

**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 02-12-009
))	
BACKLUND LOGGING COMPANY)	PROPOSED ORDER
an Oregon 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) appealing the final premium audit for the period of October 1, 2001 through October 1, 2002 (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 February 4, 2003.

Administrative Law Judge (ALJ) Ella D. Johnson heard the employer's premium audit appeal on April 21, July 19, and October 12, 2004. Attorney Scott Terrall represented petitioning employer Backlund Logging Company (petitioner or Backlund). Assistant Attorney General David Hatton represented responding insurer SAIF Corporation (insurer or SAIF). Petitioner called as witnesses: Mike Wheelock, President of Greyback Forestry; Mike Craddock, National Council of Compensation Insurance (NCCI) Field Classification Analyst; NCCI Senior Underwriting Analyst Tim Hughes; SAIF Audit Program Analyst Teresa Smith; Backlund owner Glen Johnston; and SAIF Contract Premium Auditor Joe Rick. SAIF called SAIF Regional Collections Manager Mark Hallock as a witness and recalled Teresa Smith and NCCI expert witnesses Craddock to testify. The record closed on November 30, 2004 following submission of additional documents requested by petitioner.

OFFICIAL NOTICE

As noted at hearing, I take official notice of the 2001 *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 1999, 2000, 2001 *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 applied Class Code 2702 (Logging/Thinning, Forest Fighting) to the work performed by employer;

(2) Whether the Stay of Collection Order dated February 18, 2003 applies to insurer's collection of premium for the audit period and subsequent audit periods;

(3) To the extent that insurer relies on an improper classification, whether insurer continues to incorrectly apply Class Code 2702 to the work performed by employer in subsequent audit periods; and

(4) Whether insurer's conduct in continuing to send petitioner collection and termination notices concerning petitioner's failure to pay premium for the audit period violates the Stay of Collection Order and constitutes bad faith. If so, whether insurer should be barred from objecting or responding to petitioner's challenge of the premium audit notices in addition to any other remedy available for bad faith, including assessment of attorney fees.

EVIDENTIARY RULING

The record consists of petitioner's Exhibits E1 through E27 and SAIF's Exhibits A1 through A97 and A99 through A102. SAIF withdrew Exhibit A98. Petitioner objected to SAIF's Exhibits A13, A38, A58, A59, A84, A87, A90, A91 and A95. The listed exhibits, including A95, are admitted into evidence over petitioner's relevancy and hearsay objections.

FINDINGS OF FACT

(1) Backlund is an Oregon Corporation incorporated in May 1985 and owned by Glen A Johnston. It is engaged in the business of timber falling on a contract basis and fire line construction. (Exs. A58, A91.) Backlund first applied for workers' compensation coverage with SAIF on July 17, 1985. The business was described as "Logging" and Code 2702 was assigned to the policy. (Ex. A1.) In March 1990, Backlund requested Code 0042 (Landscape, Gardening & Drivers) be added to the policy. (Ex. A4.) A 1991 SAIF Logging Survey revealed that Backlund performed traditional chainsaw logging, slash piling, whip falling, hand slash piling, thinning and pile burning. (Ex. A7.)

(2) In 1994, Backlund's SAIF policy was converted to coverage through AOI/Compwise Small Business Group and Code 0124 (Reforestation- Including Drivers) was added to the policy. (Ex. A13.) On December 2, 1994, SAIF sent Backlund a letter describing each applicable class code, including 0124 and 2702. The description of Code 2702 stated that it applied to thinning operations. (Ex. A13.)

(3) Since 1994, due to the problems associated with the preservation of the spotted owl, the timber industry has changed its operations significantly when working on federal land. Timber companies now primarily perform fuel management and fire suppression work by pre and post harvest thinning. In Oregon on federal lands, timber companies perform mostly salvage work and some logging. Most of the logging is done on private land. Chain saws are used in both logging and pre- and post- commercial thinning. The purpose of thinning trees is to allow the large trees to grow by taking out the small and damaged trees and to reduce the fire danger. None of the small trees are merchantable. Logging has the potential for very serious worker injuries because it involves the cutting and moving of very large trees; reforestation and thinning have a much lower risk. (Test. of Johnston and Wheelock.)

(4) In the third quarter of 2000, Backlund reported all payroll in Codes 0124 and 0042 and no payroll in Code 2702. (Ex. A30.) Based on information supplied by Backlund, SAIF estimated for the audit period that all payroll would be reported in Code 0124. (Ex. A33.) In July 2002, a Backlund worker was injured when a dead tree he was cutting fell on his shoulder. (Ex. A57.)

(5) In August 2001, Backlund entered into a contract with the federal government to perform thinning, hand piling and machine slash busting in certain areas of the Blue Mountain Ranger District in the Malheur National Forest. (Ex. A88.) A resume of Backlund's business dated August 2, 2001 and a list of completed projects from 1988 through 2000 states that it performed the following activities: timber felling, thinning and whipfelling, hand slashpiling and burning, machine pile burning, hand fireline construction, timber marking, wire fence construction and maintenance, juniper clearing, underburning, aerial photointerpretation, layout and traversing. (Ex. A91.)

(6) In 2001, Backlund reported payroll in Codes 0124 and 2702 but none in Code 0042. (Exs. A38, A55.) In 2002, Backlund reported payroll in Codes 0124 and 8810 (Office Clerical), but none in Code 2702. (Ex. A55.)

(7) On October 25, 2002, SAIF contractor auditor Joe Rick performed an audit of Backlund's payroll records for the audit period. The audit interpreted Code 2702 to include thinning operations, which Backlund had reported under Code 0124. The audit also interpreted Code 0124 to apply to slash piling and burning and to certain reforestation operations such as planting, and stream cleaning and to firebreak construction, as long as logging/thinning operations are completed at the time of the work. The audit moved hand slash piling and burning into Code 2702 because the records showed an interchange of labor and there were no verifiable payroll records allocating the payroll between the applicable codes. The audit also deleted Code 0042 because it applied to landscape gardening. The audit resulted in an increase of \$15, 627 for the audit period. (Ex. A58.)

(8) After receiving the premium audit notice for the audit period, Johnston e-mailed SAIF stating that he had no memory of receiving the December 1994 letter stating that Code 2702 applied to Backlund's thinning activities and that he always believed that Code 0124 applied because the risk was much less when compared to logging. In a second e-mail to SAIF, Johnston stated that he had read the December 1994 letter from SAIF very quickly and focused on the description of Code 0124, which stated that it applied to cutting trees that were not of merchantable size. He did not go on to read that thinning was included in Code 2702. Johnston conceded it was his error, attributing it to "an honest mistake by a struggling contractor overwhelmed by paperwork." SAIF offered Johnston a payment plan and advised him concerning a stay of collection should he choose to request a hearing challenging the final premium audit billing. (Ex. A83.)

(9) Every classification contains heavy and light exposure activities. The employer's premium is based on the combined risk of these activities multiplied by the employer's experience modification. The experience modification reflects the employer's safety practices. (Test. of Craddock and Hughes.)

(10) Neither Backlund's request for hearing filed with the director on December 11, 2002 nor its request for a stay of collection filed with the director on January 30, 2003 included any reference to subsequent periods or requested that the stay be applied prospectively to subsequent policy periods.

CONCLUSIONS OF LAW

(1) Insurer correctly applied Class Code 2702 (Logging/Thinning, Forest Fighting) to the work performed by employer.

(2) The Stay of Collection Order dated February 18, 2003 applies to insurer's collection of premium for the audit period, but does not apply to subsequent audit periods.

(3) I am without jurisdiction to decide whether insurer's application of Class Code 2702 to the work performed by employer in subsequent audit periods is correct.

(4) I am without jurisdiction to determine whether insurer's conduct in continuing to send petitioner collection and termination notices concerning petitioner's failure to pay premium for the audit period violates the Stay of Collection Order and constitutes bad faith. I am also without jurisdiction to determine whether insurer should be barred from objecting or responding to petitioner's challenge of the premium audit notices in addition to any other remedy available for bad faith, including assessment of attorney fees.

OPINION

Jurisdiction lies with the director. ORS 737.505. The issues to be resolved are the application of the stay of collection and whether Class 2702 (Logging/Thinning, Forest Fighting) is the correct classification for employer's business operation. Petitioner also raises two other issues concerning the relevance of other subsequent policy periods and insurer's alleged "bad faith," both of which I address below. Inasmuch as petitioner is the party seeking redress before the department concerning insurer's reallocation of the payroll 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 App 437 (1980) (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 petitioner has failed to meet its burden.

Bad Faith

Addressing petitioner's issues in reverse order, I find that I am without jurisdiction to determine whether insurer acted in "bad faith." It is a well-settled principle of administrative law that an "administrative agency possesses only those powers that the legislature grants and cannot exercise authority that it does not possess." *State ex rel SOSCF v. Klamath Tribe*, 170 Or App 106 (2000).

Here, although the director possesses broad authority under the Insurance Code to regulate the insurance industry, her authority, and thus my authority in conducting a premium audit case under ORS 737.505 is limited by the statute, which states in relevant part:

(4) Appeals to the director pursuant to ORS 737.318 with regard to a final premium audit billing must be made within 60 days after receipt of the billing.

Additionally, ORS 737.318 provides in material part:

(2) The Director of the Department of Consumer and Business Services shall prescribe by rule a premium audit program system for workers' compensation insurance.

(3) The premium audit system shall include provisions for:

* * * * *

(d) An appeal process pursuant to ORS 737.505 for employers to question the results of a premium audit. This process must include written notification to the employer that is included in the final premium audit billing that informs the employer of appeal rights to the director under ORS 737.505, of the requirement that a written request to initiate an appeal must be received by the director not later than the 60th day after the employer receives the final premium audit billing and of any other information the director may request by rule; and

(e) Civil penalties pursuant to ORS 731.988 for violations of prescribed standards of the premium audit system.

(Emphasis added.)

As set forth above in 737.318(3)(e), the legislature chose to provide the director with the authority to assess civil penalties for violations of the premium audit system by insurers. The plain language of these statutes establishes that the legislature gave the director the authority to assess civil penalties, not the authority to exert equitable power by finding that the insurer acted in bad faith.

Accordingly, I conclude that, although petitioner has the ability to request that the director investigate SAIF's billing practices, and if warranted, assess a civil penalty against the insurer, I am without authority as the director's delegate to consider whether SAIF acted in bad faith in this premium audit matter. Accordingly, I decline to analyze petitioner's argument in that regard.

Stay of Collection

After the Stay of Collection Order was issued on February 13, 2003 for the audit period, petitioner claimed that the stay should also be applied prospectively. However, after reviewing the case file in detail, I find that petitioner appealed only the audit period and not any subsequent period.

Furthermore, even if it was petitioner's intent to appeal a subsequent period or retrospectively appeal the application of the classification code, such appeals are brought under a

different part of the statute that requires the appeal to be filed within 30 days of the insurer's action and does not allow for issuance of a stay of collection. ORS 737.505 states in relevant part:

(1) Every rating organization and every insurer which makes its own rates, within a reasonable time after receiving written request therefor and upon payment of such reasonable charge as it may make, shall furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate.

(2) Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by the authorized representative, on written request by the person or authorized representative to review the manner in which such rating system has been applied in connection with the insurance afforded the person. If the rating organization or insurer fails to grant or reject such request within 30 days after it is made, the applicant may proceed in the same manner as if the application had been rejected.

(3) Any party affected by the action of such rating organization or such insurer on such request, within 30 days after written notice of such action, may appeal to the Director of the Department of Consumer and Business Services, who, after a hearing held at a place designated by the director upon not less than 10 days' written notice to the appellant and to such rating organization or insurer, shall affirm or reverse such action.

(4) Appeals to the director pursuant to ORS 737.318 with regard to a final premium audit billing must be made within 60 days after receipt of the billing.

(5) The director may, upon a showing of good cause, stay any workers' compensation insurer's collection effort on a final premium audit billing during **the pendency of an appeal authorized by subsection (4) of this section.**

(Emphasis added.)

As set forth above, only subsection (4) allows for a stay of collection; subsection (3) does not. Furthermore, neither Backlund's request for hearing filed with the director on December 11, 2002 nor its request for a stay of collection filed with the director on January 30, 2003 included any reference to subsequent periods or requested that the stay be applied prospectively

Consequently, I conclude that the only period at issue here is the audit period of October 1, 2001 through October 1, 2002 and that the February 13, 2003 Stay of Collection Order applies only to that period. Accordingly, I am without authority to consider SAIF's application of Class Code 2702 to the work performed by employer in subsequent policy periods.

Application of Code 2702

The *Basic Manual* sets forth the rules that insurers use in classifying an insured's business for the purpose of assessing premium for workers compensation insurance. Rule 1 A 2 states that "it is the business of the employer within a state that is classified, not the separate employments, occupations or operations within the business."¹ The *Basic Manual* also states that if "no basic classification clearly describes the business, the classification that most closely describes the business must be assigned." Rule 1D2 at R7.

At hearing, Backlund contended that SAIF improperly classified the work it performed during the audit period in Class Code 2702. In support of its contention, Backlund argues that the classification of the work performed in Code 2702 is arbitrary and capricious and does not comport with the risk involved. Additionally, Backlund argues that Code 0124 (Reforestation & Drivers or Reforestation or Slash Piling & Drivers – Oregon State Special) is more consistent with its work activities. SAIF responds that Code 2702 explicitly applies to the thinning of small trees and that Backlund was on notice as early as 1994 that Code 2702 applied to this work.

The January 2001 *Scopes Manual* describes Code 2702 in relevant part as follows:

PHRASEOLOGY LOGGING OR LUMBERING & DRIVERS.

* * * * *

Oregon – Logging or Lumbering: Non-Mechanized Equipment Operations & Drivers – this classification will apply to the operations of any logging site which does not meet the qualifications for Code 2725. Separately classify Slash piling and/or burning as 0124, * * * * *

Note: Refer to Oregon State Special Scope 2725 for Logging or Lumbering: Mechanized Equipment Operators; **Oregon** – Forest Fire Fighting –Special Employees Only; * * * * *.

* * * * *

SCOPE Code 2702 applies to all types of logging and lumbering operations regardless of the size of timber being harvested. It is assigned to the cutting of young trees 2 to 3 inches in diameter used for fence posts and fence sections as well as the felling of huge trees several feet in diameter. * * * **The thinning of timberland by removing small trees has also been considered within the scope of this classification.** * * *.²

(Emphasis in original and added.)

¹ The *Basic Manual* Rule 1A further states that the purpose of the classification system is to group employers with similar operations "into classifications that reflects the exposures common to those employers [and t]he rate charged reflects the exposure to loss common to those employers."

² The descriptions for Code 2702 and Oregon Special Code 0124 contained in the previous and subsequent *Scopes Manuals* (1999 through July 2001) are essentially the same. (See Ex. A87.)

Additionally, the 2001 Scopes Manual describes Oregon State Special Code 0124 in pertinent part as follows:

**PHRASEOLOGY * * * OR- REFORESTATION OR SLASH
PILING & DRIVERS**

* * * * *

SCOPE

* * * * *

OR - REFORESTATION OR SLASH PILING & DRIVERS-

Code 0124 is applicable to contractors who perform a wide variety of work relating to the above. Operations are general performed after a logging show; however, other non-logging related work is often performed by such contractors. Operations specifically assigned to Code 0124 are:

1. Slash piling and burning –following a logging show, all logging debris is pulled together by tractors or hand. Chain saws may be used to reduce the large pieces to manageable sizes. The debris is then burned. The code includes those who stand as fire watchmen and post-burn cleaners.
2. Scarification – this involves loosening the soil to make replanting easier. It is generally accomplished with a cat or tractor.
3. Site preparation – usually performed by hand or machine, this includes clearing of underbrush and small trees from an area to be replanted.
4. Tree planting – a hand operation. This involves the use of a hoedad to create a small hole in which the seedling is planted.
5. Bud capping, netting or tubing – to prevent game and rodents from damaging the trees. Plastic tubing, cartons, stockings, etc., are manually placed on or around the seedlings.
6. Stream clearing – removal of debris, limbs, cuttings, etc., from streams and streambeds to minimize erosion. Also applies to the incidental building of small dams or ponds to improve fish habitation. Such work may be accomplished manually or with mechanical equipment.
7. Fire trail construction – this involves the use of hand tools and chain saws to create pathways or hiking trails (not roads).

Other reforestation-related activities to be separately rated are:

* * * * *

5. Pre-commercial thinning – clearing of small trees by chain saws prior to the logging show allowing easier movement around the site by the felling contractors – [Class Code] 2702.

(Emphasis in original.)

In that regard, NCCI testified that in its expert opinion and based on the information presented at hearing, Code 2702 is the correct classification for the work performed during the audit period. Code 2702 applies to thinning of small trees. Even Code 0124 states that such thinning should be coded to Class Code 2702. Here, the evidence establishes that the purpose of the thinning done by Backlund was to allow the large trees to grow by taking out the small and damaged trees and to reduce the fire danger. It is not to allow for the planting of seedling trees. Therefore, I conclude that the pre- or post- commercial thinning done by Backlund is not properly classified in Code 0124 and should be classified in Code 2702. Accordingly, based on the record and NCCI's expert testimony, I conclude that SAIF correctly classified Backlund's activities for the audit period in Class Code 2702.

ORDER

SAIF's final premium audit billing classifying Backlund's activities in Code 2702 for the audit period of October 1, 2001 through October 1, 2002 is correct and payable.

IT IS SO ORDERED.

Dated this 5th day of January 2005 in Salem, Oregon.

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
Insurance Division
350 Winter Street NE, Room 440
Salem, OR 97301-3883