

**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) **PROPOSED ORDER**
)
THOMAS CANON dba QUALITY) **Case Nos: INS 04-05-004 & 04-07-014**
PARTS AND RESTORATION)
)

HISTORY OF THE CASE

On March 12, 2004, Liberty Northwest Insurance (Liberty) issued a Final Premium Audit Billing for the audit periods of January 1, 2003 through December 31, 2003, and January 1, 2004, through June 7, 2004, to employer Thomas Canon dba Quality Parts and Restoration (Petitioner). Petitioner filed a timely appeal of the Billing. Its appeal was referred to the Office Administrative Hearings on August 9, 2004.

A hearing was held by Administrative Law Judge Lawrence S. Smith of OAH on March 24, 2005. Attorney Bruce D. Smith represented Petitioner and called him as a witness. Attorney Barbara Woodford represented Liberty, with two witnesses, Deanne Bigham and David Wilson of Liberty. The record closed on the date of hearing.

ISSUE

1. Whether Liberty's reclassification of Petitioner's employees was appropriate.
2. Whether Petitioner has submitted verifiable division of wage payroll records.

EVIDENTIARY RULINGS

Insurer's Exhibits 101 through 114 and Petitioner's Exhibits 115 through 122 were admitted without objection.

FINDINGS OF FACT

(1) On September 10, 1996, Petitioner applied for Workers' Compensation coverage from Liberty for his business, Quality Parts and Restoration. On his application, he reported that he had been in business for six years and that his payroll was split evenly among auto repair, parts ordering, and machine work. (Ex. 101.) On November 27, 1996, he filled out a formal application and stated that the classification of his employees was auto repair shop or parts. (Ex. 102.) He was accepted and issued a policy from Liberty. (Ex. 103.)

(2) For subsequent years, Petitioner renewed his policy, but did not report any other type of work. In 1997, he separated from a partnership in a concrete pumping business and began using Quality and Parts and Restoration as the employer of his concrete pump employees. On January 8, 2003, he received a renewal letter from Liberty. The letter advised him to report any change in business operations. With the letter was the premium audit for the period of 2003. The audit changed the classification of Petitioner's automobile parts workers to concrete pumping and drivers, which are assessed at a significantly higher rate. (Ex. 104.)

(3) On February 24, 2004, an auditor for Liberty changed the classification of what Petitioner called automobile parts work (Code 8046) to concrete pumping (Code 9534). The auditor applied it retroactively to 2003, because Petitioner was aware that his employees were misclassified. (Ex. 107.) On February 27, 2004, the auditor wrote to Petitioner, advising him that his employees will be classified as concrete pumping because he provided no division of wage records. (Ex. 109.)

(4) During the audit periods of 2003 and January 1, 2004, through June 7, 2004, Petitioner provided concrete pumping services to his customers and also operated a garage to restore Fords for sale. His employees in the concrete pumping business were paid per hour. They transported line pumps to job sites and operated them to pump concrete into particular areas. Line pumps are mounted on a single axis frames and are towed by trucks. (Ex. 119.) They use hoses and involve no cranes to carry concrete over obstructions, unlike boom pumps, which transport the concrete through tubes suspended above. Petitioner believes the operation of line pumps is much safer than the operation of boom pumps because line pumps transport concrete through a pipe on the ground and not through overhead tubes, which could tip over. Because the feed pipe of the line pump is half the size of the boom pump tube, line pumps are mainly used for smaller jobs, such as residential driveways or patios. Petitioner also maintains line pumps for 15 different pumping businesses. (Test. of Petitioner.)

(5) Petitioner's employees also work occasionally in his Ford business when they have no pump work to do. They do no major engine work and no body work or painting. His Ford business is more like his hobby or passion. He sold about five Fords during the audit periods. He owns about 25 Fords at this time. (Test. of Petitioner; Ex. 110 at 3.)

(6) Petitioner's concrete pumping employees work either in the field or in the shop. In the shop, they maintain the line pumps owned by Petitioner and other companies. Petitioner sells some of his line pumps. During the slow season for concrete pumping, these employees work in the shop on Petitioner's Fords. Petitioner estimates that 80 percent of their shop time is working on the line pumps. (Test. of Petitioner.)

(7) Petitioner's daughter (Laurel Canon) is the secretary of the business. She does not supervise the line pump workers, but keeps track of the employees' shop hours on a calendar and writes down "pump" when the employee is in the field and "shop" when the employee is in the shop. (Exs. 115 and 117.) She reports this time to

Petitioner's bookkeeping service for payroll and is supervised by Petitioner. (Test. of Petitioner.) Petitioner's son, Jeff Canon, mainly works in public relations for Petitioner, but also sometimes works in the shop. He also trains new pump employees at the work sites. Training usually lasts one to two weeks. (Test. of Petitioner.)

CONCLUSIONS OF LAW

1. Liberty NW's reclassification of Petitioner's employees was appropriate.
2. Petitioner has not submitted verifiable division of wage payroll records

OPINION

1. Reclassification

"A workers' compensation insurer shall maintain a premium audit program to aid in achieving equitable premium charges to Oregon employers and for the collection of credible statewide data for ratemaking." ORS 737.318(1).¹

Insurers licensed in Oregon to provide workers' compensation insurance are required to be members of a licensed rating organization. ORS 737.560(2).² The

¹ ORS 737.318 states in relevant part:

Premium audit program for workers' compensation insurance; rules.

(1) A workers' compensation insurer shall maintain a premium audit program to aid in achieving equitable premium charges to Oregon employers and for the collection of credible statewide data for ratemaking.

(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:

(a) Employer education of the audit reporting function of the rating system;

(b) A continuing test audit program providing for auditing of all insurers;

(c) A continuous monitoring of the audit program system pursuant to ORS 737.235;

(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

* * * * *

² ORS 737.560 states:

Rating organization membership. (1) Except as provided in subsection (2) of this

National Council on Compensation Insurance, Inc. (NCCI) is the only workers' compensation rating organization licensed in Oregon. ORS 737.355.³ NCCI is required to file with the Insurance Division of the Department of Consumer and Business Services (DCBS) its rates, rating systems, and policy forms. ORS 737.320(3).⁴ Insurers that are members of NCCI must use NCCI policy forms and NCCI's rates and rating system unless the insurer filed its own rates and rating system. ORS 737.205.⁵ NCCI publishes

section, nothing contained in this chapter shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization.

(2) Each workers' compensation insurer, including the State Accident Insurance Fund Corporation, shall be a member of a licensed workers' compensation rating organization.

³ ORS 737.355 states in relevant part:

Licensing rating organizations generally; licensing workers' compensation rating organizations; revocation and suspension. (1) If the Director of the Department of Consumer and Business Services finds that the applicant represents a credible statistical base, is competent, trustworthy and otherwise qualified to act as a rating organization and that its constitution, articles of agreement or association or certificate of incorporation, and its bylaws, rules and regulations governing the conduct of its business conform to the requirements of law, the director shall issue a license specifying the classes of insurance, or subdivision or class of risk or a part or combination thereof for which the applicant is authorized to act as a rating organization. Each application shall be granted or denied in whole or in part by the director within 60 days of the date of its filing with the director.

⁴ ORS 737.320(3) states:

Review of certain filings; effective date of filings; investigation and evaluation of workers' compensation rate filings.

* * * * *

(3) Filings of workers' compensation rates, rating plans and rating systems by a workers' compensation rating organization shall be limited to provisions for claim payment approved or established by the director, and shall not include allowances for or recognition of expenses, taxes or profit. A workers' compensation rating organization shall make such filings with the director, which filings shall be subject to this section. The organization shall also file the workers' compensation policy forms to be used by its members. The filing shall include a report of investment income.

⁵ ORS 737.205 states in relevant part:

Filing rates, plans with director; public inspection of filings; effect on workers' compensation filings. (1) Every insurer shall file with the Director of the Department of Consumer and Business Services copies of the rates, rating plans and rating systems used by it. Except as provided in ORS 737.207, 737.209 and 737.320 (2), each filing shall become effective immediately on the date specified therein but not earlier than the date such filing is received by the director. This subsection does not apply to inland marine risks which by general custom of the

the *Basic Manual of Workers' Compensation, Insurance (Basic Manual)* and the *Scopes® of Basic Manual Classification (Scopes® Manual)*. The *Basic Manual* describes the workers' compensation classifications and the rules used to apply these classifications to employers. The *Basic Manual* has been filed with and approved by DCBS as part of NCCI's rating system. The *Scopes® Manual* is a guide for understanding and assigning classifications to employers. It includes the description of each classification as contained in the *Basic Manual* and a narrative explanation of the intent of the classification. The *Scopes® Manual* has not been filed with or approved by DCBS.

Employers aggrieved by a rating system may request review of a rating and how it is applied. ORS 737.505(2).⁶ To determine an appropriate workers' compensation premium rate for Petitioner, Liberty uses the business classifications and rates of NCCI. Petitioner contests Liberty's reclassification of his employees to Code 9534, Mobile Crane and Hoisting Service Contractors. He had the option of appealing to the Oregon Workers Compensation Rating System Review and Advisory Committee (ORAC), but he did not do so. Petitioner claims that his line pump employees are more like Code 5213 from the *Scopes® Manual* rather than Code 9534 assigned by Liberty. Code 5213 in the *Scopes® Manual* states in pertinent part:

Code 5213 applies to all commercial types of concrete building construction, self-bearing floors, foundations, piers, culverts, silos, grain

business are not written according to manual rates or rating plans.

(2) An insurer may satisfy its obligation to make such filings by becoming a member of or a subscriber to a licensed rating organization which makes such filings, and by authorizing the director to accept such filings on its behalf. Such insurer may so adopt the filings of a rating organization on part of the classes of risks insured by it and may make its own filings as to other classes which shall be uniform throughout the insurer's territorial classification. This subsection does not apply to workers' compensation insurance filings except to the extent that the rating organization filings of rating plans or systems under ORS 737.320 are complete and usable by an insurer without the addition of allowances for expenses, taxes or profit.

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⁶ ORS 737.505(2) states:

Insured entitled to rate information; remedies of aggrieved persons.

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(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.

elevators, etc., and includes making and erecting forms, playing reinforcing steel and stripping forms.

Code 9534 in the *Scopes® Manual* states in pertinent part:

Code 9534 is applied to insureds that engage in mobile crane, hoisting or rigging operations for others provided such operations are not otherwise classified in the Basic Manual.

Code 9534 also has a special code for Oregon, “Concrete: Pumping—Specialty Contractor Only—applies to specialty contractors only, regardless of the type of concrete construction being performed. If the contractor engages in other concrete activities, such a setting of forms or laying of rebar, then the appropriate construction classification would apply.”

The *Scopes® Manual* is not binding, but persuasive, especially when Oregon has established a special code for concrete pumping companies, such as Petitioner’s business. This special code specifically applies to Petitioner’s business because it applies to all specialty contractors who perform concrete pumping operations, regardless of the type of concrete construction being performed. Application of Code 9534 provides more than enough rationale to support Liberty’s classification, distinguishing this case from the employment situation in *Reforestation General v. NCCI*, 127 Or App 153 (1994), in which the court found no rationale for a classifying reforestation workers as loggers. Petitioner’s explanation that line pumping is less dangerous may be correct, but he has not established a more appropriate code for his line pump workers. Code 5213 applies to concrete workers and is less applicable to concrete pumping employees than Code 9534.

2. Division of Payroll

Petitioner also alleged that, if its concrete pumping employees are properly classified as Code 9534, their work in the shop and/or in the auto part of Petitioner’s business should be separated out. Petitioner seeks to have the payroll of his concrete pumping employees divided between Code 9534 and the automotive code.

Petitioner must meet in the requirements in OAR 836-042-0060 to establish the division of payroll. That section states in relevant part:

Conditions for Division of Payroll of Individual Employees

(1) When there is an interchange of labor, the payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, provided verifiable payroll records maintained by the employer disclose a specific allocation for each such individual employee, in accordance with the standards for rebilling set forth in OAR 836-043-0190 and this rule.

(2) This rule does not apply to a single employee whose duties vary within exposure areas normally anticipated by the scope of a single classification or who spends only a limited amount of time, on an infrequent or irregular basis, in a classification exposure that is not a normal job function for that employee. As used in this section, "infrequent or irregular" means that the time spent in the classification exposure is limited, is not anticipated in the normal duties of the employee and occurs only randomly.

(3) When verifiable payroll records are required with respect to a single employee and the employer does not maintain them as required in this rule, the entire payroll of the employee shall be assigned to the highest rated classification exposure in accordance with the standards for rebilling set forth in OAR 836-043-0190.

(4) For purposes of this rule, payroll records of an employee are verifiable if they have the following characteristics:

(a) The records must establish a time basis, and the time basis must be hourly or a part thereof, daily or part thereof, weekly or part thereof, monthly or part thereof or yearly or part thereof;

(b) For each salaried employee, the records must also include time records in which the salary is converted to an hourly, daily, weekly, monthly or yearly rate and then multiplied by the time spent by the employee in each classification exposure;

(c) The records must include a description of duties performed by the employee, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable; and

(d) The records must be supported by original entries from other records, including but not limited to time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager. Estimated ratios or percentages do not comply with the requirement of this subsection and are not acceptable for verification. Verifiable records must be summarized in the insured employer's accounting records.

* * * * *

Petitioner estimated that his employees worked in the automotive part of his business about 20 percent of the time, but provided no records to establish such work. Petitioner did provide copies of a calendar in which the employees' time was split between "pump" and "shop" by the bookkeeper (Exs. 115 and 118.) "Pump" meant work in the field and "shop" meant work in the shop. Shop work often involved maintaining the line pumps, so this record does not establish a split between line pump work and auto

work and cannot be used to divide the labor. Moreover, these records were not kept by the employees or their supervisor (Petitioner), so they do not meet the requirements in OAR 836-042-0060(4). Finally, Petitioner has not established a basis for Code 8380 (auto service and repair) and has no other code for division of labor.

Petitioner also seeks to have the salary of his son, Jeff Canon, separated from Code 9534 because he mainly works in promotion and only occasionally works as a line pumper when training new employees. Petitioner specifically asserts that his son's salary met the requirements of OAR 836-042-0060(2), which says that his payroll will be classified as Code 8742 (outside sales) and not Code 9534 (concrete pumping) if his concrete pumping work is only "for a limited amount of time, on an infrequent or irregular basis, in a classification exposure that is not a normal job function for that employee. As used in this section, 'infrequent or irregular' means that the time spent in the classification exposure is limited, is not anticipated in the normal duties of the employee and occurs only randomly." Jeff Canon's work as a trainer of line pumpers is anticipated in his normal duties and therefore, is not limited or occurs only randomly. His payroll is appropriately classified as Code 9534.

ORDER

Liberty NW's Final Premium Audit Billing to Thomas Canon dba Quality Parts and Restoration for the audit periods of January 1, 2003 through December 31, 2003, and January 1, 2004, through June 7, 2004, is correct and payable.

/s/ Lawrence S. Smith
Lawrence S. Smith
Administrative Law Judge
Office of Administrative Hearings

MAILED AND ISSUED ON: April 21, 2005

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 Mitchel D. Curzon, Chief Enforcement Officer
Insurance Division
350 Winter Street NE
Salem, OR 97301-3883