

**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	)	OAH Case No. INS 12-06-002
	)	
Audit of	)	
	)	
<b>THOMAS CREEK LUMBER</b>	)	
<b>&amp; LOG COMPANY, Employer</b>	)	<b>PROPOSED ORDER</b>

**HISTORY OF THE CASE**

On March 28, 2012, SAIF Corporation (SAIF, or the insurer) issued a Final Premium Audit Billing to Thomas Creek Lumber & Log Company (employer). The audit period was from January 1, 2011 through January 1, 2012. Employer received the billing on March 30, 2012, and appealed the billing on April 25, 2012. The Division received employer's Petition (dated May 31, 2012) on June 4, 2012 and referred the matter to the Office of Administrative Hearings (OAH) on June 5, 2012.

The case was assigned to Administrative Law Judge (ALJ) Rick Barber. A prehearing conference was held on August 27, 2012, and hearing was set for December 3, 2012.

Hearing was held as scheduled on December 3, 2012, in Salem, with ALJ Barber presiding. Brent Walker represented the employer and testified. SAIF was represented by Special Assistant Attorney General Holly O'Dell. Audit program analyst DeAnne Hoyt was the insurer representative. Auditor Loni Johansen testified. The record closed on December 3, 2012.

**ISSUE**

Whether the Final Premium Audit Billing of March 28, 2012 was in error when it failed to accept employer's time records for Class Code 8602.

**EVIDENTIARY RULINGS**

Exhibits A1 through A5, offered by SAIF, were admitted into evidence without objection. Exhibits E1 through E8, offered by employer, were also admitted into evidence without objection.

## FINDINGS OF FACT

1. During the policy period of January 1, 2011 through January 1, 2012, employer was insured by SAIF Corporation for workers' compensation. Employer has its offices in Stayton, Oregon. It is a logging company that enters into logging contracts with landowners (including the federal government), subcontracts out timber falling and then logs the fallen timber. Employer enters the area to be logged before the timber fallers to mark the trees. Depending on the contract, employer's workers may either mark the trees to be cut or the trees to be left uncut. (Test. of Walker).

2. During 2011, most of employer's work was performed pursuant to a contract with the US Forest Service in the McKenzie River Ranger District. The sale was called "Cascade Thin." (Ex. E2). Under that sale, employer's workers had to mark between 5,000 and 15,000 trees. (Test. of Walker).

3. The trip to the site each day took approximately two hours of drive time, one way. The workers traveled together to the job site in a crummy. After discussing how to delineate drive time for workers' compensation purposes, a SAIF representative told Walker that the class code for driving was to match the work to which the crew was going to perform, and the work they were leaving at the end of the day. Walker planned his workers' day so that they all performed timber cruising (tree-marking) duties first thing in the mornings. As a result, he attributed the morning drive time to classification code 8602 (Timber Cruising), and the afternoon driving time to the higher logging classification code. (Test. of Walker). This split was conceptually acceptable to SAIF, if the workers were actually timber cruising every morning and if employer kept verifiable time records. (Test. of Johansen).

4. During the month of June 2011, employees Jayme Petersen and Bob Castro's time sheets showed two hours of 8602 time on most work days. Castro had one day of 6.5 hours and so did Petersen. The time entries did not identify which job tasks were performed under that class code. (Ex. E7).

5. When SAIF's auditor came to perform a premium audit, she reviewed the forms that employer provided (similar to those in Exhibit E7). Some of the forms had areas covered with "white-out," a substance to cover writing on the form. Through the white-out, the auditor could see a reference to driving time ("D time"); over the white-out, the employer had written "8602." The auditor assumed that employer had just substituted another name for driving time, and she doubted there was enough timber cruising work to keep the entire crew busy every day. She also felt that the blanked out sections of the forms were an alteration of the records that "contaminated" them, making a full audit impossible. (Test. of Johansen). The whited-out pages were old forms that the employer thought had been destroyed. Some of them made it out to the workers in the field, where the employees used them rather than the new forms as employer intended. (Test. of Walker).

## CONCLUSION OF LAW

The Final Premium Audit Billing of March 28, 2012 was not in error when it failed to accept employer's time records for Class Code 8602.

## OPINION

Employer has contested SAIF's Final Premium Audit Billing, contending that it improperly failed to allow employer to attribute work to classification code 8602 (timber crusing). 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).

The issue here is one of "verifiable time records." OAR 836-042-0060 states in part:

### **Conditions for Division of Payroll of Individual Employees**

(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.

(2) This rule does not apply to a single employee whose duties vary within exposure areas normally anticipated by the scope of a single classification or who spends only a limited amount of time, on an infrequent or irregular basis, in a classification exposure that is not a normal job function for that employee. As used in this section, "infrequent or irregular" means that the time spent in the classification exposure is limited, is not anticipated in the normal duties of the employee and occurs only randomly.

(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). This rule sets forth the requirements for an employer that wants to split an employee's time between class codes. The primary requirement is that the employer maintain "verifiable time records" for each individual employee. Otherwise, as subsection (3) notes, the premium will be assessed at the highest rated classification exposure.

To be verifiable, the records must establish a time basis, and "must include a description of duties performed by the employee." Estimations of hours, including ratios or percentages, are not sufficient verification.

With that framework in mind, I now look at employer's contention that he has presented verifiable time records showing that his employees were performing timber cruising duties and should have been assigned 8602 for that work. There is some evidence to support that the employees were performing timber cruising duties (and other duties that would fall within that category, as will be explained below), but employer has failed to provide verifiable time records in support of that conclusion.

**"Contaminated" Records.** SAIF contends that it could not trust employer's time records, even if they had been complete, because there were portions of the forms that had been "whited out." SAIF's auditor considered the records "contaminated" because, she believed, the employer had altered the records. She considered the records untrustworthy.

The employer provided a rational and plausible explanation for the white-out on

the forms, noting that they were an old form that the office had thrown away, but that some of the employees in the field had apparently retrieved and used.

The question whether the records were altered does not need to be decided in this case because employer's records—even if altered after the fact—fail to meet the standards required of a verifiable time record.

***Timber Cruising and Drive Time.*** At the heart of the dispute between SAIF and the employer is the question of whether employer's workers were timber cruising every day and how to attribute their drive time to the work site which, according to the employer's testimony, was about two hours away from employer's location.

Employer charged the morning drive time to 8602 because he contends that timber cruising (marking which trees to cut, or which not to cut), was the first task of the day for all employees. SAIF's auditor conceptually agreed that drive time to the job site should be assigned to the class code of the task to be done at the job site (and the trip home should be assigned to the last task performed). Therefore, employer testified, he charged the morning drive time to 8602 and the afternoon drive time to the higher logging class code.

In principal, employer's analysis is correct. If his employees are all timber cruising every morning, and logging in the afternoon, the drive time would appropriately be split between them. While SAIF questions the amount of timber cruising that would be required, Walker's testimony that there could be as many as 15,000 trees to be marked would support the notion that a lot of tree marking (timber cruising) would be necessary.

The problem is that employer's records do not completely support employer's contentions.<sup>1</sup> For instance, using Jayme Petersen's time sheet for June as an example, the record shows two hours of 8602 for almost every day of the month. With the trip to the jobsite taking two hours, this would indicate little, if any, actual timber cruising on the job. If there was no timber cruising on those days, then the drive time cannot be attributed to 8602.

And that is the quandary of employer's time records. If timber cruising was happening every morning, then the cruising and drive time should have been greater on the time card. Furthermore, the amount would probably vary from day to day, or from week to week, depending on how many trees there were to be marked and how long the drive time was. The employer's records (as exemplified by Mr. Petersen's June time sheet) look more like an estimate than an actual time record. The facts of the case (distance to the site) suggest that the records cannot be correct. As Ms. Johansen testified, "We just can't tell with these time cards."

The second issue with the time records is verifiability. The word "verifiable" in the rule suggests that someone outside—such as the insurer—must be able to determine

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<sup>1</sup> This is a conclusion about the verifiability of time records, and is not a credibility finding in this case.

whether the time record was accurate. As the rule quoted above states, the time record “must include a description of duties.” The purpose of the rule is clear: the insurer must be able to look at the tasks being performed to make a determination whether those tasks are properly assigned to that class code. Thus, the use of class code 8602 on the time sheet would need to explain what was involved (e.g., driving, marking trees, etc.). Employer’s records fail to meet that standard, and therefore fail to be verifiable.

Employer testified that his employees are workers, not record-keepers, and his point is valid. However, if employer is to take advantage of a lower class code the employees must keep records that meet the standards set forth in the administrative rules. The records here do not meet those standards, and the Final Premium Audit Billing is approved.

### **PROPOSED ORDER**

I propose that the department issue the following final order:

That the Final Premium Audit Billing dated March 28, 2012 be **AFFIRMED**.

**Rick Barber**

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Senior Administrative Law Judge  
Office of Administrative Hearings

### **Notice of Right to File Exception to Proposed Order**

If the proposed order is adverse to a party, then the party has the right to file written exceptions to the order and present written argument concerning those exceptions pursuant to ORS 183.460. A party may file the exceptions and argument by sending them to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing them to P.O. Box 14480, Salem, Oregon 97309-0405; or faxing them to 503-378-4351; or e-mailing them to [mitchel.d.curzon@state.or.us](mailto:mitchel.d.curzon@state.or.us). The Insurance Division must receive the exceptions and argument within 30 days from the date this order was sent to the party.

CERTIFICATE OF SERVICE

On the 8th day of January 2013, I mailed the foregoing Proposed Order in Reference No. **1206002.**

BY FIRST CLASS MAIL:

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