

**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 09-04-002
Audit of)	
)	
R & R TREE SERVICE, INC.)	PROPOSED ORDER

HISTORY OF THE CASE

On December 30, 2008, SAIF Corporation (SAIF or insurer) issued a Final Premium Audit Billing to R & R Tree Service, Inc. (employer). The audit period was from July 1, 2007 through June 30, 2008. Employer appealed the billing on February 2, 2009. The Division received employer's Petition on April 7, 2009, and referred the matter to the Office of Administrative Hearings (OAH) on that same date.

Hearing was held before ALJ Rick Barber on December 8, 2009, in the Salem offices of the OAH. Attorney Bill Replogle represented employer in the hearing. SAIF was represented by Assistant Attorney General Ethan Hasenstein. Audit program analyst Teresa Smith was the insurer representative and testified for insurer, along with auditor Ed Grove and investigator Denise Ashley. Jannai Cornett and Robert Cornett testified for employer. The record closed later on December 8, 2009.

ISSUE

Whether the Final Premium Audit Billing of December 30, 2008, is correct and should be affirmed.

EVIDENTIARY RULINGS

Exhibits A1 through A30, offered by SAIF, and P1 through P17, offered by employer, were admitted into evidence without objection. SAIF's Hearing Memorandum, provided before the hearing, is also included in the documentary record of the hearing as Document 1 (Doc. 1).

FINDINGS OF FACT

1. Employer R & R Tree Service, Inc. is a business located in Salem that is owned primarily by Robert and Jannai Cornett. The business started out as a sole proprietorship (Robert) in 1998. Jannai became half owner in 2002. The company was originally insured by SAIF Corporation, but then was sent to the assigned risk pool, where SAIF Corporation was designated to process their claims.

2. Since approximately 2002, employer has been audited by SAIF four times. (Test. of Robert). Earlier premium audits had been performed by auditors John Hegener and Joe Rick. (Ex. P1 – P5). The most recent premium audit was assigned to “challenging risk” auditor Ed Grove because a manager at SAIF told Grove that employer was paying employees under the table. (Test. of Grove).

3. In previous audits, there had been disputes between employer and SAIF about which portions of payroll should be assigned to classification code 0106 (above the ground tree removal) and 9102 (pruning bushes, maintenance, on the ground removals). The previous auditors allowed employer to split out 9102 work from 0106 based upon the records employer kept. Auditor Rick called employer’s system “an excellent system of tracking work and time.” (Ex. P5).

4. When Grove announced SAIF’s audit of 2007-2008 year, he asked Jannai for time cards and she said there were no time cards. Instead of time cards, the employer (through Robert) kept daily records of what each crew had done and entered it into his time record system. That system differentiated between above ground work and “below ground” work, meaning tasks on-the-ground. This was the same system Rick had approved previously. (Test. of Robert; Ex. P7). Jannai did not give these records to Grove initially, and did not tell him about them, because she sensed he was being hypercritical and would try to pick the records apart. (Test. of Jannai).

5. Robert’s records, while differentiating between above ground and on the ground work, do not indicate which portions of on-the-ground work involved 0106 tasks and which involved 9102 tasks. (Ex. P7).

6. Through a series of emails, Jannai was informed that all work in and around the shop had to be charged to the governing code, which SAIF said was 0106. Jannai asked if that meant high school kids washing trucks on weekends were to be reported at the same rate as workers cutting down trees above ground; SAIF said that the kids should be reported at the 0106 rate. (Ex. P11). As a result, Jannai began to try to attribute the shop and maintenance time to the work that was being done that day—some to 0106, and some to 9102. (Test. of Jannai). Her efforts to attribute the additional amounts became more and more confusing, causing SAIF to distrust all of employer’s financial information. (Test. of Grove).

7. SAIF’s final premium audit billing concluded that all of employer’s work should be reported under 0106, and increased premium by \$67,516.11. (Ex. P9; Ex. A16).

CONCLUSIONS OF LAW

The Final Premium Audit Billing of December 30, 2008, is correct and should be affirmed.

OPINION

Employer has contested SAIF's Final Premium Audit Billing, as it relates to the classification of payroll. Employer contends that SAIF incorrectly removed payroll from class code 9102 and into 0106. 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).

This is a difficult case to decide. On the one hand, the evidence shows that SAIF has repeatedly audited this employer over a period of several years and, until the most recent audit, the auditors had been impressed with the way employer kept its verifiable time records. Previous SAIF auditors had complimented employer on their tracking system and had allowed portions of the payroll to be assigned to 9102 instead of 0106.

That relationship changed with the 2007-2008 audit. Believing that employer was paying people "under the table," SAIF assigned a special auditor, Grove, to the case. Although there is no evidence in this hearing to show that employer was illegally paying its employees, Grove focused his audit on the split between 9102 and 0106. Based upon his audit, the entire payroll (except office staff) was assigned to 0106, leading to an additional premium of \$67,000 that employer believes will put them out of business.

On the other hand, employer did not help its cause in this case when Grove asked for time cards. Jannai said there were no time cards—a correct statement—but failed to provide Grove with Robert's original records of how the time was spent by the different crews. Grove did not receive those records until much later, after he had received several other sets of records sufficiently confusing that SAIF has accused the employer of "engag[ing] in a concerted effort to manipulate payroll by arbitrarily shifting payroll between these class codes." (Opening Statement, at 3).

Although the record was made confusing by Jannai's various attempts to justify the records (attempts that Grove requested based upon new information), I find no intent to mislead and I accept the accuracy of the documents in Exhibit P7 as the direct records kept by Robert when talking with his crews during the period in question. Those are the records that Grove should have used in the case, although it understandable why he could not initially do so.

However, even with the appropriate records there is insufficient evidence to carry employer's burden of proof in this case. Those records do an excellent job of splitting the work by job and by above ground (AG) and "below" ground (BG). However, the records fail to account for the fact that the 0106 code also includes many duties that are on the ground. Therefore, although the record indicates that much of the on-the-ground work should be 9102, SAIF cannot (and I cannot) automatically attribute all on-the-ground work to code 9102. Accordingly, the verifiable time records are insufficient to answer all of the questions necessary to shift payroll away from the 0106 code and employer has been unable to prove its case. The final premium audit billing must be affirmed.

The result here is truly unfortunate. Part of the problem arises from a system where a business is forced to pay premiums for a teenage truck washer as it would the premiums for its most experienced tree climbers. Part of the problem is an aggressive audit program¹ that has turned what had been a good relationship with its insured into an adversarial one. And part of the problem stems from employer's lack of trust, by failing to provide the verifiable time records to Grove right away, so that any discrepancies or errors could be addressed and remedied.

PROPOSED ORDER

I propose that the department issue the following final order:

That the Final Premium Audit Billing dated December 30, 2008 be AFFIRMED.

DATED this 19th day of February 2010.



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

¹ Yet another premium audit had been scheduled by SAIF as of the time of the hearing in December 2009, to be held in early 2010.

CERTIFICATE OF SERVICE

On the 18th day of February 2010, I mailed the foregoing Proposed Order in Reference No. 0904002.

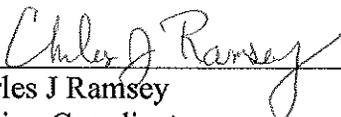
BY FIRST CLASS MAIL:

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