



insurer's audit procedure guide. OAR 836-43-115 (1) (a). I also take official notice of the *Scopes of Basic Manual Classifications (Scopes Manual)*, another NCCI publication. 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.

## FINDINGS OF FACT

(1) Employer is a partnership owned by James and Ruth Cox, both exempt partners. Employer owns a small cattle and hay/grain ranch outside of Prineville, Oregon. The ranch consists of 100 acres of hay with the balance in pastureland on which employer raises 150 cattle.<sup>1</sup> The cattle also graze on leased land where the Coxes have pasture permits. The ranch sells the cattle when the price is right, usually in mid October to November. During four months of the year, the work on the ranch is directed to the cattle; during the other eight months, the work is directed to raising hay and grains. (Ex. A12; test of Mr. Cox.)

(2) After he hired an employee, employer applied for worker's compensation coverage through SAIF on February 22, 2002. The employee, Jerry McBeth, lives about 12 miles down the road. He starts work about 7 AM and often works on the weekends. Because the ranch does not have sleeping quarters for the ranch employees, the Coxes reimbursed Mr. McBeth for his gas to and from work. (Test. of Mr. Cox.)

(3) At all times relevant herein, SAIF provided workers' compensation insurance to employer. (Ex. A1.) SAIF assigned Class Codes 0037 and 0083 to the policy. Code 0083 was designated as the governing classification, but the primary business of the ranch depends on which commodity has the higher price, the cattle or the hay and grain. (Exs. 3, A2, A12; test. of Mr. Cox.)

(4) The estimated premium for employer's policy was set at \$1,664 with a minimum premium of \$500. (Ex. A3.) On March 6, 2002, employer was provided with SAIF's Tool Box that gave information on the classifications assigned to the policy, instructions on which payments to include in premium and which to exclude, and how to maintain verifiable payroll records. (Exs. A4, A23.) The rate per \$100 for Code 0037 was \$6.72 and the rate for Code 0083 was \$16.12. (Ex. A10.)

(5) Employer's wife, Ruth, performs the direct work with the cattle, including riding check on the cattle once they are out in pasture for the summer and fall and maintaining the fences. Her son-in-law also helps with the cattle. Mr. McBeth works with the cattle the four months of the year that they are on the ranch. He moves the cattle from place to place but does not round them up or load them; the buyers perform that job. Mr. McBeth performs work on the corrals, repairs fences and shoots when the bulls tear them up, and assists with the calving in the spring.<sup>2</sup> He uses a horse, not a four-wheel drive, to perform these activities. During the winter months, Mr. McBeth was assigned to primarily to Code 0037 activities but he also feeds the cattle and performs fence repair in the late fall and early winter. Mr. McBeth works on the pumps and plants the ranches' rotational crop. (Ex. A12; test. of Mr. Cox)

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<sup>1</sup> At the time of the audit, employer had sold some of the cattle, bringing the number of cattle down to 60. (Ex. A12.)

<sup>2</sup> The calving season occurs from the beginning of February through the end of March. (Test. of Mr. Cox.)

(6) On May 23, 2003, contract auditor Joe Rick reviewed employer's records. The auditor noted that the entire payroll of employee Jerry McBeth was reported in the highest rated classification 0083<sup>3</sup> but had been reallocated on a seasonal basis for this year only<sup>4</sup> based on the information provided by the employer that the employee's entire time was spent in Code 0037 activities during the period that the cattle were out on the range. The auditor also noted that, in the future, Code 0037 would only be allowed if the employer maintained verifiable payroll records for the employee. The auditor mischaracterized a \$50 per month payment to the employee as a pickup rental when the purpose of the payment was to reimburse the employee for his gas expense in commuting to and from work. On May 23, 2003, employer told the auditor that they were canceling the policy. (Exs. 1, A12; test. of Mr. Rick.)

(7) The audit resulted in additional premium for the audit period of \$1,232. On June 5, 2003, employer called SAIF directly and cancelled its policy with SAIF because they no longer had an employee. SAIF cancelled the policy and terminated the guaranty contract effective July 8, 2003. SAIF initially charged employer a short rate penalty for early cancellation but later withdrew the penalty. (Exs. 17, 23.)

### CONCLUSIONS OF LAW

(1) Insurer did not err in assessing premium on \$600 because the purpose of the payment to employer's employee was to reimburse him for his gasoline expense in commuting to and from work.

(2) Two months of payroll were correctly reclassified from Class Code 0037 (Farm/Field Crops Raising) to Code 0083 (Cattle Raising) because employer failed to maintain verifiable payroll records.

### OPINION

The issues to be resolved here are whether money paid to an employee for gas to and from work is excludable from assessment as a business expense and whether employer maintained verifiable payroll records which would allow for division of payroll between Codes 0037 and 0083. Because petitioner is the party seeking redress before the department concerning his final premium audit billing, he has the burden of establishing by a preponderance of the evidence that the amounts now sought by insurer are not owed. *See* ORS 183.450(2) and (5); *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

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<sup>3</sup> The intent was to have Ruth Cox who is also an owner of the ranch perform the direct work with the cattle with the employee devoted primarily to 0037 activities. However, the payroll reports transposed the payroll in reporting the classifications. (Ex. A12.)

<sup>4</sup> The rules governing interchange of labor require the employer to maintain verifiable payroll records when employees perform activities in more than one classification. If an employer fails to maintain these records, the insurer is entitled to move all payroll for that employee to the highest-rated class code and assess premium accordingly for the audit period. In other words, SAIF was entitled to move all of Mr. McBeth's payroll for the entire audit period into Code 0083, instead of just two months of his payroll.

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 find that petitioner has failed to meet his burden.

*Expense reimbursement*

The *Basic Manual* (2001 ed.) Rule 2 provides in relevant part:

**A. PREMIUM BASIS** *effective 01 Jul 2001*

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Premium is calculated on the basis of the total payroll paid or payable by the insured for services of individuals who could receive workers compensation benefits for work-related injuries as provided by the policy.

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**B. PAYROLL**

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For the purposes of this manual, payroll means money or substitutes for money.

**1. Includes:**

\* \* \* \* \*

i The rental value of an apartment or house provided to an employee based on comparable accommodations.

\* \* \* \* \*

p. Expense reimbursements to employees to the extent that an employer's records do not confirm that the expense was incurred as a valid business expense.

(Emphasis in original.)

Mr. Cox testified that the ranch reimbursed Mr. McBeth for his gas expense to and from work because they did not have a place for the ranch employees to live on premises. While commendable, the *Basic Manual* Rule 2 includes in premium assessment expense reimbursements that are not incurred on the business of the employer. Here, the expense reimbursement was give to Mr. McBeth for his commuting cost to and from work. Mr. McBeth's drive to and from work is not an expense incurred on the business of the

**PROPOSED ORDER/James B. Cox** (INS 03-07-010)

employer. On the other hand, once Mr. McBeth was at work and he was sent to pick something up in Prineville or other errand for the ranch, the expense would be excluded from premium assessment. Consequently, I conclude that SAIF properly assessed premium on the \$600 paid to Mr. McBeth for his commuting expense.

*Verifiable payroll records*

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 such individual employee, in accordance with the standards for rebilling set forth in OAR 836–043–0190 and this rule.

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(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 836-043-190.

(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;

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(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.

(Emphasis added.)

As the court noted in *Pease v. NCCI*, 128 Or App 471, 475 (1994), the purpose behind the requirement that a 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.

Mr. Cox conceded at hearing that he did not maintain verifiable payroll records to allow for division of payroll because Mr. McBeth's activities varied from day to day. He stated that there were no records for the auditor to review when the audit was performed but that his "word was his bond." While sympathetic, SAIF was required to follow the above-cited rule that summarizes the relevant rules contained in the *Basic Manual* and the *Scopes Manual*, which govern assignment of classification codes and assessment of premium. I am also required to apply these rules. *See Aetna Cas. & Sur. Co. v .Blanton*, 139 Or App 283 (1996)( administrative agency does not have authority to ignore its own rules). Consequently, I conclude on this record that Mr. Cox has failed to meet his burden of proving that his payroll records are verifiable. Accordingly, SAIF's final premium audit billing is affirmed.

### **ORDER**

SAIF's final premium audit billing issued to James B. Cox for the audit period of March 1, 2002 to February 28, 2003 is correct and payable.

IT IS SO ORDERED.

Dated this 12<sup>th</sup> day of January 2004 at Salem, Oregon.

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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:

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