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2 STATE OF OREGON  
3 DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
4 DIVISION OF FINANCIAL REGULATION

5 IN THE MATTER OF: ) FINAL ORDER  
6 OREGON AUTO REPAIR LLC ) OAH Case No. 2019-ABC-03243  
7 ) Agency Case No.: INS-WCA 19-8-006

8  
9 **Procedural History**

10 The Director of the Oregon Department of Consumer and Business Services (Director),  
11 by and through Division of Financial Regulation, (Division), commenced the above entitled  
12 administrative proceeding to review a workers' compensation insurance final premium audit  
13 billing (billing) issued by SAIF Corporation to Oregon Auto Repair, LLC, (employer) pursuant  
14 to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon Administrative  
15 Rules (OAR) 836-043-0200 *et. seq.*

16 On October 28, 2019, the Division referred employer's hearing request contesting the  
17 billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether  
18 insurer's Final Premium Audit, dated August 20, 2019, was correct. By Proposed Order of  
19 dated March 29, 2021, Senior Administrative Law Judge (ALJ) Dove L. Gutman proposed that  
20 SAIF's Revised Final Premium Audit billing dated August 20, 2019, for the audit period  
21 September 1, 2017 through September 1, 2018 be AFFIRMED.

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23 **Findings of Fact, Conclusions of Law and Opinion**

24 The Director adopts, and incorporates herein by this reference, the findings of fact,  
25 conclusions of law, and reasoning of the Proposed Order as the findings of fact, conclusions of  
26 law, and reasoning of this Final Order.

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28 **Order**

29 SAIF Corporation's Final Premium Audit issued August 20, 2019 is AFFIRMED


30  
31 Final Order

Oregon Auto Repair, LLC  
Agency Case No.: INS 19-8-006 OAH No. 2019-ABC-03243

November 17, 2021

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Dated November 30, 2021

  
TK Keen  
Administrator, Division of Financial Regulation  
Department of Consumer and Business Services

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

IN THE MATTER OF:	) <b>PROPOSED ORDER</b>
	)
<b>OREGON AUTO REPAIR LLC</b>	) OAH Case No. 2019-ABC-03243
	) Agency Case No. INS-WCA 19-8-006

**HISTORY OF THE CASE**

On August 20, 2019, SAIF Corporation (SAIF or insurer) issued a Revised Oregon Final Premium Audit Billing (Revised Final Premium Audit Billing) to Oregon Auto Repair LLC (Oregon Auto Repair or employer) for the audit period September 1, 2017 through September 1, 2018 (the audit period). On August 23, 2019, Oregon Auto Repair filed an appeal with SAIF. On October 19, 2019, Oregon Auto Repair filed a Petition with the Department of Consumer and Business Services Division of Financial Regulation (Department), requesting a contested case hearing and a stay of collection of the premium during the pendency of the contested case proceeding.

On October 28, 2019, the Department 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 October 31, 2019, Presiding ALJ Monica Whitaker issued an Order Granting Stay of Collection of the premium during pendency of the contested case proceeding.

On January 6, 2020, ALJ Gutman convened a prehearing telephone conference. Bruce Robertson, owner of Oregon Auto Repair, represented Oregon Auto Repair. Leni Bader, friend of Mr. Robertson, appeared on behalf of Oregon Auto Repair. Attorney Joy Wang represented SAIF. Brittanie Holland, Premium Audit Analyst for SAIF, appeared on behalf of SAIF. During the prehearing conference, ALJ Gutman scheduled the in-person hearing for March 23, 2020.

On March 18, 2020, due to the COVID-19 pandemic, ALJ Gutman held a prehearing telephone conference to determine if the scheduled in-person hearing should be converted to a telephone hearing or be postponed. Mr. Robertson represented Oregon Auto Repair and objected to a telephone hearing. Ms. Wang represented SAIF and had no objection to postponing the hearing. During the prehearing conference, ALJ Gutman rescheduled the in-person hearing for June 9, 2020.

On May 15, 2020, Presiding ALJ Whitaker notified the parties that due to the COVID-19 pandemic, the OAH had suspended in-person hearings until further notice. Presiding ALJ Whitaker proposed converting the in-person hearing to a telephone or video conference hearing,

or postponing the hearing if the parties could not agree. On May 15, 2020, Ms. Wang notified the OAH that SAIF was willing to participate in a telephone hearing. On May 18, 2020, Mr. Robertson notified the OAH that Oregon Auto Repair wanted to proceed with an in-person hearing. On May 18, 2020, Presiding ALJ Whitaker postponed the hearing scheduled for June 9, 2020.

On June 9, 2020, ALJ Gutman held a prehearing telephone conference to reschedule the in-person hearing. Mr. Robertson represented Oregon Auto Repair. Ms. Wang represented SAIF. During the prehearing conference, ALJ Gutman rescheduled the in-person hearing for September 14, 2020.

On August 3, 2020, Presiding ALJ Whitaker notified the parties that due to the COVID-19 pandemic, the OAH had suspended in-person hearings through the end of October 2020. Presiding ALJ Whitaker proposed converting the in-person hearing to a telephone or video conference hearing. On August 3, 2020, Ms. Wang notified that OAH that SAIF had no objection to holding the hearing via telephone or video conference. On August 3, 2020, Mr. Robertson notified the OAH that Oregon Auto Repair wanted to proceed with an in-person hearing.

On August 18, 2020, ALJ Gutman held a prehearing telephone conference to determine if the scheduled in-person hearing should be converted to a telephone or video conference hearing, or be postponed. Mr. Robertson represented Oregon Auto Repair, and objected to a telephone hearing. Ms. Wang represented SAIF. During the prehearing conference, ALJ Gutman rescheduled the in-person hearing for February 2, 2021, and notified the parties that if the hearing could not be held in-person on February 2, 2021, it would be held by telephone.

On January 4, 2021, ALJ Gutman notified that parties that due to the COVID-19 pandemic, the in-person hearing scheduled for February 2, 2021, would take place by telephone. On January 17, 2021, Mr. Robertson requested that the hearing be held by video conference. On January 21, 2021, Ms. Wang indicated that she had no objection to the request. On January 22, 2021, ALJ Gutman converted the scheduled hearing to a video conference hearing.

On February 2, 2021, ALJ Gutman held a video conference hearing via Skype for Business. Mr. Robertson represented Oregon Auto Repair. Ms. Wang represented SAIF. Ms. Bader and Mr. Robertson testified on behalf of Oregon Auto Repair. Ms. Holland testified on behalf of SAIF. The record closed on February 2, 2021.

## ISSUE

Whether SAIF's August 20, 2019 Revised Final Premium Audit Billing for the audit period of September 1, 2017 through September 1, 2018 correctly billed Oregon Auto Repair by including as payroll, payments made to: Jacob Elliot, Sean Pierce, Jason (last name unknown), Brittney Desputch, Jeremy Lawler, Brett McIntyre, Jessy Simpson, Dale Rothage, Rachelle Ransom, George Cervantes, Adam Hoffman, Justin Kittell, Marcos Rubios, and James (Jeff) Waldburger. ORS 656.005 and ORS 656.027.

## EVIDENTIARY RULINGS

Exhibits A1 through A21, offered by SAIF, were admitted into evidence without objection. Exhibits R1 and R2, offered by Oregon Auto Repair, were admitted into evidence without objection.

## FINDINGS OF FACT

### *Background information*

1. Oregon Auto Repair is a limited liability company that operates a small automotive repair garage at 2440 Highway 99 North in Eugene, Oregon. Oregon Auto Repair moved to that location in 2018, during the audit period. Oregon Auto Repair was previously located at 30085 Federal Lane in Eugene, Oregon. Oregon Auto Repair is doing business as “Car Help by Oregon Auto Repair.” (Test. of Bader, Robertson; Exs. A2 at 1, A4 at 1, A13.)

2. Oregon Auto Repair is owned by Bruce Robertson, who is the sole member of the limited liability company. Mr. Robertson is an ASE Certified Master Mechanic with more than 30 years of experience. (Test. of Bader, Robertson; Exs. A2 at 1, A13 at 4.)

3. Mr. Robertson started the business in 2012 as a way to earn income while providing full-time care to his friend, Leni Bader. Mr. Robertson structured Oregon Auto Repair to be a business where independent contractors could provide quality services while supplementing their own business entities. (Test. of Bader, Robertson; Exs. R2 at 9, A10 at 1.)

### *The structure and operation*

4. Oregon Auto Repair is open Monday through Friday from 10:00 a.m. to 6:00 p.m., and Saturday by appointment only. Oregon Auto Repair has a small walk-in lobby, a service counter, an office area, a garage area with four bays and four automobile lifts, and a parking area outside of the building. (Test. of Bader, Robertson; Exs. A13 at 3-5, A17 at 4.)

5. Oregon Auto Repair provides automotive services that include brake services, fuel and oil services, engine diagnosis, and transmission repair. Other work includes diagnosis and repair of clutch, electrical, coolant, radiator, engine compression, engine detonation, malfunctioning engine sensors, spark plugs, filters, emission systems, and fluid leaks. (Exs. A16 at 8, A17 at 4.)

6. Oregon Auto Repair hires a small number of mechanics who work at the business and hold themselves out as independent contractors. Currently, those mechanics are Mr. Robertson, George Cervantes, and Marcos Ruiz, Jr.<sup>1</sup> (Test. of Bader; Ex. R2 at 9-10.) Oregon Auto Repair also hires a small number of office personnel who, among other things, answer phones, interact with the public, greet customers, accept payments from customers, and provides clerical support and bookkeeping services. The office personnel hold themselves out as independent contractors.

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<sup>1</sup> With the exception of Mr. Robertson, the mechanics working at Oregon Auto Repair have changed over the years. (See Ex. R2 at 9-10.)

(Test. of Holland; *see* Exs. A11, A12, A16, A17.)

7. Oregon Auto Repair has a verbal contract with each mechanic that is hired to work at the garage. The verbal contract includes, among other things, the negotiated pay or salary amount, the expected performance, and the intended work schedule.<sup>2</sup> (Test. of Bader.)

8. As a group, the mechanics that work at Oregon Auto Repair have the authority to make various business decisions, including hiring additional mechanics and office personnel to perform services as independent contractors for Oregon Auto Repair. The group also has the authority to determine the negotiated pay, salary, and/or bonus amounts for each person hired.<sup>3</sup> (Test. of Bader; Ex. A10 at 2, 5, 6, 8.)

9. Individually, the mechanics that work at Oregon Auto Repair have the authority to answer phones; greet customers; perform diagnostic inspection; and write up job tickets for auto repair. The mechanics also have the authority to set their own schedule; choose the job ticket that they want to complete; negotiate directly with the customer regarding the cost of the job ticket; order the parts needed for the job ticket; and complete the repair. The mechanics can also hire temporary workers to complete their job tickets provided the worker is approved by the group.<sup>4</sup> (Test. of Bader; Ex. A10 at 5, 6, 7.)

10. The mechanics that work at Oregon Auto Repair provide their own tools but use Oregon Auto Repair's garage bays, lifts, diagnostic equipment, supplies, phones, computer software, uniforms, and business cards for the repair work. (Test. of Bader, Robertson, Holland.) The uniforms and business cards that the mechanics use contain the logo "Car Help by Oregon Auto Repair." (Test. of Bader; Ex. A13 at 5.) Oregon Auto Repair pays to have the uniforms cleaned. (Test. of Bader.)

11. The office personnel that work at Oregon Auto Repair use the company's phones, office supplies, office equipment, and office area to perform their clerical support and bookkeeping services.<sup>5</sup> (Test. of Holland; *see* Exs. A16 at 8, 20, 24-40, 68, A17 at 3-4.)

12. The mechanics that work at Oregon Auto Repair do not rent the garage bays or the lifts from Oregon Auto Repair. The mechanics do not rent equipment or supplies from Oregon Auto Repair. The mechanics do not invoice Oregon Auto Repair for the work competed on each job ticket. (Test. of Bader, Robertson.)

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<sup>2</sup> The negotiated amount is based on the mechanic's experience and expected performance. (Test. of Bader.) It is unclear if the verbal contracts were of a specific duration. (Hearing record.)

<sup>3</sup> Oregon Auto Repair pays bonus payments to the mechanics and office personnel based on performance. (Test. of Bader, Holland; *see* Ex. A16 at 23-24, 27-29.)

<sup>4</sup> It is unclear if the mechanic pays the temporary worker, or if Oregon Auto Repair pays the temporary worker. (Hearing record.)

<sup>5</sup> There is no evidence that the office personnel rent the office area or pay for the office supplies to perform their services at Oregon Auto Repair. (Hearing record.)

13. Oregon Auto Repair pays for the parts that are needed for each job ticket. Oregon Auto Repair invoices the customer for the work done by the mechanic on the job ticket. The customer pays Oregon Auto Repair for the work completed. (Test. of Bader, Robertson.) If a customer is unhappy with the repair, the mechanic who performed the work corrects the repair. If the customer does not want the same mechanic to correct the repair, the mechanic finds someone else to perform the repair (provided the group approves of the individual) or the group works together to resolve the situation. (Test. of Robertson.)

14. The mechanics that work at Oregon Auto Repair are paid weekly by Oregon Auto Repair. The amount of the check is based on the amount the mechanic negotiated at the time of hire. The amount is not based on the job tickets completed for that week.<sup>6</sup> (Test. of Bader; *see* Exs. A10 at 6, A16.)

15. The office personnel that work at Oregon Auto Repair are paid weekly by Oregon Auto Repair. The amount of the check is based on the amount agreed upon by the group at the time of hire.<sup>7</sup> (Test. of Robertson; *See* Exs. A10 at 6, A16.)

16. The mechanics and office personnel can negotiate an increase in salary or bonus payment with the group. (Test. of Bader.)

17. Oregon Auto Repair provides workers' compensation insurance through SAIF for Mr. Robertson. (Ex. A4.) The other mechanics and office personnel that work at Oregon Auto Repair are not covered by workers' compensation insurance.<sup>8</sup> They do not have independent businesses registered with the Secretary of State, or business websites.<sup>9</sup> (Test. of Holland.)

#### *The company's handbook*

18. Oregon Auto Repair has a contractor handbook that is provided to each person hired. The contractor handbook addresses, among other things, the expected quality of performance, the trial period, compensation, periods of unavailability, hiring additional help, acceptance of the company's policies, and contract termination.<sup>10</sup> (Ex. A10.) Regarding the expected quality of

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<sup>6</sup> In a conventional independent contractor relationship, the independent contractor will invoice for the work that he/she performs. (Test. of Holland.)

<sup>7</sup> It is unclear if the office personnel are paid an hourly rate, flat fee or salary. (Hearing record.) More likely than not, Oregon Auto Repair has a verbal contract with the office personnel that addresses the pay amount, the expected work performance, and the intended work schedule. (*See e.g.*, Exs. A10, A16.)

<sup>8</sup> There is no evidence that they had workers' compensation insurance, liability insurance, or any type of insurance coverage during the audit period. (Test. of Holland.)

<sup>9</sup> There is no evidence that any of them had an independent business registered with the Secretary of State or a business website during the audit period. (Test. of Holland.)

<sup>10</sup> The contractor handbook applies to all individuals hired by Oregon Auto Repair. (Test. of Bader.)

performance, the contractor handbook states, in part:<sup>11</sup>

Our primary function as a company is automotive repair. However there are many additional functions performed as a company including, but not limited to, capital improvements, bookkeeping, accounting and other business functions. \* \* \*. While this handbook is primarily directed toward repair service technicians it is inclusive of all contractors regardless of their function within the structure of the company. \* \* \*.

- **Continuous Improvement** – Both for our own professional development and for the services we provide clients, becoming an ever better version of ourselves is important to the very core of CAR HELP by Oregon Auto Repair. You're willing to learn, improve and innovate constantly. \* \* \*.
- **Rolling Up our Sleeves** – No matter your areas of work or experience we encourage all to dive in head first, get work done and support the other contractors in our group. No one is above lending a hand and ensuring what needs to get done is achieved.
- **Transparency** – We believe in being honest with clients and with our group. Accounting books are open to all contractors. \* \* \*. We strive for open, trustworthy and truthful in all dealings with other contractors in the group, your personal business clients and CAR HELP clients.
- **Reliability** – Our clients rely on our ability to be knowledgeable in standard industry practices while also being creative to think "outside of the box" for difficult jobs. While you are at CAR HELP you will strive to provide creative ideas and solutions to satisfy clients and help us all grow.
- **Excellence** – Our work is our art and you will demonstrate attention to detail, pride, and the highest quality behind every client account and each project worked on.
- **Experiences** – Learning by experience is the way we grow. That being said we are working on automobiles. A misguided repair can have dire consequences if the repair is not performed properly. We expect all contractors to pay close attention to each and every repair and requesting assistance in any aspect needed. \* \* \*.

(*Id.* at 1-2; emphasis in original.) Regarding the trial period for new hires, the contractor handbook states, in part:

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<sup>11</sup> Ms. Bader prepared the contractor handbook for Oregon Auto Repair. (Test. of Bader.) No corrections have been made to the handbook's spelling, punctuation or grammar. (*See* Ex. A10.)



All new contracts, regardless of the type of work performed, have a two week trial period even if the contract is negotiated for a longer period. This is not a probationary period but rather is a trial to determine if you are a good fit for the group and it is a good fit for yourself. It is a time for you to learn about our structure and become familiar with CAR HELP by Oregon Auto Repair and the group you will be working with. At the end of the two week period a meeting will be scheduled to discuss if everyone wants to continue forward with your contract. At the two week meeting a second trial period will be scheduled for one month from then. If the group consensus is to continue your contract after your one month trial your contract will be in full effect.

\* \* \* \* \*

At all times, both during your trial period and after full contract effect your performance will be evaluated by all individuals within the group.

(*Id.* at 8; emphasis in original.) Regarding compensation, the contractor handbook states, in part:

The amount of compensation you will receive is determined from your own negotiation efforts and consensus of the group. \* \* \*. During negotiations be prepared to provide the group with information regarding your skill sets and benefits you bring from your individual knowledgebase and experience.

(Ex. A10 at 5.) Regarding periods of unavailability, the contractor handbook states, in part:

As an independent contractor with CAR HELP by Oregon Auto Repair you are in complete control of your schedule just as you are in your business. You decide your schedule of when you work, what work orders you accept and other projects you are involved as well as longer stretches of unavailability. Due to the nature of outside obligations many contractors cannot pre-specify when a period of unavailability will occur. Your continued contract is dependent upon agreement of the group your contributions of effort and completion of work is sufficient for the compensation you have negotiated. If your circumstances warrant you will have frequent unscheduled time off bring proposal to the group or coordinate with other contractors in the group how to structure coverage of existing work orders or projects to which you have obligated yourself. It is your responsibility both individually and to the group for smooth transition of transfer for jobs and projects as well as ensuring overall coverage of someone available for open hours of the shop.

(*Id.* at 6; emphasis in original.) Regarding bringing in additional help, the contractor handbook states, in part:

At any time if you have determined work is not being sufficiently covered by the existing group you may bring a proposal to the group to add additional contractors. This includes all facets of the company including but not limited to automotive repairs, building construction and improvement, accounting and bookkeeping and any other facet of the company. You may recommend a particular individual or business or simply bring forth that an additional contractor is needed. Contractors may bring in temporary assistance for their own job or project providing this individual or business is approved by the group.

(Ex. A10 at 5.) Regarding termination procedures, the contractor handbook states:

You may terminate your contract with CAR HELP by Oregon Auto Repair at any time. If you are terminating your contract we ask you support the combined efforts of the group and make a smooth transition of your CAR HELP clients and projects to other contractors.

(*Id.* at 8; emphasis in original.) Regarding acceptance of the company's policies and termination at will, the signature page of the contractor handbook states, in part:

The Contractor Handbook contains important information about the Company and group contractor interaction. I understand that I should consult existing contractors in the group regarding any questions not answered in the handbook. I have entered into my contract relationship with the Company voluntarily, and understand that there may or may not be a specified length of contract. Accordingly, either the Company or I can terminate the relationship at will, at any time, with or without cause, and with or without advance notice.

\* \* \* \* \*

Furthermore, I understand that this handbook is neither a contract nor a legally-binding contract agreement. I have had an opportunity to read the handbook, and I understand that I may ask others in the group any questions I might have concerning the handbook. I accept the terms of the handbook. I also understand that it is my responsibility to comply with the policies contained in this handbook, and any revisions made to it. I further agree that if I remain in contract with the Company following any

modifications to the handbook, I hereby accept and agree to such changes.

(Ex. A10 at 10.)

19. Oregon Auto Repair has the same expectations for the mechanics and office personnel that work at the business as employers have for their employees. (Test. of Bader.)

*The company's website*

20. Oregon Auto Repair has a website on which it advertises its services, and provides contact information and location. (See Ex. A13.) The website states, in part:

We strongly believe in providing quality, affordable auto repairs in a customer friendly atmosphere. We know how important it is to feel comfortable asking questions and being confident in the honesty, integrity, and workmanship of your auto repair shop. Car Help by Oregon Auto Repair is the place to send your wife, your sister, your son or anyone who wants a quality repair.

Let us give you CAR HELP[.]

(*Id.* at 5; emphasis in original.) The website contains pictures of the garage at the new location,<sup>12</sup> including a picture of the front of the building with the sign, “Car Help by Oregon Auto Repair.” (Ex. A13 at 5.) The website also contains a picture of two workers at the new location wearing Oregon Auto Repair’s uniform with the logo, “Car Help by Oregon Auto Repair.” (*Id.*)

21. Oregon Auto Repair’s website sets forth the company’s privacy policy, which states, in part:

We at Car Help respect our customers. We do not give out, sell, or share any of our customers’ data with any outside companies or organizations without prior authorization.

Reasons we may share your information include:

- Your vehicle is being serviced by Car Help, as well as another shop. If the other shop needs information about your service in order to handle your vehicle repair properly, we will ask your permission before sharing the information regarding your vehicle. Any additional information you have provided us that is not deemed pertinent to the repair of that vehicle will remain confidential.
- Your car being serviced is involved in an insurance claim, and the insurance provider needs information in order to properly disperse benefits or payouts in regards to that claim. If this is the case, we

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<sup>12</sup> The website also contains pictures of wall panels being built at the new location. (See Ex. A13 at 3.)

will provide the insurance company with the required documentation to assure the claim is handled properly, and there is no delay in service from us or the insurance agency.

- You are selling your vehicle, and you want the new owner to have proof of repairs. If this is the case, we will provide the new owner with information regarding the vehicle history to the extent of what we are aware of or have serviced. Any information regarding you, other vehicles on your account, or services you have had on the car through other companies, organizations, or individuals will not be provided.

(*Id.* at 7-8.)

*The nature of the work*

22. The mechanics that work at Oregon Auto Repair perform auto repair services, which are essential to the company's operations. The mechanics perform skilled work. They do not need a license to perform the work. (Test. of Holland.) The work that the mechanics perform at Oregon Auto Repair is continuous in nature. (*Id.*; see Ex. A16.)

23. The office personnel that work at Oregon Auto Repair perform office work, clerical support, and bookkeeping services, which are essential to the company's operations. They do not need a license to perform the work. (Test. of Holland.) The work that the office personnel perform at Oregon Auto Repair is continuous in nature. (*Id.*; see Ex. A16.)

*The services performed during the audit period*

24. During the period of September 1, 2017 to September 1, 2018, Oregon Auto Repair paid the following subject individuals (*i.e.*, the individuals that held themselves out as independent contractors) the following amounts to perform auto repair services:

Sean Pierce	\$50
Jason (last name unknown)	\$540
George Cevantes	\$29,975
Adam Hoffman	\$12,100
Justin Kittell	\$6,883
Marcos Rubios	\$8,650
James (Jeff) Waldburger	\$2,670

(Exs. A16, A17.)

25. During the period of September 1, 2017 to September 1, 2018, Oregon Auto Repair paid the following subject individuals the following amounts to perform office work, clerical support, and/or bookkeeping services:

Brittney Desputch	\$3,610
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Jeremy (Jay) Lawler	\$6,148
Brett McIntyre	\$2,750
Jessy Simpson	\$16,744
Dale Rothage	\$1,030
Rachelle (Shelly) Ransom	\$2,250

(Exs. A16, A17.)

26. During the period of September 1, 2017 to September 1, 2018, Oregon Auto Repair paid the following subject individuals the following amounts to perform moving and/or framing/building services:<sup>13</sup>

Jacob (Jake) Elliott	\$500
Sean Pierce	\$500
Jeremy (Jay) Lawler	\$302
Brett McIntyre	\$50
Jessy Simpson	\$356
Justin Kittell	\$417

(Exs. A16, A17.)

27. Oregon Auto Repair did not maintain verifiable time records for each subject individual that worked at the business during the audit period. Several of the subject individuals that worked at the business performed more than one classification of work during the audit period. Several of the subject individuals that worked at the business received a bonus payment based on work performance during the audit period. (Test. of Holland; Exs. A12, A16, A17.)

#### *The audit*

28. Oregon Auto Repair's insurance contract with SAIF required the company 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 Oregon Auto Repair's business records during the "policy period and within three years after the policy period ends," and "[i]nformation developed by audit will be used to determine final premium." (*Id.*)

29. On November 29, 2018, SAIF issued a letter to Oregon Auto Repair, notifying the company that John Hoppe, SAIF Premium Auditor, would be conducting an audit of the company's records to verify that it was being charged the correct premiums for the period of September 1, 2017 to August 31, 2018. (Ex. A8 at 1.) In the letter, SAIF requested that Oregon Auto Repair provide, among other things, all of its payroll records, tax reports, time records, check registers, disbursement journals, job costing reports, contracts, invoices, and workers'

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<sup>13</sup> The named subject individuals moved the business and/or framed and built walls at the new location. (See Exs. A12, A16, A17.)

compensation reports for the audit period for review. (*Id.*)

30. On or about December 20, 2018 through at least January 15, 2019, Mr. Hoppe conducted an audit of Oregon Auto Repair's records.<sup>14</sup> Mr. Hoppe reviewed, among other things, the company's cash payment disbursement journal,<sup>15</sup> independent contractor checklist, and the independent contractor status verification contracts that were signed by the subject individuals during the audit period. (*See* Exs. A7 at 3, A11, A12 at 1.)

31. Following his review of Oregon Auto Repair's records, Mr. Hoppe used the NCCI-provided classification codes and rates to determine the company's premium.<sup>16</sup> Mr. Hoppe used classification codes 8380, 8810, and 5403 for the work performed by the subject individuals during the audit period.<sup>17</sup> Classification code 8380 is for workers performing automobile service and repair. Classification code 8810 is for workers performing office work, clerical support, and bookkeeping services. Classification code 5403 is for workers performing framing or reframing on commercial business or residential dwelling exceeding three stories.<sup>18</sup> (*See* Exs. A3, A12.)

32. On February 25, 2019, SAIF issued a Final Premium Audit Billing to Oregon Auto Repair, notifying the company that it had determined that the subject individuals that worked at the business during the audit period were employees, and that it was adjusting the company's premium to include wages totaling \$119,675 that were paid to the subject individuals during the audit period. (Ex. A12.) SAIF explained how it determined that the subject individuals were employees, as follows:

Based on review \* \* \* we've determined these individuals to be subject employees. This determination was based on many factors to include the following:

The nature of the work these employees are performing. This is a situation where the nature of business is auto repair and the work being done by the 'contracted' workers is in support of your auto repair business. The coordination of these individual's activities is notably integrated on the overall business operations.

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<sup>14</sup> Mr. Hoppe met with Mr. Robertson and, after discovering the company's use of contracted labor, requested that Mr. Robertson provide verification of independent contractor status. (*See* Ex. A7 at 3.)

<sup>15</sup> The company's cash payment disbursement journal listed each subject individual by their first name with a descriptor of the work performed or reason for the payment. (*See* Ex. A16 at 23-40.)

<sup>16</sup> NCCI is the National Council on Compensation Insurance. It determines classification codes and rates for use in workers' compensation policies. (Test. of Holland.)

<sup>17</sup> In the original policy, SAIF used classification codes 8380 and 8810 on Mr. Robertson's annual reported payroll of \$50,600 to determine Oregon Auto Repair's premium. (*See* Ex. A4 at 2.)

<sup>18</sup> Classification code 8380 has a base rate of 3.44 per \$100 of payroll. Classification code 8810 has a base rate of 0.14 per \$100 of payroll. Classification code 5403 has a base rate of 6.49 per \$100 of payroll. (*See* Ex. A3 at 1-2, A4 at 2.)

The frequency of and routine payments to these workers would indicate that they are working at the business premises on a regular basis, wearing uniforms that carry the name of the business, and Oregon Auto Repair LLC supplies these individuals with the permanent shop/bay, lifts, diagnostic equipment and some tools.

These individuals do not advertise and there is no verification that these individuals possess their own general liability insurance or workers' compensation insurance. There is no start or stop date for the work and the duration of the individuals work could be enduring.

(*Id.* at 1.) SAIF also notified Oregon Auto Repair that because it did not maintain verifiable time records during the audit period, the wages of the subject individuals that had exposure to more than one classification during the audit period were placed in the highest rated classification. (*Id.* at 2.) SAIF explained how it classified the wages that Oregon Auto Repair paid to the subject individuals that moved the business and/or built walls at the new location, as follows:

During this policy period, you moved your business operations to your new location at 2440 Highway 99 N in Eugene, OR. Individuals were engaged in the move and building work (rough framing and wallboard installation). Moving equipment, tools and other business furniture and fixtures to a new location is a general inclusion to a governing class code (code with the most payroll) and would be properly classified to 8380. Verifiable time records (VTRs) were not maintained to show moving work versus building work, therefore the audit added class code 5403 Carpentry NOC (Not otherwise classified) and classified all of these wages to class code 5403.

(*Id.*) Oregon Auto Repair appealed the decision and requested a hearing. (Test. of Holland.)

#### *The revised audit*

33. On or about July 12, 2019 through August 9, 2019, Brittnie Holland, SAIF's Premium Audit Analyst, conducted a review of the Final Premium Audit Billing. (*See* Exs. A14, A15.) During the review, Ms. Holland granted several exceptions to Oregon Auto Repair, including, among other things, reducing the total subject payroll to \$95,525; granting a one-time exception for not maintaining verifiable time records; reclassifying the wages of the subject individuals based on the company's records (instead of placing the wages in the highest classification); pro-rating the bonus payments made to the subject individuals; and not including in the subject payroll an additional payment of \$6,332 for labor that was found during the review.<sup>19</sup> (Test. of Holland; Exs. A14 at 1, A16 at 7-9, A17.) The exceptions benefitted Oregon

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<sup>19</sup> Although the original audit was done according to the rules, Ms. Holland has the authority to grant exceptions and provide education to the policy holder. (Test. of Holland.)

Auto Repair. (Test. of Holland.)

34. On August 20, 2019, SAIF issued a Revised Final Premium Audit Billing to Oregon Auto Repair, notifying the company that the subject individuals that worked at the business during the audit period did not qualify as independent contractors and were subject to the company's policy for workers' compensation purposes, and that the company's premium was being adjusted to include wages totaling \$95,525 that were paid to those subject individuals during the audit period. SAIF also notified Oregon Auto Repair of the exceptions that it had granted to the company in the revised audit billing. (Ex. A17.)

## CONCLUSION OF LAW

SAIF's August 20, 2019 Revised Final Premium Audit Billing for the audit period of September 1, 2017 through September 1, 2018 correctly billed Oregon Auto Repair by including as payroll, payments made to: Jacob Elliot, Sean Pierce, Jason (last name unknown), Brittney Desputch, Jeremy Lawler, Brett McIntyre, Jessy Simpson, Dale Rothage, Rachelle Ransom, George Cervantes, Adam Hoffman, Justin Kittell, Marcos Rubios, and James Waldburger.

## OPINION

Oregon Auto Repair contends that SAIF's Revised Final Premium Audit Billing is incorrect. Oregon Auto Repair contends that the individuals named in the Revised Final Premium Audit Billing are independent contractors. 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).

*1. Whether the individuals named in the Revised Final Premium Audit Billing are independent contractors or workers.*

Oregon Auto Repair contends that the mechanics and office personnel that worked at the company during the audit period provided services as independent contractors and, therefore, SAIF incorrectly charged workers' compensation premiums for the company's payments to these individuals. SAIF contends to the contrary. I agree with SAIF.

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, that 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).

In this case, there is no dispute that the mechanics and office personnel that worked at Oregon Auto Repair during the audit period provided services for remuneration. As such, the first issue to address is whether the mechanics and office personnel were subject to the direction and control of Oregon Auto Repair. Importantly, the relevant question is not whether Oregon Auto Repair exercised *actual* control over the mechanics and office personnel. Rather, the question is whether Oregon Auto Repair had the *right* to direct and control the activities of the mechanics and office personnel.

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.

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). 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).

*a. The right to control test*

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 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 8-9 (1998)). Thus, the right to control 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.

Oregon Auto Repair presented evidence that the mechanics and office personnel that worked at its company during the audit period signed contracts agreeing that they were “independent contractors” with respect to the 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). Similarly, the fact that the company was structured to treat the mechanics and office personnel as independent contractors does not affect the analysis

of whether an employment relationship exists.

*(1) First factor – direct evidence of the right to, or exercise of, control*

*Performance.* As set forth in its contractor handbook, Oregon Auto Repair required the mechanics and office personnel that worked at its company during the audit period to be “willing to learn, improve and innovate constantly,” to think “outside of the box,” to “provide creative ideas and solutions to satisfy clients,” to “demonstrate attention to detail, pride, and the highest quality behind every client account and each project worked on,” and to be “open, trustworthy and truthful in all dealings with other contractors in the group \* \* \* and CAR HELP clients.” See Exhibit A10 at 1 and 2.

Oregon Auto Repair also required the mechanics and office personnel to undergo two trial periods and be evaluated by the group to determine if they could work at the company. Oregon Auto Repair further required the mechanics and office personnel to have their performance evaluated “at all times.” See Exhibit A10 at 8. Oregon Auto Repair also required the mechanics and office personnel to perform sufficiently in order to earn their negotiated compensation, and be able to continue to work at the company. *Id.* at 6. Additionally, Oregon Auto Repair incentivized the mechanics and office personnel to meet or exceed performance standards by paying bonus payments based on their performance. See Exhibit A16 at 23-40. These circumstances demonstrate that Oregon Auto Repair had the right to, or was exercising, control over the mechanics’ and office personnel’s performance.

*Schedule.* The mechanics and office personnel that worked at Oregon Auto Repair were allowed to set their own schedule. However, Oregon Auto Repair required the mechanics and office personnel to ensure coverage during periods of absence, and during the hours of operation. See Exhibit A10 at 6. This requirement demonstrates that Oregon Auto Repair had the right to, or was exercising, control over the mechanics’ and office personnel’s schedule.

*Hiring additional help (or subcontractors).* The mechanics and office personnel that worked at Oregon Auto Repair were allowed to bring in additional help as needed. However, Oregon Auto Repair required that the group approve the additional help before they could work at the company. See Exhibit A10 at 5. This requirement demonstrates that Oregon Auto Repair had the right to, or was exercising, control over the mechanics’ and office personnel’s ability to hire subcontractors.

*Policies and procedures.* Oregon Auto Repair required the mechanics and office personnel that worked at its company to sign the contractor handbook and agree to follow the company’s policies and procedures. See Exhibit A10 at 10. This requirement demonstrates that Oregon Auto Repair had the right to, or was exercising, control over the mechanics’ and office personnel’s behavior at the company.

I conclude that the above articulated aspects of the relationship between Oregon Auto Repair and the mechanics and office personnel that worked at the company during the audit period support a finding that the mechanics and office personnel are “workers.”

*(2) Second factor – the furnishing of tools and equipment*

The mechanics that worked at Oregon Auto Repair provided their own tools. However, Oregon Auto Repair paid for and provided the garage bays, lifts, diagnostic equipment, computer software, supplies, uniforms, and automobile parts that the mechanics used to perform their repair services. Oregon Auto Repair also paid for and provided the phones, office supplies, office equipment, and office area that the office personnel used to provide their clerical and bookkeeping services. This factor supports a finding that the mechanics and office personnel are “workers.”

*(3) Third factor – the method of payment*

Oregon Auto Repair paid the mechanics and office personnel weekly based on what was negotiated and/or agreed upon at the time of hire. Oregon Auto Repair also billed the customers directly for the repair services provided, and accepted payments from the customers. Oregon Auto Repair provided the accounting services for customers’ payments, and for the weekly amounts paid to the mechanics and office personnel. This factor supports a finding that the mechanics and office personnel are “workers.”

*(4) Fourth factor – the right to fire*

The mechanics and office personnel that worked at Oregon Auto Repair had verbal contracts, which included, among other things, the negotiated pay or salary amount, the expected performance, and the intended work schedule. Although the duration of the verbal contracts is unknown, as articulated in the contractor handbook, either party could terminate the relationship at will, at any time, with or without cause, and with or without advance notice. *See Exhibit A10 at 10.* Therefore, Oregon Auto Repair had the unconditional right to fire any mechanic and any office personnel that worked at the company during the audit period. This factor supports a finding that the mechanics and office personnel are “workers.”

Pursuant to the “right to control” test, the mechanics and office personnel that worked at Oregon Auto Repair during the audit period were subject to the direction and control of Oregon Auto Repair and, therefore, are “workers.”

*b. Nature of the work test*

As stated previously, 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). Even though I have determined that the mechanics and office personnel that worked at Oregon Auto Repair during the audit period are “workers” under the “right to control” test, I will review the “nature of the work” test for a complete record.

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).

Oregon Auto Repair operates an automobile repair garage. The mechanics that worked at Oregon Auto Repair during the audit period performed auto repair services. The mechanics provided brake services, fuel and oil services, engine diagnosis, and transmission repair. They also provided diagnosis and repair of clutch, electrical, coolant, radiator, engine compression, engine detonation, malfunctioning engine sensors, spark plugs, filters, emission systems, and fluid leaks. These auto repair services were integral to the company's operations, and were continuous in nature. *See Exhibit A16.*

In addition, the office personnel that worked at Oregon Auto Repair during the audit period performed customer and business services. The office personnel greeted customers, answered phones, interacted with the public, accepted payments from customers, and provided clerical support and bookkeeping services. These services were essential to the company's business operations, and were continuous in nature. *See Exhibit A16.*

Therefore, pursuant to the "nature of the work" test, the mechanics and office personnel that worked at Oregon Auto Repair during the audit period are "workers" for the purposes of workers' compensation services.

Oregon Auto Repair contends that the mechanics and office personnel had businesses separate from Oregon Auto Repair during the audit period. Even if true, there is no evidence that the businesses were maintained or that they impacted the continuous nature of the services that the mechanics and office personnel provided at Oregon Auto Repair during the audit period. *See Exhibit A16.*

## *2. Whether the individuals named in the Revised Final Premium Audit Billing are nonsubject workers.*

The next issue to determine is whether the mechanics and office personnel that worked at Oregon Auto Repair during the audit period qualify as nonsubject workers under the statutory scheme. *S-W Floor*, 318 Or at 630-631 (1994).

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[.]

As indicated above, sole proprietors that qualify as independent contractors are nonsubject workers. An independent contractor means a person who provide services for remuneration and who, in the provision of the services, among other things, 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.

As determined previously, the mechanics and office personnel that worked at Oregon Auto Repair during the audit period were subject to Oregon Auto Repair’s direction and control. As such, the mechanics and office personnel do not meet the statutory definition of “independent contractor” set forth in ORS 670.600. Therefore, the mechanics and office personnel do not qualify as nonsubject workers under ORS 656.027.

Accordingly, the mechanics and office personnel that worked at Oregon Auto Repair during the audit period are subject workers, and pursuant to ORS 656.017, Oregon Auto Repair must provide workers’ compensation coverage for them through its SAIF policy.

In conclusion, Oregon Auto Repair has not shown that SAIF erred by including the payments made to Jacob Elliot, Sean Pierce, Jason (last name unknown), Brittney Desputch, Jeremy Lawler, Brett McIntyre, Jessy Simpson, Dale Rothage, Rachelle Ransom, George Cervantes, Adam Hoffman, and Justin Kittell in the audited payroll. The August 20, 2019 Revised Final Premium Audit Billing is correct.

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## ORDER

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

SAIF's Revised Final Premium Audit Billing dated August 20, 2019 for the audit period September 1, 2017 through September 1, 2018 is AFFIRMED.

Dove L. Gutman

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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](mailto: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 March 29, 2021, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2019-ABC-03243.

By: First Class Mail

Oregon Auto Repair LLC  
2852 Willamette #165  
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Bruce Robertson  
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