

**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 No.: INS 03-09-012
)
)
A SHARP PAINTER, LLC) **REVISED**
) **PROPOSED ORDER BY DEFAULT**
)
)

HISTORY OF THE CASE

The employer appeals its final premium audit billing for the period April 1, 2002 through March 31, 2003 (audit period). On November 4, 2003, the Insurance Division, Department of Consumer Business Services (department) referred the matter to the Office of Administrative Hearings (OAH). On March 2, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. A Sharp Painter (petitioner) failed to appear. Assistant Attorney General David B. Hatton represented responding insurer SAIF Corporation (SAIF or insurer). Auditor John Hegner testified on SAIF's behalf and the record closed following the hearing.

On March 15, 2004, I issued a Proposed Order by Default. By letter dated April 14, 2004, employer filed exceptions. On April 21, 2004, insurer filed exceptions. On September 15, 2004, the department referred the matter to OAH. Having considered the parties exceptions, I issue this Revised Proposed Order by Default.¹

DEFAULT

Pursuant to OAR 137-003-0670, an administrative law judge may issue an adverse order upon a *prima facie* case on the record if a party was duly notified of the time and place of the hearing and failed to appear for reasons not beyond the reasonable control of that party. Here, petitioner received the Notice of Hearing by certified mail on November 10, 2003. Petitioner failed to appear for the hearing and made no contact with OAH to explain any circumstances that would justify its failure to appear. Therefore, a default hearing is appropriate.

ISSUE

Whether SAIF incorrectly assessed premium for the audit period April 1, 2002 through March 31, 2003 by including payments made under employer's incentive plan in the premium basis.

¹ Revisions are in bold type.

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, 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 SAIF's Exhibits A1 through A25 which were received without objection.

FINDINGS OF FACT

1. A Sharp Painting maintains an "Incentive Plan" (plan) whereby employees are paid various amounts. (Ex. A7.)

2. Section 3.3 of employer's plan reads, "An amount for overhead is allocated to the profit center. A suitable number as of March 2001 appears to be approximately 15% of revenues." (Ex. A7-3.)

3. Section 4.3 of employer's plan reads, "Profit Shares are paid on a quarterly basis. Team Leader shares are paid monthly." (Ex. A7-4.)

4. Section 4.4 of employer's plan reads, "Each participating employee's payout will be adjusted according to their most recent performance evaluation, based upon the following:

Rating Score: 59 or below, no payout.

Rating Score: 60 – 69, 50% payout.

Rating Score: 70 – 79, 75% payout.

Rating Score: 80 – 89, 100 payout.

Rating Score: 90 – 100, 125% payout."

5. Hegner requested and employer did not provide calculations of gross income versus expenses for the audit period to show that incentive plan payments were distributed from net realized profits. (Testimony of Hegner.)

6. During the audit period, employer made various payments to employees under the profit share plan based on hourly wages. (Exs. A18-3, A18-6, A18-7, A18-8, A18-9, A19-2, A19-13, A23-6 and A23-8.)

7. On July 11, 2003, insurer issued a Final Premium Audit which included payments made under employer's plan in the premium basis. (Ex. A10.)

CONCLUSION OF LAW

SAIF correctly assessed premium for the audit period April 1, 2002 through March 31, 2003 by including payments made under employer's incentive plan in the premium basis.

OPINION

Inasmuch as petitioner is the party seeking redress before the department concerning SAIF's final premium audit billing for the audit period, 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 facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 309 (1989).

OAR 836-042-0055(2)(c) provides:

(2) An insurer shall include a payment in or exclude a payment from the workers' compensation premium basis of an employer as follows:

(c) A profit sharing payment shall be excluded from the premium basis if all of the following conditions apply with respect to the payment:

(A) The payment is anticipated;

(B) The payment is distributed in accordance from net realized profits;

and

(C) The payment is distributed in accordance with a written plan that creates a legal obligation for the employer to disburse funds in accordance with the plan.

The department has previously considered whether certain payments to employees constitute a profit sharing plan which is exempt from remuneration for purposes of calculating workers' compensation premium assessment or an employee bonus incentive program which is subject to such assessment. In *Seaman Restaurant Corporation v. SAIF Corp.*, Case No.: 88-2-3 at 11, the department stated, "Whatever this plan is called, we will look to the intent of the maker in determining whether this was a

bonus, profit sharing or incentive plan.” The department held that payments that were contingent upon performance evaluations constituted remuneration and were properly included in the premium basis. Similarly, in the present case, payments to employees were contingent upon performance evaluations. Therefore, payments made under employer’s plan are properly included in the premium basis.

In *Bay News, Inc. v. SAIF Corp.*, Case No.: 89-05-27, the department reviewed a plan whereby employees were paid a percentage share of any quarterly profits made by the company. In one quarter, the company earned no profit and no payments were made to employees. The department concluded that the employer maintained a *bona fide* profit sharing plan and that such payments were exempt from the workers’ compensation premium assessment. In contrast, in the present case, employer provided no calculations establishing its net realized profits. Moreover, it estimated its overhead at 15 percent as of March 2001, one year before the audit period began. Furthermore, employer made payments to employees based on hourly wages and not based on a percentage of net realized profits. For these reasons, payments made under employer’s plan are not exempt from the premium assessment.

Here, employer’s plan does not qualify as a profit sharing plan because it fails to meet **two of three** requirements specified by OAR 836-042-0055(2)(c). To begin, **as required by subsection (c)(A), the bonuses are anticipated. While the amount of the bonus may not be known, it is known under employer’s plan that employees will receive a bonus if they achieve a certain performance evaluation. Consequently, I find that the plan meets subsection (c)(A).**

However, the plan fails to meet subsection (c)(B) because the payments are not distributed from realized profits. Hegner requested and employer did not provide calculations establishing that the payments were distributed from net realized profits. On the contrary, the plan allocates an estimated 15% of revenues to overhead as of March 2001. Moreover, employer’s records show that payments were made based on hourly wages which do not qualify as a profit sharing plan under the rule. **In its exceptions, employer disputes this finding, but offers no evidence to support its position. Consequently, I find employer’s argument unpersuasive.**

Next, the plan fails to meet subsection (c)(C) because distribution of payments was inconsistent with employer’s written Incentive Plan. The plan specifies that payments were to be made to employees on a quarterly basis and to team leaders monthly. However, payments were made at various times and not quarterly or monthly as specified in employer’s written plan. **In its exceptions, employer concedes that its profit plan period is six weeks even though the plan specifies quarterly. Consequently, I find that employer’s argument is unpersuasive.**

Based on the record, I conclude that employer’s plan does not qualify as a valid profit sharing plan and that payments made under the plan are properly included in the premium basis. Accordingly, I find that petitioner has failed to carry its burden of proving that the premium audit is incorrect.

REVISED PROPOSED ORDER

I propose that the department issue the following final order:

SAIF's final premium audit dated July 11, 2003 is correct and payable.

DATED this 19th day of October, 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:

Mitchel D. Curzon
Chief Enforcement Officer
Oregon Insurance Division
PO Box 14480
Salem, OR 97309-0405