



request for a hearing, otherwise the director will dismiss the employer's request for a hearing.

On 3/1/10, the director received from the employer a letter dated 2/19/10 enclosing the completed petition dated "2/26/09."<sup>2</sup>

On 3/8/10, the director referred the request to the Office of Administrative Hearings (OAH).

On 3/18/10, OAH scheduled a hearing to be conducted on 7/13/10.

On 7/13/10, 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 but was not represented by an attorney. The employer called Majid Hajarizadeh as its witness. The employer offered only R1 as its documentary evidence which was admitted into the record. The insurer appeared and was represented at the hearing by Ethan R. Hasenstein, an Assistant Attorney General assigned to represent the insurer. The insurer called Michael Craddock DeAnne Hoyt, Patrick Mogan, and David Murrieta as its witnesses. The insurer offered Exhibits A1 through A12 as its documentary evidence all of which were admitted into the record.<sup>3</sup>

On 8/31/10, OAH issued a proposed order and mailed it to the parties. The proposed order recommended that the director affirm billing.

The proposed concluded that the billing correctly classified three employees in classification code 8058 rather than code 8810. The National Council on Compensation Insurance, Inc.'s (NCCI) *Basic Manual of Workers' Compensation Insurance (Basic Manual)*, Rule 1.b.2.a, as revised by the exception to the rule in Oregon, and NCCI's *Scopes<sup>®</sup> of Basic Manual Classification (Scopes<sup>®</sup> Manual)*, describe code 8810 as applying to employees that perform only certain types of clerical work in an area that is physically separate from all areas in which non-

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<sup>2</sup> The date of the petition more likely than not should have been dated 2/26/10 rather than 2/26/09 since the employer's letter enclosing the petition was dated 2/19/10 and the director received the letter and petition on 3/1/10.

clerical work is performed.<sup>4</sup> In this case, two of the three employees assisted customers make purchases at a counter separating the desks of the three employees and a showroom, or in the showroom itself, or both. NCCI's *Basic Manual* and *Scopes*<sup>®</sup> *Manual* do not describe assisting customers make purchases as clerical work. Thus, the two employees did not perform only clerical work. The third employee performed only clerical work but in an area that was not physically separate from the area that the other two employees worked in.

The proposed also concluded that the billing correctly included all payments by the employer to its full time employees during the audit period for "vacation" in calculating the premium for workers' compensation insurance provided by the insurer to the employer during the audit period. NCCI's *Basic Manual*, Rule 2.B.1.e., as revised by the exception to the rule in Oregon, and Oregon Administrative Rules (OAR) 836-042-0055(1)(f), includes in payroll pay for holidays and sickness but not for vacation. The employer paid its full time employees for 18 "vacation days" but decided when the employees would take 8 of the 18 days which were common holidays, such as Christmas, July 4<sup>th</sup> and Labor Day, when it would not be profitable to be open for business. Thus, the employer paid its employees for both vacation and holidays. However, the employer did not keep records showing how much it paid its employees for vacation, which was excludable, and how much

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<sup>3</sup> The proposed order indicated that OAH added to the record the insurer's hearing memorandum dated 7/12/10. It was unnecessary and redundant for OAH to add the document to the record because it is automatically included the record of a case. ORS 183.417(9).

<sup>4</sup> All insurers that are licensed in Oregon to transact workers' compensation insurance are required to members of a licensed rating organization pursuant to 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*, and *Scopes*<sup>®</sup> *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*<sup>®</sup> *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*<sup>®</sup> *Manual* has not been filed with or approved by the Insurance Division. See also *Lemma Wine Company v. Nat'l. Council on Comp. Ins.*, 194 Or App 371 (2004).

it paid for holidays and sickness, which was not excludable. Since the employer had the burden of proving how much of such pay was for which purpose but failed to keep such records, the insurer was entitled to include all of such pay as payroll in calculating the premium for the workers' compensation insurance provided by the insurer to the employer during the audit period. See e.g. *In re The Pape` Group, Inc. et al.*, case number INS 02-05-012, final order dated 3/10/04.<sup>5</sup>

The proposed order informed the employer and insurer that they could file 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

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<sup>5</sup> The insurer argued that the billing correctly included all of the "vacation" pay because the employer actually paid the employees for not only vacation but also holidays, but did not keep records of how much was paid for vacation and how much was paid for holidays. The proposed order rejected the insurer's argument as "incorrect." Instead, the proposed order concluded that the billing correctly included all of the "vacation" pay simply because some of the pay was for holidays. The proposed order's reasoning is incorrect. The insurer's reasoning is correct and is consistent with our past cases one of which is cited herein.

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 October 15, 2010

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

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