

**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 08-04-027  
)  
)  
**KOZY WOOD HEATING CENTER,** )  
**INC.** )  
An Oregon Corporation ) **PROPOSED ORDER**

**HISTORY OF THE CASE**

On March 18, 2008, the employer Kozy Wood Heating Center, Inc. (hereinafter the employer) received from SAIF Corporation two workers' compensation final premium audit billings, the first for the period of July 1, 2005 to June 30, 2006 and the second for the period of July 1, 2007 to February 13, 2008. The employer timely requested a hearing on the final premium audit billings, and submitted a Petition to the Department of Consumer and Business Services (Department) on April 28, 2008.

The matter was referred to the Office of Administrative Hearings (OAH) on April 28, 2008. That same day, Administrative Law Judge (ALJ) Rick Barber issued a Corrected Order Granting Stay of Collection. On June 23, 2008, a hearing was scheduled for September 16, 2008.

The hearing was held as scheduled before ALJ Alison Greene Webster at the OAH Offices in Salem, Oregon. The employer appeared through its president, Earl G. Croucher. SAIF Corporation appeared through Premium Audit Policy Analyst Teresa Smith and was represented by Assistant Attorney General Ethan Hasenstein.

Mr. Croucher and employee Jennifer Berti testified on the employer's behalf. Teresa Smith and SAIF Premium Auditor Steve Northrop testified on SAIF's behalf. The record closed on the day of the hearing.

**ISSUES**

1. Whether, in the premium audit billing for the policy period of July 1, 2005 to June 30, 2006, SAIF correctly classified the employer's store employees under code 8044 (wood stove sales and delivery) instead of code 8810 (office clerical).

2. Whether, in the premium audit billing for the period of July 1, 2007 to February 13, 2008, SAIF correctly classified the employer's store employees under code 8044 instead of code 8810.

### EVIDENTIARY RULINGS

Exhibits A1 through A15 were admitted into evidence without objection. Exhibit 101, offered by the employer (a premium audit result for Impact Construction Company for the period of July 1, 2007 to June 30, 2008), was excluded as not relevant.

### FINDINGS OF FACT

1. Employer Kozy Wood Heating Center, Inc. is an Oregon business engaged in the retail sale of wood pellet stoves. Earl Croucher is the employer's president and sole owner. As of July 1, 2005, a related business, Impact Construction Company, Inc., took over the delivery and installation of the employer's wood pellet stoves. (Test. of Croucher.)

2. Prior to 2005, the employer had workers' compensation insurance coverage from SAIF Corporation on the voluntary market. During that time, SAIF applied job classification code 8044<sup>1</sup> to the employer's store employees, based on the employer's reporting of the employees' payroll in that class code. At some point prior to July 1, 2005, SAIF cancelled the employer's workers' compensation insurance coverage based on the employer's claims and loss history. (Test. of Smith.)

3. In June 2005, the employer applied to the National Council on Compensation Insurance (NCCI) for workers' compensation insurance coverage under the Oregon Workers' Compensation Insurance Plan (WCIP). The employer reported that it had two full time employees under job class code 8044, and two full time employees under code 8810.<sup>2</sup> (Ex. A1.) NCCI placed the employer in the assigned risk pool (ARP) and completed a Residual Market Risk Profile. NCCI then assigned the workers' compensation coverage back to SAIF under the WCIP. (Test. of Smith; Ex A1.)

4. On July 22, 2005, SAIF issued ARP policy no. 978185R, assigning three class codes, 5537,<sup>3</sup> 8044 and 8810 to employer's operations. SAIF also provided employer with a "Payroll Rules and Premium Audit" packet. This document packet, also known as the workers' compensation "Toolbox," explains the NCCI job classification system and instructs employers how to correctly classify employees and report payroll. The Toolbox includes information and instructions on how to keep "verifiable time records" for employees with varied job duties that fall into more than one classification. The Toolbox

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<sup>1</sup> Code 8044 applies to wholesale or retail dealers or stores principally engaged in selling furniture, including antique furniture for homes, lawns, gardens, offices and hotels

<sup>2</sup> Code 8810 applies to clerical office employees not otherwise classified

<sup>3</sup> Code 5537 applies to air conditioning, heating and refrigeration installation and service. SAIF later removed code 5537 from this policy when employer showed it did not have any payroll in that classification (because installations were now being done by Impact Construction Co.).

also includes copies of the applicable Oregon administrative rules pertaining to verifiable time records. In addition, the Toolbox includes a sample "daily verifiable time record." The daily time record form is designed to document the employee's name, the pay period, the job number or customer, the job description, the class code and the hours worked in that class code. (Ex. A4.)

5. On August 27, 2007, SAIF Premium Auditor Karla Pattis conducted a premium audit on the employer's records for the policy period of July 1, 2006 to June 30, 2007. Ms. Pattis came to the employer's store and spoke with the employer's then General Manager, Sherri Weidman. Pattis reclassified payroll reported in class 5537 to 8044 and most of the payroll reported in 8810 to 8044. Pattis determined that the only employee who qualified for assignment to class 8810 was the office manager, Stephanie Barrett, because she worked exclusively in the office and did not have any store duties. Pattis classified all other store and delivery employees as code 8044.<sup>4</sup> Based on the audit results, on August 28, 2007, SAIF issued a Final Premium Audit Billing in the amount of \$10,393.37. (Ex. 5.)

6. The employer did not timely petition for review of the August 28, 2007 Final Premium Audit Billing. The Department therefore dismissed the employer's request for a hearing on the matter. (Test. of Croucher; Ex. A6.)

7. Because the 2006-2007 premium audit disclosed irregularities in the employer's payroll reporting, SAIF elected to audit employer's payroll for the 2005-2006 and 2007-2008 policy years. On March 11, 2008, SAIF Premium Auditor Steve Northrop reviewed the employer's payroll records with the employer's outside accountant, Jessica Mercer of Wegner & Company, CPAs. Northrop performed two audits, for the period of July 1, 2005 to June 30, 2006 and the period of July 1, 2007 to February 13, 2008. (Test. of Northrop.)

8. With regard to the July 1, 2005 to June 30, 2006 policy period, Northrop also concluded that the only store employee qualified for assignment to class 8810 was the office manager, Stephanie Barrett. Like Auditor Pattis, Northrop assigned class 8044 to the other store employees. Northrop also assigned class code 5537 to three employees, Dan Borge, David Hall and Charles West, because they also performed installation services. In explaining these adjustments, Northrop noted: "Employees must be reported entirely in the highest rated classification in which they work, unless they keep a daily

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<sup>4</sup> In explaining the reasons for the audit adjustments, Auditor Pattis noted the following:

All other store and delivery employees are correctly assigned to class 8044, based on the description of duties provided by manager Sherri Weidman. Please make a note of this for future reporting. When employees interchange between two or more classifications, their payroll must be reported entirely in the highest rated classification applicable to their duties, unless they keep time records of all hours worked that specify their activities in each classification. You may then use those time records to divide their payroll on an actual time-worked basis between the applicable class codes.

(Ex. A5 at 5.)

record of their hours in all classifications. You must then use those records to assign their payroll – estimates are not allowed.” Based on the results of this audit, SAIF issued a Final Premium Audit Billing for the period of July 1, 2005 to June 30, 2006 in the amount of \$6,535.68. (Ex. A7)

9. With regard to the July 1, 2007 to February 13, 2008 time period, Northrop again found that only employee Stephanie Barrett qualified for assignment to class 8810. He assigned the other store employees, who did some showroom sales, to class 8044. In the audit result, Northrop explained to the employer as follows: “You split three employees’ payroll between class codes 8810 and 8044 based on estimates of time. Employees must be reported entirely in the highest rated classification in which they work, unless they keep a daily record of their hours in all their classifications. You must then use the time records to assign their payroll – estimates are not allowed.”<sup>5</sup> (Ex. A8.) Based on the results of this audit, on March 18, 2008, SAIF issued a Final Premium Audit Billing for the period of July 1 2007 to February 13, 2008 in the amount of \$2,377.85. (Ex. A9.)

10. The employer timely filed a petition to review the 2005-2006 and 2007-2008 premium audit billings, and was granted a hearing.

11. In May 2008, the employer terminated General Manager Sherri Weidman, upon discovering that she had been embezzling money from both the company and Impact Construction. (Test. of Croucher.)

12. Before Northrop conducted the audits at employer’s CPA’s office on March 11, 2008, employer asked to have its attorney present for the audits. But, the attorney, Steve Bauder, advised Northrop that he did not need to be there when Northrop met with Jessica Mercer to review employer’s tax and payroll records. Mr. Croucher did not request that he, or any other employee, be present for the audit. The employer also did not provide Northrop with any employee time records prior to the audit. (Test. of Northrop.)

13. In August 2008, the employer provided the Department with some employee time records for the policy periods in issue. The records document the times these employees punched in and out and the hours worked, but do not contain any description of the duties performed by the employee. (Exs. A11 to A15.) This record contains no daily time records for former General Manager Weidman.

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<sup>5</sup> The employer provided Northrop with time estimates for employees Jennifer Berti, Lorraine Brooks and Howard Phillips. Employer allocated 70 percent of Berti’s time to office and 30 percent to sales, 90 percent of Brooks’ time to office and 10 percent to sales, and 50 percent of Phillips’ time to office and 50 percent to sales. The also employer reported that both Stephanie Barrett and Sherri Weidman were 100 percent office clerical. (Ex. A8 at 8)

## ADMINISTRATIVE NOTICE

At the hearing, I took administrative notice of the accuracy of the *Basic Manual of Workers' Compensation and Employers Liability Insurance*, as well as of the *Scopes of Basic Manual Classifications*.

## CONCLUSIONS OF LAW

1. SAIF correctly classified the employer's store employees under code 8044 in the premium audit billing for the period of July 1, 2005 to June 30, 2006.

2. SAIF correctly classified the employer's store employees under code 8044 in the premium audit billing for the period of July 1, 2007 to February 13, 2008.

## OPINION

Where, as here, an employer contests a premium audit billing, the employer has the burden of proving, by a preponderance of the evidence, that the billing is incorrect. *Salem Decoration v NCCI*, 116 Or App 166, 170 (1992), *rev den* 315 Or 643 (1993). 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).

In this case, the employer asserts that SAIF's auditor erred in classifying all but one of its store employees to class 8804 instead of 8810. Specifically, the employer contends that its former General Manager, Weidman, should have been classified as 8810, and the payroll of the other store employees should have been divided and allocated between the two classes, with the majority of their payroll going to class 8810. The employer further contends that because it is a small business and the employees perform varied tasks, the Department's verifiable payroll records requirement is impractical and too onerous.

Notwithstanding the employer's frustration with the workers' compensation insurance rates and record keeping requirements, however, where there is an "interchange of labor," *i.e.*, when an employee who, at different times, performs duties described by two or more classifications assigned to the employer under the insurer's classification system,<sup>6</sup> the law requires that the employer maintain verifiable payroll records to justify the division of payroll for that employee:

[T]he payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, provided verifiable payroll records maintained by the employer disclose a specific allocation for each such individual employee, in accordance with the standards for rebilling set forth in OAR 836-043-0190 and this rule.

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<sup>6</sup> "Interchange of labor" is defined in ORS 836-042-0055(1)(d).

OAR 836-042-0060(1).

This same rule also sets out the characteristics of “verifiable” payroll records:

- (a) The records must establish a time basis, and the time basis must be hourly or a part thereof, daily or part thereof, weekly or part thereof, monthly or part thereof or yearly or part thereof;
- (b) For each salaried employee, the records must also include time records in which the salary is converted to an hourly, daily, weekly, monthly or yearly rate and then multiplied by the time spent by the employee in each classification exposure;
- (c) The records must include a description of duties performed by the employee, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable; and
- (d) The records must be supported by original entries from other records, including but not limited to time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager. Estimated ratios or percentages do not comply with the requirement of this subsection and are not acceptable for verification. Verifiable records must be summarized in the insured employer's accounting records.

OAR 836-042-0060(4); *see also Pease v. Nat'l Council on Comp. Ins.*, 128 Or App 471 (1994) (the records, to be verifiable, must also be accurate and should be a contemporaneous report of the individual employee's time).

Consequently, in this case, to prove that SAIF erred in assigning the store employees (other than Stephanie Barrett) to the higher rated classification code of 8804, employer must first show that it maintained verifiable payroll records required by OAR 836-042-0060. The employer admits that it did not maintain such records for its employees during the relevant time periods. Because it has not satisfied the conditions for division of payroll for individual employees set out in OAR 836-042-0060(1), employer cannot sustain its burden to prove that SAIF's premium audit billings are incorrect.

The employer's claim that the record keeping requirement is impractical and onerous is not a valid defense, and does not relieve the employer of its burden of proof in this matter. Similarly, the employer's claim that SAIF's audits were improper because Auditor Northrop did not visit the store and because its attorney was not present at the CPA's office also does not relieve the employer from the requirement of maintaining verifiable payroll records for those employees in which it seeks a division of payroll.

In short, the employer has not shown by a preponderance of the evidence that SAIF's premium audit billings for the 2005-2006 policy and the period of July 1, 2007 to February 13, 2008 are incorrect. The employer has not offered verifiable employee time records that describe the duties performed by the employee which would enable an insurer, or this fact finder, to determine the appropriate classification assignment for the individual employees. For this reason, the billings must be upheld.

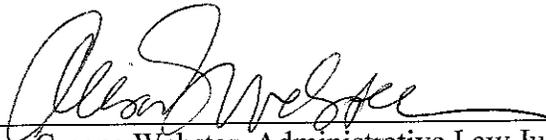
### **PROPOSED ORDER**

I propose that the department issue the following final order:

SAIF's Final Premium Audit Billings for the periods July 1, 2005 to June 30, 2006 and July 1, 2007 to February 13, 2008 are **AFFIRMED**.

The Corrected Order Granting Stay of Collection, issued April 28, 2008, is **VACATED**.

DATED this 24<sup>th</sup> day of September 2008.



Alison Greene Webster, 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

CERTIFICATE OF SERVICE

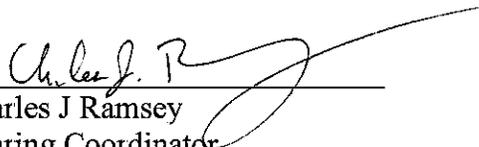
On the 24th day of September 2008, I mailed the foregoing Proposed Order in Reference No. **0804027**.

BY FIRST CLASS MAIL:

Earl G Croucher, President  
Kozy Wood Heating Center, Inc.  
2257 Broadway Street  
North Bend, OR 97459-2331

SAIF Corporation  
Legal Operations  
400 High Street SE  
Salem, OR 97312-1000

Ethan Hasenstein AAG  
General Counsel Division  
Department of Justice  
1162 Court Street NE  
Salem OR 97301-4096

  
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Charles J Ramsey  
Hearing Coordinator