

STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of **JC Reeves Corporation**) **FINAL ORDER**
) Case No. INS 09-06-004

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of Employer JC Reeves Corporation (employer), pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d), ORS 737.505(4), and Oregon Administrative Rules (OAR) 836-043-0101 *et seq*, to review a workers' compensation insurance final premium audit billing (billing) issued by Liberty Northwest Insurance Corporation (insurer) to the employer.

History of the Proceeding

On 4/9/09, the employer received from the insurer a billing dated 4/6/09, for the audit period from 10/1/07 to 10/1/08.¹

On 4/16/09, the director received from the employer a letter dated 4/15/09 requesting a hearing to review the billing.

On 4/17/09, the director mailed to the employer a petition form.

On 6/10/09, the director received from the employer the completed petition dated 6/8/09, and a request for an order staying all collection efforts by or on behalf of the

¹ The proposed order dated 1/26/10 did not find when the employer received the billing or when the director received the employer's request for a hearing. Determining when an employer received a billing, and when the director received the employer's request for a hearing and completed petition, are critical to determining whether the employer is entitled to a hearing. ORS 737.505(4), OAR 836-043-0110, OAR 836-043-0170. See *Pease v. National Council on Compensation Insurance*, 113 Or App 26, 830 P2d 605, *rev den* 314 Or 391 (1992). The employer stated in its letter dated 4/15/09 requesting a hearing, and in its petition dated 6/8/09, that the employer received the billing on 4/9/09. The director received the employer's request for a hearing on 4/16/09 and stamped the date received on the face of the letter. The director provided to OAH and the insurer a copy of the employer's request for a hearing and petition when the director referred the case to OAH on 6/17/09. The employer and insurer did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that the employer received the billing on 4/9/09 and the director received the employer's request for a hearing on 4/16/09.

insurer of any amount billed in the billing as a result of the audit until this proceeding is concluded.²

On 6/17/09, the director referred the request to the Office of Administrative Hearings (OAH).

On 7/27/09, OAH scheduled a hearing to be conducted on 11/17/09.

On 11/17/09, OAH conducted a hearing. The hearing was conducted by Rick Barber, an administrative law judge of OAH. The employer appeared and was represented at the hearing by Norman Haugk, as the employer's authorized representative pursuant to OAR 836-005-0112 and OAR 137-003-0555. The employer did not call any witnesses. The employer offered Exhibits A to E as its documentary evidence, all of which were admitted into the record. The insurer appeared and was represented at the hearing by Barbara Woodford, an attorney. The insurer called Dennis Wolcott as its witness. The insurer offered Exhibits 101 to 106 as its documentary evidence, all of which were admitted into the record.

On 1/26/10, OAH issued a proposed order and mailed it to the parties. The issue was whether the insurer correctly assigned classification code 5645³ to all of the work performed by a particular employee, Ron Estey, for the employer during the audit period, rather than assigning code 5606⁴ to part of the work and code 5645 to the remaining part of the work. The employer's operations included property development of new residential dwellings. The employee performed work as an operations manager during the entire audit period and as a project site manager for part of the audit period.⁵ The employee's work as an operations manager was described by code 5606⁶ while the employee's work as a project site manager was

² There is no record in the hearing file that OAH issued a stay of collection or that the employer again requested a stay of collection.

³ Classification code 5645 is entitled "Carpentry – Detached One- or Two-Family Dwellings."

⁴ Classification code 5606 is entitled "Contractor – Project Manager, Construction Executive, Construction Manager or Construction Superintendent."

⁵ See proposed order, findings of facts, paragraphs 2-3.

⁶ See *Scopes® Manual*, National Scopes section for code 5606, page N266. See footnote 8 herein for background information about this manual.

described by code 5645⁷. However, the insurer was required to assign code 5645 to both types of work.⁸ The proposed order recommended that the director affirm the billing.⁹ The proposed order informed the employer and insurer that they could file

⁷ See *Scopes® Manual*, National Scopes section for code 5645, page N269. See footnote 8 herein for background information about this manual.

⁸ All insurers that are licensed in Oregon to transact workers' compensation insurance, such as the insurer in this case, are required to be members of a licensed rating organization pursuant to Oregon Revised Statutes (ORS) 737.560(2). The National Council on Compensation Insurance, Inc. (NCCI) is the only workers' compensation rating organization that is licensed in Oregon pursuant to ORS 737.355. NCCI must file with the director its rates, rating systems, and policy forms pursuant to ORS 737.320(3). Insurers that are members of NCCI must use the policy forms filed by NCCI pursuant to ORS 737.265, and must also use the rates and rating systems filed by NCCI unless the insurer files its own rates and rating systems pursuant to ORS 737.205. NCCI publishes the *Basic Manual of Workers' Compensation Insurance, 2001 Edition (Basic Manual)*, and the *Scopes® of Basic Manual Classification, (Scopes® Manual)*. The *Basic Manual* describes the workers' compensation classifications and the rules used to apply those classifications to employers. The *Basic Manual* has been filed with and approved by the Insurance Division as part of NCCI's rating system. The *Scopes® Manual* is a guide for understanding and assigning classifications to employers. It includes the description of each classification as contained in the *Basic Manual*, and a narrative explanation of the intent of the classification. The *Scopes® Manual* has not been filed with or approved by the Insurance Division. As a general rule, the *Basic Manual*, Rules section, Rule 1-D-3(b) on pages R7-8, and Rule 2-G on pages R17-18, an insurer may assign more than one basic classification to an insured employer when an employee of the employer performs work directly related to more than one properly assigned classification, which is referred to as an interchange of labor and is defined in OAR 836-042-0055(1)(d), and when the employer also meets certain conditions, one of which is that the employer keeps verifiable payroll records, which are described in OAR 836-042-0060(4) and the *Basic Manual*, Rules section, Rule 2-G-2 on page R18. If the employer does not keep such records, then "the entire payroll of the individual employee must be assigned to the highest rated classification that represents any part of his or her work." Note following Rule 2-G-2-b on page R18. However, as a general exception, the *Basic Manual*, Classifications section, classification code 5606, paragraph numbered 4, page C20, states "Code 5606 is not available for division of a single employee's payroll with any other classification." However, as a special exception in Oregon, "Code 5606 ... is not available for division of payroll under this rule except: a. With Code 8227..., b. With Code 7421..., [or] c. When an employee has a distinct change in duties and is assigned to another job site." *Basic Manual*, State Rule Exceptions section, Rule 2-G, Exception 2, page 5. The *Scopes® Manual*, National Scopes section for code 5606, Note 4, page N266, is consistent with the *Basic Manual's* general exception. Also, the *Scopes® Manual*, State Exceptions to the National Scopes section for code 5606, Note 4, page E29, is consistent with the *Basic Manual's* special exception in Oregon. In this case, the employer's operations were not described by codes 8227 or 7421, and the employee did not have "a distinct change in duties and is assigned to another job site." Thus, regardless of which exception applied to this case, the insurer was required to assign only code 5606, and could not assign both codes 5606 and 5645, to the employee's work for the employer during the audit period even if the employer kept verifiable payroll records showing how much time the employee performed each type of work.

⁹ The proposed order indicated that OAH added to the record two documents. The documents were: (1) the employer's request for a hearing dated 4/15/09 and received by the director on 4/16/09, and (2) the employer's petition dated 6/8/09 and received by the director on 6/10/09. It was unnecessary and redundant for OAH to add the documents to the record because they automatically become part of the record of a case. ORS 183.417(9).

with the director written exceptions to the proposed order and the director must receive them within 30 days after the proposed order was mailed to the employer and insurer.

The director did not receive from the parties any exceptions to the proposed order.

Therefore, the director now makes the following final decision in this proceeding.

Findings of Fact, Conclusions of Law and Opinion

The director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and reasoning of proposed order as the findings of fact, conclusions of law, and reasoning of this final order, except as noted herein.

Order

The billing is affirmed.

Notice of Right to Judicial Review

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the date the party received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

Dated March 3, 2010

/s/ Teresa D. Miller
Teresa D. Miller
Administrator
Insurance Division
Department of Consumer and Business Services

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