

**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 10-03-002
 Audit of)
)
CASA BELLA OREGON, LLC.) **PROPOSED ORDER**

HISTORY OF THE CASE

On December 9, 2009, SAIF Corporation (SAIF or insurer) issued a Final Premium Audit Billing to Casa Bella Oregon LLC (employer). The audit period was from July 26, 2008 through July 31, 2009. Employer appealed the billing on January 7, 2010 (received January 12, 2010). The Division received employer's Petition on or before March 1, 2010,¹ and referred the matter to the Office of Administrative Hearings (OAH) on March 8, 2010.

Hearing was held before ALJ Rick Barber on July 13, 2010, in the Salem offices of the OAH. Employer was not represented by an attorney, but Majid Hajarizadeh appeared and testified for employer. SAIF was represented by Assistant Attorney General Ethan Hasenstein. Audit program analyst DeAnne Hoyt was the insurer representative and testified for insurer, along with auditor Patrick Mogan, auditing supervisor David Murrieta and National Council on Compensation Insurance (NCCI) Senior Quality Assurance Analyst Michael Craddock. The record closed later on July 13, 2010.

ISSUES

1. Whether the Final Premium Audit Billing properly classified employees in 8058 instead of 8810.
2. Whether the audit properly included as payroll amounts that employer contends were vacation pay.

EVIDENTIARY RULINGS

Exhibits A1 through A12, offered by SAIF, and Exhibit R1, offered by employer, were admitted into evidence without objection. SAIF's Hearing Memorandum, provided

¹ The Petition itself does not have a date stamp on it, but employer sent a letter to the Division on February 19, 2010, received March 1, 2010. I infer that the Petition was sent in with the February 19 letter.

before the hearing, is also included in the documentary record of the hearing as Document 1 (Doc. 1).

FINDINGS OF FACT

1. Employer is an importer and wholesaler of natural stone products such as tiles and slabs of marble, granite and other stones. Employer's facilities include extensive warehouse space and an attached showroom of approximately 2500 square feet. (Test. of Hajarizadeh). Separated from the showroom by a waist-high counter is the general office area. In that area, Symantha, Tricia and Christine work at clerical tasks. (Ex. R1). Symantha and Christine also help customers at the counter or in the showroom. (Test. of Hajarizadeh).

2. Next to the open clerical area is an enclosed office where Cecil works over the telephone. (Test. of Hajarizadeh).

3. Employer does not sell its product directly to the public, working instead through contractors. Contractors will bring their clients into the showroom to look at displays of stone and tile, with the occasional assistance of the counter staff. (Test. of Hajarizadeh).

4. Other employees in the warehouse, including drivers, load and unload trucks, move product around the warehouse, and deliver product to the contractors. (Test. of Hajarizadeh).

5. Employer's handbook includes a section on vacation pay. The section states:

Full-time employees accrue vacation days at the rate of 12 hours per month, which equates to 18 vacation days per year. Eight vacation days that each year will be pre selection [sic] by employer and 10 days by employee. Casa bella does not offer paid holidays, sick days or personal days. If employee choice [sic] to take such days the time will be deducted from pay. All vacation must be used by end of each year. There is no carry over.

(Ex. A7 at 2).

6. Between July 26, 2008 and July 31, 2009, employer reported payroll to SAIF in three different classification codes: \$124,849 to code 8810; \$29,348 to code 8058; and \$24,916 to code 8232, for a total of \$179,113. (Ex. A3).

7. SAIF audited employer's premium during the policy period, looking at several factors including the type of work being performed and how it was being reported, and also looking at employer's vacation policy. After the audit, SAIF concluded that only Cecil (of employer's employees) was appropriately reported under

class code 8810. All of the other clerical staff were more appropriately classed under code 8058 because they were not physically separated from the showroom, and because they occasionally went into the showroom to help customers. (Test. of Murrieta).

8. SAIF also determined that employer's vacation policy was actually a "paid time off" policy, concluding that (as a result) vacation pay was not excludable from premium. (Ex. A6 at 1).

9. Employer was dissatisfied with SAIF's analysis of the classification code issue, so SAIF requested that the National Council on Compensation Insurance (NCCI) come in to review employer's work place. NCCI determined, as SAIF had, that only Cecil qualified under code 8810, that the other clerical workers were classified under code 8058, and that the drivers and warehouse workers were classified under code 8232. (Ex. A10).

10. On December 9, 2009, SAIF issued its Final Premium Audit Billing to employer. (Ex. A4). Employer timely requested a hearing on the billing.

CONCLUSIONS OF LAW

1. The Final Premium Audit Billing properly classified employees in 8058 instead of 8810.

2. The audit properly included as payroll amounts that employer contends were vacation pay.

OPINION

Employer has contested SAIF's Final Premium Audit Billing, as it relates to the classification of payroll. 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). It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

There are two issues contested by employer in this case. First, employer contends that SAIF should not have moved clerical staff from code 8810 to code 8058. Second, employer contends that its vacation pay should not be included in the payroll for premium purposes.

Classification Codes. Although employer reported the majority of its payroll in the 8810 category, SAIF's audit limited the application of code 8810 to just Cecil, who

worked in a fully contained office next to the showroom. SAIF refused to extend the 8810 code to the three clerical workers behind the counter.

The record is clear that the three people in that portion of the office are separated from the showroom only by the counter. One of the workers, Tricia, never helps customers at the counter or in the showroom. The others do occasionally help customers, either at the counter or in the showroom.

As SAIF summarized when it first insured employer, code 8058:

Class 8058 applies to work performed in your store or showroom area only, including but not limited to, customer service, stocking shelves, filling orders and checking.

(Ex. A2 at 3). SAIF contended that the clerical staff, because they occasionally helped at the counter and in the showroom and were not physically separate from the showroom or the counter, were appropriately classified under 8058. When employer disagreed with this contention, SAIF asked NCCI to come and view the site to determine which class code applied. NCCI agreed with the use of the 8058 code for the clerical staff.

SAIF has established that it is required to class these employees under code 8058 based on the NCCI audit and the testimony of Mike Craddock from NCCI. Employer has the burden of proof, but has presented no evidence to show that his employees are more appropriately classed in 8810. SAIF has shown that 8810 does not apply. Therefore, the payroll was correctly classified by SAIF.

Vacation Pay. OAR 836-042-0055 states in part:

(1) As used in OAR 836-042-0050 to 836-042-0060, unless the context requires otherwise:

* * * * *

(f) "Payroll" means money or substitutes for money that are payable to workers for their services and that are specified or defined by the rating system used by the insurer, *except that payroll may not include vacation pay*, incremental pay recorded for overtime work, and payments excluded as provided in section (2) of this rule.

(Emphasis added).

The general rule, therefore, is that vacation pay is not included in payroll. However, Rule 2-B in the Basic Manual² shows (under Oregon's exceptions) that Payroll includes:

* * * * *

e. Pay for holidays or periods of sickness.

(NCCI Basic Manual, Rule 2-B, 2001 Ed., Oregon). Thus, in Oregon there must be a differentiation between vacation and such other benefits as holiday pay and sick leave.

SAIF relies on previous decisions from the OAH in support of its argument that this is actually a "paid time off" policy in which employer failed to separate out vacation pay from other forms of pay. However, SAIF is incorrect. The policy quite clearly indicates the amount of vacation pay (12 hours per month), and the amount of other benefits (none). (Ex. A7). So the policy cannot be ignored on that basis.

However, the fatal flaw in employer's policy concerns holiday pay. As noted, holiday pay is part of payroll in Oregon. Employer's policy requires employees to take eight days that are "preselect[ed]" by the employer. (*Id.*). Mr. Hajarizadeh testified that those were the common holidays, such as Christmas, July 4th and Labor Day, etc., when it would not be profitable to be open for business. In other words, the days were paid holidays.

Because employer's "vacation" pay includes holidays, paid time off which is expressly included in payroll under NCCI rules, I must conclude that employer's vacation policy is includable in payroll.

PROPOSED ORDER

I propose that the department issue the following final order:

That the Final Premium Audit Billing dated December 9, 2009 be AFFIRMED.

DATED this 31ST day of AUGUST 2010.



Rick Barber, Administrative Law Judge
Office of Administrative Hearings

² At hearing, I took administrative notice of both the Basic Manual and the Scopes Manual at SAIF's request. Employer did not object, and the portions of the rules that pertained to the vacation pay and the classification code matters were included in SAIF's Hearing Memorandum.

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

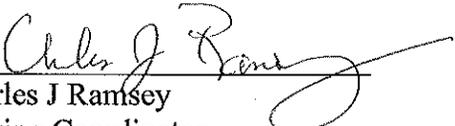
On the 31st day of August 2010, I mailed the foregoing Proposed Order in Reference No. **1003002**.

BY FIRST CLASS MAIL:

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