

**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 03-08-010
)	
)	
A+ SECURE STORAGE, LLC)	PROPOSED ORDER
)	
)	

The employer appeals the decision of the Oregon Worker’s Compensation Rating System (ORAC or committee) pertaining to employer’s final premium audit for the period January 1, 2002 through December 31, 2002 (audit period). On September 10, 2003, the Insurance Division referred the matter to the Office of Administrative Hearings (OAH). On April 7, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Jerry J. Peacore, corporate president, acted as the authorized representative for petitioning employer, A+ Secure Storage, pursuant to OAR 137-003-0555. ORAC is a party to the case because petitioner appeals an ORAC ruling. OAR 137-003-0535(2). On March 26, 2004, ORAC notified OAH that it intended to participate in the contested case hearing. ORAC Secretary Timothy J. Hughes¹ acted as the authorized representative for ORAC. Peacore testified on petitioner’s behalf and Hughes testified on ORAC’s behalf. The record closed on the date of hearing.

ISSUE

Did ORAC incorrectly decline to amend Class Code 9015 (Mini-Storage Warehouse) to allow for application of the Interchange of Labor Rule with Class Code 8810 (Office Clerical)?

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 insurer 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,

¹ Mr. Hughes is also a senior underwriting analyst for the National Council on Compensation Insurance (NCCI), but appears in appeals of ORAC decisions as the committee’s secretary and authorized representative of ORAC. Although Mr. Hughes is the NCCI member of the ORAC committee, he does not represent NCCI at appeals of ORAC decisions.

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

Petitioner's Exhibits A through G were admitted into the record without objection. On April 12, 2004, five days after the record closed on the hearing date, I received a two-page statement from Peacore which I have marked as Petitioner's Supplementary Exhibit H. OAR 137-003-0600(8). Supplementary Exhibit H was copied to ORAC and I have received no objection. See OAR 137-003-0610(3). I construe this post-hearing submission as a Motion to Reopen the Record and allow it in order to ensure that the record developed at hearing shows a full and fair inquiry into the facts necessary for consideration of all issues presented. See *Berwick v. AFSD*, 74 Or App 460 (1985).

FINDINGS OF FACT

(1) The National Council on Compensation Insurance (NCCI) is the licensed rating bureau for workers' compensation insurance in Oregon. The Oregon Workers' Compensation rating System (ORAC or committee) is comprised of representatives from Oregon workers' compensation insurance companies, the department and NCCI. ORAC 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 or require billings with the Oregon Insurance Division. At all relevant times, SAIF provided workers' compensation insurance to petitioner.

(2) Petitioner operates mini-storage facility located in Klamath Falls, Oregon. (Testimony of Peacore). Petitioner employs three part-time office workers who perform bookkeeping in a separate office, greet customers at the counter, fill out rental contracts at the counter, direct customers to their storage units, instruct customers in gaining access, and collect rent. The office workers also perform duties associated with a Federal express shipping operation housed in the rental office. The officer workers do not show rental units to customers and do not clean or maintain storage units. (Ex. A-4.)

(3) Peacore performs all outdoor job duties such as accompanying customers to the storage units and doing maintenance work. (Testimony of Peacore.)

(4) At all relevant times, SAIF provided coverage to petitioner. SAIF reallocated the payroll for petitioner's part-time employees from Class Code 8810 to Class Code 9910. (Ex. G.) Petitioner appealed to ORAC. (Ex. A.)

(5) ORAC declined to amend Class Code 9015 to allow for application of the Interchange of Labor Rule with Class Code 8810 and declined to issue a directive to SAIF concerning the disputed audit. (Ex. B.)

CONCLUSION OF LAW

ORAC correctly declined to amend Class Code 9015 (Mini-Storage Warehouse) to allow for application of the Interchange of Labor Rule with Class Code 8810 (Office Clerical).

OPINION

Inasmuch as petitioner is the party seeking redress before the department concerning ORAC's decision, petitioner has the burden of proving its position on those issues by a preponderance of the evidence. ORS 183.450(2). *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). Preponderance of the evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1998).

The *Basic Manual* describes Class Code 9015 as:

“BY OWNER, LESSEE OR REAL ESTATE MANAGEMENT FIRM: ALL OTHER EMPLOYEES.

Not applicable to an owner or lessee of a building who occupies the entire or principal portion of the premises for mfg. or mercantile purposes. Maintenance or repair work at any location where such owner or lessee does not also perform janitorial services, operation, or maintenance of amusement devices to be separately rated.”

(Emphasis in the original.)

The *Scopes Manual* describes Class Code 9015 as:

“PHRASEOLOGY BUILDINGS—OPERATION BY OWNER OR LESSEE OR REAL ESTATE MANAGEMENT FIRM: ALL OTHER EMPLOYEES.

Not applicable to an owner or lessee of a building who occupies the entire or principal portion of the premises for mfg. or mercantile purposes. Maintenance or repair work at any location where such owner or lessee does not also perform janitorial services, operation or maintenance of amusement devices to be separately rated.”

(Emphasis in the original.)

In the *Scopes Manual*, Class Code 9015 contains an Oregon Special Rule which provides in pertinent part:

“Oregon--See Apartment House Operation. Includes employees responsible for direct care, custody, and control of the premises, whose duties include, but are not limited to, direct acceptance of applications and rent from tenants; showing property; and responsibility for performing or arranging for maintenance and repair, and also includes on-site managers. **On-site office clerical employees can be separately rated to Class Code 8810—Office Clerical Employees only if they meet the test for that class and do not provide services typically handled by a resident manager.**”

(Emphasis added).

The *Basic Manual* describes Class Code 8810 as:

“**CLERICAL OFFICE EMPLOYEES NOC.** Subject to Standard Exception Manual Rule.
**CLERICAL OFFICE EMPLOYEES NOC
COVERAGE UNDER THE FEDERAL EMPLOYERS’
LIABILITY ACT (FELA)**”

(Emphasis in the original.)

The *Scopes Manual* describes Class Code 8810 in pertinent part as:

“**PHRASEOLOGY CLERICAL OFFICE EMPLOYESS NOC**”

The *Scopes Manual* Class Code 8810 contains Oregon Special Rule IV-B2a which provides:

“CLERICAL OFFICE EMPLOYEES – Code 8810—who are not specifically included in descriptions of other classes assigned to the policy, and are not included by other special rules, may qualify for inclusion in Standard Exception Class 8810. Two basic tests must be met: (1) the definition of clerical office duties and (2) the definition of an office.

(a) DEFINITION OF CLERICAL OFFICE DUTIES

The duties of a clerical office employee include creation or maintenance of financial or other employer records, handling correspondence, computer composition, technical

drafting and telephone duties, including sales by phone. Cashiering may be eligible for this classification if the employee does not handle, show, demonstrate, deliver, or have another exposure to any product and **does not provide any retail customer services**. The clerical office classification continues to apply to a qualified clerical office employee who performs a duty outside of a qualified office area when that duty does not involve direct supervision or physical labor and is directly related to that employee's duties in the office. These duties do not exclude the depositing of funds at the bank, purchase of office supplies and pick up or delivery of mail provided they are incidental and directly related to that employee's duties in the office. However, for purposes of this rule, the definition of clerical duties excludes outside sales or outside representatives; any work exposed to the operative hazards of the business; and any work, such as a stock or tally clerk, which is necessary, incidental or related to **any operations of the business other than a clerical office**.

(Emphasis added.)

Petitioner employs three part-time employees who provide some retail customer services. Therefore, their payroll may not be properly assigned to Class Code 8810.

Petitioner contends the payroll of its part-time employees should be split between Class Code 8810 and Class Code 9015. Petitioner further contends that ORAC incorrectly declined to amend Code 9015 to allow for application of the Interchange of Labor Rule between it and Code 8810. The Oregon Special Rule precludes application of the Interchange of Labor Rule between Codes 9015 and 8810. In reviewing petitioner's appeal, ORAC declined to provide the carrier with a directive concerning the disputed audit.

In a similar case, the director considered whether the payroll of part-time employees of a mini-storage business should be allocated to Class Code 8810 and Class Code 9015 proportionately. *In the Matter of the Petition of Scott Lepman Company*, INS 00-12-022 and INS 01-08-016. The director ruled that the payroll was properly allocated to Class Code 9015. The director reasoned that it is difficult for small businesses that have employees performing multiple job duties to maintain verifiable payroll records. Additionally, the director considered the degree of miscalculations that may result between these codes affecting the rates of each. In the present case, I also note that ORAC's decision comports with ORAC's instruction from the Oregon legislature and the Oregon insurance Division to maintain a simplified classification system. Based on the record, I find that ORAC properly declined to amend Class Code 9015.

Furthermore, I conclude that ORAC properly determined that the payroll for petitioner's managers was correctly allocated to Class Code 9015. Inasmuch as the Interchange of Labor Rule is not applicable between Code 9015 and Code 8810 in Oregon, the managers must be assigned to either one or the other of these two codes. The manager's payroll is ineligible for Code 8810 because their job duties are not limited to clerical office duties. Therefore, the managers' payroll is correctly allocated to Class Code 9015. 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:

ORAC's decision declining to amend Class Code 9015 is affirmed.

DATED this 5th day of May, 2004.

/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:

Department of Consumer and Business Services
c/o Mitch Curzon, Chief Enforcement Officer
Insurance Division
350 Winter Street NE
Salem, OR 97301-3883