

**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 No. INS 14-05-003
Audit of	)	
	)	
<b>OREGON CHIPPING AND LOGGING</b>	)	<b>PROPOSED ORDER</b>
<b>LLP</b>	)	

**HISTORY OF THE CASE**

On March 14, 2014, SAIF Corporation (SAIF, or the insurer) issued a Final Premium Audit Billing to Oregon Chipping and Logging, LLP (employer), covering the policy year July 1, 2012 through June 30, 2013. Employer received the Final Premium Audit Billing on March 17, 2014. Employer appealed the billing on March 28, 2014 and submitted a Petition on May 13, 2014. The Insurance Division (Division) received the Petition on May 14, 2014. On May 15, 2014, the Division referred the matter to the Office of Administrative Hearings (OAH), which initially assigned the case to Senior Administrative Law Judge Alison Greene Webster.

On April 29, 2013, ALJ Webster convened a prehearing conference to, among other things, set a hearing date. Attorney Holly O'Dell represented SAIF during the prehearing; LLP member Michael Graddy represented the employer. Hearing was scheduled for August 26, 2014. The OAH later reassigned the case to ALJ Rick Barber.

A telephone hearing was held as scheduled on August 26, 2014, before ALJ Barber.<sup>1</sup> SAIF was represented by Ms. O'Dell and Mr. Graddy represented employer. SAIF Premium Audit Analyst Eric Williams was the insurer representative and testified. Mr. Graddy testified for employer. The record closed on August 26, 2014.

**ISSUE**

Whether SAIF's Final Premium Audit Billing, as modified,<sup>2</sup> is correct.

---

<sup>1</sup> The hearing was originally scheduled to be held in person in Medford, but was switched to a phone hearing.

<sup>2</sup> As noted in the Findings of Fact, after the Final Premium Audit Billing SAIF agreed to accept employer's documentation concerning three contractors: Kurz, Krauss and Armstrong, and SAIF further agreed that the Final Premium Audit Billing should be modified in favor of the employer in those three instances.

## EVIDENTIARY RULINGS

Exhibits 1 through 13, offered by SAIF, were admitted into evidence without objection. Exhibit A, offered by employer and consisting of a summary and an equipment lease agreement,<sup>3</sup> was admitted into evidence over SAIF's objection.

## FINDINGS OF FACT

1. Oregon Chipping & Logging, LLP, was registered with the Secretary of State's office on July 22, 2009. There were four general partners: Michael Graddy, Carol Graddy, Linda Bitzer and Bob Bitzer. (Ex. 9). During the policy year of July 1, 2012 through June 30, 2013, employer was insured through the assigned risk pool and assigned to SAIF Corporation. (Ex. 2).

2. The intent of the limited partnership was to engage in logging using subcontractors to perform the actual logging tasks. Bob Bitzer, one of the partners, arranged for the logging to be performed. He used his logging company, Li'l Bit Logging, to perform the duties. (Test. of Graddy). Li'l Bit did not have workers' compensation coverage. The amount of the subcontract with Li'l Bit Logging was \$196,948. No amount of the contract was specifically designated as payroll. (Test. of Williams). Employer and Li'l Bit Logging also entered into an equipment lease, which by its terms required Li'l Bit to pay employer \$5,000 monthly for lease of heavy equipment. (Ex. A). The actual terms of the agreement were intended to be the reverse, but Bitzer wrote the lease agreement backwards. (Test. of Graddy).

3. Two claims were filed against Oregon Chipping & Logging. On March 15, 2013, a worker paid by Li'l Bit injured his low back. He did not file a claim until September 2013. When it was determined that Li'l Bit Logging did not have workers' compensation coverage, the claim was ultimately accepted under Oregon Chipping & Logging's policy on the basis of ORS 656.029. Bob Bitzer filed the second claim himself, after the other claim was accepted. In February 2013, Bitzer jumped off a loader and bit his tongue. Bitzer claimed that the injury to his tongue ruptured a tumor in his tongue, spreading cancer throughout his body. SAIF denied the claim because Bitzer, a partner, had not made a personal election to be covered. (Test. of Williams; Ex. 7). Bitzer died on or about November 6, 2013. (Ex. 7).

4. With two claims filed against employer and one found compensable under ORS 656.029, SAIF audited employer's records to determine what the correct premium should have been for the policy year of July 1, 2012 to June 30, 2013. As part of its audit, it sought the payroll records for Li'l Bit Logging. (Test. of Williams). Michael Graddy requested the records from Linda Bitzer, Bob Bitzer's widow, but she did not have the records and does not know where they are. (Test. of Graddy).

5. When SAIF discovered that it could not obtain the payroll records for Li'l

---

<sup>3</sup> Other documents initially included with Exhibit A were withdrawn and removed from the exhibit.

Bit Logging, it informed employer that it was required to use the full subcontract price as payroll under the “Subcontractor Table 1” of the NCCI<sup>4</sup> rules governing payroll allocation. Under that rule, if the subcontractor has not provided proof of workers’ compensation insurance, has not provided complete payroll records, and the subcontract price does not have a definite payroll amount, then the insurer is required to “[u]se the full subcontract price of the work performed during the policy period by the subcontractor as payroll.” (Test. of Williams, Ex. 13 at 1).

6. On March 14, 2014, SAIF issued a Final Premium Audit Billing to Oregon Chipping & Logging, LLC. After employer requested a hearing on the billing and provided more information to SAIF, SAIF orally agreed to not assess premium (and to credit the policyholder) on three of the subcontractors listed in the billing: Kurz, Krauss and Armstrong. (Test. of Williams). As of the hearing date, employer was still unable to obtain the payroll records from Li'l Bit Logging. (Test. of Graddy).

7. A1 Hauling was a trucking company that employer contracted with on occasion during the policy year. (Test. of Graddy). SAIF included the contract amounts paid to A1 as payroll. (Ex. 11).

### CONCLUSION OF LAW

SAIF’s Final Premium Audit Billing, as modified, is correct.

### OPINION

Employer contested SAIF’s Final Premium Audit Billing, contending that SAIF should not have included all of the Li'l Bit Logging subcontract as payroll, and further contending that A1 Hauling was a subcontractor for which premium would not be owed. 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).

SAIF has assessed premium against this employer for the workers at Li'l Bit Logging because that company, run by Bob Bitzer, did not have workers’ compensation insurance and two claims were filed against the company. Because the subcontractor did not have insurance, ORS 656.029<sup>5</sup> mandated that employer was required to pay for the

---

<sup>4</sup> National Council on Compensation Insurance

<sup>5</sup> ORS 656.029 states in part:

**Obligation of person awarding contract to provide coverage for workers under contract; exceptions; effect of failure to provide coverage.** (1) If a person awards a

claims of its subcontractor. Employer does not contest its responsibility for the claims, but contests the findings of the premium audit SAIF performed to determine the correct premiums. Specifically, employer contends that SAIF erred when it assigned the entire subcontract amount with Li'l Bit as payroll when there was evidence to show that portions of that subcontract were expenses other than payroll.

The premium audit identified other subcontractors which SAIF contended were subject to coverage and, as a result, assessed additional premium. Employer presented sufficient information before the hearing to establish, to SAIF's satisfaction, that SAIF should not assess premium concerning subcontractors Kurz, Krauss and Armstrong. Of the other subcontractors listed in the Final Premium Audit Billing, employer only specifically contested two at hearing: A1 Hauling and Li'l Bit Logging. Employer testified that A1 Hauling was a trucking company, but presented no evidence to show it was an independent contractor. Therefore, the assessment concerning A1 Hauling is affirmed and the balance of this opinion will focus on the subcontract with Li'l Bit Logging.

As noted above, Li'l Bit Logging subcontracted to perform the logging operation. It was owned and operated by Bob Bitzer, one of employer's partners, as a separate company. Bitzer died of cancer in 2013, and left no records of the payroll for Li'l Bit Logging. Employer has sought the records from Bitzer's widow and elsewhere, but to no avail.

Because of the lack of payroll records for Li'l Bit Logging, SAIF is basing its assessment of premium on the entire subcontract amount. Employer argues that SAIF's method leads to an inequitable result, because it is clear that the subcontract amount included expenses other than payroll.

Specifically, employer points out that there was an equipment lease of \$5,000 per month that should be taken out of the subcontract price. SAIF responds that the equipment lease in evidence actually requires Li'l Bit to pay employer \$5,000 per month. Employer concedes the contract was written incorrectly, but insists that it actually was an equipment lease paid by employer and, further, was part of the subcontract.

---

contract involving the performance of labor where such labor is a normal and customary part or process of the person's trade or business, the person awarding the contract is responsible for providing workers' compensation insurance coverage for all individuals, other than those exempt under ORS 656.027, who perform labor under the contract unless the person to whom the contract is awarded provides such coverage for those individuals before labor under the contract commences. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person who is charged with the responsibility for providing such coverage before labor under the contract commences, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.

However, regardless of the truth of employer's assertion that a portion of the subcontract amount was for expenses other than payroll, SAIF argues that it has no alternative but to treat the entirety of the subcontract as payroll under NCCI rules. I agree with SAIF.

SAIF based its decision on a specific provision in the payroll allocation rule. Exhibit 13 sets forth the "Subcontractor Tables" in the NCCI rules. Table 1 is pertinent to this case. It applies when "the contractor has not furnished evidence of workers' compensation insurance and..." the contractor does one of three things:

- Furnishes complete payroll records of the subcontractor's employees...
- Does not furnish complete payroll records and the subcontract price does not reflect a definite payroll amount...
- Does not furnish payroll records, but documentation of a specific job discloses that a definite amount of the subcontract price represents payroll...

(Ex. 13 at 1). SAIF correctly determined that the middle fact situation<sup>6</sup> applied in this case, because employer was unable to obtain the Li'l Bit Logging payroll records and there was no specific payroll amount in the subcontract.

After determining which of the three fact situations applies, Table 1 tells the insurer how "to calculate the additional premium." The method that applies to the middle fact situation and to this case requires the insurer to:

Use the full subcontract price of the work performed during the policy period by the subcontractor as payroll.

(*Id.*). Thus, SAIF correctly treated the full subcontract price of the work performed as payroll.

Therefore, although the circumstances are unfortunate, the Final Premium Audit Billing, as modified by the removal of the amounts for Kurz, Krauss and Armstrong, must be affirmed.

---

<sup>6</sup> The Table in Exhibit 13 presents the information in a box graph not easily reproduced here.

## **PROPOSED ORDER**

I propose that the department issue the following final order:

That the Final Premium Audit Billing dated March 14, 2014, be **AFFIRMED AS MODIFIED**. The charges for Kurz, Krauss and Armstrong are removed, and the balance of the billing is affirmed.

DATED: October 3, 2014

Rick Barber  

---

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 3rd day of October 2014, I mailed the foregoing PROPOSED ORDER in Reference No. **1405003**.

BY FIRST CLASS MAIL:

Michael A. Graddy  
Oregon Chipping and Logging Limited  
Partnership  
779 E Vilas Road  
Central Point, OR 97502-3269

Eric Williams  
Underwriting Division, SAIF Corporation  
400 High Street SE  
Salem, OR 97312-0700

Michele Summerlin  
Underwriting Division, SAIF Corporation  
400 High Street SE  
Salem, OR 97312-0700

Holly O Dell  
Managing Attorney, Legal Services Division  
400 High Street SE  
Salem, OR 97312-0700

Ryan Clark  
Hearing Coordinator  
Office of Administrative Hearings