

**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 04-11-010
)
CUSTOM CAST CORPORATION) **PROPOSED DEFAULT ORDER**
)

HISTORY OF THE CASE

The employer appeals the final premium audit billing dated September 10, 2004 for three audit periods. On February 10, 2005, the Insurance Division, Department of Consumer Business Services (Department) referred the matter to the Office of Administrative Hearings (OAH). On June 9, 2005 Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Custom Cast Corporation (employer) failed to appear. Assistant Attorney General David B. Hatton represented responding insurer SAIF Corporation (SAIF or insurer). Auditor John Hegener and investigator Rodney Hoff testified on SAIF's behalf and the record closed following the hearing.

MOTION TO POSTPONE

Pursuant to OAR 137-003-0525(2)(a), I may postpone a hearing at one party's request upon a showing of good cause. At hearing, defense counsel provided a copy of a fax from employer dated June 1, 2005, requesting postponement to allow employer to obtain business records that were purportedly in the possession of an accountant and an attorney. I deny employer's motion to postpone for the following reasons:

Pursuant to OAR 137-003-0570(11), I may exclude documents that were not disclosed in response to a discovery order. On April 22, 2004, I issued an Order to Compel Discovery and employer subsequently failed to provide documents. Inasmuch as the documents in question would have been excluded for failure to provide discovery, I deny employer's motion for postponement of the hearing.

DEFAULT

Pursuant to OAR 137-003-0670, I 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, employer received the Notice of Hearing dated March 11, 2005 by certified mail and regular mail. Employer 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 order is appropriate.

ISSUE

Whether SAIF incorrectly assessed premium for the audit periods:

- (1) November 30, 2001 through June 26, 2002;
- (2) March 8, 2003 through December 18, 2003;
- (3) February 10, 2004 through March 31, 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 836-43-115(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 A40, which were admitted into the record without objection.

FINDINGS OF FACT

(1) For the purpose of calculating the premium it owed to insurer for the second quarter of 2003, employer reported one worker on the payroll. In the third and fourth quarters of 2003, employer reported three workers on the payroll. In the year 2004, employer reported one worker on the payroll. (Ex. A27.)

(2) On May 15, 2003, William Lott suffered a work injury while employed by employer. (Ex. A15.) Employer failed to list Lott as an employee in its payroll report for May 2003. (Ex. A27.) On August 5, 2003, a SAIF investigator interviewed employer's corporate president, Richard Schneider by telephone. Schneider indicated that employer had paid Lott \$12.50 per hour. (Exs. A18 and A25.)

(3) On August 29, 2003, investigator Rodney Huff visited employer's work site to conduct a compensability investigation of Lott's injury. (Ex. A25-7; testimony of Huff.) He interviewed Schneider who represented that in May 2003 when Lott was injured, employer had two shifts of five workers each. (Ex. A25-8; testimony of Huff.) Schneider further represented that employer's business was doing so well, he considered adding a third shift. (Ex. A25-8.) Huff also interviewed Carl Waddington who was a

¹ Employer's policy lapsed for nonpayment during the intervening periods.

coworker of Lott's in May 2003. (Id.) Employer failed to list Waddington as employee on the payroll report for May 2003. (Ex. A27.)

(4) On September 8, 2003, Ilie Gant suffered a work injury while employed by employer. (Ex. A15.) For the purpose of calculating Gant's time loss benefits, employer indicated that it paid him \$15 per hour. (Ex. A19.)

(5) On March 10, 2004, Jose Gatica suffered a work injury while employed by employer. (Exs. A15 and A23.) For the purpose of calculating Gatica's time loss benefits, employer indicated that it paid him \$15 per hour. (Ex. A19.)

(6) On June 23, 2004, insurer conducted an audit, reviewing employer's payroll records; federal and state tax records, including quarterly payroll tax reports; and check register. (Ex. A27.) The check register displayed unidentified cash payments and the audit charged these cash payments as probable payment to workers in the form of cash labor. (Id.) The audit determined that employer had underreported its wages and added premium due to insurer. (Id.)

(7) SAIF calculated employer's final premium audit based on employer's representations that it employed two shifts of five workers each and paid them \$12.50 per hour. (Testimony of Hegener.)

CONCLUSIONS OF LAW

SAIF correctly assessed premium for the audit periods:

- (1) November 30, 2001 through June 26, 2002
- (2) March 8, 2003 through December 18, 2003
- (3) February 10, 2004 through March 31, 2004.²

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 the evidence means that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 309 (1989).

The record establishes that employer engaged in a consistent pattern of either underreporting or failing to report its payroll for purposes of calculating premium audit. For example, employer failed to report any payroll for Lott during the quarter when he suffered a work injury. Similarly, employer reported no wages for Gant and Gattica during the quarters when they suffered work injuries. Additionally, the investigator

² Employer's policy lapsed for nonpayment during the intervening periods.

interviewed Waddington, who was a co-worker of Lott's, but employer reported no payroll for him either. Moreover, employer's check register listed unidentified cash transactions that probably represent unreported cash wages for labor.

Next, I find that insurer properly estimated employer's final premium audit in the absence of proper business records. In August 2003, Schneider told the investigator that employer employed two shifts of five workers each. In order to obtain time loss benefits for employer's injured workers, Schneider represented that their wages were \$12.50 per hour. Insurer correctly estimated employer's premium audit based on this information provided by employer.

Finally, employer provided no documents in discovery and failed to appear at hearing. Employer offered no evidence to refute insurer's calculations. For the reasons set forth above, I find that insurer presented a *prima facie* case on the record establishing that the final premium audit for the periods in question is correct.

PROPOSED ORDER

I propose that the Department issue the following final order:

SAIF's final premium audit dated September 10, 2004 is correct and payable.

DATED this 16th day of June, 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