

**BEFORE THE HEARING OFFICER PANEL
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Petition of)	Case No.: INS 01-10-020
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)	
D. E. GENERAL CONTRACTORS, INC.)	PROPOSED ORDER
)	
)	

HISTORY OF THE CASE

This workers' compensation final premium audit appeal was heard by Administrative Law Judge Ella D. Johnson on June 25, 2002. Petitioning employer D. E. Contractors Incorporated (employer or petitioner) was represented by corporate president Mark S. Berry pursuant to OAR 137-003-0555. Assistant Attorney General David B. Hatton represented responding insurer SAIF Corporation (insurer). Mark S. Berry testified on employer's behalf; Joseph Rick testified on insurer's behalf. The record closed on the date of hearing.

Petitioner timely appeals the final premium audit billing for the period of July 1, 2000 through July 1, 2001 (audit period). After review and consideration of the entire record in this matter, I now issue this Proposed Order.

ISSUE

Whether insurer incorrectly moved all payroll to the highest rated classification because the employer allegedly failed to maintain verifiable payroll records.

OFFICIAL NOTICE

As noted at hearing, I take official notice of the *Basic Manual of Workers' Compensation and Employers Liability Insurance (Basic Manual)*. The *Basic Manual* is a publication of NCCI. It includes the rules insurer follow to arrive at the correct class code for a business and the official description for all class codes filed with the department. The *Basic Manual* is a required part of every insurer's audit procedure guide. OAR 836-43-115(1)(a). I also take official notice of another NCCI publication, the *Scopes of Basic Manual Classifications (Scopes Manual)*. The *Scopes Manual* consists of a numerical listing of class codes with descriptive terminology and examples of types of business activities that have been included in class codes in the past.

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EVIDENTIARY RULINGS

The record consists of SAIF's Exhibits 101 through 119 which were admitted into the record without objection.

At hearing, insurer moved to exclude petitioner's exhibits pursuant to OAR 137-003-0570(10) which provides:

The hearing officer may refuse to admit evidence that was not disclosed in response to a discovery order, unless the party or agency that failed to provide discovery offers a satisfactory reason for having failed to do so, or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415 (10)¹. If the hearing officer admits evidence that was not disclosed as ordered, the hearing officer may grant a continuance to allow an opportunity for the agency or other party to respond.

By letter dated February 12, 2002, insurer requested an order compelling employer to produce certain documents including verifiable time records for the period in question. On February 13, 2002, I issued an Order Compelling Production ordering employer to produce the requested documents no later than February 22, 2002. On April 30, 2002, Yvonne Berry, employer's vice president, received the order by certified mail and employer failed to comply.

At hearing, Mr. Berry offered Exhibits 101 through 119. He testified that he had no personal knowledge of the Order Compelling Production until the day before the hearing and that he had been up all night gathering computer information and documents in order to present employer's case.

At hearing, Joseph Rick, premium auditor, testified on insurer's behalf. Rick conducted employer's premium audit in October 2001. Ms. Berry provided general payroll information from the computer but indicated that no time records separated by work activities were available. On Ms. Berry's referral, Rick consulted Mr. Berry who informed him that it was too time-consuming and expensive for employees to keep contemporaneous time sheets recording separate work activities and that, at the end of the year, Mr. Berry estimated their separate work activities based on his recollection.

Based on the record, I refuse to admit the exhibits offered by petitioner.² Mr. Berry's testimony that he personally was unaware of the Order Compelling Discovery until the day

¹ ORS 183.415(10) provides:

The officer presiding at the hearing shall ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case.

² Employer's proposed exhibits 101 through 119 are included in the record as offers of proof.

before hearing does not constitute a satisfactory reason for employer's failure to comply with the order. The corporate vice president received the Order Compelling Production and was responsible for ensuring that the corporation met the deadline for producing documents. Moreover, I find that the exhibits employer offered at hearing to be inherently unreliable. At the time of the audit, Mr. and Ms. Berry admitted that they did not keep contemporaneous time sheets separated by work activities. Additionally, Mr. Berry admitted to the auditor that in lieu of contemporaneous separate time sheets, he estimated the employees work activities at the end of the year based on his recollection. Furthermore, at hearing, Mr. Berry testified that he had been up all night gathering information and documents, in preparation for litigation. Based on the record, I find that excluding the exhibits offered by employer does not preclude a full and fair inquiry of the issue presented. Therefore, I sustain insurer's motion and exclude employer's proposed exhibits.³

FINDINGS OF FACT

- (1) Employer operates a construction remodeling business. (Ex. 102-2).
- (2) Employer received insurer's instruction manual, *Workers' Compensation Basics* which states:

Division of payroll

Ordinarily, when a workers' duties are varied and fit several classes, the entire earnings are reported in the higher-rated class. In the State of Oregon, employers have the option to maintain verifiable time records if applicable.

Daily verifiable time records

Verifiable time records are documents completed each day by an employee or an on-site supervisor. An example of a completed verifiable time record is shown on page 17. A blank copy for your use is attached to page 17. Using this example will help you maintain adequate verifiable records.

A record of total daily hours worked must be kept for each employee who works in two or more job classifications. A brief description of the work must be shown for each job listed. Percentages or estimates are not allowable for a division of payroll. (Ex. 106-10).

- (3) On July 10, 2000, employer submitted a payroll report to insurer listing six work classifications. (Ex. 116).

³ I also note that employer's Exhibits 101 through 119 do not constitute verifiable payroll records.

- (4) Joseph Rick, premium auditor with 27 years experience, audited employer's business in October 2001. (Ex. 117; testimony of Rick).
- (5) During the audit visit, Rick asked Ms. Berry for access to employer's verifiable time records. Ms. Berry indicated that she received only weekly timesheets without data on specific work. (Ex. 117-3).
- (6) Rick contacted Mr. Berry by telephone to request verifiable time records. Mr. Berry stated that he did not have the employees account for their work and that he split wages among classification by estimation based on his recollection without supporting documentation. (Ex. 117-3; testimony of Rick).
- (7) In the premium audit dated October 2, 2001, insurer reallocated wages from the class codes they in which they were reported into Class 5645 (Residential Carpentry). (Ex. 119-4).
- (8) Employer did not maintain daily verifiable time records reflecting work activities in separate job classifications. (Ex. 118-3; testimony of Berry).

CONCLUSIONS OF LAW

Insurer correctly moved all payroll to the highest rated classification because the employer failed to maintain verifiable payroll records.

OPINION

The issue to be resolved here is whether the employer maintained verifiable payroll records which would allow for division of payroll. Because D.E. Contractors, Inc. is the party seeking redress before the department concerning insurer's final premium audit billing for the audit period, it has the burden of establishing by a preponderance of the evidence that it maintained verifiable payroll records and the amounts now sought by insurer are not owed. See *Salem Decorating v. Nat'l Council on Comp. Ins.*, 116 Or App 166 (1992), *rev den* 315 Or 643 (1993) (in premium audit cases, burden of proof is on the employer).

ORS 737.310(10) requires the director of the department to prescribe by rule "the conditions under which a division of payroll between different manual classifications is permitted for purposes of computing workers' compensation premiums." Pursuant to this authority, the director has promulgated OAR 836-042-0060, which defines the conditions under which an employer may allocate payroll between more than one classification. OAR 836-042-0060 provides in relevant part:

- (1) When there is an interchange of labor, the payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, provided verifiable payroll records of the employer

disclose a specific allocation for each individual employee, in accordance with the standards for rebilling set forth in OAR 836-043-0190 and this rule.

- (3) When verifiable payroll records are required with respect to a single employer and the employer does not maintain them as required by this rule, the entire payroll of the employer shall be assigned to the highest rated classification exposure in accordance with the standards for billing set forth in OAR 836-043-0190.
- (4) For the purpose of this rule, payroll records are verifiable if they have the following characteristics:
 - (a) The records must establish a time basis, and the time basis must be hourly or part thereof, daily or part thereof, monthly or part thereof or yearly or part thereof;

- (c) The records must include a description of duties performed by the employee, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable; and
 - (d) The records must be supported by original entries from other records, including but not limited to time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager. Estimated ratios or percentages do not comply with the requirement of this subsection and are not acceptable for verification. Verifiable records must be summarized in the insured employer's accounting records.

As the court noted in *Pease v. NCCI*, 128 Or App 471, 475 (1994), the purpose behind the requirement that payroll record be verifiable is to enable a third party to independently confirm by reviewing the employer's payroll records that the correct method of classification has

been used to report payroll. This review must be able to be accomplished without resort to other sources and the records themselves must accurately describe the work performed.

Here, employer failed to carry its burden of proving by a preponderance of evidence that the final premium audit billing is incorrect. Furthermore, based on the record, I find that employer failed to maintain verifiable payroll records that meet the definition prescribed by OAR 836-043-0190. Employer's payroll records are not verifiable because they do not provide a time basis for each employee's work activity in separate classifications. For these reasons, insurer's audit is affirmed.

ORDER

SAIF's premium audit billing to D. E. Contractors Incorporated for the audit period July 1, 2000 through July 1, 2001 is correct and payable.

DATED this 25th day of July 2002.

/s/ Ella D. Johnson
Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this proposed order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to :

Department of Consumer and Business Services
c/o Mitch Curzon, Chief Enforcement Officer
Insurance Division
350 Winter Street NE
Salem, OR 97301-3883