

**THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Final Premium Audit of) **Case No. INS 05-11-017**
)
CURTIS W & SHARON KRUSE) **CORRECTED¹ PROPOSED**
a partnership, Petitioner) **ORDER**

HISTORY OF THE CASE

On April 9, 2006, The Hartford Insurance Group (Hartford or insurer) issued a final premium audit billing to employer for the period of May 1, 2004 to May 1, 2005 (audit period). **Curtis W. & Sharon Kruse, a partnership, dba Redwood Property Investments, LLC** (~~Redwood~~ or employer) timely requested a hearing challenging insurer’s billing. On November 30, 2005, the Department of Consumer and Business Services, Insurance Division (the department) referred this matter to the Office of Administrative Hearings (OAH) for hearing.

On April 11, 2006, Administrative Law Judge Catherine P. Coburn conducted a hearing. Co-owner Curtis W. Kruse represented the petitioning employer ~~Redwood~~, pursuant to OAR 137-003-0555. Premium Auditor David C. Gormel represented responding insurer Hartford. Co-owners Curtis W. Kruse and Sharon Kruse testified on employer’s ~~Redwood~~’s behalf. The record closed upon adjournment.

ISSUE

Whether insurer improperly billed employer retroactively.

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 the National Council on Compensation Insurance (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 836-43-0115(1)(a). I also take official notice of another publication of NCCI, the *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.

¹ This Corrected Proposed Order is issued pursuant to OAR 137-003-0655(1) to correct references to the petitioning employer. It replaces the Proposed Order issued in this case on May 15, 2006, which is hereby withdrawn. Additions are noted in **Bold**. Deletions are noted in ~~Overstrike~~.

EVIDENTIARY RULINGS

Petitioner's Exhibits 1 through 9 and insurer's Exhibits 101 through 109 were admitted into the record without objection.

FINDINGS OF FACT

(1) **Curtis W. & Sharon Kruse, a partnership** ~~Redwood Investment Properties, LLC~~ is a real estate development and construction business operating in southern Oregon since 1999. **Employer Redwood** purchases vacant lots, builds residential homes and sells them. **Employer Redwood** also performs some residential remodeling. (Testimony of Curtis Kruse.) **Employer Redwood** sets its product prices according to its anticipated costs, including workers' compensation insurance premium. (Testimony of Sharon Kruse.)

(2) From 1999 to 2004, Hartford provided workers' compensation coverage to **employer Redwood** through a local agent. The 2004-2005 audit reflects the name of a different, out-of-town Hartford agent. (Testimony of Curtis Kruse.)

(3) From 1999 to 2004, **employer Redwood** accurately represented its work activities² to Hartford and Hartford assigned class codes 8810S (Clerical Office) and 9015S (Buildings NOC Operation). (Exs. 3, 4, and 5.) **Employer Redwood** paid the premium audit bills without dispute. (Testimony of Curtis Kruse.)

(4) At the end of 2004, employer paid its employees a bonus, based on business profits. (Testimony of Sharon Kruse.)

(5) In August 2005, a Hartford premium auditor visited **employer's Redwood's** place of business and examined the payroll. Hartford reassigned payroll to class code 5645 (Carpentry), resulting in \$17,746 balance due for the policy period May 1, 2004 through May 1, 2005. Hartford issued the final premium audit on April 9, 2006.

CONCLUSIONS OF LAW

Insurer correctly assessed premium retroactively.

OPINION

The issue here is whether Hartford may bill retroactively in 2005 for the May 1, 2004 through May 1, 2005 policy period. Inasmuch as **employer Redwood** is the party seeking redress before the department concerning its final premium audit billing, it has the burden to prove its position on the issue by a preponderance of the evidence. *See* ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of

² The parties agree that Exhibit 1 contains a typographical error. "Bath House Beach" should read "Buildings NOC Operation".

burden of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard, the standard in an administrative hearing is by a preponderance of the evidence); *Salem Decorating v. Natl. 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 fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General contractors v. Tandy Corp.*, 303 Or 390 (1989). I find that petitioner has failed to meet its burden.

Here, the employer challenges the insurer's billing because it is retroactive. **employer Redwood** acknowledges that it paid premiums based on incorrect classification codes in prior years. However, **employer Redwood** argues that Hartford should absorb the cost difference because **employer Redwood** accurately reported its work activities to Hartford and Hartford incorrectly assigned the wrong class codes. **Employer Redwood** further argues that retroactive billing imposes a significant and unexpected expense and places an undue burden on a small business.

The NCCI Manual Rule 1-F provides in pertinent part:

(3) If a correction in classifications would produce an increase in premiums, the date of discovery determines when the correction will be applied:

- If not discovered until the final 90 days of the policy period, no correction may be made except on the renewal policy.

The following two exceptions are noted for item (3) above:

(a) Any correction in classifications that results from the discovery of a misrepresentation or omission by the insured, his-her agent, employees, officers, or directors, will be applied from the date it should have applied had there been no such misrepresentations or omission.

(b) Changes or corrections to classifications for **construction** or erection risks, employee leasing firms, labor contractors, or temporary labor services may be applied any time during the policy period or at audit. This includes changes that result in an increase in premium. (Emphasis added.)

Here, the parties agree that **employer Redwood** made no misrepresentation or omission in any of its payroll reports to Hartford. On the contrary, **employer Redwood** accurately reported its work activities to Hartford. However, because **employer Redwood** engages in residential construction, NCCI Rule 1-F (b) authorizes Hartford to correct its class codes retroactively, even though the change results in a premium increase. Accordingly, Hartford's final premium audit for the audit period is affirmed.

ORDER

I propose that the department issue the following Final Order:

Hartford's April 9, 2006 final premium audit billing for the audit period of May 1, 2004 through May 1, 2005 is correct and payable.

IT IS SO ORDERED.

Dated this 18th day of May 2006.

/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