STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
ASAP Business Solutions, LLC	)	OAH No. INS 14-12-004
	)	Agency Case No.: INS 14-12-004

Procedural History

The Director of the Oregon Department of Consumer and Business Services (Director), by and through Division of Financial Regulation, formerly the Insurance Division, (Division), commenced the above entitled administrative proceeding to review a workers' compensation insurance final premium audit billing (billing) issued by Liberty Mutual Insurance (insurer) to ASAP Business Solutions, LLC, (employer) pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 *et. seq.*

On December 30, 2014, the Division referred employer's hearing request contesting the billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether insurer's Final Premium Audit, dated November 10, 2014, was correct. By Proposed Order dated September 30, 2015, Senior Administrative Law Judge Rick Barber Affirmed the insurer's Final Premium Audit, dated November 10, 2014.

Findings of Fact, Conclusions of Law and Opinion

The Director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and reasoning of the Proposed Order as the findings of fact, conclusions of law, and reasoning of this Final Order. The Director received and considered Petitioner's Objections to Proposed Order dated September 30, 2015 and determined that the Petitioner's arguments were not persuasive.

Order

Liberty Mutual Insurance Company's Final Premium Audit issued November 10, 2014 is AFFIRMED.

Notice of Right to Judicial Review

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 March 29, 2017

Laura Cali Robison
Administrator, Division of Financial Regulation
Insurance Commissioner and Chief Actuary
Department of Consumer and Business Services

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

IN THE MATTER OF:	) **PROPOSED ORDER**
	)
	) OAH Case No. INS 14-12-004
ASAP BUSINESS SOLUTIONS, LLC	)

HISTORY OF THE CASE

On November 10, 2014, Liberty Mutual Insurance (LM or Liberty) issued a Final Premium Audit Billing to its insured, ASAP Business Solutions, LLC (ASAP). ASAP received the audit billing on November 12, 2014, and requested a hearing with the Department of Consumer and Business Services, Insurance Division (Division) on November 21, 2014. ASAP filed a Petition with the Division on December 23, 2014.

On December 30, 2014, the Division referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe Allen to preside at hearing. Judge Allen convened a prehearing conference on February 27, 2015. Attorney Matt Hedberg represented Liberty and Kenneth Sheppard represented ASAP. In addition to setting the hearing date for July 20, 2015, the parties set a schedule for motions for summary determination and for briefing on the motions.

On June 3, 2015, Liberty filed its Motion for Summary Determination with supporting affidavits and exhibits. On June 5, 2015, ASAP filed its Motion for Summary Determination along with its exhibits. On June 17, 2015, Liberty filed a Memorandum in Opposition to ASAP's motion. ASAP filed its Response to Liberty's motion on June 19, 2015, along with supplemental exhibits. On June 30, 2015, ASAP filed a Reply on its motion. The case was reassigned to ALJ Rick Barber, who denied the motions on July 13, 2015. The ruling on summary determination and the record of the motion are hereby incorporated in this decision.

Hearing convened on July 20, 2015, in Tualatin, Oregon. ALJ Barber presided. Mr. Sheppard, appearing *pro hac vice*,[1] represented ASAP. Mr. Hedberg represented Liberty. Nathan Yanez and Karinsa Holmes Solo testified for ASAP; auditor Jeff Macey and Field Audit Manager Clyde Rapozo testified for Liberty. The evidentiary record closed on July 20, 2015, but the hearing record remained open for submission of written closing arguments. Both parties submitted Closing Briefs on August 4, 2015, and ASAP submitted a Reply Brief on August 7, 2015.

[1] Chief Administrative Law Judge Gary Tyler approved Mr. Sheppard's *pro hac vice* request on July 16, 2015. The approval is in the OAH file. The associated Oregon attorney did not appear at hearing.

In the course of reviewing the exhibits submitted by the parties, it became necessary to reopen the record to replace several of ASAP's exhibits due to confidentiality issues. On August 20, 2015, the documents containing confidential information (Exs. R2 through R4, R6 and R8) were replaced with redacted substitutes.[2] The record was again closed on August 20, 2015.

ISSUE

Whether Liberty's Final Premium Audit Billing (FPAB) is incorrect because it assesses premium for Washington workers who are temporarily working in Oregon.

EVIDENTIARY RULINGS

Exhibits A1 through A7, offered by Liberty, and Exhibits R1 through R11, offered by ASAP, were admitted into evidence. ASAP objected to the relevance of Exhibit A6, but the objection was overruled. As noted, some of the admitted exhibits were replaced with redacted copies.

All of the documents filed by the parties and my Ruling on Motions for Summary Determination are also designated as part of the documentary record of the hearing.

FINDINGS OF FACT

1. Nathan Yanez is the sole owner and member of ASAP Business Solutions, LLC, a Washington company. He registered the company in Oregon on June 14, 2013, mistakenly thinking he was registering his Washington LLC in the State of Oregon. (Test. of Yanez). He started employing workers in July 2013, when his former employer, Allstar Employment Services, LLC, went out of business. ASAP's first payroll was July 29, 2013, paying workers who had been assigned to work in Oregon the week beginning July 22, 2013. (Ex. A6).

2. Between July 22, 2013 and August 14, 2013, ASAP employed workers at locations in Oregon but did not have workers' compensation insurance in Oregon. Two ASAP workers were injured during their assignment at West Bay Marketing, a fish cannery in Astoria, Oregon. The injuries occurred on July 26, 2013 and August 2, 2013. Both employees filed workers' compensation claims in Oregon. Because it had no insurance coverage for employees in Oregon, ASAP was considered a non-complying employer and the claims were processed and accepted as non-complying. DCBS Investigator Bob Hamre investigated the non-complying status of ASAP. (*Id*.). On October 10, 2013, the DCBS Workers' Compensation Division issued an order of noncompliance and fined ASAP $8,282. (Ex. A5). ASAP did not contest the ruling and paid the fine. (Test. of Yanez).

3. ASAP entered into a contract of insurance with Liberty on August 14, 2013. Liberty provided workers' compensation coverage to ASAP for its workers in the State of Oregon. Liberty's policy included federal coverage for Longshore and Harbor Workers, although there did not appear to be federal work being performed. Washington L&I does not

[2] The documents contained names, addresses and earnings information for ASAP employees. Once the redacted documents were received, the unredacted documents were destroyed.

provide federal coverage. (Test. of Rapozo). The policy was purchased through Tri-City Insurance in Clatskanie, Oregon, after one of ASAP's Oregon clients, California Shellfish, told Yanez that he needed Oregon coverage. At that time, Yanez believed that all of his workers were covered by Washington's Labor & Industries (L&I) workers' compensation coverage. (Test. of Yanez).

4. In November 2013, Liberty auditor Jeff Macey performed an initial audit on ASAP. Liberty's purpose for an initial audit of a new insured is to get to know the insured, to verify the type of work being performed and to make sure the assigned classification codes are correct. (Test. of Macey). Macey's audit stated in part:

> The insured was advised to contact WA State L&I for proper handling of his employees. Through conversation with a WA State auditor, it was determined that L&I would provide coverage for those employees hired by the insured in WA to work temporarily (less than 30 days) in OR. This is a majority of the insured's employees. Those employees who are hired in OR to work in OR would be covered by this Liberty policy. The insured understood and agreed with this handling.

(Ex. A1 at 2). Macey and Yanez discussed the work being performed in Oregon, and agreed that ASAP should report Oregon payroll for those who lived in Oregon and were working at an assignment in Oregon, but should report Washington residents working in Oregon to Washington L&I. Both Macey and Yanez believed at the time that this was a correct interpretation of the Reciprocal Agreement between Oregon and Washington concerning workers' temporarily working outside the state. (Test. of Yanez, Macey).

5. In January 2002, Oregon and Washington entered into a Reciprocal Agreement to "resolve jurisdictional issues that arise when workers from one state temporarily work in another[.]" The agreement states in pertinent part:

> **Who is Affected by This Agreement**
>
> This Agreement affects the rights of workers and their employers when the contract of employment arises in Washington and the worker is temporarily working in Oregon, or when the contract of employment arises in Oregon and the worker is temporarily working in Washington. To be covered by this Agreement, an employer must be considered an employer under both Washington's and Oregon's workers' compensation laws, and workers must be considered workers under both Washington's and Oregon's workers' compensation laws.
>
> Basic Rule
>
> When a contract of employment arises in Washington and the worker is temporarily working in Oregon or when the contract of employment arises in Oregon and the worker is temporarily working in Washington:

Employers shall be required to secure the payment of workers' compensation benefits under the workers' compensation law of the state the contract of employment arose in, and pay premiums or be self-insured in that state for the work performed while in the other state, and:

- Workers' compensation benefits for injuries and occupational diseases arising out of the temporary employment in the other state shall be payable under the workers' compensation law of the state the contract of employment arose in, and that state's law provides the exclusive remedy available to the injured worker.
- In determining whether a worker is temporarily working in another state, Washington and Oregon agree to consider:
    1. The extent to which the worker's work within the state is of a temporary duration;
    2. The intent of the employer in regard to the worker's employment status;
    3. The understanding of the worker in regard to the employment status with the employer;
    4. The permanent location of the employer and its permanent facilities;
    5. The extent to which the employer's contract in the state is of a temporary duration;
    6. The circumstances and directives surrounding the worker's work assignment;
    7. The state laws and regulations to which the employer is otherwise subject;
    8. The residence of the worker; and
    9. Other information relevant to the determination.

- Washington and Oregon both agree to notify the other state in writing of any changes to their law that may affect this Agreement within 30 days of that law change.

Exclusion From The Basic Rule

This Agreement does not apply to any Washington worker of an Oregon employer while working in the State of Washington nor to any Oregon worker of a Washington employer while working in the State of Oregon. It is understood that an employer from either Oregon or Washington may have a contract in the other state where they may have both Oregon and Washington workers which may require obtaining coverage in both states for that same contract.

(Ex. R11).

6. After the initial audit of ASAP, Macey submitted the agreed-upon plan (that Liberty would cover Oregon workers working in Oregon, and L&I would cover the rest) to

Liberty's Underwriting Department. Underwriting disagreed with that interpretation of the Reciprocal Agreement. In 2014, Russ Griffith, an underwriting consultant in LM's home office on the east coast, contacted Field Audit Manager Clyde Rapozo by email to ask him to again review the terms of the Reciprocal Agreement. Griffith contended that ASAP and Washington L&I were misinterpreting the agreement. Once Rapozo reviewed the case further, he (and Macey) agreed that they had misinterpreted the agreement. (Test. of Macey, Rapozo).

7. In the period before the scheduled November 2014 premium audit, Macey emailed Yanez to let him know that Liberty believed its previous interpretation of the Reciprocal Agreement was incorrect, and that it considered all work performed by ASAP's workers in Oregon to require workers' compensation coverage in Oregon. (Test. of Macey). Liberty concluded that the temporary assignments of employees to ASAP's Oregon customers did not fall under the Reciprocal Agreement because there had not been an ongoing employment relationship with those employees in Washington. Liberty contrasted ASAP's employees, who may have been "hired" in Washington but actually never have worked there, with the hypothetical example of a plumber who regularly works in Longview and is dispatched to Portland for a one day job. The plumber would be temporarily working outside the State of Washington and would be covered by Washington L&I, while ASAP's employees, Liberty asserted, were specifically assigned to an Oregon job and may never work for the employer in Washington. (Test. of Rapozo).

8. A person applying for work with ASAP must come to a Washington office to submit his application and to verify the information on the application. If that person is accepted by ASAP, he is considered "hired" but has no work hours and is not paid until he actually is assigned to a client for a temporary position. ASAP assigns workers to clients in Washington and Oregon. All are temporary assignments, although some ASAP employees are hired by the client company and become that company's employee. The workers that ASAP send to a client consist of those who have successfully worked other temporary assignments with ASAP previously and those who have never worked for ASAP before this assignment. (Test. of Yanez).

9. Liberty audited ASAP to determine the amount of premium it would be required to pay for its workers in Oregon. Liberty issued a Final Premium Audit Billing (FPAB) on November 10, 2014. (LM Ex. 2).

10. ASAP requested a hearing on the FPAB, and submitted a Petition to the Division setting forth its objections to the audit. The Petition stated in part:

> The audit on which the billing was based improperly includes charges for Washington based employees working temporarily in Oregon under employment agreements negotiated and executed in Washington. Pursuant to applicable Oregon law, regulations and contractual agreements, including but not limited to the WASHINGTON – OREGON RECIPROCAL AGREEMENT between the State of Oregon Department of Consumer and Business Services, Workers' Compensation Division, dated January 31, 2002, the insurer is not entitled to charge or collect premiums for such employees.

> Further, based on specific representations made to the insured by Liberty Mutual, Liberty Mutual is stopped [sic] from collecting the disputed premiums. For further details, see the attached letter from the insured, dated December 11, 2014.

(Petition). ASAP contended that the entire requested additional amount of $69,940 be stayed pending appeal. (*Id.*).

11. During Liberty's coverage of ASAP, it received several workers' compensation claims, including one Longshore claim, from ASAP's workers in Oregon. It has accepted and/or processed those claims. (Test. of Rapozo).

CONCLUSION OF LAW

Liberty's Final Premium Audit Billing (FPAB) is correct.

OPINION

This is a premium audit case arising from ASAP's contest of Liberty's November 10, 2014 FPAB. This audit billing increased ASAP's premium for its Oregon employees by $69,940 after Liberty determined that all of ASAP's workers assigned to work in Oregon for ASAP's Oregon clients must be covered by Oregon workers' compensation insurance.

The crux of ASAP's argument is that all of its employees working in Oregon are Washington workers who were temporarily employed in the State of Oregon. ASAP interprets the Reciprocal Agreement to support that position. ASAP also relies upon *Phelan v. HSC Logging, Inc*., 64 Or App 632 (1987), in support of its case.

The insurer's final premium audit billing is presumed to be correct, and it is ASAP's burden of proof to show that it is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). In this case, for the reasons that follow, ASAP has not carried that burden of proof.

There is a Contract of Insurance

Before summarizing the facts of the case and addressing the legal standard, an initial comment must be made about ASAP's argument that it did not need insurance in Oregon. Although ASAP argues that it did not need workers' compensation coverage in Oregon during the policy year, it actually had a policy with Liberty for that period of time. Liberty insured ASAP from August 14, 2013 until August 14, 2014. ASAP paid premiums to Liberty for the insurance the company provided, and Liberty processed several workers' compensation claims (including one Longshore federal case) during that period. This premium audit hearing arises from that contract of insurance.

Therefore, ASAP's argument that it did not need workers' compensation insurance and that it did not owe any premium is of little relevance. It had workers' compensation insurance.

This is not a suit of rescission, and if it were it was filed in the wrong forum. The sole issue here is whether ASAP has established that the premium audit for that policy year is incorrect.

The Basis of Liberty's FPAB

ASAP began doing business in July 2013. It purchased insurance from Liberty in August 2013, after two ASAP workers were injured while working at ASAP's Oregon client and filed Oregon workers' compensation claims. The State of Oregon determined that the claims were compensable and that ASAP was a non-complying employer in Oregon. ASAP did not contest the determination and paid the fines that were assessed. One of ASAP's Oregon clients told Yanez that ASAP should get Oregon workers' compensation insurance, so Yanez purchased the insurance for ASAP.

Jeff Macey, Liberty's premium auditor, visited Yanez in November 2013 to discuss the new policy. Yanez and Macey informally agreed that Liberty would provide coverage for Oregon workers who were working for ASAP's Oregon clients, and that Washington L&I would cover the rest. Washington L&I initially agreed with this arrangement.[3]

However, when Liberty looked more closely at the language of the Reciprocal Agreement between Oregon and Washington (at the request of a consultant at Liberty's home office), Liberty's underwriting department concluded that all of ASAP's employees working in Oregon needed Oregon coverage.

When Liberty looked closer at how ASAP assigned its workers to Oregon clients, it noted that the workers were not actually employed before the assignment. They had been "hired" by ASAP prior to that date, but they were neither paid nor under direction and control before starting the assignment in Oregon. Some of the workers had worked other temporary assignments with ASAP previously, but they were not on assignment—or were not temporarily leaving an assignment—to take the Oregon assignment. Many of the workers assigned to Oregon clients had never worked for ASAP before.

Liberty concluded that these workers had not been Washington workers at the time of the assignment, so they were not temporarily outside the state of Washington. The reciprocal agreement did not apply in the fashion argued by ASAP. Liberty concluded that the workers who came to Oregon to work needed to be covered by Oregon workers' compensation law, and raised the premiums accordingly.

Liberty's position was confirmed by the claims that were filed by the ASAP employees during the year it was on the risk. As Mr. Yanez admitted, he could not prevent his workers, whom he believed were covered by Washington law, from filing claims in Oregon.

Analysis of the Law

There are three sources of law that impact the decision in this case. ASAP relies upon its

[3] It is unclear whether Washington L&I's position has changed in light of Liberty's reinterpretation of the Reciprocal Agreement.

interpretation of the Reciprocal Agreement between Washington and Oregon, and also relies on *Phelan, supra*. Before addressing those sources, however, the analysis must begin with the statute.

ORS 656.126. ORS 656.126 addresses coverage for workers who are temporarily in or out of Oregon, and states in pertinent part:

> **Coverage while temporarily in or out of state; judicial notice of other state's laws; agreements between states relating to conflicts of jurisdiction; limitation on compensation for claims in this state and other jurisdictions.** (1) If a *worker employed in this state* and subject to this chapter temporarily leaves the state incidental to that employment and receives an accidental injury arising out of and in the course of employment, the worker, or beneficiaries of the worker if the injury results in death, is entitled to the benefits of this chapter as though the worker were injured within this state.
>
> (2) Any worker from another state and the employer of the worker in that other state are exempted from the provisions of this chapter while that worker is temporarily within this state doing work for the employer:
>
> (a) If that employer has furnished workers' compensation insurance coverage under the workers' compensation insurance or similar laws of a state other than Oregon so as to cover that worker's employment while in this state;
>
> (b) If the extraterritorial provisions of this chapter are recognized in that other state; and
>
> (c) If employers and workers who are covered in this state are likewise exempted from the application of the workers' compensation insurance or similar laws of the other state.
>
> The benefits under the workers' compensation insurance Act or similar laws of the other state, or other remedies under a like Act or laws, are the exclusive remedy against the employer for any injury, whether resulting in death or not, received by the worker while working for that employer in this state.
>
> (3) A certificate from the duly authorized officer of the Department of Consumer and Business Services or similar department of another state certifying that the employer of the other state is insured therein and has provided extraterritorial coverage insuring workers while working within this state is prima facie evidence that the employer carries that workers' compensation insurance.
>
> (4) Whenever in any appeal or other litigation the construction of the laws of another jurisdiction is required, the courts shall take judicial notice thereof.
>
> (5) The Director of the Department of Consumer and Business Services shall have authority to enter into agreements with the workers' compensation agencies of

> other states relating to conflicts of jurisdiction where the contract of employment is in one state and the injuries are received in the other state, or where there is a dispute as to the boundaries or jurisdiction of the states and when such agreements have been executed and made public by the respective state agencies, the rights of workers hired in such other state and injured while temporarily in Oregon, or hired in Oregon and injured while temporarily in another state, or where the jurisdiction is otherwise uncertain, shall be determined pursuant to such agreements and confined to the jurisdiction provided in such agreements.
>
> (6) When a worker has a claim under the workers' compensation law of another state, territory, province or foreign nation for the same injury or occupational disease as the claim filed in Oregon, the total amount of compensation paid or awarded under such other workers' compensation law shall be credited against the compensation due under Oregon workers' compensation law. The worker shall be entitled to the full amount of compensation due under Oregon law. If Oregon compensation is more than the compensation under another law, or compensation paid the worker under another law is recovered from the worker, the insurer shall pay any unpaid compensation to the worker up to the amount required by the claim under Oregon law.

(Emphasis added). This statute addresses the rights of a "worker" employed in Oregon who leaves the state temporarily incidental to that employment. According to subsection (1), that person's injury will be covered as if he was injured in Oregon.

Subsection (2) addresses the reciprocal instance, where the person employed in another state is temporarily in Oregon incidental to his work in the other state. That person, if employed in the state and here incidental to that employment, would be exempted from Oregon workers' compensation coverage if three conditions are met: 1) the employer in the other state has coverage in that state; 2) that state recognizes the extraterritorial provisions of this statute; and 3) employees who are covered in Oregon under these provisions are likewise exempted from coverage in the other state. This is the section of the statute that would apply to ASAP's workers if they were determined to have been employed in Washington.

ORS 656.126 is premised on an employment relationship in the home state (Oregon in subsection (1) and the other state in subsection (2)). In the present case, the pivotal question under the statute (and, as will be seen, under the Reciprocal Agreement), is whether ASAP's hires are actually "employed" at the time they accept the temporary assignment in Oregon.

Under Oregon law, a "worker" is defined as 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). ASAP's personnel are "hired" after filing an application and coming to a Washington office to have their information verified. To be "hired" is nothing more than to be available to work on the next assignment that ASAP has. In the interim, they are not paid and are not directed by ASAP to do anything except wait for the assignment. For some, they will have worked on other assignments with ASAP in Oregon or Washington. For many, the Oregon assignment will be their first work for ASAP.

Under ORS 656.126, these workers are not employed in Washington at the time of the temporary assignment in Oregon, so they are not entitled to coverage from Washington L&I.

The Reciprocal Agreement. Both sides rely upon the Oregon-Washington Reciprocal Agreement as the basis for their position. There is language in the agreement that, on first blush, seems to support aspects of both positions. However, the agreement in context preponderates to a finding that Liberty is correct and to the affirmance of the premium audit.

The reciprocal agreement refers to two "contracts," and keeping those two contracts straight is essential to understanding the agreement. The agreement refers to the "contract of employment," which is the contract between ASAP and its employee. The other contract is the "contract in the state" or "contract in the other state," both referring to the contract between ASAP and its Oregon client. That is, the contract to send temporary workers to the client.

Contract of Employment. The contract of employment is the agreement between ASAP and a person it "hires." For the same reasons discussed above in the interpretation of the statute, ASAP's hires are not workers—that is, not employed—until they are actually working on an assignment.

Although a "contract of employment" might arise in a written document before the actual employment begins, the Reciprocal Agreement requires that the "workers must be considered workers under both Washington's and Oregon's workers' compensation laws." (Ex. R11). A mere hire, without remuneration and direction and control, would not meet the definition of "worker" in Oregon. Therefore, I interpret "contract of employment" to refer to actual employment. It is roughly analogous to the "employed in this state" language of ORS 656.126.

This determination of whether the ASAP hire is "employed" is important when determining whether an ASAP "employee" is actually employed in Washington at the time he or she is assigned to the client in Oregon. The person is on ASAP's books, but is not really working in Washington in most situations. It is for this reason that Liberty concluded that the ASAP employees were not Washington workers on a temporary assignment in Oregon. I agree with Liberty.

At hearing, Liberty's witnesses compared the ASAP workers with a hypothetical plumber who works in Longview and takes a one-day job in Portland. At the end of that one-day job, he returns to Longview and his regular work. That plumber, Liberty argued, would be temporarily in the State of Oregon, and would be covered by the plumbing company's Washington workers' compensation insurance.

The ASAP worker, on the other hand, was not really employed in Washington at the time of the Oregon assignment (although he may have worked for ASAP before), so he is not really temporarily out of the state when he takes the Oregon assignment. He is on a temporary job in Oregon for ASAP—not a temporary change from his employment in Washington. This is especially true if that worker also lives in Oregon, but is also true for Washington residents working in Oregon.

The plumber hypothetical is an apt one. The plumber is fully employed in Longview and (as part of his employment) takes a temporary assignment in Portland. The ASAP hire, on the other hand, is not fully or regularly employed in Washington. He may have worked other assignments for ASAP, but in most cases there will be gaps between assignments or the hire will be new and hired specifically for the Oregon client.[4] Such a hire is not a Washington worker temporarily working in Oregon. That person would need Oregon coverage.

Contract with Client. In context, the "contract in the other state" is the contract ASAP has with the Oregon clients it serves. The fifth criterion under the Agreement indicates that "the extent to which the employer's contract in the state is of a temporary duration" is a factor to be considered. ASAP argues that the contracts are temporary in duration. Liberty argues that these contracts are not temporary—they are intermittent. For instance, a contract with a seafood cannery in Astoria may only require employees for a matter of weeks in the season—but the contract repeats from year to year and covers the canning season each year. Thus, the contract is intermittent, not temporary.

Liberty argues that the key language in support of its premium audit is in the exclusion section of the Agreement:

> This Agreement does not apply to any Washington worker of an Oregon employer while working in the State of Washington nor to any Oregon worker of a Washington employer while working in the State of Oregon. *It is understood that an employer from either Oregon or Washington may have a contract in the other state where they may have both Oregon and Washington workers which may require obtaining coverage in both states for that same contract*.

(Emphasis added).

At the very least, the language of the Exclusion indicates that Oregon workers working for an Oregon client should be covered by Oregon workers' compensation coverage. They are "Oregon worker[s] of a Washington employer * * * working in the State of Oregon." But the emphasized portion of the Exclusion indicates that an employer from either state may have contracts that require coverage in both states.

The Reciprocal Agreement, quoted at length in the findings of fact, sets forth nine criteria for determining whether a worker is temporarily working in another state. For the reasons set forth above, an exhaustive examination of all of the criteria is unnecessary. However, there are some comments that make the decision here clearer.

First, it is evident that ASAP is a Washington company, and that the intent of its owner is to have all employees be covered in Washington rather than to pay for Oregon workers' compensation insurance. The intent of his employees, another factor under the agreement, is less clear. Several have filed claims in Oregon that Liberty has been required to process.

[4] One could imagine, hypothetically, that there might be an employee who was actually working a job assignment in Washington and interrupted that assignment to take the Oregon assignment. There is no evidence of such a situation in this policy year.

One of the other factors that the Reciprocal Agreement analyzes is the extent to which other state regulations affect the decision. In Oregon's unemployment insurance rules, there is a provision that makes every temporary assignment an individual job, and treats every end of an assignment as a discharge. OAR 471-030-0038 states in part:

> **Work Separations, Job Referrals and Job Refusals**
>
> (1)(a) As used in ORS 657.176(2)(a), (b) and (c) and sections (1) through (5) of this rule the term "work" means the continuing relationship between an employer and an employee. An employment relationship exists even in circumstances where the work performed is not subject employment as set forth in ORS Chapter 657. This section does not apply where no employment relationship exists because the worker is an independent contractor or operating an independently established business. With the exception of the provisions of ORS 657.221(2)(a), the date an individual is separated from work is the date the employer-employee relationship is severed. *In the case of individuals working for temporary agencies or employee leasing companies, the employment relationship shall be deemed severed at the time that a work assignment ends.*

(Emphasis added). This administrative rule is applicable to workers in Oregon and it conflicts with ASAP's understanding of having an ongoing employment relationship with the workers in Oregon locations after an assignment ends. While this rule is not directly on point to the workers' compensation issue here, it highlights the complexity of the issues involved in choosing which law applies.

ASAP has failed to establish that the Reciprocal Agreement supports Washington coverage. ASAP's workers assigned to work in Oregon need Oregon coverage. This is not unexpected or unusual. As the Agreement says:

> It is understood that an employer from either Oregon or Washington may have a contract in the other state where they may have both Oregon and Washington workers which may require obtaining coverage in both states for that same contract.

(Ex. R11).

Reliance on Case Law. Similarly, ASAP's reliance on *Phelan, supra*., is misplaced. Phelan was an Oregon resident hired by a Washington logging company that performed 80 percent of its work in Washington and the rest in Oregon. The employer had Washington workers' compensation coverage for its workers and no insurance in Oregon. Finding that Phelan was a Washington employee (even though his first job with the employer was at an Oregon site where he was injured), the Court applied a permanent employment relation test. The inquiry was whether the job in Oregon was temporary. The Court stated:

> Here, the evidence establishes that Maxwell hired claimant after he received

> authorization from HSC's office in Washington. HSC's operations were run from the Washington office, and paychecks were issued from there. Although claimant's first job was at an Oregon logging site, he and Maxwell had discussed the probability that the next logging site would be in the Mt. St. Helens area of Washington. *HSC had no temporary employees as such*, but it did have short term jobs like the one at which claimant was employed. All employees were hired on the expectation that, if they performed adequately, they could remain employed. * * * Although he had never worked in the state of Washington before his injury, we conclude that he was a Washington worker temporarily working in Oregon and that he was a Washington employe exempt from coverage[.]

(84 Or App at 635; emphasis added).

The logic of the *Phelan* decision focuses on the intent of the Washington employer. Although the claimant lived in Oregon and happened to begin work for employer on an Oregon job, the expectation was that at least 80 percent of his work would be performed in Washington. The facts of the case established that the employer intended to keep claimant working (on an ongoing basis, not as an occasional temporary worker), and the next worksite would be in Washington. The Court accepted factually that claimant was a worker only temporarily working in Oregon.

The emphasized language of the opinion shows why *Phelan* does not apply to the current case. The claimant in *Phelan* was an employee hired for a short-term position that both sides hoped would turn into regular employment in Washington. He was not a temporary employee like ASAP's employees.

Practical Factors Necessitating Coverage in Oregon

For the reasons set forth above, I have concluded that neither the statute nor the Reciprocal Agreement support ASAP's argument that its workers are Washington workers temporarily in Oregon. There are other practical factors which further establish why Liberty must cover those workers.

First, as the facts have shown, ASAP's workers have been filing workers' compensation claims in Oregon.[5] There were two claims filed within the first week ASAP was in business, and ASAP was found to be a non-complying employer because it had no Oregon coverage. Mr. Yanez, the principal of ASAP, acknowledged that the company had no way of preventing its workers from filing Oregon claims if the injury occurred in Oregon.

Second, ORS 656.126 requires the Oregon insurer to insure what the out of state carrier does not, to protect Oregon workers. For instance, Liberty received a Longshore and Harbor Workers claim from an ASAP employee working in Oregon. Washington L&I does not have federal coverage, so Liberty (as the Oregon insurer) had to process the claim. Additionally,

[5] While the location where claimants file claims is not controlling, the filing of a claim in Oregon nevertheless means additional costs to the Oregon insurer, even if the claim ultimately transferred to Washington.

subsection (6) indicates that, depending on the amount of benefits eligible to a worker in the other state, there may be additional benefits that a person injured in Oregon (but filing in Washington) would be entitled to.

ASAP has not established that its workers were Washington workers temporarily working in the State of Oregon, and has failed to otherwise show that Liberty's premium audit was incorrect. Accordingly, Liberty's FPAB will be affirmed.

ORDER

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

That Liberty's November 10, 2014 Final Premium Audit Billing is AFFIRMED.

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. You may send exceptions via email to mitchel.d.curzon@state.or.us, or via mail to:

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

CERTIFICATE OF SERVICE

On the 30th day of September 2015, I mailed the foregoing PROPOSED ORDER in Reference No. 14-12-004.

BY FIRST CLASS MAIL:

Kenneth A. Sheppard
Attorney at Law
999 Third Avenue, Suite 2525
Seattle, WA 98104-4032

Frederick A Batson
PO Box 1147
Eugene OR 97440

Matthew E. Hedberg
Bullivant Houser Bailey PC
300 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2089

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

Ryan Clark
Hearing Coordinator
Office of Administrative Hearings