

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

In the Matter of the Petition of)	Case Nos.: INS 03-05-007
)	
)	PROPOSED ORDER
RED HAT CONSTRUCTION INC.,)	
An Oregon Corporation)	

The employer appeals decisions of the Oregon Workers' Compensation Rating System (ORAC or Committee) pertaining to its premium audit billing for the period January 1, 2002 through January 1, 2003 (audit period). On May 19, 2003, employer requested a hearing. On June 3, 2003, the Department of Consumer and Business Services (DCBS) referred the matter to the Office of Administrative Hearings. On September 9, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Robert K. Alexander represented petitioning employer Red Hat Construction Incorporated (Red Hat or petitioner) as its authorized representative pursuant to OAR 137-003-0555(1)(a). Timothy Hughes represented ORAC as an authorized representative pursuant to OAR 137-003-0555(1)(a). Insurer SAIF waived appearance. Robert K. Alexander testified on petitioner's behalf. ORAC called Brian Fowler, SAIF's premium audit manager, as a witness. The record closed following the hearing.

ISSUES

1. Whether ORAC incorrectly concluded that Class Code 5651 (Carpentry-Dwellings- 3 stories or less) applies to all carpentry three stories or less, including wallboard if performed by the same contractor's employees.
2. Whether ORAC incorrectly concluded that Class Code 5403 (Carpentry NOC) does not apply to work performed on fraternity and sorority houses.
3. Whether ORAC incorrectly concluded that Class Code 5445 (Drywall) does not apply to work performed on fraternity and sorority houses.

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 836-43-115(1)(a). I also take official notice of another NCCI publication, the *Scopes of Basic Manual Classifications (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 RULINGS

The record consists of petitioner's Exhibits 1 through 11, and ORAC's Exhibits R1 and R2 which were received into the record without objection.

FINDINGS OF FACT

1.NCCI is the licensed rating bureau for workers' compensation insurance in Oregon. ORAC is comprised of representatives from Oregon workers' compensation insurance companies, the department and NCCI. It has authority over matters pertaining to workers' compensation insurance rules and classifications as applied to policies written in Oregon. ORAC provides direction to NCCI on issues that are not easily resolved under existing rules. At all relevant times, SAIF provided workers' compensation coverage to petitioner.

2.Petitioner is a construction business engaged in repair and remodeling carpentry, pouring concrete, framing, finishing, siding, specialty roofing, waterproofing, drainage systems, and dry rot repair. (Ex. R1.)

3.From June through November 2002, petitioner performed carpentry maintenance and repair on fraternity and sorority houses less than three stories in height. Petitioner repaired walls, and performed general carpentry. Petitioner also remodeled a shower room including drywall, plumbing and replacing wood members. (Testimony of Alexander.)

CONCLUSIONS OF LAW

1. ORAC correctly concluded that Class Code 5651 (Carpentry-Dwellings- 3 stoves or less) applies to all carpentry three stoves or less, including wallboard if performed by the same contractor's employees.
2. ORAC correctly concluded that Class Code 5403 (Carpentry NOC) does not apply to work performed on fraternity and sorority houses.
3. ORAC correctly concluded that Class Code 5445 (Drywall) does not apply to work performed on fraternity and sorority houses.

OPINION

Inasmuch as petitioner is the party seeking redress before the department concerning ORAC's decisions for the audit period, January 1, 2002 through January 1, 2003, petitioner has the burden of proving its position on those issues by a preponderance of the evidence. *Salem Decorating v. Nat'l 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). Proof by a preponderance of evidence means that the factfinder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 309 (1989).

The first issue is whether ORAC incorrectly determined that Class Code 5651 applies to all carpentry performed in residences three stories or less. Petitioner contends that the classification was unfair because sorority and fraternity houses resemble dormitories or barracks more closely than family dwellings. However, ORAC relies on Class Code 5651 which cross references military reservation construction and argues that sorority and fraternity houses resemble military barracks. ORAC also argues that Class Code 5651 applies because the sorority and fraternity houses were less than three stories in height. I agree.

The *Basic Manual* describes Class Code 5651 as:

Dwellings-THREE STORIES OR LESS. Applicable only to buildings designed primarily for multiple dwelling occupancy and includes garages constructed in connection therewith. Carpentry in the construction of detached private dwellings for occupancy by one or two families to be separately rated as Code 5645-Carpentry.

The *Scopes Manual* describes Class Code 5651 in pertinent part as:

CARPENTRY—DWELLINGS—THREE STORIES OR LESS. Applicable only to buildings designed primarily for multiple dwelling occupancy and includes garages constructed in connection therewith. Carpentry in the construction of private dwellings for occupancy by one or two families to be separately rated as 5634—Carpentry. CROSS REF. Military Reservation Construction.

Class Code 5651 contains an Oregon Special Rule which provides in pertinent part:

Carpentry repair or remodeling of dwellings three stories or less is also contemplated under this classification.
(Emphasis in the original.)

Based on the record, I conclude that ORAC correctly decided that Code 5651

applies to all carpentry work performed by employees of the same contractor when performed on dwellings three stories or less. Therefore, the disputed payroll was properly allocated to Class Code 5651.

The second issue is whether ORAC incorrectly concluded that Class Code 5403 (Carpentry NOC) does not apply to work performed on fraternity and sorority houses.

The *Basic Manual* describes Class Code 5403 as “CARPENTRY NOC” (Not Otherwise Classified).

The *Scopes Manual* describes Class Code 5403 in pertinent part as:

Wooden buildings or structures including those designed for dwelling occupancy.

The *Scopes Manual* Class Code 5403 contains an Oregon Special Rule which provides in pertinent part:

Code 5403 covers general carpentry work not otherwise classified in the Basic Manual. It contemplates carpentry work of a commercial and industrial nature such as buildings or structures. It also contemplates construction of dwellings that exceed three stories in height. Code 5403 also applies to carpentry repair and/or remodeling of commercial buildings and structures and dwellings that exceed three stories in height.

Class Code 5403 applies to carpentry work not otherwise classified and performed on buildings exceeding three stories in height. The disputed work does not qualify as “NOC” because it falls under Class Code 5651. Moreover, the disputed work took place on fraternity and sorority houses that were less than three stories in height. Therefore, the disputed payroll does not qualify for Code 5403.

The third issue is whether ORAC incorrectly concluded that Class Code 5445 (Drywall) does not apply to work performed on fraternity and sorority houses

The Basic Manual describes Class Code 5445 as “WALLBOARD INSTALLATION-WITHIN BUILDINGS & DRIVERS.”

The *Scopes Manual* describes Class Code 5445 as

Code 5445 contemplates the installation of drywall, plasterboard and sheetrock in private residences or commercial buildings. In the event drywall, plasterboard or sheetrock is installed in a private residence by a general contractor responsible for the entire dwelling construction project, the applicable dwelling construction code, such as

Code 5645 or Code 5651 is applicable to the entire dwelling.

Petitioner contends that sorority and fraternity houses are residential and not commercial, and therefore, any payroll arising from drywall work should be allocated to Class Code 5445. However, such buildings are dedicated to housing students, and therefore, are residential dwellings for classification purposes. Accordingly, ORAC properly declined to apply Class Code 5445.

In conclusion, I find that ORAC properly declined to apply Class Codes 5403 and 5445 and properly determined that the activities were classified under Class Code 5651. Accordingly, I find that petitioner has failed to carry its burden of proving that the premium audit is incorrect.

ORDER

IT IS HEREBY ORDERED that:

SAIF's premium audit billing to Red Hat Construction, Inc., for the audit period January 1, 2002 through January 1, 2003 is correct and payable.

DATED this 9th day of October 2003.

/s/ Catherine P. Coburn
Catherine P. Coburn,
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