

**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 06-04-025  
)  
**THE OGILVIE COMPANY, INC.,** ) **PROPOSED ORDER**  
**a Washington Corporation** )

**HISTORY OF THE CASE**

The Ogilvie Company, Inc., (Ogilvie or employer) appeals its final premium audit billing for the period December 1, 2004 through November 30, 2005 (audit period). On April 24, 2006, the Insurance Division, Department of Consumer Business Services (department) referred the matter to the Office of Administrative Hearings (OAH). On August 3, 2006, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing in Salem, Oregon. Pursuant to OAR 137-003-0555, General Manager, Weisha Liu, represented Ogilvie. Assistant Attorney General Shannon N. Rickard represented respondent SAIF Corporation (insurer). SAIF Premium Audit Program Analyst, DeAnne J. Hoyt, testified on SAIF's behalf.

**ISSUE**

Whether SAIF incorrectly assessed premium for the audit period by including payments made under a profit share plan in the premium basis.

**OFFICIAL NOTICE**

At hearing, I took 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 took 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 A10 were admitted into the record without objection. At hearing, employer moved to leave the record open in order to offer documents

concerning net realized profits and SAIF objected. Pursuant to OAR 137-003-0600 and OAR 137-003-0610, I denied the motion and the record closed upon adjournment.

### **FINDINGS OF FACT**

1. The Ogilvie Company is a steel fabrication business located in Astoria, Oregon. From 1994 through 1997, it generated net losses and its debt exceeded its assets. In 1997, two employees negotiated a verbal agreement with the business owner whereby the business agreed to pay profit shares to them in the event that the business produced a profit under their management. (Ex. A7; testimony of Liu.) The parties never signed a dated, written agreement memorializing the profit share verbal agreement. (Exs. A7 and A9.)

2. In some years since 1997, the company generated a net profit, but paid no profit shares. During the audit period, the company generated a net profit and paid profit shares. (Testimony of Liu.)

### **CONCLUSION OF LAW**

SAIF correctly assessed premium for the audit period by including payments made under a profit share plan in the premium basis.

### **OPINION**

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

OAR 836-042-0055 provides in pertinent part:

(A) An insurer shall include a payment in or exclude a payment from the workers' compensation premium basis of an employer as follows:

\* \* \* \* \*

(B) A profit sharing payment shall be excluded from the premium basis if all of the following conditions apply with respect to the payment:

(C) The payment is anticipated;

(D) The payment is distributed in accordance from net realized profits;  
and

(E) The payment is distributed in accordance with a written plan  
that creates a legal obligation for the employer to disburse funds in  
accordance with the plan.

Having reviewed the record, I find that employer's profit share plan fails to meet all three criteria listed in OAR 836-042-0055(2)(c). To begin, the profit share payments were not anticipated as required by subsection (A). In *Seaman Restaurant Corporation v. SAIF Corp.*, Case No. 88-2-3 at 11, the department held that payments that were contingent upon performance evaluations constituted remuneration and were properly included in the premium basis. Similarly, in the present case, profit share payments to employees were contingent upon the employees' performance in producing a net profit, and consequently, they were anticipated as the term is used in OAR 836-042-0055(2)(c)(A).

Next, OAR 836-042-0055(2)(c)(B) requires excludable payments to be distributed from net realized profits. However, the record in this premium hearing contains no evidence that the profit share payments were distributed from net realized profits. Consequently, the profit share plan fails to meet OAR 836-042-0055(2)(c)(B).

Finally, OAR 836-042-0055(2)(c)(C) requires excludable payments to be distributed according to the terms specified in a written plan. However, employer concedes that its profit share plan is verbal and that a signed and dated written plan does not exist. Consequently, the profit share plan fails to satisfy OAR 836-042-0055(2)(c)(C).

In conclusion, I find that employer's plan does not fulfill the criteria specified by OAR 836-042-0055(2)(c). Therefore, payments made under the plan constitute remuneration and are properly included in the premium basis. Accordingly, I find that employer has failed to carry its burden of proving that the premium audit is incorrect.

### **PROPOSED ORDER**

I propose that the department issue the following final order:

SAIF's final premium audit dated January 18, 2006, is correct and payable.

Catherine P. Coburn

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Administrative Law Judge  
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: August 9, 2006

**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

CERTIFICATE OF SERVICE

On the 9th day of August 2006, I mailed the foregoing PROPOSED ORDER in Reference No. **0604025**.

BY FIRST CLASS MAIL:

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/s/ Jennifer Halfman  
Jennifer Halfman  
Hearing Coordinator