STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of **Northwest Childrens Theater and School, Inc.**	)	**FINAL ORDER**
	)	**ON**
	)	**RECONSIDERATION**
	)	Case No. INS 08-03-001

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of Employer Northwest Childrens Theater and School, Inc. (employer)[1], pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d), ORS 737.505(4), and Oregon Administrative Rules (OAR) 836-043-0101 *et seq.*, to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation (insurer) to the employer.

History of the Proceeding

On 12/11/07, the employer received from the insurer a billing dated 12/11/07 for the audit period from 7/1/06 to 6/30/07.[2 & 3]

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[1] Notwithstanding the references to the contrary in the record, *e.g.* billing and proposed orders, the name of the employer is Northwest Childrens Theater and School, Inc., not Northwest Childrens' Theatre and School, Inc. See employer's cover letter dated 2/28/08 to petition dated 2/19/08; employer's website at http://nwcts.org/html/home.php; and Oregon Secretary of State, Corporation Division business name search results at http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_detl?p_be_rsn=248804&p_srce=BR_INQ&p_print=TRUE .

[2] The proposed order dated 4/2/09, and revised proposed order dated 8/18/09, in the first paragraph on page 1 of each order, referred to "billings." The insurer issued a billing on 12/11/07 and the employer requested a hearing on 2/6/08 to review the billing. Subsequently, on 3/11/09, the insurer revised the billing.

[3] On or about 3/30/10, after the issuance of the revised proposed order, the director discovered that the billing was incomplete under OAR 836-043-0170(7) because it did not include the notification required by OAR 836-043-0110(6). As a result, the insurer could not enforce the billing and the employer was not yet entitled to a hearing to review the billing. On 3/30/10, the director e-mailed the parties explaining the issue and requesting comments. From 3/30/10 to 4/8/10, the director, employer, and insurer communicated about how to solve the problem. On 4/1/10, the director received from the insurer an e-mail saying that "[the employer] and I proposed that you allow the parties to stipulate that the billing, as supported by the exhibits in the record – notably, A-2 and A-9 – is sufficient for purposes of jurisdiction under the rule cited below [OAR 836-043-0170(7) and OAR 836-043-0110(6)], and that the Insurance Division issue a final order based on the record developed below. To dismiss the petition now – after a complete record was compiled, proposed orders issued, and exceptions filed – would result in substantial prejudice to both parties." On 4/12/10, the director e-mailed the parties accepting the parties' stipulation. The stipulation consisted of the insurer's e-mail dated 4/1/10, as supplemented by e-mails dated 3/30/10, 4/1/10, 4/8/10 and 4/12/10.

On 2/6/08, the director received from the employer an e-mail requesting a hearing to review the billing.[4]

On 2/6/08, the director sent to the employer a petition form to complete and return by 4/7/08.

On 2/29/08, the director received from the employer the completed petition dated 2/19/08.

Also on 2/29/08, the director received from the employer a request for an order staying all collection efforts by or on behalf of the insurer of any amount billed in the billing as a result of the audit until this proceeding is concluded.

On 3/5/08, the director referred the employer's request for a hearing to the Office of Administrative Hearings (OAH).

On 3/10/08, OAH scheduled a hearing to be conducted on 7/1/08.

Also on 3/10/08, OAH issued an order granting the stay.

On 3/21/08, OAH rescheduled the hearing to be conducted on 7/15/08.

On 6/20/08, OAH rescheduled the hearing to be conducted on 7/29/08.

On 7/15/08, OAH rescheduled the hearing to be conducted on 9/30/08.

On 12/10/08, OAH rescheduled the hearing to be conducted on 3/12/09.

On 3/11/09, the insurer issued a revised billing, entitled Supplemental Premium Audit Billing, dated 3/11/09.

On 3/12/09, OAH conducted a hearing. The hearing was conducted by Susan Teppola, an administrative law judge of OAH. The employer appeared and was represented at the hearing by William H. Replogle, an attorney. The employer called Judy Kafoury as its witness. The employer offered Exhibits P1 to P31, as its

[4] The proposed order dated 4/2/09, and revised proposed order dated 8/18/09, did not find (1) when the director received from the employer a written request for a hearing, and (2) when the director received from the employer a completed petition. Determining if and when these events occurred are critical to determining whether the employer is entitled to a hearing. ORS 737.505(4), OAR 836-043-0110, OAR 836-043-0170. *See Pease v. Natl. Council on Comp. Ins.*, 113 Or App 26, *rev den* 314 Or 391 (1992). The director received the employer's request for a hearing on 2/6/08, and petition on 2/29/08, and stamped the respective date received on the face of each document. The director provided to OAH and the insurer a copy of the employer's request for a hearing and petition when the director referred the case to OAH on 3/5/08. The employer and insurer did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that the director received the employer's request for a hearing on 2/6/08 and petition on 2/29/08.

documentary evidence, all of which were admitted into the record.[5] The insurer appeared and was represented at the hearing by Ethan R. Hasenstein, an Assistant Attorney General assigned to represent the insurer. The insurer called Linda Surgenor and DeAnne Hoyt as its witnesses. The insurer offered Exhibits A1 to A12 as its documentary evidence, all of which except Exhibit A12 were admitted into the record.[6 & 7]

On 4/2/09, OAH issued a proposed order and mailed it to the parties. The proposed order recommended that the director modify the revised billing.

On 4/27/09, the director received from the employer written exceptions to the proposed order.

On 4/28/09, the director received from the insurer written exceptions to the proposed order.

On 5/21/09, the director requested OAH to review the exceptions and issue a revised proposed order.

On 8/18/09, OAH issued a revised proposed order and mailed it to the parties.[8]

The issue was whether the revised billing correctly included in the calculation of the premium for workers' compensation insurance provided by the insurer to the employer during the audit period payments made by the employer to instructors; support staff; guest directors, designers, musicians, etc.[9]; and adult and child actors.

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[5] After the hearing, OAH left the record open until 3/18/09 for the employer to provide copies of contracts for instructors and support staff. On 3/19/10, OAH received from the employer copies of four instructor contracts, Exhibits P32 to P35. OAH did not receive from the employer copies of support staff contracts. See revised proposed order page 13.

[6] The insurer's Exhibit A12 was excluded because it did not relate to the audit period.

[7] OAH added to the record five documents. The documents are: (1) the employer's petition dated 2/19/08 and received by the director on 2/29/08, (2) OAH's notice of administrative law judge re-assignment dated 10/29/08, (3) OAH's notice of rescheduled hearing dated 12/10/08, (4) the insurer's exceptions to the proposed order dated 4/24/09, and (5) the employer's exceptions to the proposed order dated 4/24/09. It was unnecessary and redundant for OAH to add the documents to the record because they automatically become part of the record of a case. ORS 183.417(9).

[8] OAH mailed the revised proposed order to employer's previous attorney. So, on 9/4/09, the director e-mailed the revised proposed order to the employer's current attorney, and extended the due date for the parties to file with the director written exceptions to the revised proposed order from 9/17/09 to 10/5/09.

[9] See below for the full list of workers under this category.

The revised proposed order concluded that the revised billing incorrectly included payments to the guest directors, designers, musicians, etc.; and adult and child actors, because it found that such persons were not subject to the direction and control of the employer under the judicially created "right to control" and "nature of the work" tests and therefore were not workers as defined in ORS 656.005(30). The revised proposed order also concluded that the revised billing correctly included payments to the instructors because it found that such persons were subject to the direction and control of the employer under the judicial tests and therefore were workers. The revised proposed order also concluded that the revised billing correctly included payments to the support staff because it found that the employer had not met its burden of presenting evidence that such persons were more likely than not, not subject to the direction and control of the employer under the judicial tests therefore were workers.[10]

The revised proposed order recommended that the director affirm in part and disaffirm in part the revised billing.

On 9/3/09, the director timely received from the insurer written exceptions to the revised proposed order.

The director did not receive from the employer any exceptions to the revised proposed order or a written response to the insurer's exceptions.

The director considered the insurer's exceptions.

On 6/29/10, the director issued a final order.

On 8/23/10, the director received from the insurer a request that the director reconsider the final order. The insurer argued that the final order incorrectly applied the judicially created "right to control" and "nature of the work" tests.

The director granted the request to reconsider the final order.

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[10] The director understands the revised proposed order to imply that if the employer had met its burden then the order would have concluded that support staff were subject to the direction and control of the employer under the judicial tests and therefore were workers because "[a]pparently, [the] support staff were not working under written contracts …[and i]f there is not contract, their employment would be 'at will.'" As explained hereinafter on page 8, the director agrees with revised proposed order's conclusion that the employer did not meet its burden but disagrees with the order's reasoning if the employer had not met its burden.

Therefore, the director now makes the following final decision on reconsideration in this proceeding.

Findings of Fact

The director adopts, and incorporates herein by this reference, the findings of fact of the revised proposed order as the findings of fact of this final order, except as follows.

On page three, paragraph numbered five, the first sentence is changed to read:

> During the audit period, NWCT had the following employees: (1) an office manager and office staff who answered the phone, sold tickets, took tuition from students and did other general office work, such as filing; (2) two development and marketing employees who raised money through soliciting contributions, grant writing, passing out marketing material at other events, and writing public relations materials; (3) a stage manager who attended the rehearsals and made sure the play was executed in accordance with the play director's vision after the director completed his or her work (after the opening performance, the director left and was not present during the remaining run of the play); (4) an artistic director (producer) **Sarah Jane Hardy** who selected the six plays for the season, wrote the budget and got it passed by the board, and then passed the budget for each play along to the directors and designers that were working on the play; (5) a technical director who built the sets after receiving plans from the set designer; and (6) an education director who ran the school.

On page five, the quoted portion of the instructor contract entitled "Relationship of the Parties," is corrected to read:

> The parties intend that an independent contractor relationship will be created by this contract. Instructor is not an agent or employee of NWCT. Theater agrees not to exclusively use Instructor's services. Instructor may engage in his or her profession for other persons or organizations during periods when ~~she~~ Instructor is not performing under ~~the~~ this ~~contact~~ contract with NWCT.

See Exhibits P32 to P35.

On page six, paragraph numbered 14, the quoted portion of the director contract is corrected to read: "Allow ~~the~~ *Artistic Director* input on artistic decisions (including, but not exclusive to casting, design~~,~~ concept, textual changes, staging and interpretation)." See Exhibit P13.

Conclusions of Law

The director does not adopt the conclusions of the revised proposed order but instead makes the following conclusions as the conclusions of law of this final order:

The revised billing *incorrectly* included the payments to:

1. Instructors.
2. Guest directors; designers; musicians; assistant choreographers; assistant costume designers; assistant directors; assistant house managers; assistant stage managers; audio describers; carpenters; choreographers; composers; sound designers; costume designers; costume shop managers; cover and poster illustrators; electricians; fight choreographers; fight directors; follow-spot operators; graphic artists; graphic designers; lighting designers; marketing assistant; music director; painters; parent liaison; photographers; printers; prop designers; properties designer; properties master; puppets; scenic artists; set designers; sound board operators; sound technicians; stagehands; stitchers; wardrobe masters; welders; and wig, prosthetic, and makeup designer; all who worked on a per-play-produced basis (other than those already on staff as employees or administrative staff).
3. Adult and child actors.

The revised billing *correctly* included the payments to support staff who assisted the instructors.

Opinion

The director adopts, and incorporates herein by this reference, the opinion of the revised proposed order as the opinion of this final order on reconsideration, except as follows.

On page11, the discussion of subject worker status analysis is changed to clarify that "when an employer has the right to control a claimant's performance in some respects but not others, 'it is essential that we consider the factors which make up the "nature of work" test' in deciding whether the control that employer retains makes the relationship one of master and servant." *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002) (citing *Woody v. Waibel*, 276 Or 189, 196-97 (1976)); but the "nature of the work" test does not apply when an employer does not have the right to control a claimant's performance in any respect. In other words, the "nature of the work" test does not apply when the "right to control" test conclusively indicates

that the relationship between the employer and worker is not an employment relationship. *See Stamp v. DCBS*, 169 Or App 354, 360 (2000).

On page 12, the director disagrees with the revised proposed order's finding that the employer retained any right to control the method and detail of the instructors' work. The evidence in the record clearly shows that the employer did not exercise or have the right to exercise control of the manner and means of accomplishing the desired result. *See Oregon Drywall Systems v. Natl. Council on Compen. Ins.*, 153 Or App 662, 667 (1998). Although the employer specified its desired result by choosing which classes to offer and which instructors to teach the classes, the employer did not dictate how the instructors taught the classes. The director finds the "right to control" factor to indicate an independent contractor relationship.

The instructor contract stated that the instructor was to provide the equipment and supplies, yet the students could also use the employer's stock of props and costumes. *See Trabosh v. Washington County*, 140 Or App 159, 166 (1996) (worker's partial use of employer's equipment by choice was suggestive of an independent contractor relationship). The director finds the "provision of tools and equipment" factor to indicate an independent contractor relationship.

The director disagrees with the revised proposed order's finding that the employer retained the right to fire instructors. Although the employer could terminate an instructor "for any reason deemed in good faith sufficient by NWCT," the employer could not terminate an instructor for any reason. "An unqualified right to fire, indicative of an employer-employe[e] relationship, must be distinguished from the right to terminate the contract of an independent contractor for bona fide reasons of dissatisfaction. The exercise of such a right is still consistent with the idea that a satisfactory end result is all that is aimed for by the contract." *Henn v. SAIF*, 60 Or App 587, 592-93 (1982), rev den 294 Or 536 (1983). The contract indicated that the relationship between the employer and instructors was to be an independent contractor relationship. In addition, the instructors were not fired and the managing director did not believe they could be fired unless the instructor committed a crime. This evidence of past practice and policy of employer regarding oral contracts shows

custom and usage that is relevant to interpretation of the contract. *Haynes v. Douglas Fir E. & E. Co.*, 161 Or 538 (1930); *George v. Sch. Dist. No. 8R of Umatilla Co.*, 7 Or App 183 (1971). The director finds the "right to fire" factor to indicate an independent contractor relationship.

Because the director finds that the "right to control" test conclusively establishes that instructors were independent contractors, the revised proposed order's statement that "the function of teaching the classes was integral to one part of NWCT's mission, which is to teach children," which is apparently in reference to one factor of the "nature of the work" test, is deleted.

On page 13, the first paragraph is corrected to read "As noted above, I found ~~above~~ that the instructors themselves were employees."

On page 13, the director disagrees with the revised proposed order's finding that the employer and support staff did not enter into a written contract, and thus their employment was "at will," and therefore the employer retained a right to fire without contractual liability. Judy Kafoury testified on behalf of the employer that the employer and support staff did enter into a written contract. However, such contract was not offered into evidence. Judy Kafoury also testified that the employer could terminate the support staff during a production only for a violation of the parties' written contract. *See Reforestation Gen. v. Natl. Council on Compen. Ins.*, 127 Or App 153, 169 (1994) (absent direct evidence of the employer retaining an unqualified right to terminate absent *bona fide reasons* of dissatisfaction, the court found no suggestion that there was such an unqualified right, and held that the right to fire factor indicated independent contractor status). "The lack of a written contract could just as easily indicate employee status as it could independent contractor status." *Stamp*, 169 Or App at 363. Therefore, the director finds the "right to fire" factor to indicate an independent contractor relationship, or to be neutral in the least. Nevertheless, the director agrees with the revised proposed order's conclusion that the support staff were employees because the employer failed to meet its burden of proof to show that it did not exercise or have a right to control the support staff. The record is devoid of any such evidence.

On Page 14, the first paragraph is changed to read "Although NWCT had some right to control behavior and attendance, there is no evidence that they retained any control over the details of how the contracted party[11] met his or her obligations under the contract. There were ~~almost~~ no indicia of an employer and employee relationship with this group of providers. I found that NWCT carried its burden to establish that directors, designers, musicians, etc. were not employees during the audit period."

On page 14, sixth paragraph from the top, the first sentence, "SAIF argued that the actors brought no tools to the job, so that factor was neutral," is deleted. The insurer did not make such an argument. See insurer's exceptions to the revised proposed order, pages 9-10.

On pages 14 to 15, the section entitled "Actors and Young Actors" is changed to exclude any discussion of the factors of the "nature of the work" test because the director finds that the "right to control" test conclusively establishes an independent contractor relationship between the employer and the actors and young actors.

Order

The billing, as revised by the insurer[12], is reversed in part and affirmed in part. The revised billing is reversed to the extent that it included in calculating the premium for workers' compensation insurance provided by the insurer to the employer during the audit period compensation paid to instructors; designers, directors, musicians, etc.; and adult and child actors. In all other respects, the revised billing is affirmed. Specifically, but not exclusively, the revised billing is affirmed to the extent that it included in calculating the premium for workers' compensation insurance provided by the insurer to the employer during the audit period compensation paid to the support staff.

The stay of collection is terminated.

Notice of Right to Judicial Review

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[11] In the revised proposed order, all references to "the contracted" are understood to mean a contracted party.

[12] See the revised proposed order pages 1, 9 and 15; and employer's e-mail dated 4/8/10.

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the date the party received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

Dated September 14, 2010

/s/ Teresa D. Miller
Teresa D. Miller
Administrator
Insurance Division
Department of Consumer and Business Services

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