

**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 10-11-006
Audit of)	
)	
R & R TREE & LANDSCAPE, INC.)	PROPOSED ORDER
dba R & R TREE SERVICE)	

HISTORY OF THE CASE

On August 13, 2010, SAIF Corporation (SAIF or insurer) issued a Final Premium Audit Billing to R & R Tree & Landscape, Inc. (employer). The audit period was from July 1, 2008 through July 1, 2009. Employer appealed the billing on September 23, 2009. On November 30, 2010, the Department of Consumer and Business Services Insurance Division referred the matter to the Office of Administrative Hearings (OAH).

The matter was assigned to Senior Administrative Law Judge Alison Greene Webster. A hearing was scheduled for May 10, 2011, but was continued on the employer's request, so that its challenges to subsequent premium audit billings for 2009 and 2010 could be consolidated into one proceeding.

On May 5, 2011, SAIF issued Final Premium Audit Billings to the employer for the periods of July 1, 2009 through July 1, 2010 and July 1, 2010 through January 1, 2011. Employer timely appealed these billings, and all three audits were consolidated for hearing.

A hearing was held before ALJ Webster on March 16, 2012, in the Salem offices of the OAH. Attorney Bill Replogle represented employer. Assistant Attorney General Ethan Hasenstein represented SAIF. DeAnne Hoyt appeared as a representative of SAIF.

The following witnesses testified on employer's behalf: Brittany Kenison, Bobby Canini, Jannai Cornett and Robert Cornett. Audit Supervisor Edwin Grove testified for the insurer. The record closed at the conclusion of the hearing on March 16, 2012.

ISSUES¹

1. Whether employer's payroll records satisfy the criteria for verifiable time records set out in OAR 836-042-0060 to support a division of payroll among class codes

¹ Prior to hearing, the parties resolved the dispute regarding under-reporting of payroll, leaving only the division of payroll issue to be adjudicated in this contested case.

0106 (tree and shrub pruning, above ground level) and 9102 (lawn maintenance performed from the ground level).

2. Whether the Final Premium Audit Billings for the periods of July 1, 2008 through July 1, 2009, July 1, 2009 through July 1, 2010 and July 1, 2010 through January 1, 2011 are correct.

EVIDENTIARY RULINGS

Exhibits A1 through A18, offered by SAIF, and P1 through P16, offered by employer, were admitted into evidence without objection. The employer withdrew exhibit P17. SAIF's Hearing Memorandum and the employer's Hearing Memorandum were also included in the documentary record of the hearing.

At hearing, official notice was taken of the *Basic Manual of Workers' Compensation and Employers Liability Insurance* published by the National Council on Compensation Insurance (NCCI) and the *Scopes of Basic Manual Classifications*, in particular, the descriptive terminology and business activity examples set out for class codes 0106 and 9102.

FINDINGS OF FACT

1. Employer R & R Tree & Landscape, Inc., dba R& R Tree Service, is a business located in Salem owned by Robert and Jannai Cornett. The business started out as a sole proprietorship by Robert in 1998. In 2002, Jannai became a half owner. The company was originally insured by SAIF Corporation, but then was sent to the assigned risk pool, where SAIF Corporation was designated to process the claims. (Test. of R. Cornett; Ex. A1.)

2. Employer has been audited numerous times over the years. Earlier premium audits, performed by auditors John Hegener and Joe Rick, permitted employer to divide its payroll between class codes 0106 (tree and shrub pruning, above ground level) and 9102 (lawn maintenance performed from the ground level). Until approximately 2008, when SAIF assigned Ed Grove to employer's premium audit, the Cornetts believed that their time tracking system worked to well to divide employee time between these two class codes. (Test. of J. Cornett.)

3. In 2008, Ed Grove audited employer's records for the period July 1, 2007 through June 30, 2008. He assigned employer's entire payroll (except office staff) to code 0106, concluding that the employer's records did not support a division and allocation of payroll. This audit resulted in a significant additional premium billing. Employer appealed the billing, which resulted in a Final Order affirming the audit. That Final Order is currently on appeal. (Stipulation.)

4. In December 2009, when Grove announced SAIF's audit of the employer for the 2008-2009 year, he asked Mrs. Cornett to produce specific records, including time

cards or time records and employer's QuickBooks payroll summaries. Ms. Cornett laid out paper copies of all monthly summaries and monthly time records for the period of July 2008 through June 2009, and provided a sampling of invoices for Grove to review.² When Grove arrived at employer's office to review these records, he repeatedly requested that Mrs. Cornett provide him with electronic copies of these records. Ms. Cornett explained that they did not save electronic copies of the daily time cards or the monthly payroll summaries. Grove did not understand the employer's timekeeping system and the lack of electronic records. He accused Ms. Cornett of destroying documents essential to SAIF's audit. Ms. Cornett felt badgered by Grove's repeated demands for electronic documents that employer did not have. (Test. of J. Cornett.)

5. At all times pertinent to the audits in issue in this case, employer did not use traditional time cards to track its employees' hours. Instead, Mr. Cornett kept a daily log of employee hours based on verbal reports at the end of each work day from each crew about each job performed on that particular day. On an Excel spreadsheet, Mr. Cornett recorded each job (by name of the person or business being billed), the crew members assigned to the job, the amount of hours worked per crew member, and whether the work performed was "AG" or "BG." (Test. of R. Cornett; Exs. A6, A11 and A14; Ex. P7, pages 3-4; Ex. P8, pages 3-4; Ex. P11, pages 3-5;) Mr. Cornett used the initials "AG" to designate that the work was "above ground," or that, in his opinion, fell within classification code 0106, and "BG" to designate that the work involved "boots on the ground," and thereby, in his opinion, came within classification code 9102. On this same daily log, Mr. Cornett recorded employees' "shop" time, mechanic time, office time, and bid time. (*Id.*)

6. Mr. Cornett started a new spreadsheet on the first working day of the month, and added to it each work day through the end of the month. Once a week, he calculated each employee's hours and provided the weekly hours to Mrs. Cornett, who input the data into QuickBooks for payroll purposes. At the end of the month, Mr. Cornett used another Excel spreadsheet to summarize each employee's hours, dividing the hours between "AG," and "BG," or where applicable as "Bid" or "Office" work. (Exs. A7, A12 and A17.) He would then print out a copy of the completed daily time log and monthly summary spreadsheets for the employer's records. Mr. Cornett did not electronically save copies of the daily time card or monthly summary. At the beginning of the next month, he deleted the data from the prior month and used the same template to record that month's daily time by job name. (Test. of R. Cornett; Exs. A6, A11 and A14; Ex. P7, pages 2-4; Ex. P8, pages 2-4; Ex. P11, pages 2-5.)

7. Other than designating the job crews' work as "AG" or "BG" hours, Mr. Cornett's daily time records did not describe the specific duties the employee performed

² Employer generates an invoice for every job, a copy of which is provided to the customer or left at the job site upon completion of the job. Each month, employer generates approximately 180 invoices. The invoice sets out the customer name, job location, a short description of the work performed and the billing amount. (*See* Ex. P7, pages 5 to 46 [invoices for the week of December 1-7, 2008]; Ex. P8, pages 5 to 43 [invoices for the week of December 1-7, 2009]; Ex. P11, pages 6 to 49 [invoices for the week of December 1-7, 2010]; test. of J. Cornett.)

on a particular job. (Exs. A6, A11 and A14.) To determine what work the employees performed on a particular job, one would have to consult the particular invoice generated for the job, which is saved in the employer's QuickBooks system. (Test. of R. Cornett; test. of J. Cornett.) The job invoices are generally created at the time the employer bids on the job rather than after completion of the job and provide the customer with a general description of the services to be performed. (*Id.*; Exs. P7, P8 and P11.) For example, the invoice description on a December 1, 2008 job for Woodburn Property Management at a site on Brooks Ave. NE in Keizer states: "Remove and stump grind dead cedar tree right side of home as facing." (Ex. P7, page 5.) As another example, an invoice description for a December 4, 2008 job on 45th Ave. SE in Salem states: "Trim two maple trees in front yard." (Ex. P7, page 35.) A December 4, 2008 invoice to Shelter Management Inc., for a site on Olney St. SE, Aumsville (Pine Meadows Townhomes), states: "Cut back all limbs touching siding."³ (Ex. P7, page 37.) And, as a fourth example, a December 1, 2010 invoice for a job on Fernbrook Ct. S in Salem contains the following descriptions: "Birch tree, right side backyard: remove" and "stump." (Ex. P11, page 9.)

8. On rare occasions, employer had jobs that required its employees to perform services other than tree pruning or lawn maintenance, such as masonry work or fence building. On those rare occasions, Mr. Cornett used the "BG" code to describe these employee hours on the daily time card. (Test. of R. Cornett.)

9. On August 13, 2010, Grove, on behalf of SAIF, issued a Final Premium Audit Billing for the period of July 1, 2008 to July 1, 2009. The auditor found, among other things, that employer's reported payroll was classified improperly. Specifically, Grove determined that the records employer provided for the audit did not enable him to determine the correct classification assignment and did not meet the Oregon verifiable time record rule (OAR 836-042-0060). Grove therefore assigned the vast majority of subject payroll (everything except some estimator and office clerical pay) to classification code 0106, resulting in a premium audit adjustment billing of \$63,397. (Ex. A4.)

10. On May 5, 2011, Grove, on behalf of SAIF, issued a Final Premium Audit Billing for the period of July 1, 2009 to July 1, 2010. As before, he found that employer's time records did not include a description of the work performed and did not meet the Oregon rule for verifiable time records. Grove also found that the time records inappropriately classified shop work and other construction work as 9102. And, as in the previous two audits, Grove assigned all payroll, except for employees working

³ Mr. Cornett's daily time record for December 4, 2008 lists three different "Shelter Mgt" jobs. The daily time record indicates that the same three person crew (Robert K, Louis and Troy) completed all three jobs. Mr. Cornett attributed 2 hours per employee to one job, 1.5 hours per employee to the second job, and 3 hours per employee to the third job. He classified all three jobs as "BG" work. (Ex. P7, page 4.) Employer's records contain three invoices to Shelter Management Inc. dated December 4, 2008 for \$150.00. (Ex. P7, pages 36, 41 and 42.) Although each Shelter Management Inc. invoice lists a different site location and description of services performed, one cannot discern from the employer's records which invoice pairs with which "Shelter Mgt" entry on the daily time log for December 4, 2008.

exclusively in the office or as outside sales, to classification code 0106. This resulted in a premium audit adjustment in the amount of \$170,465 for the audit period. (Ex. A9.)

11. Also on May 5, 2011, Grove, on behalf of SAIF, issued a Final Premium Audit Billing for the period of July 1, 2010 to January 1, 2011. Again, Grove determined that the time records did not include a description of the work performed by employees, did not meet the Oregon rule for verifiable time records, and did not properly classify shop work and other construction work to highest rated classification exposure. With the exception of payroll attributable to employees working exclusively in the office or as outside sales, the auditor classified all payroll as 0106. This resulted in a premium audit adjustment in the amount of \$85,300.63 for the audit period. (Ex. A14.)

12. The *Scopes Manual* sets out the following description for code 0106:

Code 0106 applies to specialist contractors who use hand tools or mechanical equipment to prune, spray, repair, trim, or fumigate trees. Code 0106 is applied to risks that perform one or more of the aforementioned activities. These operations may be performed from ground level or by climbing the tree, or may require the use of ladders and/or aerial buckets.

The removal, chipping, cleanup, and haul away of tree limbs and debris are also assigned to Code 0106.

Repair operations may involve cutting large, uprooted trees into manageable pieces for removal and/or pulling trees upright. Code 0106 additionally includes incidental tree removal of one or a few trees on developed sites conducted in connection with the described operations.

(Ex. A2, pages 1-2.)

13. The following is excerpted from the *Scopes Manual* description for code 9102:

Includes grass cutting, weed control and lawn spraying. Code 9102 also applies to tree pruning if the pruning is performed from the ground. The use of walls, ladders, roofs, scaffolds, hoisting equipment, etc. is not considered as working from the ground. Refer to Code 0106 when the contract involves pruning from the ground and above the ground. Code 9102 and Code 0042 – Landscape Gardening and Drivers may be assigned the same risk.

Insureds that perform maintenance of lawns, grounds, and gardens are assigned by analogy to Code 9102. The maintenance may involve lawn mowing, raking, application of liquid or granular fertilizer, spraying or trimming of shrubs or small trees from the ground, and thatching or

aerating. If any one or all of the above operations are performed by a lawn maintenance risk classified to Code 9102, then minor and incidental landscaping operations performed by the same risk, such as the replacement of dead shrubs, the planting of a few flowers, and the placing of rock or brick as edging designs are included under Code 9102. This minor landscaping operation is distinguished from work performed by an insured at a job or location where the primary work at the job or location is landscaping.

(Ex. 2, pages 6-7.)

CONCLUSIONS OF LAW

1. Employer's payroll records do not satisfy the criteria for verifiable time records set out in OAR 836-042-0060 and therefore do not support a division of payroll among class codes 0106 and 9102.
2. The Final Premium Audit Billings for the periods of July 1, 2008 through July 1, 2009, July 1, 2009 through July 1, 2010 and July 1, 2010 through January 1, 2011 are correct.

OPINION

Employer contests SAIF's Final Premium Audit Billings for the periods of July 1, 2008 to July 1, 2009, July 1, 2009 to July 1, 2010 and July 1, 2010 to January 1, 2011. Specifically, employer contends that its payroll records are sufficient to support a division of payroll between class codes 9102 and 0106, and that SAIF erred in assigning all work crew payroll into the highest rated classification exposure, code 0106. As the party seeking redress before the Department, employer bears the burden to establish that SAIF's premium audits are incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993).

Pursuant to ORS 737.310(10), the Department is authorized to prescribe, by rule, the conditions under which a division of payroll between different manual classifications is permitted for purposes of computing workers' compensation premiums. The Department has prescribed those conditions in OAR 836-042-0060, which provides, in pertinent part, as follows:

- (1) When there is an interchange of labor, the payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, provided verifiable payroll records maintained by the employer disclose a specific allocation for each such individual employee, in accordance with the standards for rebilling set forth in OAR 836-043-0190 and this rule.

* * * * *

(3) 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.

(4) For purposes of this rule, *payroll records of an employee are verifiable if they have the following characteristics:*

(a) The records must establish a time basis, and the time basis must be hourly or a part thereof, daily or part thereof, weekly or part thereof, monthly or part thereof or yearly or part thereof;

(b) For each salaried employee, the records must also include time records in which the salary is converted to an hourly, daily, weekly, monthly or yearly rate and then multiplied by the time spent by the employee in each classification exposure;

(c) *The records must include a description of duties performed by the employee*, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable; and

(d) *The records must be supported by original entries from other records, including but not limited to time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager.* Estimated ratios or percentages do not comply with the requirement of this subsection and are not acceptable for verification. Verifiable records must be summarized in the insured employer's accounting records.

(Emphasis added.)

In this case, employer contends that its payroll records satisfy the above criteria, whereas SAIF contends they do not. Employer notes that previous SAIF auditors found the payroll records sufficiently verifiable, and asserts that Grove's expectations and standards for verifiable payroll records are unreasonable. SAIF, on the other hand, contends employer's payroll records are not verifiable because: (1) the "AG" and "BG" designations are not sufficiently descriptive of the work performed to distinguish between codes 9102 and 0106; (2) the payroll records do not otherwise describe the work performed; and (3) the payroll records assembled by Mr. Cornett were not backed up by employee time cards or any other contemporaneous documentation.

In *Pease v. NCCI*, 128 Or App 471, 475 (1994), the court accepted the Department's definition of "verifiable" payroll records as follows: "that the accuracy of the insured's classification and job description technique must be capable of independent confirmation by an insurer using records that are maintained by the employer and

available to the insurer at the time of the audit.” In *Pease*, the court found that although the employer’s timecards were supposed to be filled out by the employee during the course of the day, they were often filled out by other employees at unknown times because many of the farm workers could not read or write in English or their native language (Spanish). The court agreed that, because of the lack of contemporaneous timecards and the uncertainty as to who completed them, the employer’s time records could not be audited for accuracy and were therefore not verifiable. *Id.* at 476.

Similarly, in *LeRoyce J. Massey dba Dreamscape*, INS 97-04-002, Proposed Order, *aff’d* Final Order (January 29, 1999), the hearing officer, relying on *Pease*, found that an employer’s records were not verifiable because they required additional testimony or explanation. There, the employer was a sole proprietor engaged in the landscaping business. The employer’s primary work during the audit period at issue was yard maintenance work, including mowing lawns, pruning and weeding, although the company also performed other work such as tree pruning, construction of dry wells and building concrete walls. The employees kept weekly time cards recording the total number hours worked each day during the week. About half of the time cards also showed a one or two word categorization of the work performed, such as, “maintenance,” “tree” or “lot clearing.” Proposed Order at 3. The time cards were not sufficiently detailed to inform anyone, including the employer, exactly what the employee did during the work day. *Id.*

In finding that the employer’s time records were not verifiable, the hearing officer explained:

For an insurer to verify that the classification used by the employer is correct for the duties performed by the employee, the records must contain a description of those job duties. In order to check the accuracy of the insured’s classification and job description methods, we consider when the records were prepared, and who prepared them. We give greater weight and credibility to records that are prepared by the employee or their direct supervisor than to records prepared by another person. Records prepared during or at the end of each work day describing the work will be given greater weight and credibility than those prepared later.

Proposed Order at 5.

In this case, the daily time records were not prepared by the employee or the employee’s direct supervisor, but rather by Mr. Cornett, the manager/owner. The daily time records also did not contain any description of the work performed by the employee. Based on verbal reports from each crew about each job performed on that particular day, Mr. Cornett recorded the employee’s hours, by job name, on an Excel spreadsheet. Based on his knowledge of the employer’s business and his understanding of the classification codes, Mr. Cornett then classified the work performed at the particular job site as either “BG” or “AG.” But, for Mr. Cornett, a SAIF auditor, or anyone else to determine what work activity an employee performed on any given day, requires

consulting the particular invoices for the jobs the employee worked that day for clues to the actual work performed.

After considering the employer's record keeping in light of the criteria set out in OAR 836-042-0060(4), I conclude that employer's payroll records are not verifiable. Indeed, as noted above, Mr. Cornett's daily log contains no description of duties performed by the employee, as required by OAR 836-042-0060(4)(c). I agree with SAIF that Mr. Cornett's designation of the work performed as either "BG" or "AG" does not satisfy the standard set out in the rule. Because the daily log requires additional explanation or interpretation to ascertain what duties the employee performed that day it cannot be considered as verifiable.

Second, even though OAR 836-042-0060(4)(d) states that a manager can prepare the daily logs, the fact that employer has no other contemporaneous records to establish employees' time basis and work activity (such as time cards, calendars or planners) means that Mr. Cornett's daily time log cannot be audited for accuracy. Employer asserts that the invoices for each job provide a description of the duties performed at the job site, but the invoices are not contemporaneous (as they are generally created at the time of the bid, rather than upon completion of the job). In addition, the invoices themselves occasionally require additional explanation or interpretation to ascertain the proper pairing with the daily log, and/or to determine the correct classification assignment for the work performed. For example, as set out above in note 3, where there are multiple jobs for the same customer on a given day, one cannot discern from the employer's records which invoice pairs with which entry on the daily log. For these reasons as well, the employer's payroll records do not meet the Department's standard for verifiable.

Because employer did not maintain verifiable payroll records in accordance with the criteria set out in OAR 836-042-0060(4), it has not satisfied conditions necessary for division of payroll for individual employees. And, because employer did not maintain verifiable payroll records as required by rule, OAR 836-042-0060(3) requires that the entire payroll be assigned to the highest rated classification exposure. In other words, it was appropriate in this case for SAIF's auditor to assign the entire payroll (with the exception of estimator and office clerical pay) to classification code 0106. In the absence of verifiable payroll records, employer has not sustained its burden to prove that SAIF's premium audits for the periods of July 1, 2008 to July 1, 2009, July 1, 2009 to July 1, 2010 and July 1, 2010 to January 1, 2011 were incorrect.

PROPOSED ORDER

I propose that the department issue the following final order:

The Final Premium Audit Billing dated August 13, 2010 (for audit period July 1, 2008 to July 1, 2009) is AFFIRMED;

The Final Premium Audit Billing dated May 5, 2011 (for audit period July 1, 2009 to July 1, 2010) is AFFIRMED; and

The Final Premium Audit Billing dated May 5, 2011 (for audit period July 1, 2010 to January 1, 2011) is AFFIRMED.

DATE: March 30, 2012

Alison Greene Webster
Senior 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

CERTIFICATE OF SERVICE

On the 30th day of March 2012, I mailed the foregoing Proposed Order in Reference No. **1011006**.

BY FIRST CLASS MAIL:

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