

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Final Premium) Case Nos. INS 09-01-001
Audit of)
)
IMPACT CONSTRUCTION CO., INC.) **PROPOSED ORDER**

HISTORY OF THE CASE

On September 4, 2008, SAIF Corporation (SAIF or insurer) issued a Final Premium Audit Billing to Impact Construction Co., Inc. (employer). The audit period was from July 1, 2007 through June 30, 2008. Employer requested a hearing on November 3, 2008. The Division received employer’s Petition on December 29, 2008, and referred the matter to the Office of Administrative Hearings (OAH) on January 6, 2009.

Hearing was held before ALJ Rick Barber on May 12, 2009, in the Salem offices of the OAH. Earl Croucher represented employer in the hearing and testified. SAIF was represented by Ethan Hasenstein, Assistant Attorney General. Audit program analyst Teresa Smith was the insurer representative and testified for insurer, along with auditor Steve Northrop. The record closed later on May 12, following receipt of class code information provided by SAIF.

ISSUE

Whether the Final Premium Audit Billing of September 4, 2008, is correct in its assignment of employer’s office staff to classification code 8044 instead of 8810.

EVIDENTIARY RULINGS

Exhibits A1 through A13 were admitted into evidence without objection. Documents P1 (SAIF’s Hearing Memorandum) and P2 (the class code information received on May 12), are also included in the documentary record of the hearing.

FINDINGS OF FACT

1. Impact Construction is a corporation organized to install wood stoves and do other related construction work. It installs stoves that a companion company, Kozy Wood Heating Center, Inc., sells to customers. Earl Croucher is the majority shareholder and president of both Impact and Kozy Wood. In October 2007, Croucher moved his

Kozy Wood employees, including office staff, over to Impact Construction as a cost-cutting move. (Test. of Croucher).

2. In addition to the stove installers, employer employed two sales staff (one being Croucher) and four office staff. The four office staff were Sherri Weidman, Lorrie Brooks, Jennifer Berti and Stephanie Barrett. The office workers were housed in the same building as the sales team, and part of their job duties entailed covering the sales floor if Croucher and the other salesman were gone or otherwise unable to help a customer. All four of the office workers, including Stephanie Barrett, occasionally helped in the sales department. Employer installed a partial wall between the sales floor and the office to help differentiate between the two types of work. (Test. of Croucher).

3. When employer became a SAIF insured (through the assigned risk pool) in 2005, it was given an “employer’s toolbox” that explained, among other things, how to keep verifiable time records when workers performed tasks that were in different classification codes. Insurers are required to assign wages to the highest rated classification that applies to the work unless there are verifiable time records justifying a split between the codes. (Test. of Northrop).

4. Croucher required his employees to keep time records, with the intent of being able to split out the clerical work (class code 8810) from the sales work (class code 8044). The employees kept time records, but the records Croucher has do not accurately describe the split of work between clerical and sales work. (Test. of Croucher).

5. SAIF premium auditor Steve Northrop audited Kozy Wood in March 2008 and Impact Construction in August 2008. This was Impact’s first audit, and the initial meeting was held at the accountant’s office. The accountant presented Northrop with a breakdown of the different employees’ work, and Northrop developed percentages for different classification codes: Barrett (100% in 8810); Berti (70% 8810, 30% 8044); and Brooks (90% 8810, 10% 8044). Weidman was not listed in the breakdown. (Test. of Northrop; Ex. A13).

6. When Northrop went to Impact’s offices, he requested the verifiable time records to support the numbers provided by the accountant. The only records he was given were incomplete; they did not include the type of work being performed, the classification code being claimed, and sometimes even who the employee was. Northrop asked for more records, but was informed that a management employee had been stealing from the company and Croucher could not verify that even the records he had previously provided were accurate. (Test. of Northrop; test. of Croucher).

CONCLUSIONS OF LAW

The Final Premium Audit Billing of September 4, 2008, is correct in its assignment of employer’s office staff to classification code 8044 instead of 8810.

OPINION

Employer has contested SAIF's reassignment of its office staff from class 8810 (office clerical) to class 8044, a sales classification code at a higher rate. Employer has the burden of proof to establish that the insurer's premium audit is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). Employer must show that SAIF's use of the classification code 8044 (instead of 8810) was incorrect.

The basic facts are undisputed. Employer's four office workers¹ were also backup sales staff when Croucher and the other salesman were out of the office or already occupied with customers. Because the office staff performed both tasks, they were involved in what is known as an "interchange of labor." OAR 836-042-0055(1)(d) states:

"Interchange of labor" means an employee or employees who at different times perform duties described by two or more classifications assigned to an employer according to the classification system used by the insurer.

Croucher's four office workers did both clerical and sales work; the clerical work would normally be assigned class code 8810, and the sales work is assigned to class 8044, which is the higher (more expensive) class code.

In this case, because SAIF contends there are no verifiable time records, all of the office workers' payroll has been assigned to 8044. Employer does not contest the assignment of the sales work to code 8044, but argues that it should be allowed to split the workers' time between that code and 8810.

In concept, SAIF agrees that a split would be possible, but argues that employer has failed to keep adequate records to allow the split in this case. Whenever there is an interchange of labor, the general rule is that the insurer is able to bill the entire work at the higher rate unless the worker has kept verifiable time records that clearly show the breakdown between the two codes:

When verifiable payroll records are required with respect to a single employee and the employer does not maintain them as required in this rule, the entire payroll of the employee *shall be assigned to the highest rated classification exposure* in accordance with the standards for rebilling set forth in OAR 836-043-0190.

OAR 836-042-0060(3)(emphasis added).

¹ In some of the initial paperwork, Croucher alleged that at least Ms. Barrett should be in class code 8810 because she only performed office work due to a medical condition. However, Croucher testified at hearing that Ms. Barrett also helped cover the sales floor. Therefore, she is in the same situation as the other office staff.

Thus, SAIF is correct in assigning the workers to class 8044 unless employer can show that it has verifiable time records, as those records are defined in OAR 836-042-0060(4). In this case, however, I do not address whether employer's records are verifiable time records—that is, whether employer's time records meet the requirements of the rule—because employer did not present any of its time records at hearing.

Although a large group of time records were present in the hearing room during the hearing, and were available for employer to offer into evidence,² employer refused to do so even after being advised that without evidence I could not rule in his company's favor. As will be seen, Croucher's reasons for not submitting the documents were honorable, but affected his ability to prove employer's case.

Croucher candidly admitted that he could not vouch for the accuracy of the time records in light of the possible alteration of the documents by a dishonest employee, his office manager, who is currently under investigation for theft. I applaud Croucher's candor and honesty in not submitting a document he could not represent was accurate. However, it still remains employer's burden of proof to show the split-out between the two class codes. The rules require verifiable time records, and employer does not have those records. Employer cannot meet its burden of proof, and the final premium audit billing is affirmed.

PROPOSED ORDER

I propose that the department issue the following final order:

That the final premium audit billing dated September 4, 2008 be **AFFIRMED**.

DATED this 19th day of June, 2009.

/s/ Rick Barber
Rick Barber, Administrative Law Judge
Office of Administrative Hearings

² Employer did not bring the documents for reasons that will become evident above, but SAIF had copies and was willing to submit them as exhibits if employer so desired. Croucher refused to offer them.

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 19th day of June 2009, I mailed the foregoing Proposed Order in Reference No. **0901001**.

BY FIRST CLASS MAIL:

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