

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Final Premium Audit of)	Case No. INS 03-03-009
)	
MORTHAN HOMES, INC.)	PROPOSED ORDER
an Oregon corporation.)	ON DEFAULT
)	

HISTORY OF THE CASE

Employer timely filed a hearing request within 60 days from receipt of the billing as required by ORS 737.505(4) appealing insurer's final premium audit billing for the period of October 15, 2001 to November 1, 2002 (audit period).. The Director of the Department of Consumer and Business Services, Insurance Division (director or department) referred the matter for hearing to the Office of Administrative Hearings (OAH) (formerly the Hearing Officer Panel) on April 1, 2003.

Petitioning employer Mor Than Homes, Inc. (petitioner or MTHI) failed to appear at the hearing after being duly notified of the date and time of the hearing. Administrative Law Judge Ella D. Johnson conducted the hearing on December 2, 2003, wherein the insurer SAIF Corporation presented a *prima facie* case on the record. Assistant Attorney General David Hatton represented responding insurer SAIF Corporation (insurer or SAIF). SAIF called SAIF Audit Program Analyst Teresa Smith to testify. The record closed following the hearing.

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 an NCCI publication. It includes the rules insurers follow to arrive at the correct class code for a 0business 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.

ISSUE

Whether insurer should be equitably estopped from assessing additional premium in Class Code 5645 (Carpentry – Detached One and Two Family Dwellings).

EVIDENTIARY RULING

The record consists of SAIF's Exhibits A1 through A17, which were admitted into evidence. In addition, OAH's hearing file is also designated as part of the record because petitioner failed to appear.

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FINDINGS OF FACT

(1) Petitioner is an Oregon corporation engaged in the business of residential remodeling and roofing. Petitioner also occasionally builds single family dwellings. At all times relevant herein, SAIF provided workers' compensation insurance coverage to petitioner. When petitioner applied for coverage, it described its business as:

Carpentry – residential remodel – replace floors – walls. Occasionally build a single family dwelling. Subs out most of operations. Employer will do jobsite foreman, carpentry, estimating & sales/bids – also part-time clerical worker in office.

(Exs. A1, A4.)

(2) Based on petitioner's description of its business, SAIF assigned Class Codes 5403 (Carpentry – Commercial/Industrial- NOC), 5645 (Carpentry – Detached One and Two Family Dwellings), 8742 (Estimator – No Job Hazards) and 8810 (Office Clerical). SAIF estimated petitioner's total annual premium at \$6,453.¹ At petitioner's request, SAIF added Class Codes 5551 (Roofing – All Kinds – DR), 2802 (Carpentry – Shop Only – Dr.), 2802 (Carpentry – Shop Only – Dr.) and 5437 (Carpentry – Finish Work Only) to its renewal policy for November 1, 2002 to December 31, 2002. (Exs. A1, A4, A8, A10, A11-12.)

(3) When SAIF performed its audit of petitioner's records for the audit period on February 25, 2003, the auditor discovered that petitioner failed to properly report payroll to the assigned class codes and moved payroll to the highest rated classification. Walter Bateman, the President of MTHI and 100 percent owner claimed that he use using the class codes as instructed by a SAIF representative. On May 14, 2002, Mr. Bateman had called SAIF and additional classifications were added. An investigation of the matter by SAIF indicated that no misinformation was given to Mr. Bateman. (Ex. A14.) On February 26, 2003, SAIF issued a final premium audit billing to petitioner which resulted in additional premium due of \$2,712. (Exs. 15, 16.)

(4) On March 3, 2003, petitioner timely requested a hearing challenging SAIF's final premium audit billing for the audit period. On April 15, 2003, petitioner was sent a Notice of Hearing (Notice), which stated that the hearing would be held at 8:30 a.m. on July 22, 2003 in Salem, Oregon at the offices of the Office of Administrative Hearings, 3420 Cherry Ave., NE, Suite 140. The Notice also stated “[i]f you fail to appear at the scheduled hearing and it is determined that you do not have good cause for not appearing, your case may be dismissed. The agency file is designated as the record in this proceeding in the event you do not appear at the hearing.” The Notice was sent by certified mail to petitioner's correct mailing address at 60 W. Q Street in Springfield, Oregon 97477-2142. Subsequent notices rescheduling the matter did not contain the same notice concerning the consequences of petitioner's failure to appear. (OAH Hearing File.)

¹ The Information Page of petitioner's policy noted that there was also an estimated SAIFPlus Credit of 8 percent for an estimated standard annual premium of \$5,937. Subtracting a premium discount of \$516 and adding the required DCBS assessment of \$396 resulted in a net annual estimated policy premium of \$5,817. (Ex. 5.)

(5) Prior to the hearing, Ms. Smith on behalf of SAIF and Mr. Bateman on behalf of MTHI entered into settlement negotiations. By letter dated September 23, 2003, Ms. Smith provided Mr. Bateman with a copy of the settlement agreement and emphasized that it was important that he sign the agreement and return the signed agreement to her as soon as possible in order for her to complete the settlement process and compromise the premium and interest as they had agreed. The settlement agreement provided that SAIF would accept \$1,356 in lieu of the current disputed amount of \$2,847. Despite repeated requests by Ms. Smith, Mr. Bateman never signed the settlement agreement or returned the signed agreement to SAIF. In order for Ms. Smith to settle a premium audit dispute, the settlement agreement must be in writing, signed and returned for processing. (Ex. A17; test. of Ms. Smith.)

CONCLUSIONS OF LAW

Insurer is not equitably estopped from assessing additional premium in Class Code 5645 (Carpentry – Detached One and Two Family Dwellings).

OPINION

Jurisdiction lies with the director. ORS 737.505. The issue to be resolved is whether SAIF should be equitably estopped from assessing petitioner additional premium in Class Code 5645 (Carpentry – Detached One and Two Family Dwellings). Inasmuch as petitioner is the party seeking redress before the department concerning SAIF's assessment of additional premium in Class Code 5645 for the audit period, it has the burden of proof in establishing its position on the issue by a preponderance of the evidence. *See* ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard, the standard in an administrative hearing is by a preponderance of the evidence); *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). I conclude that because petitioner has failed to appear at the hearing, petitioner has failed to meet its burden.

In that regard, the theory of equitable estoppel:

requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.

Wilkinson v. Public Employees Retirement Board, 188 Or App 97, 102 (2003).

OAR 137-003-0670 provides that, in the event a party fails to appear after being notified of the time and place of the hearing, an ALJ may issue an order adverse to the party upon default “only upon a *prima facie* case made on the record.” The ALJ “must find that the record contains evidence that persuades the [ALJ] of the existence of facts necessary to support the order.” Based on the record in this case, I find that petitioner failed to appear after being properly notified of the date, time and place of the hearing. Additionally, since petitioner’s failure to appear at the hearing, petitioner has not contacted this office with any reason for its failure to appear at the hearing.

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Furthermore, I find that the evidence presented by SAIF in its *prima facie* case supports SAIF's final premium audit billing. When SAIF audited petitioner's business records, the auditor discovered that petitioner had failed to properly report payroll to the assigned class codes and moved payroll to the highest rated classification on the policy, Code 5645. After the final premium audit billing was issued, Mr. Bateman claimed that he use using the class codes as instructed to do so by a SAIF representative. On May 14, 2002, Mr. Bateman had called SAIF and additional classifications were added. However, SAIF investigated the matter and found that no misinformation was given. Consequently, on this record, I conclude that SAIF is not equitably estopped from moving payroll to the highest rated classification on the policy, Code 5645.

ORDER

I propose that the Insurance Division issue the following order:

SAIF's final premium audit billing for the audit period of October 15, 2001 to November 1, 2002 is correct and payable.

IT IS SO ORDERED.

Dated this 10th day of December 2003 in Salem, Oregon.

/s/ Ella D. Johnson
Ella D. Johnson, Administrative Law Judge
Office of Administrative Hearings

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:

Mitchel D. Curzon
Chief Enforcement Officer
Insurance Division
PO Box 14480
Salem OR 97309-0405