

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

In the Matter of the Final Premium Audit of)	Case No. INS 01-11-010
)	
)	
PORTLAND PARTY WORKS, INC.,)	PROPOSED ORDER
an Oregon corporation.)	
)	

HISTORY OF THE CASE

On November 14, 2001, petitioning employer Portland PartyWorks, Inc. (petitioner) timely filed a request for hearing challenging the final premium audit billing issued by responding insurer, the SAIF Corporation (SAIF) for the period of June 1, 2001 through May 31, 2001 (audit period). On January 10, 2002, the matter was referred to the Hearing Officer Panel (Panel) for a hearing. On February 20, 2002, SAIF filed a motion to dismiss this matter. On April 10, 2002, Administrative Law Judge Ella D. Johnson conducted a telephone conference to hear oral argument on SAIF's motion. Assistant Attorney General David B. Hatton represented SAIF. Mike Fazzolari represented petitioner as its authorized representative pursuant to OAR 137-003-0555.

Citing OAR 436-043-110(4)(a), SAIF argued that petitioner was not entitled to appeal its final premium audit billing because the rule requires that the audit results in an increase in the premium based on the audit and here the audit resulted in a credit of \$219.00. Petitioner argued that it was entitled to appeal the audit now because the audit reclassified its business from Class Code 9154 (Theatre NOC – All Employees) with a rate of \$1.82 per hundred to Code 9186 (Amusement Device OP/Traling –Dr.) with a rate of \$10.76 per hundred. SAIF acknowledged that the audit would increase petitioner's premium prospectively and that petitioner could appeal the classification change at the end of the current period. Petitioner responded that it should not be required to wait for the next premium audit to appeal the change in classification because the reclassification of its business has resulted in a huge increase in premium, which it is currently paying and began paying in December 2001. I suggested that the interpretation of the rule be referred to the agency as a transmitted question. Subsequent to the telephone conference, SAIF formally requested that I transmit a question concerning this issue.

On April 16, 2002, I transmitted the following question to the Insurance Division of the Department of Consumer and Business Services (the division or department): Whether the Insurance Division interprets its administrative rule, OAR 836-043-0110(4)(a), to limit the employer's ability to appeal its final premium audit billing to circumstances where the audit results only in an increase in the premium for the audit period at issue and whether this limitation is consistent with the language of ORS 737.505(4) and 737.318(2)(d)? The matter was stayed until the division responded to the transmitted question. On June 27, 2002, the division responded to the transmitted question stating:

PROPOSED ORDER, PORTLAND PARTY WORKS, INC. (INS 01-11-010)

The Insurance Division does not interpret OAR 836-043-0110(4)(a) to limit an employer's right to a hearing. This rule does not apply to the issue of whether an employer is entitled to a hearing. Instead, it applies to the issue of when an insurer must notify an employer of the employer's right to hearing. By its own terms, this rule requires an insurer to notify an employer of the employer's right to appeal under ORS 737.318(2)(d) and 737.505(4) "[w]hen an insurer increases premium for an employer based on a premium audit." Whether an employer is entitled to a hearing depends on whether the employer (1) has received from the insurer a final premium audit billing, ORS 737.318(2)(d) and OAR 836-043-0110 and 0170; (2) is questioning the results of the audit, ORS 737.318(2)(d); (3) the director [of the department] has received a written request for "not later than the 60th day after the employer receives the final premium audit billing, *Id.*; and (4) the director has received a completed petition form within 60 days after the director received the request for hearing, OAR 836-043-0170(2) & (9). Since OAR 836-043-0110(4)(a) does not impose a limit on an employer's right to a hearing, this rule is not inconsistent with ORS 737.505(4) and 737.318(2)(d) relative to this issue.

In light of the division's interpretation of OAR 836-043-0110(4)(a) that the rule did not limit an employer's right to request a hearing, I concluded that SAIF's motion to dismiss petitioner's request for hearing was without merit, denied the motion and set the matter for hearing.

On January 7, 2003, I conducted an in-person hearing in Salem Oregon. At hearing, petitioner was represented by Mike Fazzolari as its authorized representative pursuant to OAR 137-003-0555(1)(a). Insurer was represented by Assistant Attorney General David B. Hatton. Mr. Fazzolari testified on behalf of petitioner. Insurer called Tim Hughes, Senior Underwriting Analyst for the National Council of Compensation Insurance (NCCI), and auditor David Murritta as witnesses. The record closed following the hearing on January 7, 2003.

ISSUE

Whether insurer incorrectly and prospectively reclassified petitioner's business from Class Code 9154 (Theatre NOC: All Other Employees) to Code 9186 (Carnival, Circus Or Amusement Device Operator – Traveling – All Employees & Drivers).

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 insurers 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 836-43-0115(1)(a). I also take official notice of another publication of NCCI, the *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.

EVIDENTIARY RULING

The record consists of petitioner's Exhibits R1 through R6,¹ including R1A, and insurer's Exhibits A1 through A12, which were admitted into the record without objection.

FINDINGS OF FACT

(1) Portland PartyWorks (PPW) is an Oregon corporation which started ten years ago in 1993 and is engaged in the business of event planning and providing interactive entertainment for special events. The type of activities PPW provides includes games, inflatable slides, a bungee jumping apparatus, inflatable rock for climbing, life size gyroscope and dunking booths.² PPW owns the inflatable and table games. PPW also hires independent contractors to assist in the activities, such as clowns, DJs and pony ride operators. Mike Fazzalari is the president and 100 percent owner of the corporation. PPW has four full-time employees. (Exs. A1, A8 at page 5-6; test. of Fazzalari.)

(2) The activities of the workers include loading the games and equipment from the warehouse into the truck, transporting the truck to the event site, unloading the truck, setting up the games and equipment, monitoring the participants to make sure that they use the equipment and games properly, loading the games and equipment back into the truck and transporting the truck back to the warehouse where it is unloaded. The workers use a dolly and the truck's lift gate to load and unload the games and equipment from the truck. It takes approximately five to ten minutes to set up a game or entertainment activity. (Test. of Fazzalari.)

(3) NCCI is the licensed rating bureau for Oregon. At all times relevant, SAIF provided workers' compensation insurance coverage to PPW through Associated Oregon Industries plan for small businesses, Compwise. (Exs. A3, A4 ; test. of Hughes.) On June 10, 2000, SAIF first assigned Class Codes 9154 (Theatre NOC: All Other Employees) and 8810 (Office Clerical) to PPW's business. PPW's premium was estimated at \$789. (Exs. A3, A4, A5.)

(4) Prior to being insured by SAIF, PPW's coverage was through Wausau Insurance Company. During the policy period of June 10, 1996 to June 10, 1997, PPW had one claim. The worker fell and sprained his ankle and Wausau paid \$32 for benefits associated with the claim. (Exs R2.)

(5) The audit for the audit period prospectively assigned the higher rated classification, Class Code 9186. Code 9186 was effective December 1, 2001 when Code 9186 would be added to the policy and Code 9154 deleted. The rate per \$100 of payroll for Code 9154 is \$1.67. The rate per \$100 of payroll for Code 9186 is \$10.76. (Exs. A3, A10.) The change in the classification increased PPW's estimated standard premium for the next policy period from \$789 to \$3,565 and to \$6,205. (Exs. A5, R4.)

¹ Petitioner's Exhibits 1 through 6 were subsequently remarked as Exhibits R1 through R6.

² PPW's website lists several mechanical games, including: the Mechanical Bull, which is made of fiberglass, 2 feet by 4 feet and weighs approximately 185 pounds with the machine; the Human Gyroscope, which is 10 feet by 10 feet by 12 feet and sits on its own trailer; and a mechanical surf machine called "Surfs Up!" which involves attaching hoses to a base unit. However, 75 percent of the entertainment is inflatable and none involves large amusement devices. Many of the mechanized games are on their own trailers and simply are required to be plugged in (Ex. R1A; test. of Fazzalari.)

(6) The auditor recommended a waiver of the higher-rated classification during the audit period because SAIF had incorrectly assigned Code 9154 to PPW's policy and PPW was not aware that Code 9186 existed. (Ex. A8.) The audit for the audit period resulted in a credit of \$219 after the waiver was granted. (Ex. A9.) The auditor generally looks at claim history only to determine if there are any red flags indicating claims that are out of the ordinary for that particular class code. The number of claims does not have any correlation to whether the business is properly classified. (Test. of Hughes.)

(7) PPW had an experience rating of 1.86 based on its projected losses in Code 9154. (Ex. A11; test. of Hughes.) PPW had one injury on June 10, 2001 while insured through SAIF. The worker, Corey Stone who works on call approximately 20 hours per week, injured his left arm while loading equipment into a truck and had to have stitches in his arm. SAIF paid \$478 in medical bills and \$243 in time loss benefits. (Exs. A12, R2.)

CONCLUSIONS OF LAW

Insurer correctly reclassified petitioner's business from Class Code 9154 (Theatre NOC: All Other Employees) to Code 9186 (Amusement Device Operator – Traveling – All Employees & Drivers).

OPINION

Petitioner's disputes the reclassification of its business to Class Code 9186. Inasmuch as PPW is the party seeking redress before the department concerning its final premium audit billing, PPW has the burden to prove its position on the issue by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Salem Decorating v. Natl. 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); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I conclude that PPW has failed to meet its burden.

Rule 1 of the *Basic Manual – 2001 Edition* provides that:

- The purpose of the classification system is to group employers with similar operations so that:
- The assigned classification reflects the exposures common to those employers
- The rate charged reflects the exposure to loss common to those employers.
- Subject to exceptions, it is the business of the employer within a state that is classified, not the separate employments, occupations or operations within the business.

“If there is no classification that describes the business, the classification that most closely describes the business shall be assigned.” *Basic Manual Rule 1-D-2.*

SAIF assigned Class Code 9186 to PPW’s policy. The *Scopes Manual* describes Class Code 9186 in relevant part:

**PHRASEOLOGY CARNIVAL, CIRCUS OR AMUSEMENT DEVICE
OPERATOR – TRAVELING – ALL EMPLOYEES & DRIVERS.**

* * * * *

SCOPE Code 9186 is applied to insureds engaged in the business of operating traveling amusements such as but not limited to traveling carnivals, traveling circuses, traveling rodeos, traveling animal shows, traveling automobile stunt shows (including drivers and mechanics) and traveling amusement device operators.

Code 9186 contemplates all employees such as but not limited to ticket sellers and employees dismantling, transporting, reerecting, operating and maintaining equipment required for a traveling amusement to conduct business. The term “all employees” does not preclude the assignment of outside salespersons codes to employees who qualify for these classifications.

(Emphasis in original.)

PPW contends that Code 9186 does not accurately describe its business operations because its business is not a high risk business with many workers’ compensation claims and does not include heavy equipment, such as roller coasters and other large amusement park devices. In support of its contention, PPW argued that Codes 5192 (Vending or Coin Operated Machines – Installation, Service or Repair & Salespersons, Drivers, 9328 (Oregon State Special Code - Trucking NOC – Garage, Dock and Warehouse Employees of Trucking Firms) and 9154 (Theatre NOC: All Other Employees) are more accurate descriptions of its business activities. PPW also argued that application of the code would place an unjustified burden on the business, increasing its premium from \$1,000 per year to \$6,000 to \$10,000 per year.

NCCI Senior Underwriting Analyst Tim Hughes who is an expert in the classification system, testified that in his expert opinion, Code 9186 is the appropriate classification for PPW’s business. Mr. Hughes stated that NCCI’s Rule 1-D which governs assignment of class codes in Oregon dictates that it is the business of the employer that is classified, not the separate employments, occupations or operations within the business. Consequently, Class Codes 5192 and 9154 would not be appropriate classifications for PPW’s business operations because, although they may address the separate operations within PPW’s business, PPW is not engaged in the business of servicing vending machines or providing trucking and warehouses for others. Additionally, Mr. Hughes testified that Code 9154 is not an appropriate classification because it applies to entertainment provided to and by others. Moreover, Mr. Hughes stated that if there is no

classification that describes the business, the classification that most closely describes the business is assigned. Here, Mr. Hughes opined that Code 9186 is the code that most closely describes PPW's business operations because PPW provides equipment and amusement devices to others. He stated that the *Scopes Manual's* description of Code 9186 addresses a range of business types but is not exhaustive and that it includes businesses where employers, like PPW, transport, set up, maintain, operate and disassemble amusement devices.

Mr. Hughes noted that the rate for Code 9186 is a blend of the average exposure of all businesses that fit within the code. He further noted that the fact that a business does or does not have injury claims does not impact its classification. For example, the fact that a roofing company has no or very few claims does not mean that it is improperly classified in Code 5551 (Roofing – All Kinds & Drivers). Mr. Hughes testified the number of claims impacts the premium of the employer because it changes the experience rating and one of the purposes of NCCI's experience rating system is to adjust or fine-tune the classification system to insure that the premium rates for specific businesses, like PPW's, are fair. Mr. Hughes further testified that, if the assignment of Code 9186 is upheld, SAIF should direct NCCI to recalculate PPW's experience rating which will adjust the rate to fit PPW's loss experience.

I find Mr. Hughes expert testimony that PPW is properly classified in Code 9186 to be persuasive. Moreover, in light of the adjustment which will occur in PPW's experience rating which will decrease its premium for the current policy period, I do not find the reclassification to Code 9186 will place an unjustified burden on the business. Accordingly, SAIF's prospective reclassification of PPW's business to Code 9186 is affirmed.

ORDER

SAIF's prospective reclassification of PPW's business from Class Code 9154 (Theatre NOC: All Other Employees) to Code 9186 (Carnival, Circus Or Amusement Device Operator – Traveling – All Employees & Drivers) is correct. SAIF shall contact NCCI to request a recalculation of PPW's experience rating consistent with its low loss rate within 10 days of the receipt of this order and upon receiving the adjusted experience rating, apply the new rating immediately to the inception of the reclassification.

IT IS SO ORDERED.

Dated this day of March 2003 in Salem, Oregon.

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.

PROPOSED ORDER, PORTLAND PARTY WORKS, INC. (INS 01-11-010)

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
Mitchel D. Curzon, Chief Enforcement Officer
Oregon Insurance Division
350 Winter Street NE Room 440
Salem, OR 97301-3883

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