

**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 )	<b>Case No. INS 03-08-002</b>
)	
<b>TLC HELPING HANDS, LLC,</b> )	<b>PROPOSED ORDER</b>
<b>dba Helping Hands Home Care</b> )	<b>ON DEFAULT</b>
)	

**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 May 16, 2002 through June 1, 2003 (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) on October 27, 2003.

The hearing was subsequently set for April 22, 2004 in Salem, Oregon with Administrative Law Judge Ella D. Johnson presiding. Trial Counsel Barbara Woodford appeared representing insurer Liberty Northwest (insurer or LNW). Petitioning employer TLC Helping Hands, LLC dba Helping Hands Home Care (petitioner or TLC) failed to appear at the hearing after being duly notified of the date, time and place of the hearing. The case file, which includes exhibits offered by insurer LNW, was previously designated as the record in this matter. The hearing file constitutes evidence presenting a *prima facie* case on the record. The record closed on the date of the hearing.

**OFFICIAL NOTICE**

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 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.

**ISSUES**

- (1) Whether insurer incorrectly assessed premium on payments made to Administrator Nancy Looker after she requested that the coverage on her be cancelled.
  
- (2) Whether insurer misclassified certain employees.

## EVIDENTIARY RULING

The record consists of insurer's Exhibits 101 through 110 and the OAH case file, which I now admit into evidence pursuant to the notice designating the file as the record in the event of default by petitioner set forth in November 6, 2003 notice of hearing.

### FINDINGS OF FACT

(1) TLC is in the business of providing private in-home personal care services catering to senior citizens in the Portland area. Nancy Looker is the President of TLC and owns 100 percent of the company. She also manages the office and supervises the care givers. TLC is structured as a limited liability company. The employees go to clients' homes and provide help in activities of daily living such as bathing, grooming and homemaking. In-home care givers also have some transportation duties. TLC supervisors have duties that take them out of the office. Clerical staff perform record keeping and secretarial duties with no duties outside the office. (Ex. 107 at 3.)

(2) On May 15, 2002, TLC applied for coverage through the Workers Compensation Insurance Plan (assigned risk plan). Nancy Looker was listed on the application as the President of TLC. LNW provided workers' compensation insurance to petitioner as the assigned carrier under the assigned risk plan beginning on May 16, 2002 for the policy period of May 16, 2002 to June 1, 2003.<sup>1</sup> (Exs. 102--104.) LNW's written policy assigned Class Codes 8810 (Office Clerical), and 8835 (Adult Day Care Center – All Employees). The policy specifically listed Nancy Looker as a covered person under Code 8835. The policy stated that TLC could cancel the policy with 30 days written notice. (Ex. 104 at 3, 11, 13.) Subsequent payroll reports submitted by TLC crossed out Nancy Looker's name on the payroll report and did not pay premium on payments made to her. (Ex. 110.)

(3) On June 17, 2003, LNW performed an audit of TLC's records for the audit period. (Ex. 106.) The audit found that some clerical staff were not included in Code 8810 and some care givers were incorrectly classified in Code 8810. No payroll was reported for May 2002 and several pay periods were missed in other months. The audit noted that payroll for Code 8810 was underreported by \$53,491 and for Code 8835 underreported by \$110,171. The audit found that TLC failed to include Nancy Looker in reporting payroll. The audit assessed premium on payments made to Nancy Looker but her payroll was changed to the minimum in Code 8835 for May 16, 2002 to February 3, 2003 the date she was endorsed off the policy. (Ex. 107 at 3-4.) The audit resulted in an additional premium of \$7,891.85 and added Class Code 7380 (Drivers, Chauffeurs & Their Helpers NOC - Commercial) to the policy for care givers who transported clients to doctors appointments and the grocery store. (Exs. 106-109.)

(4) On October 23, 2003, petitioner timely requested a hearing challenging insurer's final premium audit billing for the audit period. On November 6, 2003, petitioner was sent a Notice of Hearing (Notice), which stated that the hearing would be held at 8:30 a.m. on February 17, 2004 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

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<sup>1</sup> Prior to 2001, TLC was insured through Wausau in 1999 and TIG in 2000. (Ex. 101 at 2.)  
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Notice was sent by certified mail to petitioner's correct mailing address at 9828 E. Burnside St. Suite 235, Portland, Oregon 97216-2363. Subsequent notices rescheduling the matter did not contain the same notice concerning the consequences of petitioner's failure to appear. (OAH Hearing Case File.)

(5) The matter was reset at petitioner's request and rescheduled for April 22, 2004 at 8:30 am at the OAH office at 3420 Cherry Ave., NE, Suite 140 in Salem, Oregon. A Notice of Hearing with that information was mailed by first class mail to petitioner at TLC's correct address in Portland, Oregon on March 11, 2004. (OAH Hearing Case File.)

(6) On April 22, 2004, petitioner failed to appear at the 8:30 a.m. hearing. Thereafter, OAH was not contacted by petitioner or by its authorized representative, Nancy Looker. (OAH Hearing Case File.)

### CONCLUSIONS OF LAW

(1) Insurer correctly assessed premium on payments made to Administrator Nancy Looker because she failed to request in writing that the coverage on her be cancelled.

(2) Insurer did not misclassify TLC's employees.

### OPINION

Jurisdiction lies with the director. ORS 737.505. The issue to be resolved is whether insurer incorrectly assessed premium on payments made to Administrator Nancy Looker and whether insurer misclassified certain employees. Inasmuch as petitioner is the party seeking redress before the department concerning insurer's assessment of additional premium for 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.

OAR 137-003-0670 provides that, in the event a party fails to appear after being notified of the date, 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 which is the designated case file, 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 am persuaded that the evidence presented by LNW's exhibits in its *prima facie* case supports its final premium audit billing. The evidence establishes that audit for the audit period found that some clerical staff were not included in Code 8810 and some care workers were

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incorrectly classified in Code 8810. No payroll was reported for May 2002 and several pay periods were missed in other months. The audit noted that payroll for Code 8810 was underreported by \$53,491 and for Code 8835 by \$110,171. Because TLC failed to include in its payroll reports any amounts for payments made to Nancy Looker, the audit assessed premium on payments to her but changed the premium assessment to the minimum for Code 8835 for May 16, 2002 to February 3, 2003 when she formally requested to be endorsed off the policy. Consequently, on this record, I conclude that LNW correctly assessed premium on payments made to Ms. Looker and correctly classified certain TLC employees. Accordingly, LNW's audit is affirmed.

### **ORDER**

I propose that the Insurance Division issue the following order:

Liberty Northwest's final premium audit billing issued to TLC Home Care, LLC for the audit period of May 16, 2002 through June 1, 2003 is correct and payable.

**IT IS SO ORDERED.**

Dated this 23<sup>rd</sup> day of April 2004 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  
Department of Consumer and Business Services  
PO Box 14480  
350 Winter Street NE Room 440  
Salem OR 97309-0405