provide such coverage. Therefore, Swift would

remain responsible for providing workers' compensation insurance for the Contractors even if CMS was the "person to whom the contract was awarded."

Despite Swift's assertion that CMS was the business entity that contracted with the Contractors to perform the delivery services,<sup>6</sup> the evidence fails to support such a finding. CMS' Membership Agreement with the Contractors did not provide for the Contractors to perform services for Swift. Instead, it indicated services that CMS would provide, such as forwarding Swift's payments to the Contractors and arranging for the issuance of occupational accident insurance, to the Contractors. Instead, Swift entered into Owner/Operator Agreements with the Contractors, which provided for the delivery services the Contractors would perform for Swift. Additionally, the Business Agreement between Swift and CMS made it clear that CMS was not directly involved in the awarding of routes to Contractors nor in the value of the routes. Instead, CMS merely provided a mechanism for communication, its online electronic system, through which Swift would communicate with the Contractors and standardized forms and records for their use. Although CMS directly paid the Contractors for the performance of the delivery services, it merely acted as a conduit for the payments from Swift to the Contractors. CMS' role was that of a payroll and business administration services company. Contrary to Swift's intent, Swift remained in the same business relationship with the Contractors that it had prior to CMS' involvement.

There were a total of nine additional business entities, who received payments from CMS, that performed the actual delivery services for the period at issue. Of those entities, Swift acknowledged that the following six business entities had multiple workers performing the delivery services: Banks Couriers, Demx Delivery, G&J Transportation, Joe Dodd, Inc, LC Delivery and LeClair, Inc. Thus, like K and K, since these six business entities are not individual workers, the exemptions available under ORS 656.027 are not applicable. Instead, ORS 656.029 is applicable, and, again, Swift is the "person awarding the contract" and these six business entities are the "person to whom the contract was awarded." Because none of these businesses provided workers' compensation insurance, Swift remained responsible for providing workers' compensation insurance coverage for all the workers who performed the labor.

Swift asserted that Deep Enterprises, Mun2express and Millonario Transportation were business entities that only had a single driver, in which case, ORS 656.027 would be applicable. However, the evidence established that Swift had an expectation with all the business entities, including the "single driver" entities, that the entities would be able to perform the deliveries by use of alternate drivers if the "single driver" was unavailable. All three of these entities included the names of back-up drivers in the Agreements with Swift. Therefore, these three business entities were not individual workers, so ORS 656.027 is not applicable. Swift's relationships with these three entities were the same as with K and K. Therefore, pursuant to ORS 656.029, Swift was the "person awarding the contract" and remained responsible for providing workers' compensation insurance coverage for all the workers who performed the labor because none of these three businesses provided such coverage.

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<sup>6</sup> Swift went so far as to assert that CMS was the "employer" of the Contractors, contrary to the terms of its Business Agreement with CMS. (Test. of Luty.)

Swift is responsible for providing workers' compensation coverage for all the workers performing its delivery services through K and K, CMS, and the remaining nine business entities. Therefore, Swift must pay the adjusted premium detailed in SAIF's December 6, 2013 Final Premium Audit Billing.

### **ORDER**

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

SAIF Corporation's Final Premium Audit Billing, dated December 6, 2013 (for audit period of July 1, 2012 to July 1, 2013), issued to Swift Couriers, Inc. is **AFFIRMED**. Swift Couriers, Inc. must pay SAIF Corporation an additional \$27,291.74<sup>7</sup> for workers' compensation insurance premiums.

**Samantha Fair**

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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. Send exceptions by email to [mitchel.d.curzon@state.or.us](mailto:mitchel.d.curzon@state.or.us) or mail exceptions to:

Mitchel D. Curzon  
Chief Enforcement Officer  
Oregon Insurance Division  
PO Box 14480  
Salem, OR 97309-0405

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<sup>7</sup> This is the total amount owed including the amounts that Swift stipulated were correctly billed.

CERTIFICATE OF SERVICE

On the 16th day of July 2014, I mailed the foregoing PROPOSED ORDER in Reference No. **1402002**.

BY FIRST CLASS MAIL:

Rick Luty, General Manager  
Swift Couriers, Inc.  
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Ryan Clark  

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Hearing Coordinator  
Office of Administrative Hearings