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STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:) FINAL ORDER
Jerry Trimble Helicopters, Inc.) OAH No. INS 2017-ABC-00234
) Agency Case No.: INS 16-09-001

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 Jerry Trimble Helicopters, 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 September 6, 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 May 20, 2016, was correct. By Proposed Order dated February 17, 2017, Administrative Law Judge Samantha A. Fair affirmed the insurer’s Final Premium Audit, dated May 20, 2016.

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.

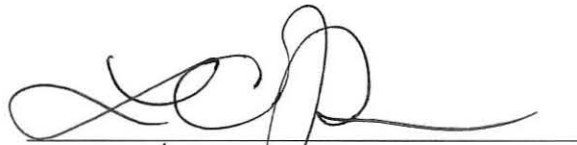
Order

SAIF Corporation’s May 20, 2016 Final Audit Billing, for audit period April 1, 2015 to April 1, 2016, is **AFFIRMED**. Jerry Trimble Helicopters, Inc. is liable for the adjusted premium.

Notice of Right to Judicial Review

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

9
10 Dated May 11, 2017



11 Laura Cali Robison
12 Administrator, Division of Financial Regulation
13 Insurance Commissioner and Chief Actuary
14 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
PREMIUM AUDIT WORK**

IN THE MATTER OF:)	PROPOSED ORDER
)	
JERRY TRIMBLE HELICOPTERS, INC.)	OAH Case No. 2017-ABC-00234
)	Agency Case No. INS-WCA-16-09-001
and)	
)	
SAIF CORPORATION)	

HISTORY OF THE CASE

On May 20, 2016, SAIF Corporation (SAIF) issued a Final Premium Audit Billing to Jerry Trimble Helicopters, Inc. (JTH) for the period April 1, 2015 to April 1, 2016. On June 21, 2016, JTH filed an objection to the billing with the Department of Consumer and Business Services, Division of Financial Regulation (Department). On August 3, 2016, JTH filed a Petition with the Department requesting a hearing and a stay of collection during the pendency of the contested case proceeding.

On September 6, 2016, the Department referred the matter to the Office of Administrative Hearings (OAH).

On September 13, 2016, the OAH issued an Order Granting Stay of Collection during the pendency of the contested case proceeding. On October 11, 2016, the OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matter.

On November 4, 2016, ALJ Fair convened a telephone prehearing conference. Jerry Trimble, corporate secretary and co-owner of JTH, appeared on behalf of JTH. SAIF appeared and was represented by Special Assistant Attorney General (AAG) Nathan Boughton. Tracy Meyer from SAIF also appeared. ALJ Fair scheduled the hearing for January 9, 2017, and set deadlines for submission of witness lists and exhibits.

On January 9, 2017, because of adverse weather conditions, the OAH rescheduled the hearing for February 7, 2017.

ALJ Fair convened a hearing on February 7, 2017, in Salem, Oregon. JTH appeared and was represented by Mr. Trimble, who testified. Also testifying on JTH's behalf was Alison Row, president and co-owner of JTH. SAIF appeared and was represented by Special AAG

Boughton.¹ Testifying on behalf of SAIF was Tracy Meyer, premium audit analyst. The record closed on February 7, 2017, at the conclusion of the hearing.

ISSUE

Whether SAIF's May 20, 2016 Final Premium Audit Billing correctly billed JTH for its payments to its flight instructors. ORS 656.005 and ORS 656.027.

EVIDENTIARY RULINGS

Exhibits A1 through A20, offered by SAIF, were admitted into the record without objection. Exhibits R2 through R4, offered by JTH, were admitted into the record without objection. The ALJ overruled SAIF's hearsay objections to Exhibit R1, offered by JTH, and admitted it into the record.

FINDINGS OF FACT

1. JTH is a flight school, operating from a hanger located in McMinnville, Oregon, that offers helicopter and airplane flight instruction for customers to obtain federal certification as licensed private or commercial pilots.² It also offers helicopter rides for scenic and photo flights, helicopter maintenance, commission sales of aircraft, and utility work, such as airlifting trees from Christmas tree farms. It has a fleet of six to seven helicopters and one to two fixed wing airplanes for these services. Each of JTH's aircraft has pilot operating manuals and checklists onboard for the operation of each of its aircraft as required by the Federal Aviation Administration (FAA). JTH maintains the aircraft and provides any equipment necessary for the operation of the aircraft. On very rare occasions, customers use their own aircraft for flight instruction. (Ex. A9 at 7; test. of Trimble.) JTH also owns the flight simulators used by customers as part of the course for flight instruction. (Test. of Trimble.)

2. JTH has a website on which it advertises its services. On the website, it states:

- We offer fast, high-quality primary and advanced flight training in the Robinson R-22 and R-44 * * *. Since flight instruction is our priority, you can be guaranteed our full attention to provide you with the best training experience possible. We take an enormous amount of pride in providing individualized instruction by experienced instructors. (Ex. A12 at 1.)
- Training will be given by high time pilots with many hours or real world longline experience. Our instructors have worked for operators such as Erickson and HTS. (Ex. A17 at 1.)

¹ Also present during the hearing as observers were Robert Miller and Emilio Delgado, both from SAIF.

² JTH also has locations in Texas and California. In its audit, SAIF only included payments made to individuals performing services in Oregon. (Ex. A9 at 7, 15.)

3. JTH's mission statement on its website is "To provide the best, most experienced helicopter flight instruction training in a highly efficient manner." (Ex. A12 at 1-2.)

4. JTH posts programs and pricing on its website. It lists helicopter flight time as \$205 to \$415 per hour for the aircraft and an additional \$40 per hour for an instructor. The website lists prices for customers to obtain private rotorcraft helicopter certificates as \$10,645, instrument rotorcraft certificates as \$6,675, and commercial rotorcraft helicopter certificates as \$24,725. Each of these total prices include a per line price breakdown for such items as solo and dual flight time, written materials, and flight simulator time. The breakdown does not specify flight instructor time. The hourly rate for the dual flight time is listed as \$40 more than for the solo flight time. (Ex. A13 at 1-3.) JTH's website provides additional details regarding its certified flight instructor training program, including a breakdown of the costs. This breakdown does not specify charges for flight instructor time. (Ex. A16 at 1.) JTH's website also posts pricing for certificates related to its fixed wing training in its Cessna airplane. The breakdown of the pricing for these certificates does not specify charges for flight instructor time. (Ex. A15 at 1-3.)

5. The typical business model for small flight schools is for the school to maintain a fleet of aircraft and rent the aircraft to the customers. The flight school will associate with a number of flight instructors, who provide the required flight instruction for the customers. The flight school will charge the customers for the aircraft rental and the customer will pay the flight instructor separately. The flight school and flight instructors operate with an understanding that the flight instructors are independent contractors. JTH follows this business model in its own operations as it is a "Mom-and-Pop" school, operated by the married owners, with a casual atmosphere that the owners, the flight instructors, and the customers appreciate. However, because most customers pay by credit card and flight instructors do not have the equipment to process credit card payments, JTH bills the customer for all the costs and then pays the flight instructors. (Test. of Trimble.)

6. JTH verbally contracts with the flight instructors for them to safely and professionally provide flight instruction services for JTH's customers in compliance with federal regulations. In exchange, JTH bills the customers \$40 per hour for the flight instructors' logged time. After the customers pay their bills, JTH pays the flight instructors \$35 per hour for their logged time.³ JTH does not have any written contracts with any of its flight instructors. JTH would have no legal recourse against any of the flight instructors if a flight instructor unilaterally ceased performing services for JTH. Even if a flight instructor went to work at a competitor's flight school and took JTH's customers with him, JTH would have no recourse against the flight instructor. Likewise, the flight instructors would have no legal recourse against JTH if JTH unilaterally removed the flight instructor from its list and its online scheduling program. (Ex. R1; test. of Trimble.)

7. JTH provides workers' compensation insurance through SAIF for its office and shop

³ JTH has one flight instructor, Bill Hayden, who sets his own rate and provides flight instruction for JTH's customers and for customers of another competitor in the same McMinnville airfield. (Test. of Row.)

personnel. (Test. of Row.) JTH does not provide the flight instructors with coverage under its SAIF policy. (Ex. A6 at 1.) The flight instructors are not covered by any workers' compensation insurance. The flight instructors do not have their own business websites or entities. The flight instructors do not have their own aircraft. (Test. of Trimble.) The flight instructors do not have business licenses. They do not furnish their own equipment. They cannot hire other employees or subcontractors, they do not advertise, and they do not have liability insurance.⁴ (Ex. A9 at 7.) JTH keeps files on all the flight instructors as required by the Transportation Security Administration (TSA) with copies of the flight instructors' certifications and licenses. JTH also requires the flight instructors to complete random drug testing, and the results of those tests must be kept in the flight instructors' files, as required by the TSA. (Test. of Trimble.)

8. JTH does not require the flight instructors to work specific hours. The flight instructors input their availability on JTH's online calendaring program. JTH does not prohibit the flight instructors from performing services for other individuals or companies. (Ex. R1 at 1; test. of Trimble.)

9. JTH recruits flight instructors by job postings. (Ex. A6 at 1.) On its website, JTH has a job opportunities tab. Within that tab, JTH posted the following advertisement:

[JTH] is seeking motivated individuals to fill the following positions in McMinnville, Oregon:

1. Fixed Wing Certified Flight Instructor (CFI) / Multi Engine Instructor (MEI) preferred

If you would like to join the JTH team and meet the minimum qualification for one of the positions listed above, please email your resume to: [Ms. Row].

(Ex. A19 at 1.)

10. In order to obtain certification as a licensed pilot, customers must be trained by a licensed flight instructor with the appropriate certification. Federal rules require a customer to log in a specific number of hours with a licensed flight instructor as well as solo flight time. Flight instructors must perform flight training in compliance with federal requirements. Federal requirements include the customer's demonstration of an understanding of the fundamentals of flight, flight regulations, emergency procedures, and weather. Once a flight instructor is satisfied with the performance of the customer, the flight instructor signs off on the customer's license forms, certifying that the customer is ready for licensing. The customer then arranges a check ride with a third party to complete the licensing process. Check rides are not performed through JTH or its flight instructors. (Test. of Trimble.)

11. JTH provides training manuals for its programs, including one for the private pilot

⁴ JTH has an aviation insurance policy to pay for property damage, personal injury and medical expenses arising from accidents involving its aircraft. (Exs. R3 and R4.)

rotorcraft helicopter certification program, which are located on its website. (Ex. A20; test. of Trimble.) JTH's private pilot manual states that the "Course Objective" is for the customer to "obtain the knowledge, skill and aeronautical experience necessary to meet the requirements for a private pilot certificate." (Ex. A20 at 2.) The manual provides that course completion requires the customer to have a total of 30 hours of flight time and 30.5 hours of ground instruction with a certified flight instructor. (*Id.* at 2-3.) The manual includes the three stages of training for the private pilot program and provides checklists for each flight and ground lesson. (*Id.* at 4-79.) The FAA requires the use of syllabuses for flight training. JTH prefers the flight instructors to use its manuals but does not require them to do so. Some flight instructors, who received their own flight training at another flight school, prefer to use the syllabus from the other flight school. JTH will remind the flight instructors to use a syllabus and complete the checklists but does not require the flight instructor to provide JTH copies of the completed syllabus. (Test. of Trimble.)

12. Flight instructors perform ground instruction with the customers as part of flight training. JTH lets the flight instructors choose how to charge customers for ground instruction, which is only five percent of the total cost of certification. Frequently, the customer will pay the flight instructor directly in cash after the conclusion of ground instruction. In such cases, JTH will not include these charges in its billing to the customer. Some flight instructors may waive charging the customers for the ground instruction, in which case JTH does not bill the customer for the ground instruction time. (Test. of Trimble.)

13. The FAA requires customers to pass a written test before solo flights. The flight instructors give the tests to the customers once the customers have reached a level of proficiency as determined by the flight instructors. JTH leaves it to the flight instructors to determine if a customer needs additional training to achieve proficiency. JTH provides all materials and books for the flight instructors' use but leaves it to the flight instructors to decide which materials and books the flight instructors will actually use, whether JTH's materials or other materials. (Test. of Trimble.)

14. Potential customers normally contact JTH either through its website or word of mouth from members of the pilot community. (Test. of Trimble.) A prospective customer will contact JTH, who will schedule a demo flight and assign one of the flight instructors for that demo flight. After the demo flight, if the customer wishes to continue with a training program, the customer will access JTH's online scheduling program and reserve an aircraft for instruction times in conjunction with the flight instructor's online-listed availability. (A18 at 1; test. of Row.) If a customer is dissatisfied with a flight instructor, the customer may complain to JTH. Dependent upon the complaint, JTH may assign the customer to another flight instructor (such as a customer complaining that the flight instructor did not have enough experience) or speak with the flight instructor to correct a behavior (such as a flight instructor who hogs the flight controls). If JTH continues to receive consistent complaints from customers, JTH will discontinue using that flight instructor. Sometimes, customers will make arrangements directly with a flight instructor to switch to another flight instructor. (Test. of Trimble.)

15. If a flight instructor becomes suddenly unavailable to perform a scheduled flight, the flight instructor will call the customer to reschedule the flight or will arrange for another flight instructor to cover the scheduled flight. JTH would not allow a flight instructor to arrange for a

flight instructor not on JTH's list of flight instructors to provide flight instruction services to JTH's customers. Before JTH would allow a flight instructor to provide services to its customers, JTH must meet the potential flight instructor, verify the flight instructor's certifications and licensing, and test fly with the flight instructor. (Test. of Trimble.)

16. The flight instructors' services to the customers are crucial to the operation of JTH as a flight school. Ninety percent of JTH's business is its flight school business. Without the flight instructors' services, JTH could not operate as a flight school. (Test. of Trimble.)

17. During the period of April 1, 2015 to April 1, 2016, JTH paid the following individuals the following amounts to perform services as flight instructors:

Daniel Lee Boone	\$25,328
Ryan Baily	\$26,987
Adrian Michael Schneiter	\$7,595
Heath Van Aken	\$36,513
Nicholas James McDonald	\$25,725
Daniel Robert Kraus	\$788

(Exs. A9 at 15; A10 at 1.)

18. The insurance contract with SAIF required JTH to pay insurance premiums based upon "payroll and all other remuneration paid or payable during the policy period for the services of * * * employees * * * and all other persons engaged in work that could make [SAIF] liable" for workers' compensation claims. (Ex. A1 at 4.) The insurance contract further provided that SAIF may audit JTH's business records during the "policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium." (*Id.*)

19. On April 11, 2016, SAIF issued a letter to JTH, informing it that SAIF would be conducting an audit of JTH's records to verify that it is being charged the correct premiums for the coverage provided for the period April 1, 2015 through March 31, 2016. (Ex. A7 at 1.)

20. The National Council on Compensation Insurance (NCCI) determines classification codes and rates for use in workers' compensation insurance policies. SAIF used the NCCI-provided classification codes and rates in determining JTH's premium. (Test. of Meyer.) The classification codes SAIF used on JTH's policy were 7403 and 7425. Classification code 7403 is for workers performing aviation ground crew services, including repairs and maintenance of aviation equipment and structures. Classification code 7425 is for workers performing aviation flying crew services for helicopters and other fixed wing aircraft, including ground time and on call time. (Ex. A3 at 1.)

21. Mr. Boone, Mr. Baily and Mr. Schneiter also perform mechanic or shop help services for JTH. JTH pays them as employees for the hours spent on such services, which is reported as part of the JTH payroll. In its audit for the period April 1, 2015 to April 1, 2016, SAIF attributed the hours spent performing mechanic and shop help services of these three workers to

classification code 7403. For this policy period, SAIF accepted the information recorded in the flight and maintenance log to divide their pay between classification codes 7403 and 7425.⁵ (Ex. A9 at 3, 12.) When Mr. Boone, Mr. Baily and Mr. Schneiter performed flight instruction services, JTH treated them as independent contractors and did not include payments for flight instruction in JTH's payroll. (Test. of Trimble.)

22. On May 20, 2016, SAIF issued JTH a Final Premium Audit Billing, in which it found that the flight instructors were subject workers with a classification code of 7425 and adjusted the premium to include the \$122,936 JTH paid to the flight instructors during the period of April 1, 2015 to April 1, 2016. SAIF also adjusted the premium for an additional \$183 of payroll paid for aviation ground crew with a classification code of 7403. The total premium adjustment for the flight instructors was an additional \$7,079 and for the aviation ground crew was an additional \$5. (Exs. A9 at 1; A10 at 1.)

CONCLUSION OF LAW

SAIF's May 20, 2016 Final Premium Audit Billing correctly billed JTH for its payments to its flight instructors.

OPINION

JTH asserts that the Final Premium Audit Billing for the period of April 1, 2015 to April 1, 2016 is incorrect, contending that SAIF incorrectly included JTH's payments to the flight instructors in its determination of the premium. JTH bears the burden to establish that SAIF's billing is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). To sustain this burden, JTH must prove that the billing is incorrect 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).

JTH contends that the flight instructors provided services as independent contractors, not as employees, and thus SAIF incorrectly charged workers' compensation premiums for JTH's payments to these individuals. ORS 656.017 requires every employer to maintain assurance with the Department that subject workers will receive compensation for compensable injuries by qualifying as a carrier-insured employer or a self-insured employer. ORS 656.005 defines "employer," "worker," "subject worker," and "independent contractor." It provides, in part:

(13)(a) "Employer" means any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal

⁵ SAIF noted in its audit report that JTH would need to maintain appropriate verifiable time records for SAIF to divide time between different classification codes for all future policy periods. (Ex. A9 at 3.) In the Final Premium Audit Billing, SAIF further noted that "If the ground crew employee also performs duties as a pilot or member of the flying crew, the appropriate "flying crew" classification would apply to their entire payroll if [JTH does] not maintain verifiable time records." (Ex. A10 at 3.)

corporations, school districts and other public corporations or political subdivisions, 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.

(Emphasis added.)

Whether a person is a “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). Here, there was no dispute that the flight instructors provide flight training services to JTH’s customers in exchange for remuneration based upon a rate of \$35 per hour. Accordingly, the primary question to be answered is whether the flight instructors were subject to the direction and control of an employer, in this case JTH. Importantly, the relevant question is not whether JTH exercised *actual* control over the flight instructors. Rather, the question is whether JTH had the *right* to direct and control the activities of the flight instructors.

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 insurance 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.

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 Court of Appeals further determined that:

For the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all.

Coghill v. Natl. Council on Comp. Ins., 155 Or App 601, 606, *adh'd to as modified on recons*, 157 Or App 125 (1998), *rev den*, 328 Or 365 (1999) (quoting 3 Larson, *Workmen's Compensation Law* § 44.31, at 8-90 (1998)). Thus, this test is not a balancing test; instead, the factors are weighted such that any one factor, if it supports the existence of an employment relationship, will be determinative that such a relationship exists.

At the hearing, Mr. Trimble testified that the flight instructors were considered independent contractors by JTH and the flight instructors. However, the fact that the putative employer and putative workers may have believed and operated on the premise that the workers were independent contractors does not control the outcome of the required analysis under the applicable laws. *Woody v. Waibel*, 276 Or App 189 (1976). Similarly, just because JTH structures its business model in a similar manner to the industry standard for small flight schools, which treats flight instructors as independent contractors, does not affect the analysis of whether an employment relationship exists.

JTH requires that the flight instructors perform flight training safely and professionally. Such requirements are not specific enough to establish an employment relationship. JTH also requires that the flight instructors provide flight training services in compliance with federal requirements. Because federal regulations establish the requirements for a student to complete in order to obtain certification or licensure, flight instructors must meet those requirements regardless of the nature of the employment relationship with the flight school. Although JTH provides the online calendaring program utilized by the flight instructors and students, JTH does not require the flight instructors to perform services on specific dates at specific times. These circumstances do not establish that JTH has the right to, or is exercising, control over the flight instructors.

However, on its website, JTH represents that it, JTH, will provide “the best, most experienced helicopter flight instruction training.” Such a representation is evidence of JTH’s right to exercise control over the quality, if not the content, of a flight instructor’s performance of

flight training services. In addition, there are several aspects of the relationship that demonstrate JTH's right to, or actual exercise, of control: JTH will not allow a flight instructor to hire a substitute flight instructor who is not on JTH's list to perform flight instruction services; JTH will reassign a customer to another flight instructor dependent upon a customer's complaint; JTH will counsel a flight instructor to improve behaviors based upon customer complaints; and JTH maintains files and performs drug testing on the flight instructors, demonstrating that JTH is not merely a renter of aircraft but the provider of the flight training. These aspects of the relationship support a finding that the flight instructors are "workers."

JTH furnishes, maintains, and equips the aircraft used by the flight instructors in providing flight training. The flight instructors do not ever provide the aircraft. JTH also provides other equipment, such as the flight simulators, as well as the hanger location from which the flights operate. JTH provides the online scheduling software for the flight instructors' and customers' use in scheduling their flight times. JTH provides the vast majority of the tools and equipment necessary for the flight instructors to perform their services, including the equipment that is absolutely mandatory for their services, the aircraft. This factor supports the finding that the flight instructors are "workers."

JTH also provides the billing and payment services for the customers and the flight instructors, with the minor exception of some ground instruction time. JTH directly bills the customers for the services rendered by the flight instructors, and, after receipt of payment from the customers, pays the flight instructors for their services based upon an hourly rate of \$35 per hour. Here again, JTH provides the vast majority of the accounting services for customers' payments and pays the flight instructors an hourly wage. This factor also supports the finding that the flight instructors are "workers."

There is no written contract between JTH and the flight instructors. The verbal contract is for the flight instructors to safely and professionally provide flight training in compliance with FAA requirements to JTH's customers in exchange for remuneration based upon an hourly rate of \$35 per hour. Either party can unilaterally and immediately sever the relationship without the other party having any legal recourse. Therefore, JTH has the unconditional right to fire any flight instructor. This final factor of the "right to control" tests also supports the finding that the flight instructors are "workers." Therefore, pursuant to the "right to control" test, the flight instructors are "workers."

In addition, even if evidence of direction and control was inconclusive, the courts then look to the "nature of the work" test. Under that test, the courts look at the significant factors relevant to the nature of the work, including indicators of how integrated and coordinated a particular individual's activity was to the employer's overall production pattern. *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614 at 619 (2002), citing *Woody*, 276 Or at 198.

Ninety percent of JTH's business operation is its flight school. The flight school provides programs to allow customers to obtain certifications and licenses necessary for private or commercial pilots. Pursuant to the FAA requirements, flight instructors must perform flight training and ground instruction for customers to complete certification or licensing programs. Because the services provided by the flight instructors is a required part of the programs offered

by JTH, the nature of the flight instructors' services are integral to JTH's operation as a flight school. As Mr. Trimble acknowledged during the hearing, without the flight instructors' services, JTH could not operate as a flight school. Pursuant to the "nature of the work" test, the flight instructors are "workers" for purposes of workers' compensation services.

Because JTH had the right to control and direct the services of the flight instructors and the flight instructors' services were integral to JTH's operations, the flight instructors were workers as defined in ORS 656.005(30). ORS 656.027 provides that all workers are "subject workers" unless a statutory exception makes them nonsubject workers. ORS 656.027(7)(a) provides the following statutory exception:

Sole proprietors, except those described in paragraph (b) of this subsection. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

ORS 670.600 provides the applicable definition for an independent contractor. It provides, in part:

(2) As used in ORS chapters 316, 656, 657, 671 and 701, "independent contractor" means a person who provides services for remuneration and who, in the provision of the services:

(a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results[.]

To the extent JTH contends that the flight instructors were nonsubject workers by virtue of their alleged status as independent contractors under ORS 670.600, that argument is foreclosed under the prior analysis required by *S-W Floor*. Because the flight instructors were subject to JTH's direction and control, they cannot meet the statutory definition of ORS 670.600, which requires that an independent contractor be free from the employer's right to direct and control the means and manner of providing services. Other than JTH's argument that the flight instructors qualified as independent contractors, JTH presented no other evidence or argument that the flight instructors qualified as nonsubject workers pursuant to any other exception listed in ORS 656.027. The flight instructors are subject workers, and, pursuant to ORS 656.017, JTH must provide workers' compensation coverage for them through its SAIF policy.

Pursuant to ORS 737.310, ORS 737.560 and OAR 836-043-0001 *et seq.*, NCCI is the rating organization licensed in Oregon to establish and file rates and classifications for workers' compensation insurance. OAR 836-043-0005(14). NCCI provides the classification code of 7425 for helicopter flight instructors. SAIF used this classification code and its assigned rate for the \$122,936 that JTH paid to its flight instructors. Because the flight instructors were "subject workers," SAIF's assignment of this classification code and its rate to the payments made by JTH to the flight instructors for their services was appropriate and its Final Premium Audit

billing, with its adjusted premium for this period, is correct.⁶

ORDER

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

SAIF Corporation's May 20, 2016 Final Premium Audit Billing, for audit period April 1, 2015 to April 1, 2016, is **AFFIRMED**. Jerry Trimble Helicopters, Inc. is liable for the adjusted premium.

Samantha A. Fair

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

⁶ JTH asserted that it was not equitable for SAIF to charge increased premiums for a prior policy period, when no claims were filed. However, pursuant to its contract with SAIF, SAIF is entitled to audit JTH's account for any policy period in the past three years and adjust the premium based upon the results of the audit.

CERTIFICATE OF MAILING

On February 17, 2017 I mailed the foregoing Proposed Order issued on this date in OAH Case No. 2017-ABC-00234.

By: First Class Mail

Jerry Trimble Helicopters, Inc.
Jerry Trimble
4050 SE Nimbus Loop
McMinnville OR 97128

By: Electronic Mail

Eric Williams
SAIF Corporation
400 High Street SE
Salem OR 97312

Nate Boughton, Special Assistant Attorney General
SAIF Corporation
400 High Street SE
Salem OR 97312

Lucy M Garcia
Hearing Coordinator