

**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>JAL CONSTRUCTION, INC.</b>	)	Case No. INS 1303013
	)	

**HISTORY OF THE CASE**

On January 30, 2013, SAIF Corporation (SAIF or the insurer) issued a Final Premium Audit Billing to JAL Construction, Inc. (employer) for the audit period of October 1, 2011 through October 1, 2012. The employer received the Final Premium Audit Billing on February 4, 2013. The employer appealed the Final Premium Audit Billing on March 8, 2013. On March 18, 2013, the Department of Consumer and Business Services (DCBS) received from the employer a completed Petition requesting review of the January 30, 2013 Final Premium Audit Billing for workers' compensation policy number 753258.

On March 19, 2013, 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 February 15, 2012, ALJ Rick Barber, on behalf of ALJ Webster, issued an Order Granting Stay of Collection relative to the challenged billing. On April 10, 2013, ALJ Webster presided over a prehearing telephone conference. Attorney Holly O'Dell represented SAIF, DeAnn Hoyt participated as SAIF's representative and corporate principal Joe Levesque participated on the employer's behalf. During the conference, the parties agreed to a July 2, 2013 hearing date.

ALJ Webster presided over a hearing in Salem, Oregon on July 2, 2013. Mr. Levesque appeared *pro se* for the employer. Assistant Attorney General O'Dell represented SAIF and Ms. Hoyt appeared as a representative of SAIF.

The following witnesses testified at the hearing: Mr. Levesque, on behalf of the employer; and Michael Craddock, Sr. Analyst for the National Council on Compensation Insurance (NCCI), on the insurer's behalf. The record closed at the conclusion of the hearing on July 2, 2013.

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## ISSUES

1. Whether SAIF properly classified \$78,038 in payroll to Code 5511 (Logging/Forest Road) instead of Code 5507 (Street or Road Construction).

2. Whether SAIF's January 30, 2013 Final Premium Audit Billing for the audit period of October 1, 2011 to October 1, 2012 is correct.

## EVIDENTIARY RULINGS

Exhibits 1 through 9, offered by SAIF, were admitted into evidence without objection. Exhibits 1 through 7, offered by the employer, were also admitted.

At hearing, official notice was taken of the *Basic Manual of Workers' Compensation and Employers Liability Insurance* published by NCCI and the *Scopes of Basic Manual Classifications*, in particular, the phraseology set out for classification Codes 5507 and 5511.

## FINDINGS OF FACT

1. Employer JAL Construction is a specialty contractor active in large public works construction projects. The employer's projects over the last 10 years have included road construction through forested land on Apiary Road in Columbia County, Oregon; an ODOT road project on Oregon Route 126 (Route F) through Bureau of Land Management (BLM) land between Eugene and Florence; an ODOT road project in a forested area of Douglas County between Roseburg and Elkton; and another ODOT road project through BLM land on Highway 126. (Test. of Levesque; Employer Exs 1 through 5.)

2. In October 2011, SAIF issued the employer policy number 753258, effective from October 1, 2011 through September 30, 2012. Based on the employer's representations of the business operations, SAIF assigned estimated payroll of \$368,807 (approximately one half of the employer's total payroll) to Code 5507<sup>1</sup> (Street or Road Construction). (SAIF Ex. 4.)

3. During 2012, the employer was awarded a contract for the reconstruction and repair of Forest Service Road 77 in the Wallowa Whitman National Forest (at mileposts 25.7, 26.3 and 28.1). The scope of work included repair of fill slopes using riprap buttressing, construction of a mechanically stabilized earth (MSE) retaining wall, along

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<sup>1</sup> Code 5507, Street or Road Construction; Subsurface Work and Divers, applies to clearing of right-of-way, earth excavating, filling and grading when performed by the principal street or road contractor or other insured street and road contractors. (*Scopes Manual*.) The code includes clearing, grading and moving of land to form the subsurface of new roads. It includes culvert work which is less than 10 feet from top to bottom inside the culvert. Project work includes removal of existing structures, road base, and wearing surfaces. (SAIF Ex. 8 at 25.)

with backfill and aggregate surfacing. The employer started work on this project in July 2012. (SAIF Ex. 6; SAIF Ex. 8 at 25.)

4. Forest Service Road 77 travels along the southern edge of the Wallowa Mountains. It parallels Eagle Creek and ends at the Catherine Creek Summit. Forest Service Road 77 is used to access forest campgrounds, mining claims and several private summer homes scattered throughout the area. (Test. of Levesque.) The employer repaired washed out portions of the road to the south of the Tamarack Campground. (Employer Ex. 7.)

5. In December 2012, SAIF Auditor Rick Moar audited the employer's records for the period of October 1, 2011 to October 1, 2012. As pertinent to this matter, based on his review of the employer's records and reports, the auditor found that classification Code 5511 (Logging/Forest Road Construction) should have been added to the policy to cover the work activities involved in the reconstruction and repair of Forest Service Road 77. (SAIF Ex. 8.)

6. In a Final Premium Audit Billing dated January 30, 2012, the auditor transferred \$78,038 in payroll to Code 5511 from Code 5507, based on the work performed in 2012 on Forest Service Road 77. The auditor explained the transfer as follows:

There was a classification difference when comparing the reported payrolls versus the audited wages.

The classifications and payroll associated with the assignment of wages was reviewed and discussed. JAL was awarded a contract in the Wallowa Whitman NF for the reconstruction and repair of Forest Road #77 with operations starting after July 1, 2012.

Class 5511 Logging/Forest Road Construction should have been added to your policy at that time. This classification carries a higher rate than class 5507 (where the payroll was reported).

Audit transfers a total of \$78,038 from class 5507 to class 5511 in the 2012 period.

(SAIF Ex. 8.)

7. The employer timely appealed the January 30, 2013 Final Premium Audit Billing, specifically challenging the audit's reclassification of payroll to Code 5511 from Code 5507. (Pleadings; test. of Levesque.)

8. Under the NCCI's classification system, Code 5507 is a national code that encompasses general road construction. NCCI has also approved Code 5511, a State

Special code that applies only in Montana and Oregon. In Oregon, Code 5511 applies to three distinct activities as follows:

(1) Forest—Access Road Construction or Maintenance and Drivers.

Note: Includes construction of maintenance of forest trail used for recreational purposes.

(2) Logging—Road—Construction and Maintenance—All Operations and Drivers.

Note: Excludes falling. Bucking and hauling of timber, Logging road construction and/or maintenance to be separately rated as Code 5511, including spur road and forest access roads.

(3) Reforestation—Forest Train Construction and Drivers.

SCOPE: This classification is to be used exclusively for road construction within forest access roads.

(SAIF Ex. 9; test. of Craddock.) Per NCCI, the “Forest—Access Road” phraseology under Code 5511 applies to all road construction or maintenance on roads in or around a forest, regardless of the potential risks or hazards of the activity. The roads need not be associated with logging activities, and can be roads that are used to access the forest for other purposes, such as national forest campgrounds, recreational areas, and fire access. (Test. of Craddock.)

9. For purposes of assigning payroll to classifications, a more specific classification code, including a State Special code, will trump a general code. (Test. of Craddock.)

### **CONCLUSION OF LAW**

1. SAIF properly classified \$78,038 in payroll to Code 5511 (Logging/Forest Road) instead of Code 5507 (Street or Road Construction).

2. The January 30, 2013 Final Premium Audit Billing for the audit period of October 1, 2011 to October 1, 2012 is correct.

### **OPINION**

The employer contests that portion of SAIF’s January 30, 2013 Final Premium Audit Billing for the period of April 1, 2011 to April 1, 2012 that transferred \$78,038 in payroll to Code 5511 from Code 5507. The employer contends that the work performed under the contract on Forest Service Road 77 did not involve any logging or heavy clearing, and therefore the payroll should be classified as Code 5507 (street or road construction). As the party seeking redress before the Department, the employer bears

the burden to establish that SAIF's premium audit is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993).

To sustain this 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 classifying an employer's business into appropriate job codes for purposes of premium rates, Oregon workers' compensation insurers are governed by rules set out in the NCCI *Basic Manual* and the phraseology set out in the *Scopes Manual*. As noted above, Code 5507 is a general code that applies to employers engaged in street or road construction involving subsurface work. The classification contemplates the clearing of the right-of-way, earth excavating, and filling and grading. Code 5511, on the other hand, is a State Special code that applies only in Montana and Oregon and is to be used exclusively for road construction within forest access areas.

Based on the evidence in the record, specifically the phraseology of Code 5511 and the testimony of the NCCI Analyst Craddock, SAIF properly assigned the payroll for work on Forest Service Road 77 to Code 5511. Even though the hazards or risks present on this particular project may have been the same, or perhaps even less than the employer's other large road construction projects that were assigned to Code 5507, the fact remains that this project in the Wallowa Whitman National Forest involved road construction on a forest access road. As Mr. Levesque acknowledged, Forest Service Road 77 is used to access, among other things, forest campgrounds, mining claims and several private summer homes scattered throughout the area. Because of the location and nature of Forest Service Road 77, the work under the contract falls within the specific activities described in Code 5511. Consequently, the employer has not sustained its burden to prove that SAIF's January 30, 2013 Final Premium Audit Billing is incorrect.

### **PROPOSED ORDER**

I propose that DCBS issue the following final order:

The Final Premium Audit Billing date January 30, 2013 (for the audit period of October 1, 2011 to October 1, 2012) is **AFFIRMED**.

Alison Greene Webster  
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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 MAILING

On July 23, 2013, I mailed the foregoing PROPOSED ORDER in Reference No. **1303013.**

BY FIRST CLASS MAIL:

JAL Construction, Inc  
L. Joe Levesque, President  
PO Box 6269  
Bend OR 97708-6269

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

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

Ryan Clark for Lucy M Garcia  
Hearing Coordinator  
Office of Administrative Hearings