

**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 04-08-009
)	
)	
LARSON SKYLINE FARMS)	PROPOSED ORDER
)	
)	

HISTORY OF THE CASE

The Insurance Division, Department of Consumer and Business Services (department) referred this workers’ compensation final premium audit appeal to the Office of Administrative Hearings on October 15, 2004. Administrative Law Judge Catherine P. Coburn conducted a contested case hearing on February 1, 2005. Petitioning employer Larson Skyline Farms (employer or petitioner) timely appealed the final premium audit billing for the period of March 1, 2003 through March 1, 2004 (audit period). Pursuant to OAR 137-003-0555, managing partner Farrell V. Larson represented employer. Assistant Attorney General David B. Hatton represented responding insurer SAIF Corporation (insurer). Farrell V. Larson testified on employer’s behalf. Auditor Joseph Rick and Premium Audit Program Analyst DeAnne J. Hoyt testified on insurer’s behalf. The record closed on the date of hearing.

ISSUE

Whether insurer incorrectly assessed premium for the audit period March 1, 2003 through March 1, 2004.¹

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 836-043-115(1)(a). I also take official notice of another NCCI publication, the *Scopes of Basic Manual Classifications (Scopes Manual)*. The *Scopes Manual*

¹ Prior to hearing, employer represented to insurer that it did not dispute the inclusion of contract labor in the audit. Therefore, I do not address an independent contractor issue. See Ex. A13.

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

Insurer's Exhibits A1 through A6 were admitted into the record over employer's relevance objection. Insurer's Exhibits A7 through A17, as well as employer's Exhibits P1 through P10 were admitted into the record without objection.

FINDINGS OF FACT

(1) Employer is a partnership operating a farm near Ontario, Oregon. During the audit period, employer owned or leased 4,500 acres and raised onions, wheat, alfalfa and sugar beets. Twenty-eight percent of the total acreage was planted in onions. The employees plant, irrigate, handhoe weeds, machine harvest and do some hand harvesting. (Ex. A11-4; testimony of Larson.)

(2) On March 2, 2004, employer submitted estimated payroll amounts in three classifications: vegetable farm, field crops and office clerical. (Ex. A10.)

(3) Joseph Rick has worked as an auditor for thirty years. (Testimony of Rick.) On July 23, 2004, Rick conducted an audit. (Ex. A11; testimony of Rick.) Rick obtained quarterly payroll records from employer. (Ex. A11-6.) The audit reallocated payroll between classifications based on the proportionate acreage rule. The reallocation placed 28 percent of the wages in Code 0008 (Onion Raising/Handhoeing) and 72 percent in Code 0037 (Field Crops). (Ex. A11-1; testimony of Rick.) Rick and Larson discussed options available to employer for reducing premium. (Testimony of Rick and Larson.)

(4) After Rick's audit, employer's foremen reviewed time cards and employer drafted additional payroll records listing the hours each employee spent in onions, weeding, general labor and clerical work. The additional payroll records are not original documents. (Exs. P1 through P8 and A14.)

CONCLUSION OF LAW

Insurer correctly assessed premium for the audit period March 1, 2003 through March 1, 2004.

OPINION

The issue to be resolved here is whether the employer maintained verifiable payroll records which would allow for division of payroll. Because Larson Skyline Farms, Inc. is the party seeking redress before the department concerning insurer's final premium audit billing for the audit period, it has the burden of establishing by a

preponderance of the evidence that it maintained verifiable payroll records and the amounts now sought by insurer are not owed. *See 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).

ORS 737.310(10) requires the director of the department to prescribe by rule “the conditions under which a division of payroll between different manual classifications is permitted for purposes of computing workers’ compensation premiums.” Pursuant to this authority, the director has promulgated OAR 836-042-0060, which defines the conditions under which an employer may allocate payroll between more than one classification. OAR 836-042-0060 provides in relevant part:

- (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 of the employer disclose a specific allocation for each individual employee, in accordance with the standards for rebilling set forth in OAR 836-043-0190 and this rule.

- (1) When verifiable payroll records are required with respect to a single employer and the employer does not maintain them as required by this rule, the entire payroll of the employer shall be assigned to the highest rated classification exposure in accordance with the standards for billing set forth in OAR 836-043-0190.
- (2) For the purpose of this rule, payroll records are verifiable if they have the following characteristics:
 - (a) The records must establish a time basis, and the time basis must be hourly or part thereof, daily or part thereof, monthly or part thereof or yearly or part thereof;

- (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.

As the court noted in *Pease v. NCCI*, 128 Or App 471, 475 (1994), the purpose behind the requirement that payroll record be verifiable is to enable a third party to independently confirm by reviewing the employer's payroll records that the correct method of classification has been used to report payroll. This review must be able to be accomplished without resort to other sources and the records themselves must accurately describe the work performed.

Here, after the audit took place, employer's foremen reviewed time cards and employer drafted additional payroll records listing each employee's hours in several work activities. However, these records were not prepared daily as required by OAR 836-042-0060. Moreover, they are not original records and fail to enable a third party to independently confirm that the work hours are assigned to the correct payroll category. Employer's records do not meet the requirements specified by OAR 836-042-0060 and consequently, they do not constitute verifiable payroll records.

Because the employer failed to provide verifiable payroll records, the proportionate acreage rule applies. The *Basic Manual* prescribes Rule 8742 which provides in pertinent part:

FARM Effective 01 Jul 2001

For the purposes of the application of workers compensation rates, a farm is defined as any parcel(s) of land used for the purpose of agriculture, horticulture, viticulture, dairying, or stock or poultry raising, as a business or commercial venture. A division of payroll may

be allowed for each separate and distinct type of commercial farm operation as described by the manual classifications described herein, provided that separate records of payroll are maintained. **In the event that the payroll records do not reveal clearly an accurate segregation in accordance with the manual classifications described herein, the entire payroll for the farm must be segregated on the basis of proportionate acreage.**

Each classification includes all employees, other than inside domestic workers, including drivers, and all normal repair and maintenance of buildings or equipment performed by the employees of the insured. Such activities as the maintenance of cows, hogs, or chickens for family use; a family orchard or truck garden; and hay or grain crop raised for the purpose of maintaining work animals on the farm must be considered usual and incidental to the operation of any type of farm.

Note:

1. All hoeing by hand will be assigned to Code 0008 regardless of the product involved unless specifically excluded.

(Emphasis added.)

Here, employer cultivated 4,500 acres and 28 percent of the total acreage was planted in onions. Under the proportionate acreage rule, insurer correctly allocated 28 percent of the wages to Code 0008 (Onion Raising/Handhoeing) and 72 percent to Code 0037 (Field Crops).

In conclusion, I find that employer failed to carry its burden of proving by a preponderance of evidence that the final premium audit billing is incorrect. Based on the record, I find that employer failed to maintain verifiable payroll records that meet the definition prescribed by OAR 836-043-0190. Furthermore, I find that insurer correctly applied the proportionate acreage rule. For these reasons, insurer's audit is affirmed.

ORDER

SAIF's premium audit billing to Larson Skyline Farms, Inc. for the audit period March 1, 2003 through March 1, 2004 is correct and payable.

DATED this 4th day of March 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:

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