

**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 03-05-001
)	
HARMONY WORKS, INC.,)	PROPOSED ORDER
dba Arrow Graphics,)	ON DEFAULT
a California corporation.)	
)	

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). 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 May 20, 2003. Administrative Law Judge (ALJ) Ella D. Johnson heard the employer's premium audit appeal by on September 3, 2003. The record closed that day following the hearing.

Petitioning employer Harmony Works, Inc. dba Arrow Graphics (petitioner or Harmony) failed to appear at the hearing after being duly notified of the date and time of the hearing. Assistant Attorney General David Hatton represented responding insurer SAIF Corporation (insurer or SAIF). SAIF called SAIF Premium Auditor Patrick Mogan to testify. Petitioner appeals SAIF's final premium audit billing for the period of December 15, 2001 to December 31, 2002 (audit period).

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 incorrectly reclassified payroll reported in Class Code 8742 (Salespersons, Collectors or Messengers, Outside) to Code 9554 (Sign Installation, Maintenance, Repair, Removal or Replacement NOC & Drivers).

EVIDENTIARY RULING

The record consists of SAIF's Exhibits A1 through A23, which were admitted into evidence. In addition, OAH's hearing file is also designated as part of the record because petitioner failed to appear.

FINDINGS OF FACT

(1) NCCI is the licensed rating bureau for workers' compensation in Oregon. NCCI is also the administrator for Oregon's Workers' Compensation Insurance Plan (assigned risk plan). Petitioner is a California corporation engaged in the business of At all times relevant herein, SAIF provided workers' compensation insurance coverage to petitioner as the assigned carrier through the assigned risk plan. (Ex. A1.)

(2) When petitioner first applied for insurance through the assigned risk pool, it described its business as "outside sales for signs, especially signs for new home developments, open house, this way, and etc. signs are shipped directly from the manufacturer." (Ex. A9.) Based on petitioner's description, SAIF assigned Class Code 8742. (Ex. A10)

(3) When SAIF performed its audit of petitioner's records, the auditor discovered that petitioner's employees delivered and installed the signs. (Test. of Mogan.)

(4) On April 14, 2003, petitioner timely requested a hearing challenging SAIF's final premium audit billing for the audit period. On June 19, 2003, petitioner was sent a Notice of Hearing (Notice), which stated that the hearing would be held at 8:30 a.m. on September 3, 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 1050 Mantelli Drive in Gilroy, California. (OAH Hearing File.)

CONCLUSIONS OF LAW

Insurer's final premium audit for the audit period, which correctly reclassified payroll reported in Class Code 8742 (Salespersons, Collectors or Messengers, Outside) to Code 9554 (Sign Installation, Maintenance, Repair, Removal or Replacement NOC & Drivers), is correct and payable.

OPINION

Jurisdiction lies with the director. ORS 737.505. The issue to be resolved is whether petitioner's business operations were correctly reclassified to Code 9554 (Sign Installation, Maintenance, Repair, Removal or Replacement NOC & Drivers). Inasmuch as petitioner is the party seeking redress before the department concerning SAIF's reclassification of its business operations 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

PROPOSED ORDER (*Harmony Works, Inc., Case No. INS 03-05-001*)

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.

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.

Furthermore, I find that the evidence presented by SAIF in its *prima facie* case supports SAIF’s reclassification in this matter. When petitioner applied for coverage through SAIF as the assigned carrier under the assigned risk plan, the application stated that it sold signs, i.e. performed “outside sales.” When the auditor audited petitioner’s business records, he discovered that not only did the salespersons sell the signs, they also delivered and installed the signs. Class Code 8742 excludes from its classification businesses that install signs. On the other hand, Class Code 9554 specifically covers businesses that *inter alia* install signs.

OAR 836-043-0190 provides in relevant part:

If an insurer determines the workers' compensation insurance policy of an insured needs reclassification, the insurer:

(1) May bill additional premium for the revised classification after the insurer has provided the insured at least 60 days written notice of the reclassification.

* * * * *

(3) May, notwithstanding section (1) of this rule, retroactively bill an insured for reclassification during the policy year without prior notice of reclassification if:

(a) The insured knew or should have known that the employees were misclassified;

(b) The insured provided improper or inaccurate information concerning its operations; or

(c) The insured's operations changed after the date information on the employees is obtained from the insured.

(Emphasis added.)

Here, the evidence establishes that petitioner provided inaccurate information to SAIF in its insurance application. Consequently, I conclude that SAIF is entitled to retroactively reclassify and bill petitioner at the correct rate for Code 9554.

ORDER

I propose that the Insurance Division issue the following order:

SAIF's reclassification of petitioner's business operations to Code 9554 for the audit period of December 15, 2001 to December 31, 2002 is correct and payable.

IT IS SO ORDERED.

Dated this 16th day of October 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