STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
Kyle Buckman DBA	)	OAH No. INS 2017-ABC-00219
NW Relocators, Inc.	)	Agency Case No.: INS 16-03-015

Procedural History

The Director of the Oregon Department of Consumer and Business Services (Director), by and through Division of Financial Regulation, (Division), commenced the above entitled administrative proceeding to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation (insurer) to Kyle Buckman DBA NW Relocators, Inc., (employer) pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0101 *et. seq.*

On July 27, 2016, 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 18, 2015, was correct. By Proposed Order dated February 22, 2017, Senior Administrative Law Dove L. Gutman affirmed the insurer's Final Premium Audit, dated November 18, 2015.

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.

Order

SAIF Corporation's Final Premium Audit issued November 18, 2015 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 May 1, 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 & BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	**PROPOSED ORDER**
	)	
KYLE BUCKMAN DBA	)	OAH Case No. 2017-ABC-00219
NW RELOCATORS, INC.	)	Agency Case No. INS-WCA 16-03-015

HISTORY OF THE CASE

On November 18, 2015, SAIF Corporation (SAIF or the insurer) issued an Oregon Final Premium Audit Billing to Kyle Buckman dba NW Relocators, Inc. (the employer) for the audit period September 1, 2014 through July 6, 2015. The employer received the Final Premium Audit Billing on November 20, 2015. On January 1, 2016, the employer requested a hearing.

On April 11, 2016, the employer submitted a Petition to the Department of Consumer & Business Services Division of Financial Regulation (the Division). On July 27, 2016, the Division referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Dove L. Gutman to preside at hearing.

On December 8, 2016, ALJ Gutman convened a prehearing telephone conference. Employer did not appear. Joy Wang, Attorney at Law, represented the insurer. Eric Williams appeared on behalf of insurer. On December 8, 2016, ALJ Gutman issued a Prehearing Order, scheduling the contested case hearing for January 18, 2017.

On January 18, 2017, ALJ Gutman convened a hearing in Salem, Oregon. Kyle Buckman appeared without counsel and testified on behalf of employer. Ms. Wang represented the insurer. Mr. Williams testified on behalf of insurer. The record closed on January 18, 2017.

ISSUE

Whether the insurer's Final Premium Audit Billing for the audit period September 1, 2014 through July 6, 2015 is incorrect.

EVIDENTIARY RULING

Insurer's Exhibits A1 through A12 and employer's Exhibits 1 through 4, were admitted into the record without objection.

FINDINGS OF FACT

Background

1. The employer, Kyle Buckman dba NW Relocators, Inc., operates a local moving company based in Wilsonville, Oregon. Mr. Buckman is the owner of the company. Mr. Buckman started the business in the second quarter of 2005. (Test. of Buckman.)

2. The employer's business operations include loading, transporting, and unloading household and office goods within Oregon and SW Washington. (Test. of Buckman.)

Audit period

3. On September 1, 2014, employer obtained workers' compensation insurance from SAIF (insurer). (Ex. A6.)

4. During the audit period (September 1, 2014 through July 6, 2015), employer worked as an independent contractor for Graebel Van Lines (Graebel), an interstate and intrastate moving company. (Test. of Buckman.)

5. Graebel maintained a warehouse in Wilsonville, Oregon. (Test. of Buckman.)

6. Employer employed one office assistant, Maya Maldarelli, and two local warehouse workers and drivers, Laszlo Szarvas and Charles Woosley. The employer directed and controlled its employees. Employer dispatched Mr. Szarvas and Mr. Woosley to transport goods for customers locally. (Test. of Buckman; Exs. A7, A9.)

7. Employer owned at least five vehicles[1] that were used in the transportation of customer's goods from one location to another. Employer was responsible for the cost and maintenance of the vehicles. Employer paid a percentage to Graebel to insure employer's vehicles as part of Graebel's fleet. (Test. of Buckman; Ex. A7.)

8. During the audit period, Graebel had difficulty retaining good drivers. Graebel asked employer to recruit drivers under employer's independent contract. Employer recruited and hired three drivers known to employer for cross country transportation of customer's goods: Travis Olson, John Cannon, and Wedemal Vierra.[2] (Test. of Buckman; Exs. 1, 2, 3.)

9. On May 24, 2014, employer entered into a contract with Travis Olson of 12627 48th Ave. NE Apartment #2, Marysville, WA, that stated, in pertinent part:

Description of services: Beginning on May 24th 2014, Travis

[1] Mr. Buckman testified that he owned and operated five vehicles. The documents submitted by insurer indicate that Mr. Buckman may have owned and operated seven vehicles. (Test. of Buckman; Ex. A7.)

[2] Mr. Vierra's last name is spelled differently in the documents submitted by insurer versus the documents submitted by employer. (Exs. A9, A10, 3.)

Olson will become an independent contractor with NW Relocators Inc. Services will include Interstate and Intrastate relocation services for customers of Graebel Van Lines.

Term/Termination: This Agreement may be terminated by either party immediately with written notice to the other party.

Relationship of Parties: It is understood by the parties that Travis Olson is an independent contractor with respect to NW Relocators Inc., and not an employee of NW Relocators Inc. NW Relocators Inc. will not provide fringe benefits, including health insurance benefits, Workers Compensation Insurance, paid vacation, or any other employee benefit, for the benefit of Travis Olson.

Travis Olson shall be responsible for procuring and operating the vehicles and the employment, hiring, training, supervising, and controlling its helpers.

Travis Olson shall be responsible for the safe and lawful operation of the vehicles used in the performance of the transportation contemplated by this Contract.

Rates, Charges and Payment for Services: The rates and charges for the transportation services contemplated by this Contract shall be stated in Schedule "A" attached to this Contract. The rates and charges as stated in Schedule A shall remain in effect for the term of the contract unless the Parties agree in writing to their modification, by mutual consent Schedule A may be modified, if the modification is in writing and signed by both parties.

NW Relocators Inc. will pay compensation to Travis Olson for the Services in accordance with Schedule A or any modification thereof upon completion of the Services. This compensation shall be payable in a lump sum within 15 days upon completion of each job under this Contract.

Bills of Lading: Each shipment here under shall be evidenced by and subject to the terms, conditions and provisions of the bill of lading, or other proof of delivery receipt. In the event of conflict between the terms, conditions and provision of such bill of lading or receipts and this Contract, the provisions of this Contract shall govern.

Freight Loss or Damage: Travis Olson shall be liable to NW Relocators INC [sic], for cargo claims occurring while in the

possession of or under the control of Travis Olson, relating to or arising out of Travis Olson solely negligent performance of this contract. The rates and or charges for loss or damage contemplated by this Contract shall be stated in Schedule "B."

Injuries: Travis Olson acknowledges that it is [his] obligation to obtain appropriate workers compensation insurance coverage for the benefit of Travis Olson. Travis Olson waives any rights to recovery from NW Relocators Inc. for any injuries that Travis Olson may sustain while performing services under this Contract and that are a result of the negligence of Travis Olson or Travis Olson employees.

Idemnification [sic]**:** Travis Olson agrees to indemnify and hold harmless NW Relocators Inc. from all claims, losses, expenses, fees including attorney fees, costs, and judgments that may be asserted against NW Relocators Inc. that result from the acts or omissions of Travis Olson, Travis Olson employees, if any and Travis Olson Agents.

(Ex. 1; emphasis in original.) Schedule A of the Contract provided, in part:

Rates and Charges

Transportation	70%
Origin Service Charge	100%
Destination Service Charge	100%
Fuel Surcharge	100%
Full Service Pack Job (labor)	100%
Custom Pack Job (labor)	100%
Pack Job (materials)	0%
Unpacking	100%
Impractical Operations	100%
Extra Labor	100%
Bulky Articles	100%
Waiting Time	50%
Commercial Services (labor)	100%
Auto transportation	70%
Auto Fuel Surcharge	100%

The above percentages are what NW Relocators is to pay Travis Olson. These amounts are to be paid off of revenue collected from Graebel Workplace Moving Solutions to NW Relocators Inc.

(Ex. 1 at 6.) Schedule B (Freight Loss and or Damages) of the Contract provided, in part:

Cargo claim	first 75% max at $600.00
Auto claim	100%
Loss of article	100%
Negligence	100%
Residential	100%

The above percentages are what Travis Olson is responsible for. Claims are paid by NW Relocators with the above amounts charged back to Travis Olson.

Travis Olson is to establish a claim reserve account in the amount of $2,500.00. The claim reserve account will be established by five $500.00 payments made monthly to NW Relocators Inc. with first payment due on June 24th 2014. This claim reserve will be held by NW Relocators until 6 months after date of Contract termination to cover all claims after termination of Contract.

(Ex. 1 at 7.) Employer provided the vehicle to Mr. Olson to transport goods cross country. Employer paid Mr. Olson a percentage out of the revenue employer received from Graebel for each job completed. Employer had the authority to hire and fire Mr. Olson. Employer never received proof that Mr. Olson obtained workers compensation insurance coverage for himself. (Test. of Buckman.) During the period of September 1, 2014 through July 6, 2015, employer paid Mr. Olson $50,610.14 for work completed. (Exs. 1 at 8, A9 at 17.)

10. On July 15, 2014, employer entered into a contract with John Cannon of 1118 180th St SW, Lynnwood, WA, that stated, in pertinent part:

> **Description of services:** Beginning on July 15th 2014, John Cannon will become an independent contractor with NW Relocators Inc. Services will include Interstate and Intrastate relocation services for customers of Graebel Van Lines.
>
> **Term/Termination:** This Agreement may be terminated by either party immediately with written notice to the other party.
>
> **Relationship of Parties:** It is understood by the parties that John Cannon is an independent contractor with respect to NW Relocators Inc., and not an employee of NW Relocators Inc. NW Relocators Inc. will not provide fringe benefits, including health insurance benefits, Workers Compensation Insurance, paid vacation, or any other employee benefit, for the benefit of John Cannon.
>
> John Cannon shall be responsible for procuring and operating the vehicles and the employment, hiring, training, supervising, and controlling its helpers.

John Cannon shall be responsible for the safe and lawful operation of the vehicles used in the performance of the transportation contemplated by this Contract.

Rates, Charges and Payment for Services: The rates and charges for the transportation services contemplated by this Contract shall be stated in Schedule "A" attached to this Contract. The rates and charges as stated in Schedule A shall remain in effect for the term of the contract unless the Parties agree in writing to their modification, by mutual consent Schedule A may be modified, if the modification is in writing and signed by both parties.

NW Relocators Inc. will pay compensation to John Cannon for the Services in accordance with Schedule A or any modification thereof upon completion of the Services. This compensation shall be payable in a lump sum within 15 days upon completion of each job under this Contract.

Bills of Lading: Each shipment here under shall be evidenced by and subject to the terms, conditions and provisions of the bill of lading, or other proof of delivery receipt. In the event of conflict between the terms, conditions and provision of such bill of lading or receipts and this Contract, the provisions of this Contract shall govern.

Freight Loss or Damage: John Cannon shall be liable to NW Relocators INC [sic], for cargo claims occurring while in the possession of or under the control of John Cannon, relating to or arising out of John Cannon solely negligent performance of this contract. The rates and or charges for loss or damage contemplated by this Contract shall be stated in Schedule "B."

Injuries: John Cannon acknowledges that it is [his] obligation to obtain appropriate workers compensation insurance coverage for the benefit of John Cannon. John Cannon waives any rights to recovery from NW Relocators Inc. for any injuries that John Cannon may sustain while performing services under this Contract and that are a result of the negligence of John Cannon or John Cannon employees.

Idemnification [sic]**:** John Cannon agrees to indemnify and hold harmless NW Relocators Inc. from all claims, losses, expenses, fees including attorney fees, costs, and judgments that may be asserted against NW Relocators Inc. that result from the acts or

omissions of John Cannon, John Cannon employees, if any and John Cannon Agents.

(Ex. 2; emphasis in original.) Schedule A of the Contract provided, in part:

Rates and Charges

Transportation	70%
Origin Service Charge	100%
Destination Service Charge	100%
Fuel Surcharge	100%
Full Service Pack Job (labor)	100%
Custom Pack Job (labor)	100%
Pack Job (materials)	0%
Unpacking	100%
Impractical Operations	100%
Extra Labor	100%
Bulky Articles	100%
Waiting Time	50%
Commercial Services (labor)	100%
Auto transportation	70%
Auto Fuel Surcharge	100%

The above percentages are what NW Relocators is to pay John Cannon. These amounts are to be paid off of revenue collected from Graebel Workplace Moving Solutions to NW Relocators Inc.

(Ex. 2 at 6.) Schedule B (Freight Loss and or Damages) of the Contract provided, in part:

Cargo claim	first 75% max at $600.00
Auto claim	100%
Loss of article	100%
Negligence	100%
Residential	100%

The above percentages are what John Cannon is responsible for. Claims are paid by NW Relocators with the above amounts charged back to John Cannon.

John Cannon is to establish a claim reserve account in the amount of $2,500.00. The claim reserve account will be established by five $500.00 payments made monthly to NW Relocators Inc. with first payment due on July 15th 2014. This claim reserve will be held by NW Relocators until 6 months after date of Contract termination to cover all claims after termination of Contract.

(Ex. 2 at 7.) Employer provided the vehicle to Mr. Cannon to transport goods cross country. Employer paid Mr. Cannon a percentage out of the revenue employer received from Graebel for each job completed. Employer had the authority to hire and fire Mr. Cannon. Employer never received proof that Mr. Cannon obtained workers compensation insurance coverage for himself. (Test. of Buckman.) During the period of September 1, 2014 through July 6, 2015, employer paid Mr. Canon $87,720.25 for work completed. (Exs. 2 at 8-10, A9 at 17.)

11. On April 22, 2015, employer entered into a contract with Wedemal Vierra of 811 Carlson Drive, Orlando, FL, that stated, in pertinent part:

> **Description of services:** Beginning on April 22nd 2015, Wedemal Vierra will become an independent contractor with NW Relocators Inc. Services will include Interstate and Intrastate relocation services for customers of Graebel Van Lines.
>
> **Term/Termination:** This Agreement may be terminated by either party immediately with written notice to the other party.
>
> **Relationship of Parties:** It is understood by the parties that Wedemal Vierra is an independent contractor with respect to NW Relocators Inc., and not an employee of NW Relocators Inc. NW Relocators Inc. will not provide fringe benefits, including health insurance benefits, Workers Compensation Insurance, paid vacation, or any other employee benefit, for the benefit of Wedemal Vierra.
>
> Wedemal Vierra shall be responsible for procuring and operating the vehicles and the employment, hiring, training, supervising, and controlling its helpers.
>
> Wedemal Vierra shall be responsible for the safe and lawful operation of the vehicles used in the performance of the transportation contemplated by this Contract.
>
> **Rates, Charges and Payment for Services:** The rates and charges for the transportation services contemplated by this Contract shall be stated in Schedule "A" attached to this Contract. The rates and charges as stated in Schedule A shall remain in effect for the term of the contract unless the Parties agree in writing to their modification, by mutual consent Schedule A may be modified, if the modification is in writing and signed by both parties.
>
> NW Relocators Inc. will pay compensation to Wedemal Vierra for the Services in accordance with Schedule A or any modification thereof upon completion of the Services. This compensation shall

be payable in a lump sum within 15 days upon completion of each job under this Contract.

Bills of Lading: Each shipment here under shall be evidenced by and subject to the terms, conditions and provisions of the bill of lading, or other proof of delivery receipt. In the event of conflict between the terms, conditions and provision of such bill of lading or receipts and this Contract, the provisions of this Contract shall govern.

Freight Loss or Damage: Wedemal Vierra shall be liable to NW Relocators INC [sic], for cargo claims occurring while in the possession of or under the control of Wedemal Vierra, relating to or arising out of Wedemal Vierra solely negligent performance of this contract. The rates and or charges for loss or damage contemplated by this Contract shall be stated in Schedule "B."

Injuries: Wedemal Vierra acknowledges that it is [his] obligation to obtain appropriate workers compensation insurance coverage for the benefit of Wedemal Vierra. Wedemal Vierra waives any rights to recovery from NW Relocators Inc. for any injuries that Wedemal Vierra may sustain while performing services under this Contract and that are a result of the negligence of Wedemal Vierra or Wedemal Vierra employees.

Idemnification [sic]**:** Wedemal Vierra agrees to indemnify and hold harmless NW Relocators Inc. from all claims, losses, expenses, fees including attorney fees, costs, and judgments that may be asserted against NW Relocators Inc. that result from the acts or omissions of Wedemal Vierra, Wedemal Vierra employees, if any and Wedemal Vierra Agents.

(Ex. 3; emphasis in original.) Schedule A of the Contract provided, in part:

Rates and Charges

Transportation	70%
Origin Service Charge	100%
Destination Service Charge	100%
Fuel Surcharge	100%
Full Service Pack Job (labor)	100%
Custom Pack Job (labor)	100%
Pack Job (materials)	0%
Unpacking	100%
Impractical Operations	100%
Extra Labor	100%

Bulky Articles	100%
Waiting Time	50%
Commercial Services (labor)	100%
Auto transportation	70%
Auto Fuel Surcharge	100%

The above percentages are what NW Relocators is to pay Wedemal Vierra. These amounts are to be paid off of revenue collected from Graebel Workplace Moving Solutions to NW Relocators Inc.

(Ex. 3 at 6.) Schedule B (Freight Loss and or Damages) of the Contract provided, in part:

Cargo claim	first 75% max at $600.00
Auto claim	100%
Loss of article	100%
Negligence	100%
Residential	100%

The above percentages are what Wedemal Vierra is responsible for. Claims are paid by NW Relocators with the above amounts charged back to Wedemal Vierra.

Wedemal Vierra is to establish a claim reserve account in the amount of $2,500.00. The claim reserve account will be established by five $500.00 payments made monthly to NW Relocators Inc. with first payment due on May 24th 2015. This claim reserve will be held by NW Relocators until 6 months after date of Contract termination to cover all claims after termination of Contract.

(Ex. 3 at 7.) Employer provided the vehicle to Mr. Vierra to transport goods cross country. Employer paid Mr. Vierra a percentage out of the revenue employer received from Graebel for each job completed. Employer had the authority to hire and fire Mr. Vierra. Employer never received proof that Mr. Vierra obtained workers compensation insurance coverage for himself. (Test. of Buckman.) During the period of September 1, 2014 through July 6, 2015, employer paid Mr. Vierra $22,845.21 for work completed. (Exs. 3 at 8, A9 at 17.)

12. Graebel central dispatch (located in Colorado) dispatched Mr. Olson, Mr. Cannon, and Mr. Vierra to work sites cross country. Central dispatch contacted each driver by phone and dispatched the driver to a scheduled job and/or jobs. The driver contacted the customer and confirmed pickup and/or delivery; scheduled his work hours; loaded, transported and unloaded the goods; and hired temporary workers (per job) as needed. After completing the job, the driver submitted the completed paperwork to Graebel. Following receipt of the paperwork, Graebel paid the employer a percentage for each completed job. Employer then paid a percentage out of

the revenue it received for the job to the driver that completed the job.[3] Employer did not withhold taxes. (Test. of Mr. Buckman; Exs 1, 2, 3.)

13. The employer required Mr. Olson, Mr. Cannon, and Mr. Vierra to provide the employer with receipts for any costs (i.e., vehicle, equipment, maintenance, etc.) that the driver incurred for each job. (Test. of Mr. Buckman; Exs. 1, 2, 3.)

14. Graebel informed employer if the three drivers did not perform their duties properly (i.e., if they were late and/or delivered damaged goods). (Test. of Buckman.)

15. During the audit period, Mr. Olson, Mr. Cannon, and Mr. Vierra were not registered business owners in Oregon. (Test. of Williams.)

16. On December 23, 2014, David Heironimus, auditor with insurer, completed a New Account Survey on employer and provided the employer with the survey results. (Exs. A7, A8.) During the survey, Mr. Heironimus spoke with employer regarding employer's three contract drivers, including employer's requirement that the contract drivers obtain their own workers' compensation insurance. Mr. Heironimus advised employer to ensure that all of the required insurance information on the drivers be available at any future audit to review the status of each driver as either "subject" or "non-subject" to employer's workers' compensation policy. (Ex. A7 at 8.)

17. On or about July 6, 2015, employer's workers' compensation insurance policy with insurer was cancelled. (Ex. A12 at 4.)

Additional information

18. On November 18, 2015, Jessicah Matshe, auditor with insurer, completed a Final Audit on employer. (Ex. A9.) During the audit, Ms. Matshe identified payments made by employer outside of payroll to drivers Travis Olson, John Cannon and Wedemal Vierra. Ms. Matshe determined that because employer had no proof that the three drivers secured their own workers' compensation coverage, employer's payments to the drivers totaling $161,175 had to be included at audit. Ms. Matshe determined that employer's total Oregon subject wages were under reported, resulting in an audit adjustment owed by employer. (*Id*. at 1, 6, 7, 17.)

19. On November 18, 2015, insurer issued a Final Premium Audit Billing to employer for the audit period September 1, 2014 through July 6, 2015. (Ex A10.)

20. The employer's association with Graebel ended on February 28, 2016. (Test. of Buckman.)

///

[3] During the hearing, Mr. Buckman explained that for a move costing $50,000, Graebel would pay employer 54 percent (or $27,000) for the job. Employer would then pay the driver of the job a percentage of the $27,000. (Test. of Buckman.)

CONCLUSION OF LAW

The insurer's Final Premium Audit Billing for the audit period September 1, 2014 through July 6, 2015 is correct.

OPINION

In matters challenging a final premium audit, the employer bears the burden of proving the audit is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). To satisfy this burden, the employer must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Failure to demonstrate independent contractor status

The employer contends that Travis Olson, John Cannon, and Wedemal Vierra were independent contractors and exempt from workers' compensation coverage.

The Oregon Supreme Court, in *S-W Floor Cover Shop v. National Council on Compensation Insurance*, 318 Or 614 (1994), provided a framework for determining whether certain individuals are exempt from workers' compensation coverage. *S-W Floor* provides, in relevant part:

> A determination first is made as to whether one is a "worker" before a determination is made as to whether that "worker" is a "nonsubject" worker pursuant to one of the exemptions of ORS 656.027. The initial determination of whether one is a "worker" under ORS 656.005(28) continues to incorporate the judicially created "right to control" test. One who is not a "worker" under that test is not subject to workers' compensation coverage, and the inquiry ends. The "nonsubject worker" provisions of ORS 656.027 never come into play. If the initial determination made under ORS 656.005(28) is that one is a worker because one is subject to direction and control under the judicially created "right to control" test, then one goes on to determine under ORS 656.027 whether the worker is "nonsubject" under one of the exceptions of that statute. *S-W Floor*, 318 Or at 630-631 (1994).

ORS 656.017 requires employers to carry workers' compensation coverage for all "subject workers." ORS 656.005 sets forth definitions applicable to the workers' compensation statute and provides, in pertinent part:

> (13)(a) "Employer" means any person * * * who contracts to pay a

> remuneration for and secures the right to direct and control the services of any person.
>
> * * * * *
>
> (28) "Subject worker" means a worker who is subject to this chapter as provided by ORS 656.027.
>
> * * * * *
>
> (30) "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 * * *.
>
> (31) "Independent contractor" has the meaning for that term provided in ORS 670.600.

A "subject worker" is any worker who is subject to the workers' compensation statutes. All workers are subject workers unless a statutory exception makes them nonsubject workers. ORS 656.005(28); *SAIF v. DCBS Ins. Div.*, 250 Or App 360 (2012). Whether a person is a "subject worker" depends on whether the person agrees to provide services for remuneration and whether the person's services are subject to the putative employer's direction and control. *RJ Enterprises, LLC v. DCBS*, 255 Or App 439 at 447 (2013), citing *DCBS v. Clements*, 240 Or App 226 at 232 (2010).

The first issue to address is whether Mr. Olson, Mr. Cannon, and Mr. Vierra were subject to the direction and control of the employer.

There are two tests that are used to determine whether an individual is a "worker" – the "right to control" test and the "nature of the work" test. *SAIF v. DCBS Ins. Div.*, 250 Or App 360 at 364-365 (2012). The "right to control" test examines whether the employer has a right to control the individual's performance. The "right to control" test includes four factors: (1) direct evidence of the right to, or exercise of, control; (2) the furnishing of tools and equipment; (3) the method of payment; and (4) the right to fire. *SAIF v. DCBS*, 250 Or App at 364 (2012), citing *Clements*, 240 Or App at 234. The "nature of the work" test examines the significant factors relevant to the nature of the work including indicators of how integrated and coordinated a particular individual's activity was in the employer's overall production pattern. *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614 at 619 (2012), citing *Woody v. Waibel*, 276 Or App 189 at 198 (1976). The "nature of the work" test consists of two elements. The first is the character of the person's work or business – its skill, its status as a separate enterprise and the extent to which it may be expected to carry the burden of its accidents itself. *SAIF v. DCBS*, 250 Or App at 364 (2012), citing *Stamp v. DCBS*, 169 Or App 354 at 358 (2000). The second is the relation of the person's work to the employer's business – how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether it is of sufficient duration to be the hiring of continuing services rather than contracting for a particular job. *SAIF v. DCBS*,

250 Or App at 364 (2012), citing *Stamp v. DCBS*, 169 Or App 354 at 359 (2000).

When an employer has the right to control an individual's performance in some respects but not in others, both the "right to control" and the "nature of the work" tests must be applied to determine whether the individual(s) at issue are "workers" or independent contractors. *SAIF v. DCBS*, 250 Or App at 370 (2012).

Right to control test. In this case, the evidence does not support a finding that the drivers were completely free from the employer's direction and control. Although employer did not dispatch the drivers to scheduled job sites or control their work hours, the employer owned and maintained the vehicles that were used by the drivers. Additionally, employer paid for the cost to insure the vehicles and required the drivers to provide receipts for any vehicle/equipment costs incurred during each job (presumably for reimbursement reasons). As such, employer retained and exercised the right to control the equipment used by the drivers, and by doing so, employer directed and controlled *some* activities of the drivers utilizing the equipment.

Nature of the work test. Employer owned and operated an interstate and intrastate moving company, transporting goods from one location to another. The drivers at issue in this case (Mr. Olson, Mr. Cannon, and Mr. Vierra) transported goods cross country. The drivers provided services in loading, transporting and unloading goods. Those services were an integral part of the employer's business operation. There is no evidence that the drivers maintained independent businesses and/or registrations separate from employer's work. In addition, though the audit period was only a period of 10 months, the record demonstrates the drivers' services were a continuous and regular part of employer's regular work. Consequently, an examination of the relative nature of the work establishes the necessary relationship to support the insurer's determination in this matter.

Employer presented evidence that the three drivers signed contracts agreeing they were "independent contractors" with respect to employer. However, the fact that the parties may have believed and operated on the premise that their relationship was that of an independent contractor does not control the outcome of the required analysis under the applicable laws. *Woody v. Waibel*, 276 Or App 189 (1976). Here, a preponderance of the evidence supports the insurer's determination that the three drivers were subject to employer's direction and control.

Therefore, I find that the employer failed to demonstrate that the three drivers were free from its direction and control. Accordingly, the employer failed to demonstrate that the three drivers were not subject workers.

The next issue to determine is whether Mr. Olson, Mr. Cannon and Mr. Vierra qualify as nonsubject workers under the statutory scheme. *S-W Floor*, 318 Or at 630-631 (1994).

ORS 656.029(1) provides, in part:

> 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. ***.

ORS 656.027 identifies nonsubject workers and provides, in part:

> All workers are subject to this chapter except those nonsubject workers described in the following subsections:
>
> * * * * *
>
> (5) A worker engaged in the transportation in interstate commerce of goods, persons or property for hire by rail, water, aircraft or motor vehicle, and whose employer has no fixed place of business in this state.
>
> * * * * *
>
> (15) A person who has an ownership or leasehold interest in equipment and who furnishes, maintains and operates the equipment. As used in this subsection "equipment" means:
>
> * * * * *
>
> (c) A motor vehicle used in the transportation of property by a for-hire motor carrier that is required under ORS 825.100 or 825.104 to possess a certificate or permit or to be registered.

As indicated above, 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.

In addition, nonsubject workers include a worker engaged in the transportation in interstate commerce of goods for hire by motor vehicle and whose employer has no fixed place of business in this state, and a person who has an ownership or leasehold interest in equipment and who furnishes, maintains and operates the equipment.

Exemption (5). During the audit period, Mr. Olson, Mr. Cannon, and Mr. Vierra engaged in the transportation in interstate commerce of goods for hire by motor vehicle. However, the employer in this case, who asserted all along that it was not the three drivers' employer, had a fixed place of business in Oregon. As such, Mr. Olson, Mr. Cannon, and Mr. Vierra are not exempt under ORS 656.027(5).

Exemption (15). During the audit period, the employer (not the three drivers) owned and maintained the vehicles used by the three drivers in the transportation of goods cross country. Consequently, Mr. Olson, Mr. Cannon, and Mr. Vierra are not exempt under ORS 656.027(15).

Therefore, Mr. Olson, Mr. Cannon and Mr. Vierra do not qualify as nonsubject workers under ORS 656.027.

Accordingly, the employer has not shown that SAIF (the insurer) erred in including compensation paid to Mr. Olson, Mr. Cannon and Mr. Vierra in the audited payroll. The November 18, 2015, billing is correct.

ORDER

I propose the Department of Consumer & Business Services Division of Financial Regulation issue the following order:

SAIF's Final Premium Audit Billing dated November 18, 2015 for the audit period September 1, 2014 through July 6, 2015 is AFFIRMED.

Dove L. Gutman
Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

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 **Division of Financial Regulation** within 30 days following the date of service of this Proposed Order. You may send exceptions via email to gail.m.gage@oregon.gov, or via mail to:

Gail M. Gage
Compliance Specialist 3
Division of Financial Regulation
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF MAILING

On February 22, 2017 I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2017-ABC-00219**.**

By: First Class Mail

NW Relocators Inc
Kyle Buckman
21653 SW Aspen Place
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By: Electronic Mail

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Lucy M Garcia
Hearing Coordinator