

The record was held open for Exhibit E6, employer's 2007 tax returns. The employer represented that the tax returns had been prepared but that the tax preparer would not fax them to her or her attorney. Exhibit E6 was received on February 17, 2009, but SAIF objected to the exhibit because, on its face, it shows it was created after the hearing.¹ Exhibit E6 was admitted into evidence, and the parties were informed that the weight given to the document would be addressed in the Proposed Order.

FINDINGS OF FACT

1. On April 5, 2007, DRS Trucking contacted its workers' compensation insurer, SAIF Corporation, to tell the insurer of a change in ownership. Before that date, the company was a sole proprietorship owned by Donald R. Steen. Effective that date, the new entity was DRS Trucking LLC. The limited liability company was capitalized by Donald Steen, who took a 93 percent interest in the LLC, 90 percent in his name and three percent in unclaimed one-percent shares. The other seven percent was split between William Hathaway, Karen Steen, Elizabeth "Fern" Steen, Elmer Daniels, Nicole Lindsey, Clyde Reynolds and Calvin Laird, at one percent each. (Ex. A1).

2. Employer advised SAIF of the change in ownership using an ERM-14 Form (Confidential Request for Ownership Information), put out by the National Council on Compensation Insurance, Inc. (NCCI). The form stated in part:

The following confidential ownership statements may be used only in establishing premiums for your insurance coverages. Your workers' compensation policy requires that you report ownership changes, and other changes as detailed below, to your insurance carrier in writing within 90 days of the change.

(*Id.* at 2). SAIF acknowledged the eight members of the LLC by letter dated April 26, 2007. (Ex. A2). Pursuant to employer's request, Reynolds and Laird were covered for workers' compensation purposes. (Ex. A4 at 5, 7).

3. The election for coverage of Reynolds was canceled on August 24, 2007, and Calvin Laird's coverage election was cancelled on August 1, 2007. SAIF processed these changes upon receiving notice from employer. (Ex. A9, A10).

4. On October 29, 2007, SAIF auditor Karla Pattis performed a premium audit of employer for the policy year July 1, 2006 through June 30, 2007,² a policy year that involved both the previous and successor business entities. Pattis recorded her conversations with Fern Steen:

¹ The document is dated February 6, 2009, the day after the hearing. SAIF argued that there is a difference between an existing, unavailable document and one that was created after the hearing. It argued that the document should be excluded because it was created after the hearing and because it did not show that the taxes were actually filed.

² The earlier year is not at issue, but the note is instructive on the LLC membership issue.

Fern seemed very confused regarding who is a member of this LLC and who are just employees, and indeed, they did not report a lot of payroll they should have for individuals who were employees but not on any list SAIF has of LLC "members." From discussions with the insured's accountant and my interaction with Fern, my impression is that they changed the entity type and made some of the employees nominal LLC members just to avoid paying workers' comp premium on them. In my phone conversation, Fern described having "fired" members Nichole Lindsey and Elmer Daniels. (I wouldn't think it would be so easy to terminate someone who supposedly has an ownership interest in the business). She also indicated there were others employees who were made members, but they never provided a change in ownership after the 4/5/07 entity change, so I am treating only those listed by SAIF as members * * * and all others as subject employees.

(Ex. A5 at 3).

5. On May 28, 2008, auditor Steve Northrop reviewed employer's records for the policy period of July 1, 2007 through February 10, 2008, the date the contract of insurance ended. Northrop noted that the audit included payroll for Doyle Boyd, Ken Edwards, Daniel Hall, Jim Smith, and Mark Strumer, as well as Laird and Edwards during the periods of their personal elections. SAIF compared the list of persons with the members of the LLC that employer had provided, and determined that the above individuals' payroll should have been reported for workers' compensation purposes. (Ex. A13). The final premium audit billing was mailed to employer on May 30, 2008. (*Id.* at 11).

CONCLUSIONS OF LAW

SAIF's Final Premium Audit Billing is correct.

OPINION

Clarification of the Issue. Although both parties have focused on the same primary issue—whether the persons noted in the final premium audit billing are LLC members or not—there has not been a meeting of the minds concerning what must be proved, and who must prove it.

In order to narrow down and identify the issue, it is as important to identify what the issues do not include as it is to address the issues themselves. First, this case is not about whether employer's LLC is a valid means of avoiding paying workers' compensation benefits for its employees. While SAIF apparently has some concern on that point, the record shows that SAIF has accepted the validity of the LLC and has made changes in keeping with the LLC ownership when it has received notice to do so. I am operating from the assumption that the LLC is a valid legal entity because I have no

evidence to lead to a different conclusion and, indeed, SAIF's own actions emphasize that the entity is valid.

Second, this case is not about whether SAIF is treating LLC members as if they had filed personal elections, or about whether SAIF must prove that there were personal elections in order to charge for premium. As employer stated:

[T]he fact that DRS had a duty to notify of change in ownership does not equate to allow SAIF to charge for Coverage not elected in writing. We would not be doing a SAIF appeal had SAIF followed the statute. SAIF cannot assume Members have elected coverage without the written election.

(Employer Arg. at 1). Although employer argues that SAIF cannot charge employer for premiums to cover the payroll attributed to the LLC members unless those members have made a personal election, it has misunderstood the real issue.

The real issue focuses on an earlier point in the analysis. SAIF is not contending that LLC members have made personal elections; SAIF is contending that the persons employer calls members are not members of the LLC at all. That is the basis for the increase in the final premium audit billing, and that is the primary issue to be addressed.

The Burden of Proof. Clarifying the issue also clarifies the burden of proof. Employer contends that SAIF must prove that the members filed personal elections, but that argument is based upon its misunderstanding of the issue.

Again, the real question is more basic. Were the individuals claimed by employer actually members of the LLC? When an employer contests a final premium audit billing, it has the burden to present evidence to establish its case. By statute, the proponent of a position has the burden of presenting evidence in support of that position. ORS 183.450(2). In a premium audit matter, the insurer's conclusions are deemed correct, and employer must prove, by a preponderance of the evidence, that they are not correct. *Salem Decoration v. NCCI*, 116 Or App 166, 170 (1992), *rev den* 315 Or 643 (1993). As the following analysis shows, this burden does not contradict the statute.

Subject to specific exceptions, employers in Oregon are required to cover their employees with workers' compensation insurance. ORS 656.017 states in part:

(1) Every employer subject to this chapter *shall maintain assurance* with the Director of the Department of Consumer and Business Services *that subject workers of the employer and their beneficiaries will receive compensation for compensable injuries* as provided by this chapter and that the employer will perform all duties and pay other obligations required under this chapter, by qualifying:

(a) As a carrier-insured employer; or

(b) As a self-insured employer as provided by ORS 656.407.

(Emphasis added). ORS 656.152 likewise prevents operating a business until the subject employer provides coverage pursuant to ORS 656.017 for subject workers the person employs. Thus, the general rule is that an employer must provide workers' compensation coverage for all of its workers.

The statutes also provide specific exceptions to the requirement that workers be covered for workers' compensation purposes, and one of the exceptions is for limited liability members. ORS 656.027 states in part:

All workers are subject to this chapter except those nonsubject workers described in the following subsections:

* * *

(9) Except as provided in subsection (25) of this section, *members, including members who are managers, of limited liability companies, regardless of the nature of the work performed.*

(Emphasis added). There are similar statutes for many other exceptions, including independent contractors. See ORS 656.005(30) and 656.128.

If the general rule requires an employer to cover its workers with insurance, then any party seeking to apply an exception has the burden to prove entitlement to that exception. In this case, quite simply, employer must prove that the persons it claims as members were actually members of the LLC.³

Additional members have not been shown. The initial documentation from employer listed eight members of the LLC, Donald Steen with 93 percent and 1 percent each for the other seven. (Ex. A1). The initial information was provided timely and appropriately.

However, employer never contacted SAIF concerning further changes to the membership of the LLC. Since that time, at least on the record before me, employer has failed to provide any substantial documentation about changed membership of the LLC. The only evidence presented by employer is the purported tax return discussed below, and two promissory notes ostensibly signed by Edwards and Plumlee, pertaining to LLC membership. The latter documents were provided to SAIF on the evening before the hearing.

However, according to the purported 2007 tax returns for the LLC (which had not been filed as of February 2009),⁴ there are now several persons whom employer contends

³ Practically speaking, this burden is similar to what a company seeking to show that a person was an independent contractor instead of an employee would face.

⁴ The weight I give to the purported returns will be addressed below.

were members of the LLC during the policy year. The document includes the original eight members of the LLC, and adds Ken Edwards, Richard Plumlee, Jim Smith, Mark Sturmer, Daniel Hall, and Doyle Boyd.

Once again, employer contends that SAIF must show that these individuals were not members of the LLC before it can charge premium for their portion of the payroll. Employer is incorrect. Employer bears the burden of presenting evidence to establish that these individuals were members of the LLC, and it has failed to make that showing on this record.

As noted above, SAIF has accepted—and continues to accept, despite its apparent misgivings—employer’s LLC at face value. When Fern Steen sent the ERM-14 to SAIF, the insurer immediately made the changes as requested. (Ex. A1). When Edwards and Laird wanted personal elections of coverage, and later when they both withdrew them, SAIF cooperated with the intent of the LLC. (Ex. A6, A9, A10).

The purported tax return. As noted above, employer’s primary evidence is Exhibit E6, which purports to be the LLC’s tax return for 2007. That document indicates the following persons were owners: Donald Steen, Elmer Daniels, Ken Edwards, Calvin Laird, William Hathaway, Nichole Lindsey, Richard Plumlee, Clyde Reynolds, Jim Smith, Mark Sturmer, Elizabeth Steen, Karen Steen-Weekly, Daniel Hall, and Doyle Boyd. (Ex. E6). For several reasons, I give the document little weight.

SAIF objected to Exhibit E6 for a number of reasons but I allowed it into evidence because the objections went to the weight of the evidence, not its admissibility. First, as SAIF pointed out, employer represented at hearing that this was a finished document waiting at the bookkeeper’s office to be picked up. However, the document actually received was dated by the bookkeeper on February 6, 2009, the day *after* the hearing. In short, employer’s representations about the document were not accurate.

Second, the document does not conform to the other evidence in the case. The LLC agreement shows that Donald Steen kept 93 percent of the ownership (90 percent plus three one-percent interests not initially distributed). If the purported tax return is correct, there are 14 members including Steen. That cannot be accurate, as it purports to describe ownership greater than 100 percent. No other documents have been submitted to explain the discrepancy.

Third, the group of members listed on the 2007 return includes Plumlee, but the “promissory note” ostensibly signed by Plumlee was dated April 18, 2008—the following year. (Ex. E5 at 37). The purported tax return is clearly incorrect even if it is a bona fide return that employer intends to file.

Finally, as SAIF notes, there is no indication why, or even if, this document has been submitted as an actual tax return for the employer. It has been shown to be inaccurate, it is not what employer represented it to be, and I give it little weight in my analysis.

What little weight I do give the purported tax return actually corroborates what SAIF has argued from the beginning—that employer has not advised SAIF of any changes in the membership of the LLC since the initial notice. Employer was aware that it was required to do so, since both the NCCI form it used to notify SAIF of the change required employer to inform its insurer of ownership changes within 90 days, and the SAIF contract of insurance likewise required employer to do so. (Ex. A1, A4).

Employer argues that SAIF was selective in its audit, contending that the auditor only looked at the original LLC agreement and did not ask for information about change in ownership. Whether or not that criticism of SAIF's auditor is correct, I give the argument little weight because the employer had a chance to correct that problem by providing me with the evidence of changed ownership at the hearing. It did not do so. As discussed, the small amount of evidence provided failed to show the changes alleged by employer.

Employer has failed to show that any of the individuals beyond the original eight were actually members of the LLC, and SAIF appropriately included the amounts paid to those persons in its determination of subject payroll. Therefore, the final premium audit billing must be affirmed.

PROPOSED ORDER

It is therefore PROPOSED that the Final Premium Audit Billings for the two years in question be AFFIRMED.

DATED this 27th day of April, 2009.



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

CERTIFICATE OF SERVICE

On the 27th day of April 2009, I mailed the foregoing Proposed Order in Reference No. 0810002.

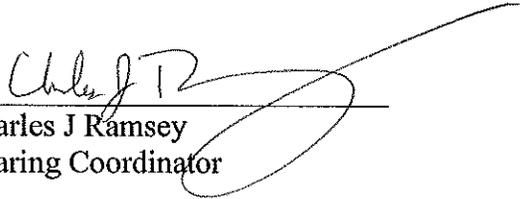
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