STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
GRASS ROOTS NURSERY, LLC	)	OAH No. 2018-ABC-02233
	)	DFR Case No. INS-WCA 18-09-0006

Procedural History

On July 26, 2018, Liberty Mutual Insurance (Liberty) issued a Final Premium Audit Billing to its insured, Grass Roots Nursery, LLC (Grass Roots) for the period May 12, 2017 to May 12, 2018 (the audit period). On September 14, 2018, Grass Roots requested a hearing through the Division of Financial Regulation of the Department of Consumer and Business Services. Grass Roots requested a Stay of Collections which was issued on November 21, 2018 by Administrative Law Judge (ALJ) Rick Barber.

ALJ Samantha Fair convened a telephone hearing on March 18, 2019. The hearing record closed on that date. ALJ Fair issued a Proposed Order on April 8, 2019, affirming the Final Premium Audit Billing. There were no Exceptions filed by any party.

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

Liberty's Final Premium Audit Billing for the policy year date through date, issued date is AFFIRMED and the Stay of Collections issued November 21, 2018 by ALJ Rick Barber is vacated.

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 Division of Financial Regulation.

Dated: January 8, 2020



Andrew Stolfi
Administrator, Division of Financial Regulation
Insurance Commissioner
Department of Consumer and Business Services

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

IN THE MATTER OF:	)	FINAL ORDER
GRASS ROOTS NURSERY, LLC	)	OAH No. 2018-ABC-02233
	)	Agency Case No.: INS-WCA 18-09-0006

I certify that I sent the final order to the following person(s) on the date and by the means indicated below:

Grass Roots Nursery, LLC
5619 Butte Falls Hwy.
Eagle Point, OR 97524

✓ US First Class Mail

Jon Red Horse
Grass Roots Nursery, LLC
5619 Butte Falls Hwy
Eagle Point, OR 97524

✓ US First Class Mail

Liberty Mutual
PO Box 1525
Dover, NH 03821-1525

✓ US First Class Mail

Melody Viel
Liberty Mutual Group, Inc.
PO Box 1525
Dover, NH 03821-1525

✓ US First Class Mail

Dated: January 9, 2020

Gail M. Gage
Compliance Specialist

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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**
	)	
GRASS ROOTS NURSERY, LLC	)	OAH Case No. 2018-ABC-02233
	)	Agency Case No. INS-WCA 18-09-0006
	)	
	)	

HISTORY OF THE CASE

On July 26, 2018, Liberty Mutual Insurance (Liberty) issued a Final Premium Audit Billing - Revised (Revised Audit Billing) to Grass Roots Nursery, LLC (Grass Roots) for the period May 12, 2017 to May 12, 2018 (the audit period). On September 14, 2018, Grass Roots filed an objection to the billing with the Department of Consumer and Business Services, Division of Financial Regulation (Department). On November 9, 2018, Grass Roots filed a Petition with the Department requesting a hearing and a stay of collection during the pendency of the contested case proceeding.

On November 20, 2018, the Department referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matter

On November 21, 2018, the OAH issued an Order Granting Stay of Collection during the pendency of the contested case proceeding.[1]

On January 7, 2019, ALJ Fair convened a telephone prehearing conference. Jon Red Horse, co-owner of Grass Roots, appeared on behalf of Grass Roots. Liberty appeared and was represented by Melody Viel, a premium audit supervisor. ALJ Fair scheduled the hearing for March 18, 2019, and set deadlines for submission of witness lists and exhibits.

ALJ Fair convened a telephone hearing on March 18, 2019. Grass Roots appeared and was represented by Mr. Red Horse, who testified. Liberty appeared and was represented by Ms. Viel, who testified. The record closed on March 18, 2019, at the conclusion of the hearing.

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[1] In its exhibits, Grass Roots included copies of two demands for payment by Liberty, one issued on November 15, 2018, and the other on November 21, 2018. (Ex. R6 at 2-3.) The first demand was issued prior to the OAH's grant of stay. The second demand was issued on the same day as the OAH's grant of stay, which would have been before either party was served with the grant of stay. These demands did not violate the provisions of the stay.

ISSUES

Whether Liberty's July 26, 2018 Final Premium Audit Billing - Revised correctly billed Grass Roots by including as payroll:

- Payments made to Extreme Trimmers LLC; and
- Payments made to Tiospaye LLC.

ORS 656.027 and 656.029.

EVIDENTIARY RULINGS

Exhibits A1 through A6, offered by Liberty, were admitted into the record without objection. Exhibits R1 through R6,[2] offered by Grass Roots, were admitted into the record without objection.

FINDINGS OF FACT

1. Grass Roots, a limited liability company created approximately three years ago, operates a recreational marijuana nursery in Eagle Point, Oregon, and is jointly owned by Mr. Red Horse and his spouse Florence Red Horse. (Ex. A1 at 1, 5; test. of Red Horse.) Grass Roots' nursery includes open fields and greenhouses for the growing of marijuana. After harvest, the individual buds of the marijuana plant must be carefully trimmed with hand pruners or scissors and then packaged prior to Grass Roots' sale of the product to wholesale distributors. (Test. of Red Horse.)

Extreme Trimmers LLC

2. Approximately April 2017, Grass Roots hired James Dean, the fiancé of the owners' daughter. As Grass Roots' employee, Mr. Dean worked a scheduled 40-hour work week as Grass Roots' employee. He performed a variety of farm labor services, including the cultivating and harvesting of the plants and the preparing and packaging of the product for distribution. He also performed maintenance work on the premises and built the large shed in which the harvested product was prepared for distribution. (Test. of Red Horse.)

3. Extreme Trimmers LLC is a limited liability company that was formed in 2017. The company is owned by multiple partners, one of whom is Mr. Dean. (Ex. A4 at 5, 9.) Beginning October 2017, Extreme Trimmers LLC provided workers to Grass Roots that performed the post-harvest trimming and packaging of the marijuana buds prior to their distribution to the wholesalers. (*Id.* at 5; test. of Red Horse.) Extreme Trimmers LLC provided the workers with

[2] At the prehearing conference, the ALJ had instructed Grass Roots to mark its exhibits as R1, R2, etc. When submitted, the exhibits were marked as exhibits 1A, 1B, 2A, 3A, etc. At the hearing, the ALJ remarked the exhibits as R1 through R6 and identified the revised exhibit numbering to the parties.

the gloves, pruners and scissors necessary to perform the work. (Ex. R5 at 1.)

4. In 2017, after the formation of Extreme Trimmers LLC, Mr. Dean continued to work the same schedule and hours and performed the same services for Grass Roots. Through Extreme Trimmers LLC, Mr. Dean hired additional workers to perform the post-harvest trimming and packaging for Grass Roots. During the harvest season, Extreme Trimmers LLC provided up to six workers to perform the post-harvest trimming and packaging. (Test. of Red Horse.)

5. In 2017, Grass Roots initially paid Mr. Dean as its employee $500 every week for 40 hours of work, beginning April 7, 2017, and then $1,000 every two weeks for 80 hours of work, through his last 2017 paycheck issued on December 16, 2017, for a total of $18,500 in 2017 wages. (Ex. A4 at 9.) In 2018, Grass Roots began reducing payments made to Mr. Dean as employee wages and, instead, paid Extreme Trimmers LLC for Mr. Dean's services. (Exs. A1 at 9; A4 at 9-10.)

6. In 2017, Grass Roots paid Extreme Trimmers LLC weekly or biweekly amounts ranging from $1,130 to $4,536, for a total of $21,859.50, beginning October 7, 2017, through the final 2017 payment on December 20, 2017. Of that $21,859.50, Grass Roots paid Extreme Trimmers LLC $5,382 in December 2017. (Ex. A4 at 9.) Grass Roots issued a 1099 for the 2017 tax year to Extreme Trimmers LLC for total nonemployee compensation of $21,859.50. As required by the 1099 form, Grass Roots included the federal tax payer identification number for Extreme Trimmers LLC on the form. (Ex. A1 at 17.)

7. On December 26, 2017, Extreme Trimmers LLC acquired a workers' compensation policy for its employees, which was effective December 1, 2017 through December 1, 2018. (Ex. A1 at 18; test. of Red Horse.)

Tiospaye LLC

8. Owentino Horne is Mr. Red Horse's nephew. For a few months in 2017, Mr. Horne resided in his recreational vehicle on Grass Roots' property. After moving to Grass Roots' property, Mr. Horne formed Tiospaye LLC as a single member limited liability corporation and was the only individual who worked for Tiospaye LLC. After Mr. Horne formed Tiospaye LLC, Grass Roots' paid Tiospaye LLC to perform post-harvest trimming and packaging of the marijuana buds. Mr. Horne used his own gloves, pruners and scissors when he trimmed the buds. Mr. Horne did not have a set schedule to perform these services. Mr. Horne and Mr. Red Horse would connect, either by phone or in person, and Mr. Red Horse would indicate what days and hours Mr. Horne could work for Grass Roots. Mr. Horne would then work the days and hours he chose. Once Mr. Horne moved from the property, he ceased performing any work for Grass Roots. (Ex. R5 at 1; test. of Red Horse.)

9. On September 5, 2017, Tiospaye LLC obtained a federal employer identification number. Tiospaye LLC's address was the same address as Grass Roots. (Ex. A4 at 11.)

10. From August 18, 2017 through December 15, 2017, Grass Roots made 15 weekly or

bi-weekly payments in the total amount of $10,692 to Tiospaye LLC, ranging from a low of $300 to a high of $1,792 but usually in the amounts of $500 to $900. (Ex. A4 at 8-9.) Grass Roots issued a 1099 for the 2017 tax year to Tiospaye LLC for total nonemployee compensation of $10,692. As required by the 1099 form, Grass Roots included the federal tax payer identification number for Tiospaye LLC on the form. (Ex. A1 at 21.)

11. Tiospaye LLC did not have a workers' compensation policy. (Ex. A1 at 2.) There were no written contracts or invoices between Grass Roots and Tiospaye LLC. (Exs. A1, A3-A5.)

Liberty's Audit

12. On May 26, 2018, Mr. Red Horse completed a self-reported audit form for Liberty. Grass Roots reported Mr. Dean's 2017 wages of $18,500 as subject payroll to Liberty for purposes of the workers' compensation insurance for the audit period. (Ex. A1 at 1-2.) Grass Roots also reported payments, including cash payments, made to multiple individuals and companies, including Extreme Trimmers LLC and Tiospaye LLC, that Grass Roots labeled subcontractors. (*Id.* at 1-4.)

13. Liberty initiated an audit of Grass Roots' account on June 7, 2018. (Test. of Viel.) On July 26, 2018, Liberty issued the Revised Audit Billing to Grass Roots in which it based the premium on a total subject payroll of $48,011. (Ex. A2 at 1.) In a July 26, 2018 email to Mr. Red Horse regarding the revised audit, Liberty confirmed that the subject payroll included Grass Roots' payments to Extreme Trimmers LLC except for $5,382 of the total payments. The payments that totaled $5,382 were made by Grass Roots after December 1, 2017, the effective date of Extreme Trimmers LLC's workers' compensation policy. In the email, Liberty also indicated that Grass Roots' payments to Tiospaye LLC were included in the subject payroll because Liberty had concluded that Tiospaye LLC did not meet the exemption for an independent contractor, as there was no documentation to demonstrate that it was free from Grass Roots' direction and control.[3] (Ex. A5 at 1.)

14. On November 9, 2018, Mr. Red Horse completed the Petition on behalf of Grass Roots to appeal Liberty's Final Premium Audit Billing – Revised, arguing that Liberty erred by including payments made to Extreme Trimmers LLC and Tiospaye LLC.[4] (Ex. R1 at 1-2.)

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[3] As provided in OAR 836-043-0170(7), the Revised Audit Billing and the July 26, 2018 explanatory letter together are considered to the be the final premium audit billing. Therefore, Liberty met the notice requirements of OAR 836-043-0170(6).

[4] Mr. Red Horse also asserted as errors that Liberty issued revised audits and that Liberty retained funds in excess of the policy premium. First, insurers can revise original audits. *See* OAR 836-043-0100. Second, the Department and the ALJ have no jurisdiction over issues regarding collections (payments received, retained, reimbursed, or credited). Finally, in other materials submitted by Mr. Red Horse, he also raised issues alleging unethical practices and harassment by Liberty. Again, the Department and the ALJ do not have jurisdiction over such issues.

CONCLUSIONS OF LAW

Liberty correctly billed Grass Roots in its July 26, 2018 Final Premium Audit Billing - Revised, and Grass Roots is liable for the adjusted premium.

OPINION

Mr. Red Horse asserted that Extreme Trimmers LLC and Tiospaye LLC were independent contractors per the definition contained in ORS 670.600. He further argued that the insurer has the burden of proof and indicated it was not his responsibility to establish that Extreme Trimmers LLC and Tiospaye LLC met the definition of independent contractor. However, Mr. Red Horse's argument is in error. The Court of Appeals determined in *Salem Decorating v. NCCI,* 116 Or App 166 (1992) *rev den* 315 Or 643 (1993), that the employer has the burden to establish that an insurer's premium audit billing is incorrect. To sustain this burden, Grass Roots must prove its case (that Grass Roots' payments to the two companies are exempt from subject payroll for purposes of workers' compensation) by a preponderance of the evidence.[5] *Dixon v. Board of Nursing,* 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.,* 303 Or 390 (1987).

Responsibility for Workers' Compensation Insurance Pursuant to ORS 656.029

ORS 656.017 through ORS 656.174 are part of a "statutory scheme that seeks to ensure that workers are, in fact, covered by workers' compensation insurance." *In the Matter of the Compensation of Sparks*, 171 Or App 65, 69 (2000).[6] *Sparks* further states that the "rule has been that general contractors are responsible for providing coverage to all persons working under the contract." *Id.* Thus, ORS 656.027(1) provides that "[a]ll workers are subject to this chapter except those nonsubject workers described" in a series of specifically enumerated classes that includes the independent contractor.

Mr. Red Horse argued Grass Roots hired Extreme Trimmers LLC and Tiospaye LLC as independent contractors to perform the post-harvest trimming and packaging services for Grass Roots. Thus, he argued that Grass Roots was relieved of any responsibility to provide workers' compensation insurance to those individuals who actually performed the work. This same argument was raised by K-Mart Corporation in *K-Mart Corp. v. Claussing*, 162 Or App 558 (1999), a case which dealt with the application of ORS 656.029.

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[5] During the January 7, 2019 prehearing conference, the ALJ informed Mr. Red Horse that Grass Roots had the burden to prove that the Revised Audit Billing was in error.

[6] *Sparks* involved a general contractor of a construction project who contracted with a subcontractor to perform drywall services. A worker for the subcontractor was injured while performing work on the construction project. *Sparks* at 67.

ORS 656.029 provides, in part:

> (1) If a person awards a contract involving the performance of labor where such labor is a normal and customary part or process of the person's trade or business, the person awarding the contract is responsible for providing workers' compensation insurance coverage for all individuals, other than those exempt under ORS 656.027, who perform labor under the contract unless the person to whom the contract is awarded provides such coverage for those individuals before labor under the contract commences. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person who is charged with the responsibility for providing such coverage before labor under the contract commences, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.
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> * * * * *
>
> (3) As used in this section:
>
> (a) "Person" includes partnerships, joint ventures, associations, corporations, limited liability companies, governmental agencies and sole proprietorships[.]

In the *K-Mart Corp.* case, K-Mart contracted with a sole proprietor[7] to provide janitorial services for its retail locations. Pursuant to the terms of the contract with the sole proprietor, the sole proprietor was to provide workers' compensation insurance for the workers. K-Mart understood that the sole proprietor would be hiring additional workers to perform the janitorial services needed by K-Mart. The Court of Appeals agreed with the Workers' Compensation Board's reasoning that because K-Mart contracted with the sole proprietor with the expectation that the sole proprietor would have additional workers perform the work that the sole proprietor was not "exempt from coverage." *Id.* at 563. Thus, the exemption under ORS 656.027 is only for individual workers, not for those who employ individual workers. *Id.* at 562.

Grass Roots is in the same position as K-Mart in regards to its relationship with Extreme Trimmers LLC. Grass Roots contracted with Extreme Trimmers LLC to perform the post-harvest trimming and packaging of the marijuana for distribution, and Grass Roots knew that Extreme Trimmers LLC would hire multiple workers to perform the actual trimming and packaging. These workers performed the labor that is the normal part of Grass Roots' business, i.e. the preparation of the marijuana buds prior to their distribution to Grass Roots' wholesale clients. Therefore, Grass Roots was the "person awarding the contract" and was responsible for

[7] The sole proprietorship as independent contractor exception in ORS 656.027(7) is similar to the limited liability company as independent contractor exception in ORS 656.027(9).

providing workers' compensation insurance coverage for all the workers who performed the labor. Even if those workers performing the actual trimming and packaging services were indeed independent contractors (and therefore exempt from coverage pursuant to ORS 656.027), pursuant to ORS 656.029(1), Grass Roots remains responsible for providing them workers' compensation insurance because Extreme Trimmers LLC, the person awarded Grass Roots' contract, is not a worker "exempt from coverage."

ORS 656.029(1) provides an exception to holding the person awarding the contract responsible for providing the coverage. That exception applies if "the person to whom the contract is awarded provides such coverage." ORS 656.029(1). Additionally, "the burden is on the [general contractor] to make sure that the [subcontractor] provides the coverage." *Sparks* at 69. As in *K-Mart*, Extreme Trimmers LLC did not provide workers' compensation insurance for the workers until December 1, 2017. Therefore, Grass Roots remained responsible to provide the coverage for those workers until the effective date of Extreme Trimmers LLC's workers' compensation policy.

Grass Roots was responsible for providing workers' compensation coverage for all of Extreme Trimmers LLC's workers who performed its post-harvest trimming and packaging services until December 1, 2017, when Extreme Trimmers LLC began providing the coverage. In the Revised Audit Billing, Liberty removed the payments Grass Roots paid to Extreme Trimmers LLC in December 2017 from subject payroll. Because Extreme Trimmers LLC did not provide workers' compensation insurance until December 2017, Liberty properly included the earlier payments made to Extreme Trimmer LLC as subject payroll.

Responsibility for Workers' Compensation Insurance Pursuant to ORS 656.027

As indicated above, Mr. Red Horse made the same argument for Grass Roots' payments to Tiospaye LLC as it did for the payments made to Extreme Trimmers LLC – that the payments were not subject payroll because Tiospaye LLC was an independent contractor. Unlike Extreme Trimmer LLC, the evidence established that Tiospaye LLC was a single member limited liability company that was never expected to provide Grass Roots any other workers than its one member, Mr. Horne. Therefore, ORS 656.029 is not applicable to the determination of whether Grass Roots is responsible for providing workers' compensation coverage for Mr. Horne.

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 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.
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> * * * * *
>
> (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.)

At the hearing, Mr. Red Horse testified that Tiospaye LLC was considered an independent contractor by Grass Roots and Tiospaye LLC. However, the fact that the putative employer and putative worker may have believed and operated on the premise that the worker was an independent contractor does not control the outcome of the required analysis under the applicable laws. *Woody v. Waibel*, 276 Or App 189 (1976).

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 Tiospaye LLC performed post-harvest trimming and packaging for Grass Roots in exchange for remuneration, usually in the amount of $500 to $900 every week or two weeks, for a period of four months in late 2017. Accordingly, the primary question to be answered is whether Tiospaye LLC's sole worker, Mr. Horne, was subject to the direction and control of an employer, in this case Grass Roots. Importantly, the relevant question is not whether Grass Roots exercised *actual* control over Mr. Horne. Rather, the question is whether Grass Roots had the *right* to direct and control his activities. *See* ORS 656.005(13)(a).

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.

Mr. Horne provided hand-trimming and packaging services for Grass Roots based upon in person or telephone conversations with his uncle, Mr. Red Horse. Even though Mr. Horne only worked the days and hours he chose to work, that fact alone does not establish that Grass Roots did not have the right to control his labor. Although Mr. Horne provided his own tools, those tools were limited to a couple of minor items, gloves and pruners/scissors. Therefore, Mr. Horne was providing Grass Roots unskilled farm labor, not the type of skilled labor that an independent contractor performs, with tools of limited investment costs. The provision of unskilled labor with no need of any significant investment is indicative of an employer-employee relationship. Additionally, Mr. Horne provided these services pursuant to verbal arrangements with Mr. Red Horse. Either party could unilaterally and immediately sever the relationship without the other party having any legal recourse. Therefore, Grass Roots had the unconditional right to fire Mr. Horne at any time. Grass Roots also made cash payments to its subcontractors, including Tiospaye LLC, and had no invoices or contracts regarding the work performed and billed by Tiospaye LLC. The lack of written contracts and invoices and the payment in cash for services is further evidence of an employer-employee relationship, not an independent contractor relationship. Finally, the creation of Tiospaye LLC occurred simultaneously with Mr. Horne first performing work for Grass Roots, and there was no evidence to support a finding that Tiospaye LLC was used for anything other than Mr. Horne's brief provision of services to Grass Roots. These aspects of the relationship between Grass Roots and Tiospaye LLC support a finding that Mr. Horne was a "worker," pursuant to the "right to control" test.

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. Grass Roots is a nursery that grows, harvests, trims and packages marijuana for sale to wholesale distributors. The services that Mr. Horne provided, the post-harvest trimming and packaging, are an essential part of Grass Roots' overall production pattern. Pursuant to the "nature of the work" test, Mr. Horne was a "worker" for purposes of workers' compensation services.

Because Grass Roots had the right to control and direct Mr. Horne's services and his services were integral to Grass Roots' operations, Mr. Horne was a worker 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(9) provides an exception for limited liability companies that "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 Grass Roots contends that Mr. Horne was a nonsubject worker by virtue of his alleged status as an independent contractor under ORS 670.600, that argument is foreclosed under the prior analysis required by *S-W Floor*. Because Mr. Horne was subject to Grass Roots' direction and control, he 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.[8] Other than Grass Roots' argument that Mr. Horne qualified as an independent contractor, Grass Roots presented no other evidence or argument that Mr. Horne qualified as a nonsubject worker pursuant to any other exception listed in ORS 656.027. Mr. Horne is a subject worker, and, pursuant to ORS 656.017, Grass Roots must provide workers' compensation coverage for him through its Liberty policy.

Because Mr. Horne was a "subject worker," Liberty's inclusion of the payments to Tiospaye LLC as subject payroll was appropriate. Because Extreme Trimmers LLC did not provide workers' compensation coverage for its workers until December 2017, Grass Roots was

[8] The majority of the other factors contained in ORS 670.600 also support a conclusion that Mr. Horne was not an independent contractor. Mr. Horne was not customarily engaged in an independently established business; he did not maintain a business location separate from Grass Roots; he did not enter into any written contract with Grass Roots regarding the provision of his services; he did not make a significant investment in Tiospaye LLC; and there was no expectation that he would hire other workers.

liable to provide such coverage until then. Liberty properly included the pre-December 2017 payments to Extreme Trimmers LLC as subject payroll. Liberty's Revised Audit Billing, with its adjusted premium for the audit period, is correct and Grass Roots is liable for the adjusted premium.

ORDER

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

Liberty Mutual Insurance's July 26, 2018 Final Premium Audit Billing - Revised, for audit period May 12, 2017 to May 12, 2018, is AFFIRMED. Grass Roots Nursery LLC 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

CERTIFICATE OF MAILING

On April 8, 2019 I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2018-ABC-02233.

By: First Class Mail

Grass Roots Nursery, LLC
5619 Butte Falls Hwy.
Eagle Point OR 97524

Jon Red Horse
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