

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

In the Matter of the Premium Audit of

Case No: INS 06-02-006

**FORTUNE'S BULLDOZING
and GRADING, LLC**

PROPOSED ORDER

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HISTORY OF THE CASE

This premium audit appeal was heard by Administrative Law Judge Catherine P. Coburn on June 1, 2006. Manager David Eversz appeared on behalf of the petitioning employer, Fortune's Bulldozing and Grading, LLC (employer or Fortune's). Assistant Attorney General Shannon N. Rickard represented responding insurer SAIF Corporation (insurer or SAIF). Respondent rating bureau National Counsel of Compensation Insurance (NCCI) waived appearance at the hearing.

Fortune's timely appealed SAIF's final premium audit billing for the period of April 10, 2004 through March 30, 2005 (audit period). On February 14, 2006, the Department of Consumer and Business Services, Insurance Division (the department) referred this matter to the Office of Administrative Hearings.

Eversz testified on employer's behalf and no witnesses testified on insurer's behalf. The record closed upon adjournment of the hearing on June 1, 2006.

ISSUES

- 1 Whether manager David Eversz may properly represent the employer at hearing.
2. Whether insurer incorrectly assessed premium for the audit period April 10, 2004 through March 30, 2005.

EVIDENTIARY RULINGS

The record consists of Exhibits A1 through A9, which were admitted into the record without objection.

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.

FINDINGS OF FACT

1. Prior to December 2, 2004, Fortune's operated as a business partnership. The members were Richard C. Fortune and Laura R. Fortune. On December 2, 2004, Fortune's registered articles of incorporation as a limited liability corporation with the Oregon Business Registry. (Ex. A9.)

2. On May 5, 2004, Richard Fortune hired Jimmy Howard through the Jobs Plus program which provides vocational retraining for unemployed forestry workers. Fortune and Howard mistakenly believed that Howard was hired through the Preferred Worker Program and that his wages would be exempt from premium audit. (Testimony of Eversz.)

3. At hearing, manager David Eversz appeared on Fortune's behalf.

CONCLUSIONS OF LAW

1. Manager David Eversz may not properly represent the employer at hearing.
2. Insurer correctly assessed premium for the audit period April 10, 2004 through March 30, 2005.

OPINION

Representation

ORS 137-003-0550 provides in pertinent part:

(2) Corporations, partnerships, limited liability companies, unincorporated associations, trusts and government bodies must be represented by an attorney except as provided in OAR 137-003-0555 or as otherwise authorized by law.

OAR 137-003-0555, in turn, provides in pertinent part:

(1) For purposes of this rule, the following words and phrases have the following meaning:

(b) "Authorized Representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, an authorized officer or employee of a governmental authority other than a state agency or other authorized representatives recognized by state or federal law;

During the first eight months of the audit period, and at the time it hired Jimmy Howard, Fortune's was a partnership. Consequently, only an attorney or a member of the partnership may represent Fortune's at hearing. However, David Eversz is neither an attorney, nor a member of the partnership. Consequently, Eversz is not authorized to represent Fortune's in this premium audit hearing. Therefore, no authorized representative appeared at hearing on Fortune's behalf.

Premium Audit

Inasmuch as Fortune's Bulldozing and Grading, LLC is the party seeking redress before the department concerning SAIF's final premium audit billing for the audit period, it has the burden of proof in establishing its position on the issues by a preponderance of the evidence. *See* ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of 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).

Richard Fortune hired Jimmy Howard, mistakenly believing that his wages would be excluded from premium audit for purposes of obtaining workers' compensation insurance coverage. At hearing, Fortune's presented no evidence that SAIF incorrectly included Howard's wages in the premium audit. Moreover, even if Eversz had offered such evidence, it would have been inadmissible because no authorized representative appeared on Fortune's behalf. For these reasons, Fortune's failed to carry its burden of proving that the final premium audit is incorrect. Therefore, I conclude that the final premium audit is correct and payable.

ORDER

SAIF's final premium audit billing for the audit period of April 10, 2004 through March 30, 2005 is correct and payable.

IT IS SO ORDERED.

Dated this 11th day of July, 2006.


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
Mitchel D. Curzon, Chief Enforcement Officer
Oregon Insurance Division
350 Winter Street NE Room 440
Salem, OR 97301-3883

CERTIFICATE OF SERVICE

On the 11th day of July 2006, I mailed the foregoing PROPOSED ORDER in Reference No. 0602006.

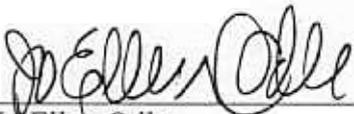
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