



## OFFICIAL NOTICE

As noted at hearing, I take official notice of the *Basic Manual*. The *Basic Manual* is a publication of the 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.

## EVIDENTIARY RULINGS

The record consists of petitioner's Exhibits PE1 through PE9 and insurer's Exhibits A1 through A7. The insurer objected to petitioner's Exhibits PE1 through PE5 and the petitioner objected to insurer's Exhibit A4 based on relevance. I overruled the objections and entered all the exhibits into evidence pursuant to OAR 137-003-0050. Petitioner also objected to my taking official notice of the *Basic Manual* and the *Scopes Manual*. As the *Basic Manual* and the *Scopes Manual* are required relevant information for every auditor, I overrule petitioner's general objection and take official notice of these publications.

## FINDINGS OF FACT

(1) Petitioner is a non-profit corporation. It operates a 501 [c] 3 non-profit drop-in center that is staffed in large part by the mental health consumers that use the services of the facility. Some individuals work at the facility as key holders. Some key holders also serve as corporate officers of petitioner's board of directors. (Ex. A3.) The corporate officers did not receive remuneration for their services on the board. However, they are paid less than \$300.00 per month for their work as key holders. (Test. of Daryll Stanfill and Robert Ewbank.)

(2) Sometime prior to January 26, 2006, Robert Miller, field premium auditor for SAIF, performed a routine audit of petitioner's business. Mr. Miller identified those corporate officers who were paid for their services as key holders. Mr. Miller determined that under Basic Manual Rule 2-E. 1. b those corporate officers, were subject to \$300.00 weekly minimum payroll. (Test of Robert Miller.)

(3) Sometime prior to April 22, 2003, Mr. Ewbank requested Oregon Workers' Compensation Rating System Review and Advisory Committee (ORAC) to amend its *Basic Manual* that establishes a minimum payroll for officers of a business. After reviewing testimony and written materials presented at its April 22, 2003 meeting, ORAC denied Mr. Ewbank's request to amend the payroll treatment of the officers of a non-profit corporation. ORAC issued its decision letter on May 7, 2003. (Ex. A3.)

(4) Even though petitioner appealed the ORAC decision, it did not appear for a hearing scheduled on December 3, 2003. ALJ Catherine P. Coburn issued a proposed default order on December 9, 2003 affirming ORAC's decision. Insurance Director, Joel Ario issued a final order on April 9, 2004 also affirming ORAC's decision. (Ex. A4.)

### CONCLUSION OF LAW

Insurer correctly applied the rules from the *Basic Manual* in allocating \$300.00 weekly minimum payroll for petitioner's subject corporate officers and correctly assessed premium during the audit period.

### OPINION

The issue to be resolved here is whether petitioner's corporate officers, who were paid less than \$300.00 per month for their services as key holders but otherwise received no remuneration, should be included in the premium audit and whether the insurer correctly allocated \$300.00 weekly minimum payroll to these subject corporate officers.

Because the petitioner is the party seeking redress before the Division 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 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).

The parties do not dispute that petitioner is a non-profit corporation and that its corporate officers did not receive remuneration for their services on the board but received remuneration of less than \$300.00 per month for their work as key holders. However, it appears that petitioner's basic argument is that it should not be subject to the workers' compensation premium because it is a non-profit corporation and because its corporate officers are not workers under ORS 656.005(30) but volunteers.

#### ***Application of the Basic Manual rules***

Petitioner's exhibits PE6 and PE7 show that ORAC, who has the authority to amend the *Basic Manual* rules, was aware of petitioner's contention that non-salaried employees should be treated as volunteers. After considering testimony and written response on April 23, 2003, ORAC chose not to amend the *Basic Manual* rules. Accordingly, the insurer, who is charged with the application of the *Basic Manual* rule,

must apply the rule as it exists. In this instance, insurer is required to treat petitioner's corporate officers as workers and not as volunteers.

### ***Premium Determination***

The *Basic Manual* (2001 ed.) Rule 2-E.1.b. provides in relevant part:

Premium for executive officers is based on their total payroll, subject to the following limitations and the requirements of Rule 2-D.

- (1) The minimum individual payroll for an executive officer is shown on the individual state pages in the **Basic Manual**.
- (2) The maximum individual payroll for an executive officer is shown on the individual state pages in the **Basic Manual**.
- (3) The payroll limitations in b(1) and b(2) apply to the average weekly payroll of each executive officer for the number of weeks the officer was employed during the policy period.
- (4) Payroll is subject to minimum and maximum limitations and included when . .

\* \* \* \*

- The officer received no salary, either drawn or credited, or the audit records fails to disclose the salary. In this instance the amount to be included in the payroll is the applicable minimum per *Rule 2-D*

- (5) Payroll is excluded when. . .
  - The executive officer is elected for the value of his/her name or because of stock holdings, has no duties and does not visit the premises, except perhaps to attend director's meetings.
  - The executive officer ceases to perform any duties and does not visit the premises, expect perhaps to attend directors' meetings.

Under the individual states page, page 84 for the State of Oregon, the minimum payroll applicable to executive officers is \$300.00 per week.

In order to be excluded from minimum and maximum limitations, the petitioner must be able to show that one of the exclusions applies to petitioner's situation. Petitioner is not able to show that any of the exclusions under 2-E.1.b.(5) apply to petitioner. Therefore, I conclude that petitioner has failed to meet his burden of proving that the corporate officers should be excluded from the premium audit. Accordingly, SAIF's final premium audit billing for the audit period is affirmed.

**ORDER**

SAIF's final premium audit billing for the audit periods of October 1, 2004 through September 30, 2005 and October 1, 2005 through December 10, 2005 are correct and payable.

**IT IS SO ORDERED.**

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Rohini Lata, Administrative Law Judge  
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: November 30, 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:

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 30th day of November 2006, I mailed the foregoing PROPOSED ORDER in Reference No. **0604002**.

BY FIRST CLASS MAIL:

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Jennifer Halfman  
Hearing Coordinator