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

In the Matter of the Petition of	)	Case No. INS 07-03-011
	)	
	)	
LAKEWOOD THEATRE	)	
COMPANY, an Oregon Corporation	)	**REVISED PROPOSED ORDER**

HISTORY OF THE CASE

On February 22, 2007, SAIF Corporation (SAIF) issued final premium audit billings to Lakewood Theatre Company (Employer), for the periods of October 1, 2004 through September 30, 2005 and October 1, 2005 through September 30, 2006. Employer timely requested a hearing on the final premium audit billings, and submitted a Petition to the Department of Consumer and Business Services (Department) on March 23, 2007.[1]

The Department referred the matter to the Office of Administrative Hearings (OAH) on March 27, 2007. Hearing was scheduled for January 23, 2008.

Hearing was held as scheduled, with Administrative Law Judge Rick Barber presiding. Employer appeared through its attorney, Bill Replogle. Andrew Edwards, Executive Director of the theater, testified for Employer. SAIF was represented by Ethan Hasenstein, Assistant Attorney General. Auditor Tracy Meyer and Program Analyst Teresa Smith testified for SAIF. The record was held open to allow for oral closing argument. The record closed on February 4, 2008, after the arguments were heard.

EXCEPTIONS TO THE PROPOSED ORDER

A Proposed Order was served on the parties on April 2, 2008. On April 28, 2008, SAIF filed exceptions to the Proposed Order. On October 1, 2008, Employer filed exceptions to the Proposed Order.[2]

SAIF filed five exceptions, contending:

1. The directors are subject to Lakewood's direction and control.

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[1] On July 26, 2007, SAIF issued revisions to it premium audit billing for both policy periods. (Ex. A9). The revised premium audit is what was at issue at hearing.

[2] **The delay in Employer's exceptions occurred because of problems with the oral record of the hearing. Portions of the record were missing, and the parties entered into a stipulation about the record and presented Andrew Edwards' testimony via affidavit.**

2. **ORS 656.029(1) was incorrectly applied to the cast and crew**

3. **The Festival of Arts workers are subject.**

4. **Elizabeth Hayden should be found subject.**

5. **Payments to Chris Witten should be included under ORS 656.029.**

Employer filed one exception in the case, joining with SAIF's second exception (concerning the application of ORS 656.029(1) to the cast and crew), but arguing that a different result than SAIF seeks would be appropriate.

In this Revised Proposed Order, I will address each of these exceptions by interspersing comments throughout the order. Comments added during the revision are made in bold and, if any language needs to be stricken, that language will remain in the order with a strikethrough covering it.

ISSUES

Whether the following individuals are subject workers or independent contractors for purposes of the workers' compensation laws:

a. Directors of the theatrical productions;

b. Designers, actors, musicians, and crews of the plays;

c. Curators (including the security and maintenance curator) directing the annual Festival of the Arts;

d. Elizabeth Hayden in her role as a teacher;

e. Chris Whitten Design (issue under ORS 656.029).[3]

EVIDENTIARY RULINGS

Exhibits A1 through A10 and P1 through P20, (including P11A, P11B, and P14A) were admitted into evidence without objection.

[3] Employer also initially raised issues about the classification codes used by SAIF, and the failure to use actual compensation instead of estimated compensation to determine payroll and, thereby, premium. Employer withdrew those issues based upon the representation of SAIF that its July audit revisions were based upon the actual compensation rather than Meyer's estimates of the payroll.

FINDINGS OF FACT

1. Lakewood Center for the Arts (Lakewood, or employer) is a semi-professional theater operating in Lake Oswego, Oregon. There are three basic types of theaters in Oregon: *professional theaters* actually employ actors and directors, as well as behind-the-scenes workers. *Semi-professional theaters* contract with directors, actors and others to put on the productions on a per-show basis, and pay less in most cases than professional theaters. Finally, *community theaters* use volunteers to put on the productions. Lakewood began as a community theater and continued as such until the mid-1980s, when it became semi-professional. (Test. of Edwards).

2. Andrew Edwards is the Executive Director at Lakewood, and has been involved with the theater for 30 years. Lakewood has three or four full-time employees (an artistic director, an administrator, a producer, and a marketing/public relations director), and three or four part-time employees (secretary, ticket office and wardrobe). Elizabeth Hayden is one of the part-time employees in the ticket office. Lakewood covers its employees for workers' compensation insurance through SAIF Corporation (SAIF). (Test. of Edwards).

3. During the period of October 1, 2004 through October 1, 2006, Lakewood presented five or six "main stage" theatrical productions each year as well as several smaller "cabaret style" productions. Once each year, it held a Festival of the Arts, a three day event that included musical and stage performances as well as juried competitions in different areas of arts and crafts. Lakewood is a not-for-profit corporation and has had a tax exemption from the Internal Revenue Service (IRS) since 1961. The corporate goals are to educate and to entertain. Lakewood is funded through its productions (70 percent) and through gifts and grants (30 percent) that it applies for from local, state, and federal government sources. (Test. of Edwards).

Directors

4. Directors who participate in Lakewood's productions sign a written contract for each show, which will last from a few days to a few weeks and will cover rehearsal time and the production. Lakewood enters into a contract with a director to direct a specific show. Pursuant to the contract, the director is paid one amount at the end of the production, by Lakewood. Sometimes, Lakewood contacts a director to ask him or her to make a proposal to direct a show; sometimes the director contacts Lakewood with a proposal without any such request. Lakewood will then negotiate with the director about the play, including when it will be presented and what his budget will be. The director then sets the production schedule (sometimes holding rehearsals on Lakewood's premises and sometimes elsewhere), selects the cast and determines the rehearsal schedule. (Test. of Edwards).

5. The director has artistic control over the production, and hires and fires the actors, set designers, costumers, and lighting personnel. The director will also select a musical director and musicians, when appropriate. If the director's interpretation of a

play is controversial, Lakewood will the support the director's interpretation unless what is intended would violate the initial contract entered into with the director. On some occasions, for instance when a director wished to include nudity in a play and there was controversy in the community, Lakewood supported the director's position. (Test. of Edwards).

6. The director's artistic vision controls the production. He or she sets the rehearsal schedule, determines the cast and crew, and determines how the play will be presented. (Test. of Edwards).

Cast and Crew

7. Lakewood enters into a contract with each cast and crew member, and pays the person at the end of the performance. The actors and directors who are involved in Lakewood's productions are also involved in productions at other theaters. For instance, Sarah Dresser (who played "Mrs. Meers" in "Thoroughly Modern Millie" at Lakewood), has a Masters in Theater and has appeared in the following venues: Blue Monkey, Portland Actors Ensemble, Stark Raving, Mt. Hood Repertory, CoHo, Quintessence, Really Big Dance Company, and several others. Other actors have comparable resumes. (Ex. P20 at 11; Ex. P3).

8. The cast and crew members putting on a theatrical production bring their own skills and experiences to the production, and help to develop their character. It is the director who has the artistic control of the production, and the final say concerning the way a character is portrayed, or a set is designed. **Lakewood, and not the director, pays the honorarium to the paid actors.** (Test. of Edwards).

9. Chris Whitten Design is a company that contracted with the directors of most of the productions in the two audit years to do set design. The sets were built at Whitten's shop, not Lakewood's premises, sometimes using what Whitten referred to as "contract labor." Whitten performs under written contract, invoices each job, and is paid at the end of the job. He purchases the materials and uses his own tools. (Ex. P5). Whitten does similar work for other theaters. Other set designers also design and build sets for directors of Lakewood productions. (Test. of Edwards). SAIF Corporation checked to see if Whitten had workers' compensation coverage for his contract employees, determined he did not, and concluded that Chris Whitten Design was subject by operation of ORS 656.029. (Test. of Smith).

Teachers

10. Lakewood offers classes on such theater-related topics as set design and lighting. All of the teachers sign a written contract, and are paid at the end of the class. (Ex. P1 at 2). SAIF has determined that the teachers of the classes at Lakewood are not subject workers. (Test. of Smith). Elizabeth Hayden works for Lakewood part-time in the ticket office, and also teaches classes at Lakewood. Lakewood sends a Form 1099 to Hayden to report her contract earnings as a teacher at the end of the year, and sends her a

W-2 for her employment earnings in the ticket office at the end of the year. The hours in each area, teaching and ticket office, are separate. She never does both at the same time. (Test. of Edwards).

Festival of the Arts

11. In addition to the theatrical productions, Lakewood offers a yearly Festival of the Arts. All of the performers for the three-day Festival work under written contract. The Festival is put together by "curators," who are the directors of the different areas of the Festival (such as crafts, music performance, etc.), security, set up crews, and performers. All, including the curators and the security person, sign a written contract and are paid an agreed-upon amount within 30 days of the end of the Festival. (Test. of Edwards). SAIF determined that the performance and set up people were not subject workers, but considers the security personnel and the curators to be employees of Lakewood. (Test. of Smith).

12. Lakewood contracted with five to eight curators for every Festival. Each curator would have an area of visual or musical arts, would select the performers or participating artists, and would coordinate the jury process for determining the best in each area of art. Lakewood provided the location for the Festival and the budget, but gave curators full artistic control of their area. (Test. of Edwards).

13. Nina Dodd was the security coordinator during the audit periods. She signed a contract and acted as a curator in charge of security and maintenance. She selected the vendors for security and maintenance and was responsible to resolve any issues in those areas during the set-up, tear down, and run of the Festival. She was paid, pursuant to the contract, 30 days after the event.

14. SAIF performed an audit of the theater in December 2006. The auditor, Tracy Meyer, interviewed Edwards and others, and sent a questionnaire to Edwards to determine the nature of the relationship between Lakewood, its directors and its actors. Meyer did not believe she had complete information about the funds paid to each actor or director, so she projected payroll at the time of the initial audit. (Test. of Meyer). Using those projections, SAIF concluded that Lakewood had payroll of $672,586 in the first audit period and $680,158 in the second audit period. (Ex. A8, A9). The final revision to the premium audit in July 2007 was based upon the actual amounts expended, not the projected numbers. (Stipulation of the parties; Ex. A9 at 3).

CONCLUSIONS OF LAW

a. Directors are not subject workers;

b. Designers, music directors, actors, musicians, and backstage workers on the plays are **not** subject workers;

c. Curators involved in the annual Festival of the Arts are not subject workers;

d. Elizabeth Hayden is a subject worker when working in the ticket office but is non-subject when teaching classes;

e. Chris Whitten Design is a separate company and is non-subject.

OPINION

SAIF Corporation's claim for additional premium for the two periods in question is based upon its contention that the directors, actors, and crew of the various theatrical productions are employees of Lakewood for whom workers' compensation premiums must be paid. SAIF bases this position upon its belief that Lakewood exercises control over all of them, and that the nature of the work (putting on plays in a theater) requires a finding that they are subject.

SAIF makes a similar argument regarding the curators and security staff of the Festival of Arts, as well as to the work of Chris Whitten Design and the "dual relationship" of Elizabeth Hayden. However, SAIF reached the opposite decision concerning the performers at the three-day Festival of the Arts, and also with regard to those teaching classes at Lakewood.

Lakewood contends that the decision SAIF reached concerning the Festival performers—that they were not subject workers—should extend to the directors, crew and performers who are putting on plays on Lakewood's stages.

When an employer contests a premium audit billing, it has the burden to present evidence to establish its case. SAIF's conclusions are deemed correct, and employer must prove, by a preponderance of the evidence, that they are not correct. *Salem Decoration v. NCCI*, 116 Or App 166, 170 (1992), *rev den* 315 Or 643 (1993). In order to prevail, Lakewood must establish that any or all of the individuals are not subject workers.

The proper procedural approach. Although there are some individual differences in the roles of contractors—and, as will be seen, in the special place of the director—the analysis of the law in this case affects all of them and will be addressed first. The analysis must begin with the definition of "worker" found in the workers' compensation statutes:

> "Worker" means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer[.]

ORS 656.005(30). This statute encompasses what is known as the "right to control" test.

The Right to Control Test. With this test the question is whether the person is "subject to the direction and control" of another; if so, he is a subject worker and the one with the right to control him is an employer.[4] There are several factors to be examined in the "right to control" test. As the Court of Appeals has stated:

> We have held that the principal factors in applying the right to control test are:
>
> "(1) direct evidence of the right to, or the exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire." *Castle Homes, Inc. v. Whaite,* 95 Or App 269, 272, 769 P2d 215 (1989).

Salem Decorating, 116 Or App at 171 (1992).

This is not a simple balancing test, as such. The factors supporting employment are given much more weight than those supporting a contractor relationship. As Professor Larson described the elements of the right to control test:

> "For the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, on the opposite direction, contrary evidence as to any one factor is at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." 1B Larson, *Law of Workmen's Compensation* 8-90, § 44.31 (1990).

Cy Investment v. NCCI, 128 Or App 579, 584 (1994)(quoted with approval). In other words, if there is some evidence of control by the putative employer, the employment relationship is established; if there is some evidence suggesting an independent contractor relationship, it is only possibly mildly persuasive.

The underlying principle behind this unbalanced test is that the courts (following Professor Larson) favor the employment relationship because of the protection it affords to the worker, and will only find an entity to be an independent contractor if none of the indicia of employment are present.

The Nature of the Work Test. If the right to control test establishes the employment relationship or an independent contractor status, the inquiry stops. If the test is inconclusive or ambiguous, then I must apply the "nature of the work" test as the final step in the analysis. *Nagaki Farms v. Rubalcaba,* 333 Or 614, 619 (2002). The factors of importance in this second test include whether the work being done by the putative contractor is an integral part of the employer's regular business and whether the contractor is in business for himself outside the relationship with the employer. *Woody v. Waibel,* 276 Or 189, 197-98 (1976).

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[4] By definition, an "employer" is one who has "the right to direct and control the services of any person." ORS 656.005(13)(a).

Application of the Right to Control Test

The subjectivity decisions reached in this case are complex because the factors seem to vary in their logical force depending upon the starting point of the analysis. If one looks at the relationship between Lakewood and the director of the play, there is solid evidence of a contractor relationship because Lakewood exercised little control over the director. Conversely, however, the amount of control exercised by the director over the actors and the stage crew in a performance indicate an employment relationship.

The Director. The analysis must start with the director of the production. The director signs a contract to direct a specific production for a negotiated fee paid at the end of the production. The terms of that contract are negotiated. The director is given full artistic control of the production, and hires the cast and crews for the production. He or she sets the rehearsal schedule. If there is a problem with a cast member or a crew member, the director makes the decision whether to replace that person. All of these factors are evidence of a contractor relationship between the director and Lakewood.

Further, although Lakewood obviously supplies the stage and the incidentals of the production (advertising, ticket-taking, places for the audience to sit, etc.), the actual equipment needed for the performance (set, costumes, music, lighting) is the director's responsibility. These factors strongly support a finding that the director is not subject to Lakewood's control.

During the hearing, wishing to determine whether Lakewood was truly giving the right of control to the director, I asked Edwards what would happen if a director's artistic vision included something controversial, such as doing the musical Brigadoon in the nude. Would Lakewood step in and change directors or stop the play? Edwards answered in two ways. First, he testified that he gives artistic control to the director and has actually had situations where there has been controversy over nudity in a play. Lakewood backs the artistic decision-making of the director and does not intervene. Second, if something was illegal or potentially damaging, Edwards testified that he would review Lakewood's written contract entered with the director, to determine whether there had been a breach of the contract. Both of these answers again suggest the presence of a contractual relationship rather than an employment relationship. I conclude that Lakewood has established that its directors are independent contractors.

SAIF Corporation's first exception claims that "The Directors are subject workers," and SAIF makes the same arguments that it made at hearing concerning Lakewood's alleged right to control the actions of the directors. For reasons already addressed, I have concluded that the directors were not subject to the direction and control of Lakewood. It is the difference between the right to control the desired result of the contract—putting on a show—and the right to control the method and details of the performance. Lakewood does not control the method and details of the performance. The directors are independent contractors.

Cast and Crew. At first blush, it would seem as if the decision about the directors' status would resolve the issues of the cast and crew, at least as far as Lakewood is concerned. In fact, the parties tried the case as if there was no difference between the directors and actors in a production.

However, the analysis is not that simple. Unlike the director, who has full artistic control, the cast or crew member participates in the production under the direction and control of that very same director. While many of the actors appear in productions in other locations, the fact remains that they are expected to perform as the director wishes in this production. They must attend rehearsals. They must wear the costumes chosen. If they sing and dance in the production, it is in accordance with the director's decision. Similarly, the set design is developed either by the director or his designee.

There are very good reasons, perhaps, to treat actors and cast members as contractors rather than employees; it may be, as implied that that is the standard in the arts industry. However, I must review the facts in this case with the issue of direction and control in mind. I must conclude that there clearly is direction and control exercised in these productions. The very use of the word "director" suggests that he or she is directing the action of the actors and others. The actors are required to attend rehearsals and to perform in a fashion that meets the director's expectations. I conclude that the actors and others who take the direction of the director are subject to direction and control.

But to whom? This is where the issue becomes murky. Lakewood could conceivably argue that, if the director is not an employee of Lakewood and the actors are subject to the director's direction and control, they are not Lakewood's employees. ~~On that theory, the simplest answer is that they would be the employees of the director who is exercising direction and control over them. However, that answer raises as many questions as it answers.~~

~~If the cast and crew are the employees of the director, for workers' compensation purposes, one of two things must happen. First, the director would have to provide coverage for the cast and crew – something clearly not contemplated in the contract between the director and Lakewood, and something that did not happen, as a matter of fact, in the productions in the two years in question. Second, if the director does not provide such coverage, then the person "awarding the contract" would have to provide coverage pursuant to ORS 656.029, which states in part:~~

In the original Proposed Order, I concluded that ORS 656.029(1) would operate to make the cast and crew of employer. That statute provides:

> (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.

(Emphasis added).

As I originally applied ~~Applying~~ this statute to the present situation, Lakewood is the "person awarding the contract" and the director is "the person to whom the contract is awarded." The cast and crew are those "who perform labor under the contract." Simply put, **under my original analysis,** if the director does not provide coverage for the cast and crew, then Lakewood must. Under the second part of subsection (1), it is possible that Lakewood's failure to provide coverage for those workers could make them a non-complying employer if there was an injury.

ORS 656.029 is most often used to find a general contractor responsible for an injury occurring to the employee of an uninsured subcontractor, and it contains specific language addressing that issue. However, the emphasized language of the statute also contemplates that the person awarding the contract (Lakewood) would be responsible "before labor under the contract commences." In other words, the statute does not just apply to later injuries. It also applies when it is clear that labor under the contract must be covered.

~~Therefore, although it is arguable that the cast and crew of the productions would be the employees of the director, not Lakewood, Lakewood is responsible for providing coverage for them in the absence of insurance being provided by the director.~~

However, my initial analysis was in error but not for the reasons raised by SAIF or for the procedural reason raised by Employer (that no one had argued the statute applied). My error concerned the remuneration for the crew and actors.

The employment relationship is established through compensation and the right of control. ***Robinson v. Omark Industries,*** **46 Or App 263 (1980). Here, the director has the right of control but is not an employer because he or she does not provide remuneration. Likewise, Lakewood cannot be the employer because, although it paid the cast and crew, it did not have the right of control of those people. The cast and crew are not employees because the right to control and the fact of remuneration were with separate entities. Lakewood is not required to pay workers' compensation coverage for them.**

In summary, ~~whether as employees of the director (who, in the instances before me had no insurance), or by operation of~~ ORS 656.029 **does not apply to the cast and crew, and** Lakewood is **not** responsible to pay premium on the payments made to the casts and crews of the productions during the audit periods.

Curators, Security and Curator Coordinator. The evidence indicates that the curators and the security and maintenance coordinator are essentially the "directors" of the Festival of the Arts. Like a director, they sign a written contract and are given control over the presentation of the Festival. They are involved in the process of selecting the performers and exhibitors for the Festival, and they are allowed to do so with no real involvement from Lakewood. For the reasons discussed in the analysis of the director role, I conclude that the curators and the security and maintenance coordinator are independent contractors.

SAIF's third exception concerns the Festival of the Arts "workers," but the workers were not at issue in this hearing. Presumably, SAIF means the curators and coordinators. For the reasons which have been set forth in this Revised Proposed Order concerning the directors, there is no basis to change my opinion concerning the curators and other Festival of Arts personnel.

Analysis of Specific Individuals

Elizabeth Hayden. Hayden performs two sets of duties on behalf of Lakewood, working as an employee in the ticket office and also teaching various classes at Lakewood. SAIF has determined that the other teachers offering classes at Lakewood are independent contractors, and has agreed that there is nothing in Hayden's teaching that is any different than the other teachers. Accordingly, I conclude that her teaching activities, all things being equal, would be non-subject.

However, SAIF treats Hayden differently than the other teachers because she is also an employee, arguing that this "dual role" should lead her to be considered an employee at all times. In other words, SAIF contends that the money Hayden makes as a teacher should be subject to the payment of premium.

SAIF offers no legal basis for its argument that Hayden's dual role should make all of her earnings subject, and the evidence presented by Lakewood demonstrates that there is no practical reason to lump the two roles together. Hayden is paid by the hour as an employee, and she is paid one time for each class she teaches. Her employee paycheck has the appropriate withholdings, and Lakewood withholds taxes as appropriate. Hayden's contract proceeds from the teaching are paid to her in full, at the end of the teaching period, and a 1099 is provided each year. There is simply no basis to believe there could be confusion about the two different roles Hayden has with Lakewood.

For all of the reasons noted above, it would be easy to differentiate between the two. To the extent that SAIF is worried that Hayden could be injured while teaching and

try to argue it happened while taking tickets, she could argue the same thing if she was injured watering the plants at home. Lakewood does not have to pay premium for the teaching duties of Hayden or anyone similarly situated.

SAIF's fourth exception concerns Elizabeth Hayden, who wears two "hats" at the theater. She is a teacher, and SAIF has conceded throughout this proceeding that it considers the teachers to be independent contractors. However, SAIF sees Hayden's case as different because she also is a part-time employee, working in the ticket office. SAIF argues:

> **The Proposed Order makes light of the serious challenge posed by dual-status workers by stating that Hayden could just as easily argue she was injured at work when she was really injured at home watering plants. Proposed Order, at 10. It would be difficult, if not impossible, to ascertain precisely when Hayden stops performing box office work and starts teaching. For instance, Hayden could be injured walking from that section of the facility where she teaches to her job in the box office, and vice versa. Moreover, it would also be difficult to determine the cause of an occupational disease – the teaching work or the box office work. If she were allowed to lapse in and out of subjectivity, the next logical question would be when subjectivity began and ended.**

(Exceptions at 12).

SAIF's exception identifies the specter of a dual status worker who "lapses in and out of subjectivity." If that were the fact situation in this case, its exception would be worth further discussion. However, the evidence in this case does not present that situation.

The uncontradicted evidence concerning Hayden is that her employment as ticket taker (which would obviously be during performances) and her role as a teacher took place at separate times and in separate parts of the facility. There is no crossover; there is no basis to require employer to pay premium for her teaching duties because they remain entirely separate from her employment duties.

I do not need to address the argument that Hayden's dual status would make it more "difficult to determine the cause of an occupational disease." That is exactly the point made in the Proposed Order about watering plants at home. An occupational disease is determined by looking at all possible factors and determining whether the work-related factor (in this case, ticket-taking) was the major contributing cause of the condition. ORS 656.802.

Chris Whitten Design. SAIF has included Whitten in the putative payroll for Lakewood not on the basis of his company—which SAIF agrees would be an independent contractor—but by operation of ORS 656.029, which has been previously

discussed concerning the cast and crew. Certainly, the statute could operate in the same way as it does with the cast and crew and, if Whitten has been employing workers without covering them for workers' compensation purposes, Lakewood could be held responsible for any injury to one of those workers.

However, what makes the Whitten situation different than the cast and crew of the productions is that it is not clear that there were uncovered employees working on the sets. Although Whitten lists "contract labor" in his invoice, and although SAIF stated that Whitten does not have insurance coverage, it is unclear what "contract labor" means. It is possible that Whitten brought in workers from a temporary services company, or made other arrangements for them to be covered.

However, the subjectivity of Whitten's workers is not the issue in this case. It is Whitten's relationship with Lakewood that is at issue. The record does not contain all of the facts about Whitten and his workers. Although Whitten refers to "contract labor" in his invoices, (Ex. P5), it is entirely possible that he used laborers through a temporary agency to do the work for the very purpose of avoiding workers' compensation liability. "Contract worker" would be the appropriate designation for such a worker. If so, there would be no liability for Whitten or a general contractor.

It is also possible that SAIF is correct and Whitten was using "contract workers" as a term to describe uninsured employees. If Whitten is using laborers that would qualify as employees and he is not paying workers' compensation coverage, then there would be a distinct possibility that Lakewood—or any other theater for which Whitten was designing sets—could end up with a claim under ORS 656.029. That is not, however, a premium audit question. Lakewood does not have to pay premium on Whitten's proceeds because Whitten is not a subject worker.

SAIF's fifth exception, addressing the status of Whitten and his "contract workers." SAIF's argument focuses on the role of Whitten's workers, seeking to require Lakewood to prove the status of another employer's workers. However, Whitten's workers are not the issue. Whitten is clearly an independent contractor for the reasons set forth in the initial order. Whitten's employees, therefore, are not a proper inclusion on Lakewood's premium with SAIF.

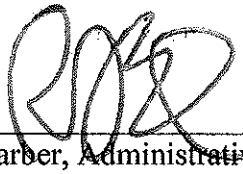
Summary

Based upon the evidence in the case, I have concluded that the directors and curators (including the person in charge of security and maintenance for the Festival of the Arts), **as well as all cast and crew members,** are not subject. Elizabeth Hayden is subject when working as an employee and is not subject when working as a teacher. Whitten Design is not subject. ~~All other actors and crew members are subject workers.~~

PROPOSED ORDER

It is therefore PROPOSED that the Final Premium Audit Billings for the two years in question be MODIFIED to exclude the directors, curators, **cast and crew,** Hayden when teaching, and Whitten from the billing.

DATED this ~~28th day of March 2008~~. 13TH **of January 2009.**



Rick Barber, ~~Administrative~~ Law Judge
Office of Administrative Hearings

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this proposed order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to:

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

CERTIFICATE OF SERVICE

On the 13th day of January 2009, I mailed the foregoing Revised Proposed Order in Reference No. **0703011.**

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