

**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	)	<b>PROPOSED ORDER</b>
Audit of	)	<b>ON DEFAULT</b>
	)	
<b>LUMBER REMANUFACTURING, INC.</b>	)	Case No. INS 12-08-007

On May 30, 2012, SAIF Corporation (SAIF or the insurer) issued a Final Premium Audit Billing to Lumber Remanufacturing, Inc. (employer) for the audit period of February 1, 2011 through February 1, 2012. The employer received the Final Premium Audit Billing on June 4, 2012. On July 26, 2012, the Department of Consumer and Business Services (DCBS) received the employer's appeal of the Final Premium Audit Billing. On August 10, 2012, DCBS received from the employer a completed Petition requesting review of the Final Premium Audit Billing for workers' compensation policy number 983064.

On August 13, 2012, DCBS referred the matter to the Office of Administrative Hearings (OAH). OAH assigned the matter to Senior Administrative Law Judge (ALJ) Alison Greene Webster. On August 15, 2012, ALJ Barber issued an Order Granting Stay of Collection relative to the challenged billing.

On September 26, 2012, ALJ Webster presided over a telephone prehearing conference in the matter. The employer participated in the conference through its corporate principal, George Gabriel. Attorney Holly O'Dell appeared and participated on behalf of SAIF. DeAnne Hoyt appeared as a representative for SAIF. During the conference, the parties agreed to a January 22, 2013 hearing date.

On January 9, 2013, SAIF filed a request for an order compelling the employer to produce certain documents the employer had previously volunteered to produce during the prehearing conference. On January 14, 2013, ALJ Webster issued an Order Compelling Document Production, directing the employer to produce the listed documents on or before January 18, 2012.

On January 18, 2013 (a state mandated furlough day for the OAH), the employer submitted a request for a two week extension to comply with the Order Compelling Document Production. The employer did not request to postpone the hearing scheduled for January 22, 2013.

On January 22, 2013, ALJ Webster convened a hearing at the Salem offices of the OAH. The employer did not appear, and was declared in default. SAIF was represented by Attorney O'Dell. Ms. Hoyt appeared as the representative for SAIF. No witnesses

testified at the hearing. The hearing record closed on January 22, 2013, following admission of SAIF's proffered hearing exhibits.

## **ISSUE**

Whether the insurer properly classified individual payees noted in the premium audit as subject workers performing general labor in class 2710 and, if so, whether the May 30, 2012 Final Premium Audit Billing is correct.

## **EVIDENTIARY RULINGS**

Exhibits 1 through 8, offered by SAIF, were admitted into evidence.

## **FINDINGS OF FACT**

1. The employer, which began operating as Lumber Remanufacturing Inc., in October 2011, operates lumber kilns for drying lumber.<sup>1</sup> (Ex. 4 at 6.) George Gabriel is the company's Vice President and authorized representative. (Ex. 3 at 3.)

2. In December 2010, the employer procured workers' compensation insurance coverage from SAIF for the period of February 1, 2011 to January 31, 2012. At that time, the employer reported an estimated payroll of \$5,000 for the policy period, assigned to class 2710 (saw mill operations). (Ex. 2.)

3. In September 2011, SAIF received a workers' compensation claim from a Michael O'Brien, who reported an on-the-job injury while working for the employer on September 1, 2011. (Ex. 5.) The employer verified that the injury occurred on the employer's premises, but initially denied that Mr. O'Brien was an employee. During SAIF's investigation of the claim, Mr. O'Brien advised that he was a temporary employee, paid by the employer in cash, and that he worked directly for the employer and not through an agency. Although the employer disputed Mr. O'Brien's assertions, it later acknowledged to SAIF that he "is on our payroll now." (Ex. 6.)

4. Because of the conflicting information regarding Mr. O'Brien's status as a worker, SAIF's investigator grew concerned that the employer was not reporting its payroll properly. (Ex. 6.)

5. In a report received February 6, 2012, the employer reported payroll of \$33,923 to classification code 2710 (saw mill) for the period of February 1, 2011 to January 1, 2012, and payroll of \$7,914 to the same classification for the period of January 1, 2012 to February 1, 2012. (Ex. 7 at 2.)

---

<sup>1</sup> Prior to October 2011, the business operated as Custom Dry Kilns and Sawmill of Oregon, Inc. (Ex. 4 at 6; Ex. 8 at 3.)

6. In May 2012, SAIF undertook an audit of the employer's payroll for the period of February 1, 2011 through February 1, 2012. (Ex. 4.) In addition to the payroll reported by the employer (totaling \$41,837 for the audit period), the auditor determined that the employer's payments to casual laborers and other individuals in the amount of \$71,679 should have been reported as payroll. Consequently, the May 30, 2012 Final Premium Audit Billing was based on a total audited payroll of \$113,513, all assigned to class 2710. (Ex. 8 at 2.)

7. In the May 30, 2012 Final Premium Audit, SAIF explained to the employer its decision to include all of these payments in the audited payroll as follows:

The audit includes payments to casual laborers Shawn Russell (\$68), Leighton (\$136) and Shane Loucks (\$119) in class 2710 as they were paid an hourly rate, were working with your employees and were subject to your direction and control.

The audit includes payments to Mike O'Brien (\$289), Lynn Marks (\$1,668) and Steve Brooks (\$721) involved in labor class 2710. These persons were identified in your records as "purchases," yet O'Brien did file a claim which was paid. There is no evidence to support that these workers were not performing labor or an independent business. If you can produce additional documentation of the work or service performed, a revision may be possible.

The audit includes payments to Dave Gleason (\$1,285), Ken Raymond (\$3,494), Josh Kamp (\$23,587), Jeremy Crosky (\$1,940) and Jose Sevilla (\$10,964) involved in labor class 2710. These workers were also paid as employees, were subject to your direction and control and there is not evidence to support that they were independent businesses or non-subject earnings. If you can produce additional information to support the reason for payment or itemization of an allowable exclusion, a revision may be possible.

The audit includes \$600 paid to Eric Ward involved in labor class 2710. There is no evidence to support that he is an independent business and the amount was listed as a "commission."

The audit includes payments to Bruce Graves (\$3,301) and Ben Sorenson (\$15,594) involved in labor in class 2710. Both were shown on your safety meeting minutes, worked along with your employees and were subject to your direction and control. There is no evidence to support that they were independent businesses. If you can produce additional information to support the payment reason or itemization of an allowable exclusion, a revision may be possible.

The audit includes payments to Robert Foster (\$688), Dennis Murdock (\$1,000), Ted Murdock (\$400), Gary Turner (\$825), and Dennis Matheson (\$5,000) involved in general labor in class 2710. There is no evidence of ccb registration or independence as businesses. Notes included some building and grounds related work, however the information did not include any support of their freedom from your direction and control or provide business registration or related information. If you can produce additional information to support the payment reason or itemization of an allowable exclusion, a revision may be possible.

(Ex. 8 at 1-2.)

8. In the May 30, 2012 Final Premium Audit Billing, SAIF declared that the employer owed an additional premium of \$7,008.12, the difference between the total premium of \$4,435.59 from the reported payroll of \$41,837 and the total premium of \$11,443,71 from the premium audit payroll of \$113,513. (Ex. 8 at 5.)

### **CONCLUSION OF LAW**

The employer has not sustained its burden to establish that the May 30, 2012 Final Premium Audit Billing is incorrect.

### **OPINION**

The employer contests SAIF's May 30, 2012 Final Premium Audit Billing for the period of February 1, 2011 to February 1, 2012. In its petition to DCBS, the employer disputed expenses of \$70,866 which SAIF had assigned as payroll. As the party seeking redress before the Department, the 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).

To sustain its burden, the employer 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).

In its petition to DCBS, the employer noted that it did not have evidence to support its contention that the listed workers were not performing labor. In the prehearing conference, Mr. Gabriel asserted that the employer had some documentation that the individual workers identified in the audit were businesses or independent contractors, but the employer did not produce any such documentation prior to, or at the time of, the hearing. The employer did not appear for the hearing, and did not offer any evidence in support of its contention that SAIF's premium audit billing was incorrect.

Given the employer's failure to appear, and its failure to offer any evidence to show that that SAIF's premium audit is incorrect, the May 30, 2012 Final Premium Audit Billing stands.

### **PROPOSED ORDER**

I propose that DCBS issue the following final order:

The Final Premium Audit Billing dated May 30, 2012 (for audit period February 1, 2011 to February 1, 2012) is **AFFIRMED**.

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 24th day of January 2013, I mailed the foregoing Proposed Order on Default in Reference No. **1208007**.

BY FIRST CLASS MAIL:

George Gabriel  
Lumber Remanufacturing, Inc.  
PO Box 333  
Sheridan OR 97378

DeAnne Hoyt  
SAIF Corporation  
400 High St SE  
Salem OR 97312-1000

Holly O'Dell AAG  
Special Assistant Attorney General  
SAIF Corporation  
400 High St SE  
Salem OR 97312-1000

VIA ELECTRONIC MAIL:

Mitchel Curzon  
Chief Enforcement Officer  
Insurance Division  
Department of Consumer and Business Services

Lucy M Garcia  
Hearing Coordinator  
Office of Administrative Hearings