

FINDINGS OF FACT

1. Petitioner owns and operates a company called Pro Landscaping Construction, a sole proprietorship using an assumed business name. Petitioner does landscape contracting and general contracting. He is licensed with the Construction Contractors Board (CCB) and the Landscape Contractors Board (LCB). Most of the work he performs is as a landscape contractor for Goings Homes, a developer/contractor of custom homes in Southern Oregon. He is the only landscape contractor that Goings uses in its subdivisions. Petitioner received \$363,000 from Goings for work performed in the audit period of June 24, 2005 through June 30, 2006. In addition to the work at Goings Homes, Petitioner has a contract with the Medford Fire Department to mow properties in the City of Medford that the fire department designates a fire hazard due to the length of the grass. Petitioner's hourly rate for mowing is \$60. He earned approximately \$30,000 between June 2005 and September 2005, inclusive, mowing for the fire department. Petitioner works 14 to 16 hour days from May through October, seven days a week, and 10 to 12 hour days the rest of the year, six days a week. (Test. of Petitioner). **Petitioner also did work for private homeowners and for the Jackson County Dog Kennel, putting in a lawn. The total amount of Petitioner's income during the audit period is unclear.**

2. Petitioner had one employee, Matthew or Michael O'Connell,¹ working during the audit period. O'Connell worked three days per week and earned \$10 per hour. (Ex. P13). O'Connell was paid his wages in cash rather than by check, at O'Connell's request. (Test. of Petitioner). Petitioner reported O'Connell's wages to SAIF Corporation and paid premium to cover O'Connell with workers' compensation insurance. Petitioner performs work for his company, but is exempt from coverage. (Ex. A1). **[The ALJ has considered the exception filed by SAIF and does not believe any additions or deletions to the Second Finding of Fact is necessary].**

3. SAIF Corporation decided to audit Petitioner's business to determine if the amount of premium being charged to the company was correct. SAIF asked Petitioner to provide records of income and expenses, including bank records, checkbook records, cash disbursements, invoices, and other important documents. Petitioner provided records, but they are incomplete because Petitioner does not keep complete records. Petitioner banks at the same bank as Goings Homes; when he takes a check in to deposit, the teller releases large amounts of cash to Petitioner from the checks received from Goings. Normal bank practices would require a waiting period before sums could be withdrawn, but having the Goings' accounts in the same bank gives the bank the confidence to release funds immediately. (Test. of Petitioner). Of the \$363,000 received from Goings during the audit period, only about \$213,000 was actually deposited in the bank. The rest was given as cash to Petitioner. Petitioner used cash to pay some business bills, including payroll, and also used cash and checks from the business account to pay for personal expenses as well. (*Id.*).

¹ Both names are used in the documents; the employee's first name is of no significance in this case.

4. Petitioner used subcontractors on his jobs during the audit period. His primary subcontractor was his brother, Gary Gipner, who has a license with the CCB but is not registered with the LCB. Petitioner's other primary subcontractor is Overstreet Landscape, for the limited purpose of hydroseeding the lawns in the subdivisions. Overstreet is licensed with the LCB and is also bonded. (Ex. P18). **Some payments were made to the subcontractors by check; it is unknown whether the amounts listed in the check registers and bank statements is the entire compensation paid to the subcontractors.**

5. SAIF audited Petitioner, at least in part, because it had audited and investigated his company in the past and found irregularities. In 2003 and 2004, workers' compensation claims were filed against Petitioner; both claims were investigated, and both times the injured or allegedly injured person claimed to be Petitioner's employee. In both situations, and particularly in the last one, Petitioner claimed the person was not an employee. The 2003 claim was accepted as compensable. (Ex. A12). The 2005 claim was withdrawn within days of its filing. (Ex. A10 at 6). **The persons in the previous audit periods who claimed to be employees were paid in cash.**

6. In the process of preparing the final premium audit to serve on Petitioner, SAIF determined that Petitioner's records were incomplete and that the amount of wages he was paying to workers could not be determined. Based upon the workers' compensation claims in previous years, from individuals whom Petitioner insisted were not employees, SAIF believed that Petitioner was employing other workers during this audit period (besides O'Connell), and paying them cash. To determine the amount of payroll dollars upon which premium should be based, SAIF took the amount of money received by Petitioner from Goings Homes, and determined that half should be considered expenses and half wages. SAIF applied "in reverse" the rule that attributes 50 percent of a contract amount to costs and 50 percent to labor when the recipient is self-employed and has no records. (Test. of Smith). SAIF determined that Petitioner owed premium on an additional \$181,274 in wages. (Ex. P15). The amount chosen was "arbitrary," and did not make any provision for any of Petitioner's own earnings, which would be exempt. (Test. of Smith). **[The ALJ has considered the exception filed by SAIF and does not believe any additions or deletions to the Second Finding of Fact is necessary].**

CONCLUSION OF LAW

SAIF Corporation's premium audit billing is incorrect.

OPINION

Petitioner contends that SAIF's final premium audit report is incorrect in two major ways. First, he contends that SAIF has no proof whatsoever of employees other than O'Connell working for him during the audit period. Second, Petitioner contends that SAIF's arbitrary designation of the contract proceeds as wages upon which premium

must be paid ignores the fact that Petitioner himself is exempt from coverage. I will address these arguments in reverse order.

In its first exception, SAIF argues that Petitioner is lacking in credibility, and that the ALJ erred in not assessing his credibility (“To determine the relevant facts in this case, it was necessary for the [ALJ] to make a credibility finding with respect to Petitioner * * *”). (Exceptions at 1). However, SAIF did not ask at any time during the hearing for an assessment of credibility.

SAIF’s credibility argument essentially relies on two foundations. First, it contends that Petitioner lied to them in past audit years about having employees. Second, it contends that Petitioner could not have done all of the work he claimed during the audit period because “human experience demonstrates that it is logically incredible that one person could do all the work necessary” to earn what Petitioner earned. (Exceptions at 4).

SAIF fails to understand the basis of the decision in the Proposed Order. The issue is narrow: Was the premium audit billing incorrect? Petitioner had the burden of proof to show it was incorrect. He presented evidence that he did the work during the audit period, with the exception of the work performed by the one employee he reported to SAIF and by the qualified subcontractors. SAIF did not present any evidence to contradict Petitioner’s evidence. With all due respect, I am unwilling to consider my concept of “human experience” as evidence in this case.

Most importantly, the decision in this case is not based upon Petitioner’s credibility as much as it is upon SAIF’s use of a rule (the 50/50 rule) that did not properly apply to the fact situation. Even counsel agreed it was an “arbitrary” rule in closing arguments; Ms. Smith also testified that it was arbitrary and that the rule was used “in reverse.” In other words, the rule was not used the way the rule was intended to be used. Ms. Fisher did not know why the rule was used. The record is clear concerning how frustrating it would be for SAIF to properly assess the amount of premium in a business with record-keeping like Petitioner’s, which helps me understand why such a solution would be considered. However, there was no valid basis for SAIF to apply the arbitrary rule, and no way that a premium audit billing that fails to take into account the amount of exempt wages could be called correct.

SAIF argues that Petitioner did not present evidence on how much money he earned during the audit period; that is incorrect. Petitioner testified that he did *all* of the work except that done by his employee and the contractors. Even if there was evidence contradicting that testimony, it is undisputed that Petitioner did some of the work. However, SAIF’s premium audit assigns 50 percent of the contract amount to costs (a correct use of the 50/50 rule), and the other 50 percent to *non-exempt* wages of the employees Petitioner denies having. There is no consideration whatsoever of the amounts Petitioner earned—not to mention the total lack of evidence showing that Petitioner had other employees besides the one. The premium audit billing is clearly incorrect.

In this case, I am unwilling to go through an entire credibility analysis because: 1) it was not requested as part of the hearing; 2) it is not necessary to a determination of the raised issue; and 3) there is no evidence contradicting Petitioner’s testimony.

Petitioner is exempt from coverage. SAIF does not dispute that Petitioner is exempt from coverage, and the record is quite clear that he is. Therefore, to the extent that Petitioner is claiming (and can prove) that he was working for Pro Landscaping, that portion of the contract proceeds would not properly be the basis for premium calculation.

SAIF argues, in its eighth exception, that the ALJ “assume[d] that there was a way for SAIF to determine the portion of the contract with Goings Homes attributable to Petitioner’s work for Pro Landscaping.” (Exceptions at 13). I made no such assumption. I concluded, based upon the lack of evidence to the contrary, that Petitioner did the work he testified he did. More importantly, since there was no disagreement that Petitioner did at least some of that work, I concluded that SAIF’s premium audit billing—which gave him an exemption for *none* of the amount attributed to wages under the 50/50 interpretation of the contract—was incorrect.

In this case, Petitioner testified that he did *all* of the work under the Goings contract, with the exception of the portions performed by O’Connell and the subcontractors, Gary Gipner and Overstreet Landscape. Petitioner also did the work on the Medford Fire Department contract. He testified that he worked 14 to 16 hours per day, seven days a week, from May through October. During the rest of the year, he worked ten to 12 hours per day, six days a week.

SAIF contests the number of hours Petitioner claims to have worked but—importantly—SAIF does not contest that Petitioner did at least some of the work on the jobs. Therefore, given the admitted failure to take Petitioner’s exempt status into account, SAIF’s final premium audit assessment is incorrect. This conclusion is strengthened when SAIF’s method of calculation is considered.

SAIF’s calculation method. In order to determine the appropriate amount of premium for the audit period, SAIF assumed that employer must have hidden employees because: 1) they had received reports in the past of unreported employees; 2) the amount of money received from Goings Homes seemed too large for one person to have done the work; and 3) employer’s records were so sparse that SAIF could not tell if employer was telling the truth or not. With these factors in mind, the auditor was told to use a very simple calculation: take the amount of money received from Goings during the audit period (\$362,548), and split it in half. Half of it (\$181,274) was to be attributed to the cost of materials and overhead, and the other half was to be considered payroll. (Test. of Fisher). This “arbitrary” figure, (Test. of Smith), was not examined any further because, it was concluded, employer’s records were of no value.

SAIF's calculation was based upon an NCCI rule designed for a different purpose: to determine the appropriate split between labor and costs when looking at a contractor who does not meet the independent contractor definition. The following example demonstrates the usual use of the rule for illustrative purposes: If Gipner was paid \$362,000 by Goings and it was determined that Gipner was actually an employee (or subject), then the NCCI rule would determine that half of the contract proceeds would be considered expenses and half would be considered payroll—for *Goings*, not for *Gipner*. Ms. Smith testified that the rule was applied "in reverse" in this case. I conclude it was applied in error.

It was not unreasonable to apply a 50/50 rule to determine what portion of an amount of money should be attributed to labor, as opposed to materials. The problem in this case is that SAIF made what should have been the starting point into the ending point. Once the amount of payroll was "determined," it was necessary to determine who was receiving it. If it was Mr. Gipner, he is exempt. If it was Gary Gipner or Overstreet, then the money spent is exempt as payments to contractors. However, SAIF did not take the next ~~step~~ **step**; it simply declared the 50 percent of the contract proceeds to be subject payroll, and assessed premium on it.

SAIF obviously believes that a portion of the money it has attributed to payroll was paid to unknown employees paid under the table. I have already indicated that this suspicion was reasonably justified **because of past audit periods** and would justify ongoing audits for as long as employer's records are a mess. However, **a suspicion is not evidence**; in this audit period there is no evidence to show that anyone was employed except for O'Connell, and his income was reported to SAIF. In short, I have no evidence to contradict the testimony of Petitioner that he did the remainder of the work during the audit period.

SAIF's ninth exception contends the ALJ erred in not following SAIF's reverse use of the 50/50 rule to attribute all of the funds paid to Petitioner to nonexempt wages, upon which premium would be due. SAIF also interprets my decision as concluding it was "reasonably justified" to believe other employees had been paid during the audit period. (Exceptions at 14). SAIF misunderstands the "reasonably justified" comment. Given Petitioner's terrible record-keeping, SAIF is more than justified to keep looking to see where his money is going. If it is going to employees paid under the table, premium would be owed on those funds. However, in this audit period there was "no evidence to show that anyone was employed except for O'Connell..." (See above). I continue to conclude that SAIF misapplied the rule, for the reasons previously stated.

SAIF further contends that "[t]he ALJ's analysis on this point implies that SAIF had some obligation to do more than it did to ascertain this information." (Exceptions at 15). SAIF is partially correct. Please see the discussion of *Salem Decorating*, discussed below. That decision was based upon ORS 183.450(2), which places the burden of presenting evidence on the proponent of a position.

In this case, the burden works as follows: Petitioner had the burden of proof to show that the premium audit billing was incorrect. He has done so in this case. On the other hand, SAIF is the proponent of the position that 50 percent of the Goings contract should be treated as nonexempt wages. Therefore, it must present evidence in support of that position. So, to return to the exception's question whether SAIF is under an "obligation to do more," I conclude that it needed to do more if it wanted to prevail on that issue.

In fact, SAIF's evidence for the application of the "reverse 50/50" rule consisted of the candid testimony of Ms. Smith, indicating that the decision was arbitrary, based upon SAIF's experience with Petitioner in previous years, and that it did not take into account any of Petitioner's earnings, which would be exempt. While I trust Ms. Smith's testimony,² that testimony actually supported the conclusion that the premium audit billing was incorrect.

SAIF interprets my decision as "rewarding" Petitioner for having bad record keeping practices. (Exceptions at 15). It is not my job to "reward" any party in any hearing. My job is to examine the issue, the evidence, and the law, and to determine how the issue should be resolved. That is what I have attempted to do in this case.

Proof of other payroll. SAIF's assumption that Petitioner hired other workers—although not specifically stated by SAIF during the hearing—is the only realistic basis for the increased premium audit amount. Petitioner is paying workers' compensation insurance for his one reported employee, O'Connell, and he himself is exempt. Therefore, the only basis to increase the premium would be the belief that others were working.

At least one of the factors leading to SAIF's premium audit decision during this audit period was, as noted, Petitioner's previous conflicts with SAIF. Although Petitioner held himself out as having no employees in previous years, the Collins workers' compensation claimant in approximately 2003 and the Hamlet claim in 2004 or 2005 caused SAIF to have substantial doubts about his veracity. Both men claimed to be employees;³ both told SAIF that employer had several other employees as well.

Petitioner also has a history of keeping abysmal records for his business, and paying both himself and his contractors (and his 2006 employee, O'Connell) in cash. As Ms. Smith testified, the record-keeping and cash payments continued to be a warning sign to SAIF. Given the previous problems between SAIF and employer, it was a wise business practice for SAIF to regularly audit employer to determine his compliance with the laws and rules relating to paying premium. As I told Petitioner at hearing, had I been his workers' compensation carrier, I would have audited him, too.

² Ms. Smith appears regularly in premium audit matters before me, and I have found her without exception to be a candid, credible witness.

³ Hamlet later withdrew his claim, and Petitioner testified that Hamlet had never been an employee. Rather, he was a bill collector trying to collect a debt from Petitioner.

However, there is a large difference between the *assumption* that other workers were hired and the *proof* of it. While the insurer's premium audit conclusions are deemed correct, and employer has the burden to prove, by a preponderance of the evidence, that the conclusions were wrong, *Salem Decorating v. Nat'l Council on Comp. Ins.*, 116 Or App 166, 170 (1992), *rev den* 315 Or 643 (1993), it is also true that the proponent of a fact or position has the burden of presenting evidence in support of that fact or position. ORS 183.450(2). The rules are not contradictory; in fact, they are statements of the same basic principle of evidence.

In *Salem Decorating*, the Court of Appeals held that the employer bore the burden to prove that SAIF was wrong in its premium assessment. The basis of the decision was the very same statute:

In its next assignment of error, employer contends that the referee erred in placing the burden of proof on it. ORS 183.450(2) provides that "[t]he burden of presenting evidence to support a fact or position in a contested case rests upon the proponent of the fact or position." As the Supreme Court has explained:

"The general rule is that the burden of proof is upon the proponent of the fact or position, the party who would be unsuccessful if no evidence were introduced on either side. [Citations omitted].

Because employer was the party seeking redress before DIF and whose position would be defeated if no evidence were introduced on either side, it had the burden to prove that SAIF was wrong * * *.

116 Or App at 170 (1992). Thus, the *Salem Decorating* decision is based upon the statutory burden of presenting evidence found in the Administrative Procedures Act.

In the present case, Petitioner was the proponent of the position that the premium audit was incorrectly done, and that the amount of premium sought was incorrect. Petitioner has presented evidence showing that SAIF's determination of premium was arbitrary, that it did not take into account his exempt status, and that he did not have other employees. Against that evidence, SAIF's assumption is insufficient; it must present its own evidence to contradict Petitioner's evidence.

In its seventh exception, SAIF contends that the ALJ misapplied the burden of proof. SAIF again argues that the ALJ erred by accepting Petitioner's testimony about the hours he worked, because that finding was "based solely on Petitioner's uncorroborated testimony, and as outlined above, is not credible." (Exceptions at 12). However, there is no requirement of corroboration of testimony in a hearing, especially when there is no opposing evidence presented. As noted above, SAIF's assumption that Petitioner is untruthful is not evidence. SAIF did not present witnesses from other contractors on the site, or from homeowners, indicating that Petitioner had crews working for him. It did not present the testimony of members

of Petitioner's alleged work crew. It did not subpoena (as far as this record shows) the one employee Petitioner reported, to see if there were others working there.

SAIF relies on the investigations in 2003 and early 2005 as an indication that Petitioner was hiring workers and not reporting them to SAIF. The evidence also shows, as in previous periods, that employer did not take good care of his money and it is impossible to determine the whereabouts of large cash withdrawals during the period. It is certainly plausible that Petitioner could have been using large portions of cash to pay employees under the table, but there is no evidence that it happened during this audit period.

SAIF, fresh from its previous premium audit disputes with ~~employer~~ **Petitioner**, interprets this lack of information as an indication that ~~employer~~ **Petitioner** is paying his employees under the table. ~~Employer~~ **Petitioner** argues that the lack of information should be seen as evidence corroborating ~~employer's~~ **his** testimony that there were no other employees than O'Connell. Both positions, again, are plausible. However, only Petitioner's position is supported by evidence in this record.

In addition to contending that Petitioner had other employees who he paid under the table, SAIF relies upon an impossibility defense. It argues that Petitioner could not have done all of the work necessary to perform the Goings Homes contract as well as the Medford Fire Department contract. Once again, however, SAIF's contention is defeated by evidence from Petitioner. He testified he worked 14 to 16 hour days, seven days per week, for half the year, and then 10 to 12 hour days, six days per week, the other half of the year. That is roughly equivalent to working two full-time jobs, something that is not impossible. Furthermore, it must be noted that the monies received from Goings Homes were the payments under the contract. Petitioner would have paid his subcontractors and employee out of that amount received by the company. The impossibility defense fails in this case.

SAIF takes issue with the phrase that working two full-time jobs "is not impossible." SAIF contends that the ALJ used a different legal standard than preponderance, but SAIF misunderstands the context of the comment. SAIF argued that "human experience" made Petitioner's claims that he did all of the work incredible, essentially because it would be impossible for one man to do that much work.⁴ My comments, found at page 6 of the original Proposed Order, indicated that the hours testified to by Petitioner were the equivalent of having two full time jobs, something that was not impossible to do. The context of the comments makes it quite clear that I was not applying a different standard than a preponderance. To make it even more clear: Since Petitioner testified that he did all of the work, and since it was possible for him to do so, and since SAIF did not present any evidence to contradict Petitioner's testimony, I find that the evidence preponderates in Petitioner's favor.

⁴ Counsel used the phrase "logically incredible" and I have interpreted that phrase to mean she thought it would be impossible for one man to do the job.

In summary, I conclude that the evidence presented by Petitioner is more persuasive than SAIF's evidence in this case. Petitioner owes the premium on his employee, O'Connell. There is no basis in this record to assess premium on any other amounts during the audit period. I remain troubled, as (I am sure) does SAIF, with the poor record-keeping in Petitioner's company and, candidly, with what is happening to large portions of cash that has not been accounted for. However, I have to base my decision on evidence, and there is no evidence that Petitioner had other payroll or employees during the audit period.

PROPOSED ORDER

I propose that the Insurance Division issue the following final order:

SAIF's final premium audit dated September 19, 2006 is MODIFIED. Petitioner shall pay premium on the wages of the one employee, O'Connell, and on no other amounts during this audit period.

DATED this 16th day of August, 2007.

/s/ Rick Barber
Rick Barber, 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