

**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**  
 )  
**FINISHING TOUCH CONSTRUCTION** ) **Case No.: INS 04-07-021**

**HISTORY OF THE CASE**

Finishing Touch Construction (employer) appeals its final premium audit billing for the periods September 1, 2002 through September 1, 2003 and September 1, 2003 through September 1, 2004 (audit periods). On September 8, 2004, the Insurance Division, Department of Consumer Business Services (department) referred the matter to the Office of Administrative Hearings (OAH). On May 4, 2005, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing in Salem, Oregon. Genaro Sebastian Leiva-Perez, sole proprietor, represented petitioning employer pursuant to OAR 137-003-0555. Assistant Attorney General David B. Hatton represented respondent SAIF Corporation (insurer). Leiva-Perez testified on employer's behalf. Investigator Jeffrey Hull, Auditor Ed Dolfay and Investigator Denise L. Ashley testified on insurer's behalf. The record closed on the date of hearing.

**ISSUE**

Whether insurer incorrectly assessed premium for the audit periods September 1, 2002 through September 1, 2003 and September 1, 2003 through September 1, 2004

**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**

SAIF's Exhibits A1 through A41 were admitted into the record without objection. Employer offered no exhibits.

## **FINDINGS OF FACT**

1. Employer is a siding installation business. (Ex. A1; testimony of Leiva-Perez.) Insurer has provided workers' compensation insurance coverage to employer since June 1998. (Ex. A1.)

2. For the first audit period, employer reported estimated payroll of \$30,000. (Ex. A12-4.)

3. On December 13, 2003, insurer conducted an audit. (Ex. A28; testimony of Dolfay.) Employer provided no tax or FICA records. (Exs. A26 and A27.) Employer's check register showed payroll of \$41,304. (Ex. A28.)

4. Finishing Touch Construction and Leiva Construction are one business operated by Genaro Sebastian Leiva-Perez. (Testimony of Perez.) Both businesses use Construction Contractor Board license number 124082. (Ex. A41; testimony of Perez.)

5. On March 1, 2003, Leiva Construction entered into a written contract to install siding at Aspen Highland Apartments for \$156,270. (Ex. A41.) Leiva-Perez signed the contract. (Ex. A41; testimony of Perez.) In April and May 2003, approximately 20 workers employed by Leiva Construction installed siding on this job site. (Testimony of Ashley.) Employer paid each worker \$2,300 to \$2,500 per month. Employer paid its workers either in cash or by check without any tax or FICA withholdings. (Exs. A17, A18, A34-4 and A35.)

6. On April 4, 2003, Anica L. Corrasco began working for employer for \$50 per day in cash. On April 17, 2003, while installing siding at the Aspen Highland Apartments for employer, he fell 14 feet 8 inches onto a concrete stairway. (Exs. A17 and A24; testimony of Hull.) Corrasco was hospitalized for approximately four days for injuries including head, face and rib fractures and T3 through T8 vertebrae damage. (Ex. A24.) Following this injury, insurer conducted a fraud investigation. (Ex. A18.)

7. On October 28, 2004, insurer's auditor met with Leiva-Perez in order to conduct a second audit. (Ex. A35; testimony of Dolfay.) Leiva-Perez represented that all job contracts were verbal. (Ex. A40; testimony of Dolfay.) In response to specific questioning, Leiva-Perez denied that employer had performed any work at the Aspen Highlands Apartments and he repeated the denial three times. When confronted with information contained in the fraud investigation, Leiva-Perez admitted that employer did work on that project. (Ex. A40; testimony of Dolfay.) Employer's check register for both audit periods showed payroll of \$129,866. (Exs. A30-2 and A40-2; testimony of Dolfay.)

8. After completing the Aspen Highlands Apartment project, employer planned to go Bend to install siding on 100 homes. (Ex. A18-1.)

## CONCLUSION OF LAW

SAIF correctly assessed premium for the audit periods September 1, 2002 through September 1, 2003 and September 1, 2003 through September 1, 2004

## OPINION

Inasmuch as employer is the party seeking redress before the department concerning SAIF's final premium audit billing for the audit period, employer 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).

Employer contends that the final premium audits are incorrect because it employed fewer workers. However, employer offered no documentary evidence to support its position. Furthermore, employer called no witnesses to testify except its sole proprietor, Genaro Sebastian Leiva-Perez. In *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245 (1977), *rev den* 288 Or 677 (1980), the court held that a credibility determination may be based on several factors, including demeanor, inherent probability of the evidence, internal inconsistencies, and whether the evidence is logically credible. Based on the record, I find Leiva-Perez' testimony not credible. To begin, Perez lied to insurer's auditor repeatedly. He stated that all of his job contracts were verbal when in fact he had signed a written contract to perform work at Aspen Highlands Apartments. Three times Perez denied that his business performed any work at Aspen Highland Apartments and admitted the truth only when confronted with information from the fraud investigation. Moreover, employer paid its workers either in cash or by check without any tax or FICA withholdings, reflecting dishonest business practices.

In conclusion, I find that employer has failed to carry its burden of proving by a preponderance of evidence that the final premium audits for the two policy periods are incorrect. Therefore, I propose that the department affirm the premium audits.

## PROPOSED ORDER

I propose that the department issue the following final order:

SAIF's final premium audits dated July 13, 2004 and July 14, 2004 are correct and payable.

Dated this 24<sup>th</sup> day of May, 2005

/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