

**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 06-10-004 |
| |) | |
| WENLUND MAINTENANCE LLC, |) | PROPOSED ORDER |
| Petitioner |) | |

HISTORY OF THE CASE

On August 3, 2006, Liberty Northwest Insurance (Liberty) issued a Final Premium Audit Billing for the audit period of June 1, 2005 until June 1, 2006, to Wenlund Maintenance LLC (Petitioner). Petitioner filed a timely appeal of the Billing. Its appeal was referred to the Office Administrative Hearings (OAH) on October 3, 2006.

A hearing in regards to Petitioner's appeal was conducted by Administrative Law Judge Lawrence S. Smith of the OAH on February 1, 2007, in Beaverton, Oregon. Member Barbara Wenlund represented Petitioner. She and manager Don Wenlund testified on behalf of Petitioner. Attorney Barbara Woodford represented Liberty and called one witness, Mark Lybbert, senior auditor with Liberty. The record closed the day after the hearing.

ISSUES

1. Whether Liberty assigned the payroll of members Isidro Mendoza, Salvador Mendoza, and Scott Wenlund to the correct class code in its Final Premium Audit Billing.
2. Whether Liberty is equitably estopped from assigning the payroll to those classifications.

EVIDENTIARY RULINGS

Liberty's Exhibits 101 through 109 and Petitioner's Petition and letter (Ex. A) were admitted without objection.

FINDINGS OF FACT

(1) Petitioner is an Oregon corporation engaged in the business of the repair, remodeling, and maintenance of homes. It is licensed by the Construction Contractors Board (license number 120976). The corporation is run by Don Wenlund, manager, and his wife, Barbara Wenlund, member/bookkeeper, out of a shop in their home. They have been in business for nine years. Petitioner has between three and nine employees,

depending on the season. (Test. of Barbara Wenlund.)

(2) Liberty has provided workers' compensation insurance for Petitioner since 2004. In late 2004, member/bookkeeper Barbara Wenlund called Liberty and asked how to report the payroll of workers who were doing maintenance work on tools at the home shop. (Test. of Barbara Wenlund.) A Liberty senior auditor told her that if Petitioner kept detailed records of when the employees were in the home office and maintaining equipment and not working in repair or maintenance of homes, Petitioner would be able to claim the home shop time under class code 8227. The senior auditor told her on July 12, 2005 that class code 8227 was called the "Permanent Yard Code" and is to be used by an employer only when an employee was cleaning or maintaining equipment in the shop and not when doing Petitioner's business of repairing or remodeling homes. (Test. of Lybbert.) Petitioner kept detailed records of such maintenance work during the audit period ending June 1, 2005 and until the end of 2005. (*Id.*)

(3) During the audit period, Scott Wenlund (the son of Barbara and Don Wenlund), Isidro Mendoza, and Salvador Mendoza were also members of Petitioner. As members, their payroll was not at first reported to Liberty because Petitioner did not wish to provide workers' compensation insurance for them due to the high cost of insurance. (Test. of Barbara Wenlund.) After Scott Wenlund was injured at work, Petitioner decided it would be best to cover him and the other two members for future injuries. In early January 2006, Barbara Wenlund called Petitioner's insurance agent (the Wenlunds' daughter) to add the three members to Petitioner's workers' compensation policy. (*Id.*; Ex. 103.) The agent called Liberty and advised Liberty that the three should be added. (Test. of Barbara Wenlund.) On January 26, 2007, Barbara Wenlund received documents from Liberty that the three members were added to Petitioner's policy. (*Id.*)

(4) The payroll for the three had not been reported to Liberty before and Liberty did not know what work they would be doing for Petitioner. (Test. of Lybbert.) On March 20, 2006, Liberty sent a Workers' Compensation Payroll Report to Petitioner. The Report listed the various class codes for Petitioner, including class code 5403 for carpentry non-residential and the class codes for other related construction activities. It also listed the three members and, on the same line as their names, the class code 8227, the code for employees' payroll when they are maintaining equipment in the home shop and not working in construction. (Ex. 104.)

(5) In late November 2005, Petitioner began remodeling another building with the intent of using it as a cabinet-making shop and show room for the cabinets and other products Petitioner would be offering. This remodeling included building artificial walls, installing windows, and laying carpet, tile and marble, the services Petitioner provides to its customers. (Test. of Don Wenlund.)

(6) After Petitioner received the March 20, 2006 Payroll Report from Liberty, Barbara Wenlund presumed that the work of the three members should be in class code 8227, even when they were remodeling the new shop. She did not call Liberty to

confirm her presumption and did not keep strict records of when the members were maintaining equipment versus when they were performing carpentry or other construction work in the new shop. For the period of January 1, 2006, until June 1, 2006, she reported the payroll for the three members in class code 8227, which is assessed at a rate of 5.34 as compared to the rate of 15.83 for general carpenters. (Test. of Barbara Wenlund.)

(7) Liberty conducted an audit of Petitioner's reports for the audit period of June 1, 2005 through June 1, 2006 and disallowed the claim of the three members' payroll in class code 8227 because Petitioner could not provide verifiable time records differentiating between constructing the new shop and maintaining equipment in the shop. Liberty concluded that Petitioner did not have enough records to establish the interchange of labor among the various class codes. Liberty's senior auditor transferred the payroll reported in class code 8227 to class code 5403 (general carpentry) because he did not know what kind of work the three members did. He had the authority to assign their payroll to the highest rate on Petitioner's report, which would have been "Carpentry—1 or 2 family dwelling" at a rate of 22.40, but gave Petitioner a break and assigned it to class code 5403. (Test. of Lybbert.) This change in class codes resulted in an additional premium of \$4,493.38. (Ex. 109 at 4.)

(8) Petitioner's manager believes that Liberty should not be able to assess a higher premium because Liberty made the mistake of listing the three members with the 8227 class code. (Test. of Don Wenlund.)

CONCLUSIONS OF LAW

1. Liberty properly assigned the payroll of members Isidro Mendoza, Salvador Mendoza, and Scott Wenlund to the correct class codes in its Final Premium Audit Billing.
2. Liberty is not equitably estopped from assigning the three members' payroll to a different classification.

OPINION

1. Correct class code

In its Final Premium Audit Billing for the audit period of June 1, 2005 through June 1, 2006, Liberty assigned the payroll of the three members to class code 5403 because Petitioner did not provide detailed records to establish that their payroll should be reported in class code 8227, "Permanent Yard Code", a class code for cleaning and maintaining equipment in the main shop. The rate for this code was much less than the rate for the code of the three members' regular construction work.

ORS 737.310 describes the method and factors involved in setting rates and provides in relevant part:

The following standards shall apply to the making and use of rates:
* * * * *

(12) At the time an insurer issues a workers' compensation insurance policy to an insured for the first time, the insurer shall give written notice to the insured of the rating classifications to which the insured's employees are to be assigned and shall provide an adequate description of work activities in each classification. * * *

(13) If an insurer determines the workers' compensation insurance policy of an insured needs reclassification, the insurer:

(a) May bill an additional premium for the revised classification after the insurer has provided the insured at least 60 days' written notice of the reclassification.

* * * * *

(c) May, notwithstanding paragraph (a) of this subsection, retroactively bill an insured for reclassification during the policy year without prior notice of reclassification if the insurer shows by a preponderance of the evidence that:

(A) The insured knew that the employees were misclassified, or the insured was adequately informed by the insurer of the proper classification for the insured's employees;

(B) The insured provided improper or inaccurate information concerning its operations; or

(C) The insured's operations changed after the date information on the employees was obtained from the insured.

Petitioner argues that Liberty has no authority to change the class code of 8227 for the three members because Liberty appeared to assign the payroll of the three to this code on the Payroll Report mailed to Petitioner on March 20, 2006. Under ORS 737.310, Liberty only has authority to retroactively bill Petitioner for reclassification if Liberty shows that Petitioner either knew the employees were misclassified or was adequately informed by Liberty of the proper classification. On July 12, 2005, Liberty's senior auditor explicitly advised Petitioner's member/bookkeeper regarding what payroll should be charged to class code 8227 and how to keep detailed records in order to use the class code. Petitioner's member/bookkeeper must have understood the directions because after the advice, she kept detailed records until the three members became covered. Petitioner was adequately informed of the proper classification for the three members and knew their work could only be reported as class code 8227 when they were cleaning or maintaining equipment in Petitioner's home shop and Petitioner kept detailed time records of such work. Petitioner should have known that the work by the three members in constructing the new shop or outside the shop could not be reported as class code 8227 as maintenance of tools in the shop. Liberty has established grounds to retroactively change the class code for the three members' payroll.

Petitioner has not provided sufficient records to establish another appropriate code or an interchange of labor, so Liberty has the authority to apply more appropriate class

codes that are on Petitioner's report to the payroll of the three members. Their payroll was split among the various codes listed on the report. Petitioner has provided no records to establish that Liberty's application and interchange of these class codes was improper.

2. Equitable Estoppel

Petitioner appears to be arguing also that Liberty should be equitably estopped from changing the class codes for the payroll for the three members. This argument is not accepted, for the reasons stated below.

Under the doctrine of equitable estoppel, a party may be precluded by its act or conduct or by silence when there is a duty to speak, from asserting a right which it otherwise would have had. *Mitchell v. McIntee*, 15 Or. App. 85 (1973). See also *Coos County v. State of Oregon*, 303 Or 173, 180 (1987), as quoted in *Bruer's Contract v. Natl. Council on Comp. Ins.*, 116 Or App 485, 488 (1992):

The elements of equitable estoppel in Oregon were set out by this court in *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P. 722 (1908):

To constitute estoppel by conduct, there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have induced to act upon it: [cite omitted.]

Courts generally have held that the misrepresentation must be one of existing material fact, and not of intention, nor may it be a conclusion from facts or a conclusion of law. [cite omitted.] The party seeking estoppel must demonstrate not only reliance, but a right to rely upon the representation of the estopped party. *Marshall v. Wilson*, 175 Or. 506 518, * * * (1944). Reliance is not justified where a party has knowledge to the contrary of the fact or representation allegedly relied upon. *Willis v. Stager*, 257 Or. 608, 619 * * * (1971). The facts creating an estoppel must be proved by a preponderance of the evidence. *McKinney v. Hindman*, 86 Or. 545, 551 * * * (1917).

Furthermore, in *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 35 (1973), the court concluded:

[I]t is well established that there can be no estoppel unless there was not only reliance, but a right of reliance, and that reliance is not justified where a party has knowledge to the contrary of the fact or representation allegedly relied upon * * * .

As stated above, Petitioner claims reliance on the Payroll Report sent by Liberty in which Liberty appears to assigning class code 8227 to the three new members. The other construction class codes are on the Report and were available for Petitioner to use to correctly report interchange of labor, as Petitioner had done before. Petitioner has the burden of establishing the grounds for equitable estoppel. *See Breuer*, above, and ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case is on the proponent of the fact or position”).

There is no evidence that Liberty intended for Petitioner to rely on what was stated in the Payroll Report for determining which class code Petitioner should use to report the payroll for the three members. Petitioner has clearly failed to show that Liberty induced them to believe that all of the three members’ payroll should be reported in class code 8227. Moreover, Petitioner has failed to establish that Liberty knew the information on the Payroll Report was false because Petitioner had not before reported payroll for the three members. Without knowing about the prior work of the three, Liberty did not know the proper class code for their payroll. Petitioner has also not established that it was ignorant of the truth because it had been advised about class code 8227 and how to keep detailed records in order to use the class code. In fact, before the three members were included in coverage, Petitioner had kept the records necessary for proper use of class code 8227. Finally, Petitioner did not receive the Payroll Report until after it was mailed on March 20, 2006, so it could not have relied on the information in it when making the decision in January and February not to keep the specific records needed to report the three members’ payroll in class code 8227. The three members were clearly doing more than cleaning or maintaining equipment in the shop and Petitioner must have known that charging their time to only the maintenance code was improper.

Petitioner’s frustration is understandable to some extent. Its members do not understand the requirements of workers’ compensation law as well as Liberty’s employees do. Petitioner claims that Liberty should be liable for any alleged mistake, but if Petitioner made a mistake and paid too much, Liberty would refund the overpayment.

ORDER

Liberty NW’s Final Premium Audit Billing issued to Wenlund Maintenance LLC on August 3, 2006, for the audit period of June 1, 2005 until June 1, 2006, is correct and payable.

Lawrence S. Smith
Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: February 15, 2007

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
c/o Mitchel D. Curzon, Chief Enforcement Officer
Insurance Division
350 Winter Street NE
Salem, OR 97301-3883

CERTIFICATE OF SERVICE

On the 15th day of February 2007, I mailed the foregoing PROPOSED ORDER in Reference No. **0610004**.

BY FIRST CLASS MAIL:

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