THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of the Premium Audit of	)	**Consolidated Case Nos:**
	)	**INS 02-06-009 and 03-04-010**
EXPRESS MESSENGER	)	
SYSTEMS, INC.,	)	**AMENDED PROPOSED ORDER**
a Delaware Corporation.	)	

HISTORY OF THE CASE

This consolidated premium audit appeal was heard by Administrative Law Judge Ella D. Johnson on May 27, 2003. Massachusetts licensed attorney Wesley A. McClure, appearing *pro hac vice* pursuant to Uniform Trial Court Rule (UTCR) 3.179, and Oregon licensed attorney William E. Gaar represented petitioning employer Express Messenger Systems, Inc. (petitioner or Express). Assistant Attorney General David B. Hatton represented responding insurer SAIF Corporation (insurer or SAIF). Respondent rating bureau National Counsel of Compensation Insurance (NCCI) waived appearance at the hearing. Petitioner timely appealed SAIF's final premium audit billings for the periods of December 1, 2000 to September 18, 2001 (first audit period), September 19, 2001 to December 31, 2001 (second audit period), January 1, 2002 to January 31, 2003 (third audit period)(collectively, the audit periods). The Department of Consumer and Business Services, Insurance Division (the department) referred these matters to the Hearing Officer Panel,[1] now the Office of Administrative Hearings (OAH), on August 20, 2002 (for the first and second audit periods) and on May 13, 2003 (for the third audit period). At the request of petitioner, the audit periods were consolidated for hearing on May 20, 2003.

National Independent Contractor Association (NICA) Senior Vice President for Sales and Marketing Timothy F. Bergerin, Third Party Administrator Claims Manager Brenda Cullinan, and driver Duncan Padding testified on behalf of petitioner. SAIF Lead Auditor Tracy Meyer and SAIF Premium Audit Program Analyst Deanne Hoyt testified on behalf of insurer. The record closed following the hearing on May 27, 2003.

On August 5, 2003, ALJ Johnson issued a Proposed Order which found that insurer correctly assessed premium on payments made to contract drivers who were "workers" as defined by ORS 656.005(30), that insurer did not fail to comply with ORS 737.310(12), and that insurer did not fail to adjust the final premium audit billing to exclude portions of the billing to reflect payments not includable in premium for those drivers deemed to be workers. On September 5, 2003, SAIF filed exceptions to the Proposed Order requesting that the order conform to the evidence. Petitioner also filed exceptions to the Proposed Order on September 5, 2003 alleging *inter alia* that the Proposed Order erred in failing to give weight to the

[1] The name of the Hearing Officer Panel was changed to the Office of Administrative Hearings by House Bill 2526 with the Governor's signature on May 22, 2003.

testimony on Duncan Padding and Timothy Bergin and incorrectly applied the "right to control" test. Insurer timely filed a response to petitioner's exceptions on September 15, 2003.[2]

On September 16, 2003, the department referred the matter back to OAH pursuant to OAR 137-003-0650 to "revise the proposed order as the [ALJ] considers appropriate to address [the] exceptions filed by the employer and insurer." Having reviewed the exceptions filed by petitioner, insurer's response and the record in this matter, I now issue this Amended Proposed Order, affirming and adopting the Proposed Order as supplemented herein.

ISSUES

(1) Whether insurer incorrectly assessed premium on payments made to drivers who were allegedly not "workers" as defined by ORS 656.005(30) or are covered by contingent liability policies and occupational accident and disability policies.

(2) Whether insurer failed to comply with the requirements of ORS 737.310(12).

(3) Alternatively, whether insurer failed to adjust the final premium audit billing to exclude portions of the billing to reflect the payments not includable in premium for those drivers deemed to be workers.

EVIDENTIARY RULING

The record consists of insurer's Exhibits A1 through A51 and A53 and petitioner's Exhibits R1 through R22, which were admitted into evidence without objection. Petitioner objected to Exhibit 52, which consists of the claim records of Express' employee John Boyles. This matter involves the status of Express' contract drivers, not its employees. It's undisputed that Express' employee drivers were covered by SAIF. Consequently, I do not find Exhibit 52 to be relevant to this inquiry, sustain petitioner's objection and exclude the exhibit from the record.

FINDINGS OF FACT

(1) Express was originally a Minnesota corporation engaged in the courier business in Oregon and eight other states offering next day delivery of mail and international re-mailing. The corporation's offices are located in Phoenix, Arizona. On November 27, 2000, Express first applied for workers' compensation insurance in Oregon. Express noted on its application that it occasionally used subcontractor/contractors and that the corporation did business in Oregon, California, Washington, Nevada, Arizona, Utah, Nebraska, Colorado, Minnesota and Kentucky. Coverage for the first audit period became effective December 1, 2000. SAIF assigned Class Codes 7231 (Truck-Mail/Parcel/Packages-All Employees Including Drivers), 8742 (Outside Sales/Field Representatives), and 8810 (Office Clerical). (Ex. A1-A3.)

(2) Stockholders of Express included Air Canada and EMS Corp. By letter dated October 23, 2001, Express notified SAIF of a change in ownership as of September 19, 2001 precipitated by the sale of minority stockholder Air Canada's shares to Citicorp Venture Capital Ltd., which was the

[2] **The bolded text indicates changes made in the Proposed Order by this Amended Proposed Order.**

majority stockholder of EMS Corp, a Delaware corporation. As a result, the Minnesota corporation for Express Messenger Systems, Inc. was dissolved and EMS Corp. changed its name Express Messenger Systems, Inc. The corporation remained as a Delaware corporation and Citicorp became the majority stockholder of Express. (Exs. A8, A9.)

(3) SAIF provided workers' compensation insurance to Express during all periods relevant herein. Express received a Workers' Compensation Toolbox from SAIF. The toolbox contained *inter alia* detailed information on how to determine whether contract drivers/contractors payroll should be reported under the policy. (Ex. A2-A4.) When Express reapplied for coverage through SAIF, the corporation stated that it employed drivers and paid them hourly and that the drivers operated company trucks and bikes to deliver the express mail. (Ex. A10.) Coverage for the second audit period became effective September 19, 2001. (Ex. A13.) Part Five, Section C subsection 2 of SAIF's policy states:

> All other persons engaged in work that could make us liable for their services and materials may be used as premium basis. This paragraph will not apply is you give us proof that the employers of these persons lawfully secured their workers' compensation obligation. (Ex. R1.)

(4) The National Independent Contractors Association (NICA) is an independent contractor services administrator which was started in 1993 by Thomas McGrath, who was himself an independent contract courier, as an informal association of independent contractor couriers. NICA was incorporated in 1995. (Ex. R21.) It is structured as an S-Corporation, wholly owned by Mr. McGrath and headquartered in Boston, Massachusetts. NICA's mission is to "clarify" the independent contractor issue by providing assistance to regulatory agencies and affiliated companies in preventing inappropriate unemployment and workers' compensation claims and the misclassification of contractors as employees. (Ex. A43.) To carry out its mission, NICA recruits and refers contract drivers and provides documentation, insurance, tax and commission settlement services. The contract drivers pay NICA a one-time account set up/application fee of $20 and a weekly affiliation fee of up to $19, depending on what NICA services the contract driver uses. The affiliated companies pay an annual administration fee of $500 to $1,000. (Exs. A20, A43: test. of Bergerin.) All of the contract drivers are covered by NICA's group insurance policies and carry insurance cards that they are required to use if they have a claim. NICA does not have its own staff in Oregon but has staff in California. NICA has contract drivers in 38 states. NICA establishes trusts for each affiliated company. The company wires the contract drivers' commission settlements to the trust and NICA makes the authorized deductions for such items as pagers or cell phones and pays the contract drivers their net settlement commissions out of the trust. The frequency of payment is determined by the affiliated company. NICA gives the contract drivers IRS 1099 Forms at the end of the year. The contract drivers usually received only one 1099 Form, even if they work for several carriers. The contract drivers then file Schedule C Tax Forms with the IRS. Upon request, NICA helps the contract drivers file their taxes and helps them with their quarterly tax estimates. (Exs. A20 at pages 19-20, 43.) NICA provides detailed instructions on its website for contract drivers and companies concerning the procedure to follow to use NICA's services. [3] (Ex. 43; test. of Bergerin.)

[3] In the fall of 1995, the FBI launched a criminal investigation of NICA and Mr. McGrath after complaints were filed by several insurers and the Massachusetts Department of Industrial Accidents and Workers' Compensation Rating and Inspection Bureau. The Federal Government ultimately indicted Mr. McGrath for

(5) NICA's Independent Contract Application and Agreement required the contract drivers to acknowledge that they were independent contractors engaged in their own independently established businesses and were not employees of NICA or the contracting company. The contract drivers were also required to acknowledge that they were not entitled to participate in employee health benefits or pension programs and were not entitled to unemployment or workers' compensation benefits; they waived any right to such benefits. The agreement set forth the benefits the contract driver would receive and the process the drivers were required to follow in invoicing and obtaining payment of their commissions. It required the drivers to provide their own equipment, tools and supplies and to comply with all Federal, state and local tax laws. The agreement terminated when the contract driver ceased to perform services for the NICA-affiliated company. The drivers also completed an insurance application and an independent contractor profile form in which they provided their motor vehicle registration, information concerning their vehicle, work history and emergency contact. The terms and conditions of NICA insurance expressly stated that the benefits under this policy did not necessarily equate with the benefits available under the statutory worker's compensation policy. If the driver declined to take NICA's insurance, they were required to provide evidence of statutory workers' compensation coverage. (Exs. A43 at pages 14-20, 44.)

(6) The insurance provided by NICA to Express was through Clarendon America Insurance Company (Clarendon) and Steadfast Insurance Company (Steadfast). (Ex. R2.) Neither Clarendon nor Steadfast hold or have ever been issued certificates of authority by the State of Oregon to transact insurance in Oregon. No guarantee contracts have been filed with the department by either Clarendon or Steadfast naming Express as an insured employer. (Exs. A47, 48 (Ex. A49.)

(7) The insurance policies provided by NICA to Express included a contingent liability policy. The Certificate of Liability Insurance stated:

> Policy will cause issuance of a policy Workers (sic) Compensation law, which will respond to the obligation of the insured under the workers (sic) compensation law, but only with respect to a covered contractor or contractor driver who may seek to be deemed and (sic) employee of the insured by a workers (sic) compensation board, government agency or court of competent jurisdiction. See Policy.

The contingent liability policy had a policy limit of $500,000 per person and was effective for the period of August 1, 2001 to August 1, 2002. The policy defined "Contractor" to mean a:

> Contractor who has leased to the insured on a long term basis a power unit and who drives the power unit as an Independent Contractor, under the operating authority of an independent , unrelated motor carrier who is the

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mail and wire fraud and workers' compensation insurance premium fraud. Most of the allegations were based on business practices discontinued after Mr. McGrath incorporated NICA in 1995, for example the use of altered certificates of workers' compensation insurance. The matter was plea bargained and the allegations of workers' compensation insurance premium fraud were dropped. Mr. McGrath and NICA were ordered to pay fines and restitution. An injunction was never filed and Mr. McGrath continued conducting business through NICA. (Ex. R21.)

> insured under this policy. This definition could also include a second individual who is a co-owner of the same power unit and who also drives the vehicle as an Independent Contractor co-driver. A Contractor is not an employee of the insured.

The purpose of the contingent liability policy was to pay benefits to an injured contract driver if the driver is found to be a "worker" under Oregon's workers' compensation law. The benefits provided to the injured contract driver by the contingent liability policy was not equivalent to the benefits provided under Oregon's law. The occupational accident insurance policy provided through NICA had 24-hour coverage and paid the contract drivers' medical bills when injured, even if not on the job. Gallegar-Bassett is Clarendon's third party administrator for its contingent liability and occupational accident and disability insurance. (Test. of Cullinan.)

(8) On or about August 1, 2001, Express became an affiliated company, signed an agreement with NICA and started using the contract drivers who were referred through NICA. The contract drivers were current Express employees who delivered for Express. If the drivers wanted to stay with Express, they were required to sign up through NICA and become contract drivers. If they did not want to become contract drivers, their employment with Express was terminated. Most of the employees signed up with NICA. Express paid NICA the contract drivers' commissions and NICA paid the contract out of Express' trust beginning on November 1, 2001. (Exs. A22, A45; test. of Meyer.)

(9) The agreement between NICA and Express provided that NICA would periodically refer independent contractors to Express but "without any obligation to do so." NICA agreed to provide Certificates of Insurance to the contract drivers and Express for the occupational accident and disability insurance coverages as proof of insurance with an agreement that the coverages could not be cancelled without 30 days prior notice. NICA also agreed to provide the following benefits to Express' contract drivers: (1) occupational accident insurance coverage up to $400,000 per incident with a $250 deductible paid for by the contract driver; (2) a disability policy with benefits to begin on the eight consecutive day off work which would pay up to 75 percent of commissions up to $500 per week; (3) a continuous total disability policy which paid up to 75 percent of commissions up to $500 per week, subject SSDI and offset for contract drivers out of work beyond 104 days due to an on the job injury; (4) an occupational accidental death and dismemberment policy up to $150,000; (5) upon request, tax assistance to prepare and file annual individual or joint state and federal returns and a tax escrow service for estimated quarterly tax payments at no cost to affiliated NICA driver members and on condition that the drivers would remain affiliated with NICA for at least six months of the tax year the service is being provided; and (6) non-occupational benefits with limits of $7,500 in medical coverage with a $250 deductible for injuries sustained while not under dispatch, with an accidental death benefit of $15,000. NICA also agreed to offer health insurance options to the contract drivers. (Ex. 42.) Under the agreement, NICA agreed to assume sole and exclusive responsibility for compliance with federal, state, local laws and regulatory challenges and to indemnify and hold Messenger "harmless from and against any tax assessments, including penalties and interest, claims, demands, suits, administrative hearings, losses, damages, costs and expenses, including legal defense, arising out of any non-compliance or alleged non-compliance by NICA of any such laws." This included any challenges related to the contract drivers. (Ex. 42 at pages 6-7.)

(10) The contract drivers were also required to sign a "Terms and Conditions of Transportation" agreement with Express, the "purchasing" company, which dealt with

confidentiality of proprietary information and provided remedies for breach of the confidentiality agreement, injunctive relief and any other remedies available by law. It also provided for purchase or rental of Express equipment, training and for termination of the driver's services for failure to complete deliveries. If the Express sustained a monetary loss as a result of the driver's failure to properly perform the delivery, Express was authorized under the agreement to offset the loss against the driver's commission settlement payment. (Ex. A 46 at page 60.) The drivers also signed lease agreements for the equipment. (Ex. A46 at pages 76-78.)

(11) During the audit periods, Express had two operations. One involved short hauls for small packages using contract drivers where the contract drivers pick up and drop off mail and/or packages on specified routes. Express negotiated the contracts with the customers and negotiated the contract drivers' commission rates. Express had a dispatch office and warehouse in Portland, Oregon. The contract drivers picked up and delivered mail and small packages weighing less than 100 pounds. NICA or Express would recruit contract drivers by advertising or posting the route on a board with the job requirements. Express would select the contractor based on their bid and what type of vehicle they drove. The contract drivers furnished their own vehicles and paid for their own gas and maintenance. They were paid a percentage of the contract price for the delivery plus mileage. They had taxpayer identification numbers and certificates. Express assigned them a driver number and an employee number. The contractor drivers listed the deliveries completed and their commission percentages. Express paid the amount due into a trust created by NICA and NICA paid the contract drivers their settlement commissions from the trust every two weeks. Some contract drivers delivered on the same route for years. Even if Express lost the contract, if the new contract holder was or became associated with NICA and the contract driver was still associated with NICA, the contract driver could continued to do the route for the new contract holder. On "hot shot" jobs where something had to be delivered very quickly and the delivery was not associated with a route, Express would call one of the contract drivers on a list until it found someone to perform the delivery. These deliveries were usually paid at a higher rate because of the short notice. The contract drivers received no benefits such as vacation, retirement or sick leave. Express did background and criminal history checks on the contract drivers because its transportation insurance carrier required the background checks for liability reasons. (Ex. A22 at pages 1-3, 19-21, A46, R12; test. of Padding, Meyer.)

(12) The contract drivers were allowed to work for others, but were prohibited from taking business from Express. They set their own schedule but were required to make deliveries according to their contract with Express. Some deliveries required the contract driver to wear a special badge or Express Messenger System (EMS) uniform and the contract driver purchased uniforms from Express. Contract drivers could also rent cell phones and pagers and purchase EMS shirts, hats and jackets from Express. The costs of these items were deducted monthly from the contract driver's commission settlement. If requested by the contract driver, Express would provide training on the delivery work specifications for the route, including route planning, customer schedules, etc. The contract drivers used their own vehicles. There was no requirement as to the size or type of vehicle, but some deliveries required a certain size of vehicle. If a contract driver was sick, it was the contract driver's responsibility to find a replacement to do the deliveries. The contract driver could hire anyone they wanted to hire as long as the work is accomplished according to the contract. If the contract driver failed to show up for work, Express found another contract driver to do the job. If the contract driver was not dependable, Express would take the contract driver off the route. If there were customer complaints, Express would talk to the contract driver to try to correct the problem but if the problem could not be corrected, Express would assign a different contract driver. Express also

required contract drivers to sign a "Non-Back Solicitation Agreement" which prohibited disclosure of confidential and proprietary knowledge concerning Express' operation to third persons during the period the contract drivers provided the services to Express and for one year after services were terminated. The agreement also required the contract drivers to disclose any mutual customers at the execution of the agreement. (Exs. A22 at page 20, A46 at pages 22, 30, 45.)

(13) The other operation involved the use of Express's own employees for delivery of packages weighing over 100 pounds. The items to be delivered are placed on a pallet and shrink-wrapped and picked up and delivered at the dock. Some of the employees drove box trucks and transported items on pallets to Seattle, Washington. The employee drivers received mileage reimbursement and some received an auto reimbursement when they used their own vehicles. Express also employed salespeople, who contacted prospects by telephone and in person. The salespeople received a car allowance. (Ex. A22.)

(14) The audit for the first and second audit periods found the contract drivers to be "workers" for the purposes of workers' compensation insurance coverage because the auditor found that Express had the right to direct and control their work. (Exs. A19, A37.) The payments made to the drivers were assessed pursuant to the rate for Class Code 7231 (Truck- Mail/Parcel/Package – All Employees- Drivers). The audit also determined that NICA was acting as a leasing company by providing contract drivers to Express and that liability for coverage of the contract drivers transferred to Express's policy because NICA had no valid Oregon workers' compensation insurance. The audit also added Class Code 7219 (Trucking) to Express's policy for employee drivers delivering packages weighing over 100 pounds. (Ex. A19.) The records provided by Express noted $630,900 excluded from subject payroll but some of the exclusions were not applicable to workers' compensation in Oregon. **The audit resulted in additional assessed premium of $5,183.88 for the first audit period and $18,888.28 for the second audit period. (Exs. A23-A29.)** By letter dated July 8, 2002, SAIF directed Express to report the wages of its contract drivers, inasmuch as they had been determined to be subject workers by the first and second audit periods. (Ex. A30.)

(15) In January 2003, SAIF requested a list of the contract drivers and the amounts paid to each from Messenger. Messenger did not have the information and asked NICA to provide the information from the drivers' Schedule C Tax Forms. NICA purposed that SAIF provide NICA a non-disclosure agreement or it would need to redact the contract drivers' names. When NICA provided the information, it provided only a list of the contract drivers' names and addresses but did not provide the amounts paid or the mileage amounts due to confidentiality/privacy concerns. (Exs. A35, A36; test. of Meyer.) If SAIF had received the information, it could have adjusted the settlement amounts by deducting the contract driver's mileage based on the federal standard. Effective January 17, 2003, SAIF cancelled Express' policy coverage. (Ex. A34; test. of Meyer.)

(16) **SAIF thereafter conducted two audits for the third audit period, which were both issued on February 27, 2003. The third audit period covered the period from January 1, 2002 through December 21, 2002 and January 1, 2003 through January 31, 2003. Both audits found the contract drivers to be "workers" because Express had the right to direct and control their work. The audits again determined that NICA was acting as a leasing company by providing contract drivers to Express and that liability for coverage of the drivers transferred to Express's policy because NICA had no valid Oregon workers' compensation insurance. During the third audit period, Express switched its payroll to ADP for processing. During period of January 1, 2002 through December 31, 2002, the settlement payments made to the**

driver's totaling $1,702,776 were assessed pursuant to the rate for Class Code 7231. During the period of January 1, 2003 through January 31, 2003, the settlement payments in the amount of $171,521 were also included in the March 11, 2003 final premium audit billing. The audit used the contract driver's settlement amounts because the settlement sheets were the only information available. The business operation with respect to Express' employee and contractor drivers remained the same throughout the audit periods. (Exs. **A37 -39**; test. of Meyer.)

(17) On December 5, 2001, contract driver Darwin L. Brandow was involved in an automobile accident and filed an Occupational Accident Insurance claim. On February 26, 2002, Brenda Cullinan, Claims Manager for Clarendon third party administrator Gallegar-Bassett, Inc., took Mr. Brandow's claim information over the telephone and sent claim forms to Mr. Brandow. Mr. Brandow subsequently told Ms. Cullinan not to turn in the claim because the other person's insurance would be taking care of the medical bills inasmuch as the other person was at fault. The doctor's office that treated Mr. Brandow inadvertently sent the bills to SAIF and SAIF paid the doctor's bill for $181. Ms. Cullinan reimbursed SAIF for its $181 payment in July 2003. SAIF cashed the check in March 2003 but sent a check for $181 for the medical benefits back to Ms. Cullinan. Ms. Cullinan did not cash SAIF's check. The contingent liability policy was also in place in the event that Mr. Brandow was found to be a "worker" under Oregon law. Prior to Mr. Brandow's claim, Ms. Cullinan processed and paid 23 other claims by Express contract drivers under the Occupational Accident Insurance policy. (Exs. R10-15, R19; test. of Cullinan.)

(18) In January 2003, Duncan Padding became an Express contract driver. He also provides courier services to Swift Couriers, Inc. (Swift). Prior to becoming a contract driver with Express, Mr. Padding was not in the delivery business. NICA did not refer him to Express. He obtained the work after contacting both Express and NICA. Mr. Padding is now a member of NICA. He has a business license under a dba in his own name and works out of his home. He plans to incorporate his business in July 2003. Until he incorporates, he advertises his services by word of mouth but plans to order business cards when he incorporates his business. Mr. Padding has two vehicles he uses for his business and covers them with commercial auto insurance. In his deliveries for Express, he decides the route he will take to deliver merchandise and when he will make the deliver but his deliveries are required to be completed by 5:00 p.m. that day. He can refuse to make the delivery but has not yet done so. Mr. Padding receives commissions from Express and Swift after completing the deliveries. Express and Swift each pay him separately for this deliveries; Swift pays him directly and Express pays him through NICA. Together, Express and Swift provide him with enough work for approximately 10 to 11 hours of work per day, five days a week and six hours on Saturday. Mr. Padding pays all of his own business expenses. He has medical insurance through his wife's work. He files estimated quarterly taxes and a Schedule C Form with the IRS. He carries NICA's Occupational Accident and Disability insurance. Mr. Padding delivers Staples merchandise and provides delivery services to several banks, including Wells Fargo, US Bank and the Bank of Astoria. He also delivers pharmaceutical supplies on Saturdays to several pharmacies and the Kaiser Permanente Hospital. He contracts with Swift to deliver and collect bank documentation from Ridgefield Community Credit Union and delivers the documents to Wells Fargo Bank in Portland, Oregon. Express gave him three Express shirts and an Express cap when he first started with work. When he delivers office supplies for Staples, he wears an Express hat and Express shirt at Staples request. He also has an Express identification badge with his picture and driver number on it. He also has an employee number but he is unsure what that number is used for. When he does a bank run for Swift, he wears no uniform. He carries an Express-provided cell phone to keep in contact with Express' dispatcher and he leases the phone. Mr. Padding has no employees because he is not

as yet incorporated and is not bonded. Prior to his first Express bank delivery, he went on a training run with another Express driver and was shown the route and introduced to the customer by the other driver. (Ex. R20; test. of Padding.)

CONCLUSIONS OF LAW

(1) Notwithstanding the contingent liability policy and the occupational accident and disability policy provided through NICA, insurer correctly assessed premium on payments made to contract drivers who were "workers" as defined by ORS 656.005(30).

(2) Insurer did not fail to comply with the requirements of ORS 737.310(12).

(3) Insurer did not fail to adjust the final premium audit billing to exclude portions of the billing to reflect the payments not includable in premium for those drivers deemed to be workers.

OPINION

The issues to be resolved here are whether the individuals who performed contract driver services for petitioner were “workers” as defined by the Oregon Workers’ Compensation Law, whether insurer was required to comply with ORS 737.310(12), and whether insurer failed to adjust the assessed premium to exclude payments excludable under Oregon law. Inasmuch as Express is the party seeking redress before the department concerning SAIF's final premium audit billings for the audit periods, it has the burden of proof in establishing its position on the issues by a preponderance of the evidence. *See* ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div*., 47 Or 437 (1982) (in the absence of legislation adopting a different standard, the standard in an administrative hearing is by a preponderance of the evidence); *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166 (1992), *rev den* 315 Or 643 (1993) (in premium audit cases, burden of proof is on the employer). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

SUBJECTIVITY OF CONTRACT DRIVERS

“Right to Control” test

In making the determination of whether the contract drivers providing transportation services for Express are subject “workers,” the initial inquiry is whether they are "workers" within the meaning of the workers' compensation law. *S-W Floor v. Nat’l Council on Comp Ins.*, 318 Or 614, 622 (1994). ORS 656.005(30) provides in pertinent part that a "worker" is "any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *." There is no dispute that the contract drivers received remuneration for their services, therefore, my analysis is limited to the question of whether they were subject to employer’s direction and control.

The initial determination of whether the contract drivers were subject to Express' direction and control is made under the judicially created "right to control" test. *S-W Floor*, 318 Or at 622.

The critical question in determining direction and control under the "right to control" test is not the actual exercise of control, but whether the right of control exists. *Id.* The factors to be considered in determining whether the right to control exists are: (1) direct evidence of the right to, or the exercise of, control; (2) the furnishing of tools and equipment; (3) the method of payment; and (4) the right to fire. *Salem Decorating v. Nat'l Council of Comp. Ins.*, 116 Or App 166, 171 (1992) *rev den* 315 Or 643 (1993); *Castle Homes v. Whaite*, 95 Or App 269, 272 (1989). [4]

The "relative nature of the work" test must be considered 'if there is some evidence suggesting the employer retained the right to control the method and details of the [contract drivers'] work." *Rubalcaba v. Nagaki Farms, Inc*., 333 Or 614, 627 (2002).

Direct evidence of the right to control: Although the contract between the parties here states that the contract drivers are independent contractors, the parties understandings do not determine whether an employee or independent contractor relationship exists. *Woody v. Waibel*, 276 Or 189, 198-99 (1976).

In *Salem Decorating*, the court found *inter alia* that procuring the contract with the customer, selecting the contractors to perform the work, instructing the contractor on the work and maintaining the right to stop using the contractor or remove the contractor if problems arose or the contractor failed to perform the work demonstrated "fundamental control" over the work. 116 Or App at 171. The court also noted that the employer used both employees and contractors who were formerly employees and provided the contractor with a description of the job. The court further found that payment directly to the individual by the employer instead of by the customer indicated a right to control. *Id.* at 172. It is not the degree of control by the employer, but the employer's right to control that indicates worker status. *HDG Enterprises v. Nat'l Council on Comp. Ins*., 121 Or App 513, 518 (1993).

The undisputed evidence here demonstrates the same "fundamental control" over the contract drivers' work found by the court in *Salem Decorating.* Express negotiated the contracts with the customers and selected the contractors. Express maintained the right to stop using the contractor. If the contract driver failed to show up for work, Express found another contract driver to do the job. If the contract driver was not dependable, Express would take the contract driver off the route. If requested by the contract driver, Express would provide training on the delivery work specifications for the route, including route planning, and customer schedules, presumably showing them how to do the work. Express used contract drivers who were former employees. It also had employees that performed similar work but involving packages over 100 pounds. NICA or Express recruited contractor drivers by advertising or posting the route with the job requirements on a board, which is very similar to the advertising or posting of an employee job description. Although Express paid NICA and NICA paid the contract drivers, I find that NICA was acting as Express' agent in that regard. Customers contacted Express directly with any complainants about contract drivers. Express would talk to the contract driver to try to correct the problem, but if the problem could not

[4] In applying the "right to control" test, I note that Express presented evidence concerning only one contract driver, Duncan Padding. However, there is no evidence establishing that Mr. Paddy's work was representative of the work of the other contract drivers. Moreover, he began work three days before the end of the third audit period. Consequently, I give Mr. Paddy's affidavit and testimony little weight in terms of it applicability to the rest of the contract drivers.

be corrected, Express would assign a different contract driver. Additionally, some deliveries required the contract drivers to wear special badges and Express Messenger System (EMS) uniform, which they purchased from or were provided by Express. They could also purchase EMS shirts, hats and jackets. Express issued the contract drivers an identification badge with a driver number and employee number. Express required contract drivers to sign a "Non-Back Solicitation Agreement" which prohibited disclosure of confidential and proprietary knowledge concerning Express' operation to third persons during the period the drivers provided the services to Express and for one year after services were terminated. This is very similar to a non-competition agreement sometimes signed by employees. The agreement also required the contract drivers to disclose any mutual customers at the execution of the agreement. This is all strong evidence of the right to control the means and manner of the contract drivers' work. Therefore, this factor indicates an employment relationship.

Furnishing of tools and equipment: This factor weighs in favor of an independent contractor relationship. The contract drivers could also lease cell phones and pagers and were provided or purchased EMS shirts and hats. The cost of these items was deducted monthly from the contract driver's commission settlement check.

Method of payment: "When payment is by quantity or percentage, the method of payment test largely becomes neutral. To the extent that it indicates continuing service, it suggests employment; to the extent that it lessens an employer's interest in the details of how the employee spends (their) time, it has been said to suggest an independent contractor relationship." *Henn v. SAIF*, 60 Or App at 592. The evidence establishes that the contract drivers were paid a percentage of the contract price for the deliveries plus mileage. The contractor drivers listed the deliveries completed and their commission percentages and provided the information to Express. Express paid NICA and NICA passed the payment through Express' trust and paid the contract driver every two weeks. Although the creation of a trust to transfer the payment appears to create an arms-length transaction, I find that trust was used only to create the appearance that these individuals were not paid directly by Express. On the other hand, the contract drivers were also issued 1099 Forms by NICA and filed Schedule C Forms with the IRS. Therefore, this factor is neutral.

Right to fire: The right to terminate the relationship at any time without liability is strong evidence that the contract was one of employment. *Bowser v. State Indus. Accident Comm*., 182 Or 42, 54 (1947). The right to control whether further work would be done is also indicative of the right to fire. *Cy Inv. Inc. v. Nat'l Council on Comp. Ins.*, 128 Or App 579, 584 (1994). The evidence here establishes that Express maintained the right to fire the contract for failure to make the deliveries or problems with the customer. The "Terms and Conditions of Transportation" agreement with Express also reflects Express' right to fire by the absence of any indication of liability resulting from termination of the contract driver's services. The agreement dealt with confidentiality of proprietary information and provided remedies for breach of the confidentiality agreement, including injunctive relief and any other remedies available by law. The agreement also dealt with the situation where Express sustains a monetary loss as a result of the driver's failure to properly perform the delivery. Under those circumstances, Express was authorized to offset the loss against the driver's commissions, much like an employer would offset damage done by an employee. The agreement also provided for termination of the contract driver's services for failure to complete deliveries. But nowhere in the agreement do the parties address any liquidated damages or breach of contract remedies for termination. I find that this evidence establishes that Express could terminate the relationship with a contract driver without liability or could simply not assign any deliveries to a

driver. Therefore, this factor strongly indicates an employment relationship.

In sum, the "right to control" test indicates that one factor is neutral, one factor indicates independent contractor status and two factors indicate an employment relationship. Consequently, I move to the "relative nature of the work" test.

"Relative Nature of the Work" Test

The "relative nature of the work" test involves an examination of:

> "The character of the claimant's work or business – how skilled it is, how much a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden * * * its relation to the employer's business, that is how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished for the completion of a particular job. *Woody v. Waibel,* [276 Or 189, 195 (1976)], quoting 1A Larson's *Workmen's Compensation Law*, section 43.51 (1973)

Before the court's decision in *Rubalcaba*, the test was only applied when the right to control test was inconclusive. *See Oregon Drywall Systems, Inc. v. Nat'l Council on Comp. Ins,* 153 Or App 662 (1998) (if the right to control is inconclusive, the relative nature of the work test may be applied.) In *Rubalcaba*, the Oregon Supreme Court reversed the Court of Appeals and the Workers' Compensation Board because both the court and the board failed to apply the relative nature of the work test when there was "some evidence" that the employer retained the right to control. 333 Or at 627. Here I find that, inasmuch as two of the factors of the right to control test indicate an employment relationship, there is "some evidence" that the employer retained the right to control the work of the contract drivers. Accordingly, I apply relative nature of the work test.

The contract drivers are unskilled because their jobs involve the type of skills and expertise gained through experience rather than through years of education or specialized training. The work of the contract drivers is not a separate business. Express is engaged in the courier business, including the pick up and delivery of mail and packages. Without the contract drivers to make the mail and small package pick ups and deliveries, Express could not operate its business. Furthermore, many of the contract drivers were Express employees before Express entered into an agreement with NICA. Therefore, I find that the contract drivers are a regular and integral part of Express' business as opposed to a separate and distinct business.

The work of the contract drivers was also continuous and of sufficient duration to amount to the hiring of continuous services rather than the contracting for the completion of a specific job. They did not just deliver one package or deliver one route on a particular day. Some of the contract drivers had been delivering the same route for Express for years, both as an employee and as a contract driver. Moreover, there were significant payments to the 43 contract drivers throughout the audit periods, including 10 part-time and 34 full-time contract drivers, which is also indicative of the provision of continuous services.

Finally, because Express negotiated the contract with the customers, Express was in a better position to bear the cost of injuries to the contract drivers. Consequently, I find based on the analysis set forth in the relative nature of the work test, that the contract drivers are "workers" under the Oregon workers' compensation statutory scheme.

IMPACT OF CONTINGENT LIABILITY & OCCUPATIONAL ACCIDENT AND DISABILITIES POLICIES

Express argues that SAIF is not entitled to premium on the contract drivers because they were covered by a contingent liability policy and an occupational accident and disability policy. The stated purpose of the contingent liability policy was to pay benefits to an injured contract driver if the injured driver is found to be a "worker" under Oregon's workers' compensation law. The occupational accident and disability policy provided 24 hour coverage and paid the contract driver's medical bills when injured, even if not on the job. In support of its argument, Express further argues that Part Five, Section C of its policy with SAIF expressly excludes contract drivers from premium assessment because the are covered by the contingent liability policy and an occupational accident and disability policy. Part Five, Section C of SAIF's policy states in relevant part:

> 2. All other persons engaged in work that could make us liable for their services and materials may be used as premium basis. This paragraph will not apply is you give us proof that the employers of these persons **lawfully** secured their workers' compensation obligation. (Emphasis added.)

However, I do not find Express' arguments persuasive. The Oregon workers' compensation law requires employers to obtain workers' compensation insurance from a carrier which has authority to transact business in Oregon and the carrier is required to file a guarantee contract with the department agreeing to assume, without monetary limit, the employer's liability arising during the period of the guarantee contract for compensable injuries that are due under the law. ORS 656.419(2), 731.066. The evidence establishes that neither Clarendon nor Steadfast have certificates of authority authorizing them to transact insurance in the State of Oregon. Moreover, neither insurer has filed a guarantee contract with the department as required by the law, naming Express as the insured. On the other hand, SAIF has filed a guarantee contract with the department and would be the insurer liable for any injuries to the contract drivers under Oregon law. Therefore, SAIF is the insurer which has assumed the risk of injury to contract drivers.

Additionally, the occupational accident and disability likewise does not relieve SAIF from its exposure to the risk of injury to the contract drivers. The occupational accident policy pays 400,000 per incident with a $250 deductible, which was paid for by the contract driver. The disability policy benefits began on the eight consecutive days off work and would pay up to 75 percent of the injured driver's commissions up to $500 per week. Under Oregon law, injured workers are not required to pay a deductible to obtain benefits and these limits are contrary to the statutory scheme under ORS 656. Furthermore, as noted by SAIF in its Trial Memorandum, there is no proof as to how many contract drivers purchased these policies or maintained other coverage. Consequently, I conclude that, notwithstanding the previous claims paid through NICA's group insurance, these policies do not "lawfully' secure Express' workers' compensation obligation in Oregon and SAIF remains liable under Oregon law.

APPLICATION OF ORS 737.310(12)

Express argues that SAIF failed comply with ORS 737.310(12) because SAIF "reclassified" its contract drivers from independent contractors to employees. Express' argument is misguided. ORS 737.310(12) provides:

> If an insurer determines the workers' compensation insurance policy of an insured needs **reclassification**, the insurer:
>
> (a) May bill an additional premium for the revised classification after the insurer has provided the insured at least 60 days' written notice of the reclassification.
>
> (b) Shall bill retroactively to policy inception or date of change in insured's operations for any reclassification that results in a net reduction of premium.
>
> (c) May, notwithstanding paragraph (a) of this subsection, retroactively bill an insured for reclassification during the policy year without prior notice of reclassification if the insurer shows by a preponderance of the evidence that:
>
> (A) The insured knew that the employees were misclassified, or the insured was adequately informed by the insurer of the proper classification for the insured's employees;
>
> (B) The insured provided improper or inaccurate information concerning its operations; or
>
> (C) The insured's operations changed after the date information on the employees was obtained from the insured. (Emphasis added.)

Previous cases decided by the department have interpreted "reclassification" to include "only circumstances where an insurer adds a new class code to an insured's policy or deletes an existing class code." *Professional Employer Resources, Inc.*, INS 96-02-991 (Proposed Order March 13, 1998); *LeRoyce J. Massey dba Dreamscape*, INS 97-04-002 (Proposed Order June 17, 1998). The department has since formally defined "reclassification" by OAR 836-043-180(5) stating that "Reclassification" is "an addition or removal of a classification by an insurer to a policy for an insured when the previous classification is improper or inadequate." Here, Express mistakenly believes that the "reclassification" referenced in ORS 737.310(12) applies to subjectivity determinations. However, SAIF has not added or deleted a classification but rather determined the subjectivity of the contract drivers. Consequently, ORS 737.310(12) is inapplicable to this matter because there is no "reclassification" of a class code in designating the contract drivers as "workers."

EXCLUDED PAYMENTS

Alternatively, Express argues that SAIF incorrectly included in premium assessment the full contract amount paid to the drivers without deducting items which are excludable by law from

the assessment, such as Washington based contract drivers and excludable expenses. However, Express presented no evidence concerning its Washington based drivers. In addition, SAIF was unable to adjust the final premium audit billing to delete excludable expenses because Express and NICA refused to provide copies of the contract drivers' Schedule C tax forms. Without that information, SAIF was unable to determine the nature and amount of these expenses. Consequently, I find Express' argument to be unpersuasive because SAIF had no obligation to deduct the amount of any expenses not established by Express.

EXCEPTIONS

With regard to insurer's exceptions, I find them to be appropriate and recommend that the department accept them. Accordingly, I have made the changes necessary to conform the findings set forth in the Proposed Order to the evidence pursuant to insurer's exceptions as set forth above. With respect to petitioner's exceptions, I recommend that the department deny those exceptions for the reasons set forth in SAIF's response to Express' exceptions as summarized and supplemented below.

Express first excepts to the Proposed Order's Findings of Fact, arguing the order erred in referring to the individuals at issue as "contract drivers" instead of "independent contractors." The practice in this forum has been to refer to the individuals at issue in a way that does not prejudge their status as a worker or an independent contractor until the analysis has been done. Consequently, Express's first exception is without merit. Express next excepts to the Proposed Order's failure to state that NICA had no obligation to refer members to the affiliated companies, but points to no evidence that supports that finding. This exception is also without merit. Express next excepts to the failure of the Proposed Order to find that the benefits provided by NICA's insurance was equivalent to that afforded workers under Oregon's Workers' Compensation Law. Such a finding would be incorrect inasmuch as the benefits are not equivalent. Therefore, this exception is likewise without merit. Finally, Express excepts to paragraph 7 of the findings and without explanation references its previous exception. However, as noted by SAIF, the provisions of the Clarendon Accord and the Contingent Liability were correctly quoted. Consequently, Express's final exception to the Proposed Order's Findings of Fact should also be rejected as meritless.

Express objects to the Proposed Order's Conclusion of Law as well because it concludes that the contract drivers were "workers" as defined by Oregon Law. However, Express does not point to any evidence establishing otherwise and its exception should therefore be rejected as meritless.

Next, Express excepts to the Proposed Order's Opinion. It first argues that the opinion erred in failing to give weight to the testimony of Duncan Padding. As noted in footnote 3, page 9 of the order, I did not find Mr. Padding's testimony to be persuasive because there was no corroborating evidence that his work was representative of the work performed by other contract drivers. Moreover, he began work only three days before the end of the last audit period. In addition, Express argues that the opinion failed to take into consideration the testimony of Timothy Bergin, NICA's Senior Vice President of Sales and Marketing, concerning the activities of the contract drivers. However, Mr. Bergin admitted he had no personal knowledge in response to an objection made by SAIF, which was sustained.

Therefore the department should deny this exception.

In its second exception to the Proposed Order's Opinion, Express complains that the order improperly applied the "right to terminate" factor of the "right to control" test because the ALJ did not understand the contract terms. In support of its complaint, Express explains that each delivery constitutes a contract with the driver and thereafter there is no contract. However, under *Cy Investment, Inc. v. Nat'l Council on Comp.Ins.*, 128 Or App 584 (1994), the right to fire may be established by Express simply declining to assign additional deliveries to the driver. Moreover, the opinion correctly found that the drivers' contracts contained no breach of contract or liquidated damages provision. Consequently, Express's exception is without merit and should be denied.

In its third exception to the opinion, Express argues that the opinion erred in finding that SAIF was still liable and therefore, is entitled to a premium assessment on payments made to the contract drivers. In support of its argument, Express contends that SAIF had no risk because the risk was covered by the occupational accident and disability policy. However, as noted by SAIF and the opinion, SAIF remained liable under the policy because Express had not lawfully secured its workers' compensation obligations by purchasing insurance through a carrier that issued and filed a guarantee policy with the director of the department. Neither of NCIA's carriers is authorized under ORS chapter 731 to conduct insurance business in Oregon. Consequently, Express did not lawfully secure its workers' compensation obligations under the law and SAIF remained liable. Moreover, there was no proof how many of the contract drivers had purchased the occupational accident and disability insurance. Consequently, this exception should also be rejected as meritless.

ORDER

ACCORDINGLY, I RECOMMEND THE DEPARTEMNT AFFIRM, ADOPT AND REPULISH THE PROPOSED ORDER AS AMENDED AND SUPPLEMENTED IN THIS AMENDED ORDER, ORDERING THAT:

SAIF's final premium audit billings for the audit periods of December 1, 2000 to September 18, 2001, September 19, 2001 to December 31, 2001, and January 1, 2002 to January 31, 2003 are correct and payable..

IT IS SO ORDERED.

Dated this 16th day of March, 2004 in Salem, Oregon.

/s/ Ella D. Johnson
Ella D. Johnson, 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:

Department of Consumer and Business Services
Mitchel D. Curzon, Chief Enforcement Officer
Oregon Insurance Division
350 Winter Street NE, Room 440
Salem, OR 97301-3883