

**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) **PROPOSED ORDER**
PREMIUM AUDIT OF:)
)
ATHERLY CONTRACTING, LLC) OAH Case No.: INS 14-07-005
)

HISTORY OF THE CASE

On December 3, 2013, SAIF Corporation (SAIF) issued Atherly Contracting, LLC (Company) a Final Premium Audit Billing for the period April 1, 2012 through April 1, 2013. On June 16, 2014, SAIF issued the Company a Revised Final Premium Audit Billing (Revised Audit) for the period April 1, 2012 through April 1, 2013. On July 3, 2014, the Department of Consumer and Business Services (DCBS) received the Company's request for hearing.¹ On July 25, 2014, DCBS received the Company's Petition, requesting review of the Revised Audit, and its request for stay of collection for amounts owed under the Revised Audit.

On July 29, 2014, DCBS referred the matter to the Office of Administrative Hearings (OAH). On August 12, 2014, Administrative Law Judge (ALJ) Rick Barber issued an Order Granting Stay of Collection. Subsequently, the OAH re-assigned the matter to ALJ Samantha Fair.

On October 8, 2014, ALJ Fair convened a telephone prehearing conference in the matter. SAIF appeared, represented by its attorney Holly O'Dell. Eric Williams, SAIF's premium audit program analyst, also appeared. The Company did not appear. ALJ Fair scheduled the hearing for November 17, 2014, and set deadlines for submission of witness lists and exhibits.

On October 30, 2014, ALJ Fair convened a telephone prehearing conference. SAIF appeared, represented by Ms. O'Dell. The Company appeared, represented by its attorney Matthew Denley. The Company requested a postponement of the hearing, which was granted by ALJ Fair. ALJ Fair scheduled the hearing for January 8, 2015, and set deadlines for submission of witness lists and exhibits.

A hearing was held on January 8, 2015, in Salem, Oregon with ALJ Fair presiding. SAIF appeared, represented by Ms. O'Dell. The Company appeared, represented by Mr. Denley. Testifying on behalf of SAIF was Mr. Williams. Testifying on behalf of the Company were Darst Atherly, president and sole member of the Company, and Hunter Caputo of HR Support,

¹ Pursuant to ORS 737.318(3)(d) and ORS 737.505(4), DCBS provides the appeal process for insureds to question the results of an insurance company's premium audit.

which performs payroll and bookkeeping services for the Company. The hearing was continued to January 21, 2015 for additional testimony.

The hearing reconvened on January 21, 2015, with ALJ Fair presiding. Both parties appeared, represented by their respective attorneys, and additional testimony was taken from Mr. Williams. ALJ Fair continued the hearing to February 13, 2015, for additional testimony.

On February 12, 2015, the OAH and SAIF received additional exhibits from the Company. On February 13, 2015, Presiding ALJ John Mann convened a status conference at which both parties appeared. ALJ Mann postponed the continued hearing to March 2, 2015 and set a date of February 19, 2015, for a status conference for ALJ Fair to rule on the admissibility of the additional exhibits.

On February 18, 2015, SAIF submitted additional exhibits to the OAH and the Company. On February 19, 2015, ALJ Fair convened a status conference at which both parties appeared and ruled on the admissibility of the additional exhibits.

On March 2, 2015, the hearing reconvened with ALJ Fair presiding. Both parties appeared, represented by their respective attorneys. Mr. Atherly testified. The record closed on March 2, 2015, at the conclusion of the hearing.

ISSUES

Whether SAIF's June 16, 2014 Revised Final Premium Audit Billing correctly billed the Company for the following:

1. Reclassification of the Company's employees from classification Code 0124 to classification Code 2702;
2. Allowance of saw rental exclusion only to employees with classification Code 2702; and
3. Limitation of the per diem exclusion to \$75 per day.

ORS 737.318, OAR 836-042-0001 *et seq.* and OAR 836-043-0001 *et seq.*

EVIDENTIARY RULINGS

Exhibits A1 through A26, offered by SAIF, were admitted into the record without objection. Exhibits R1 through R4 and R9, offered by the Company, were admitted into the record without objection. ALJ Fair overruled SAIF's objections to Exhibits R5 through R8, offered by the Company, and admitted them into the record.

On February 12, 2015, the Company offered Exhibits R10 through R12. Exhibits R10 and R12 were excluded based upon ALJ Fair's determination that the exhibits were irrelevant. ALJ Fair sustained SAIF's objections to pages 1 through 3 of Exhibit R11, which were excluded

from the record. ALJ Fair overruled SAIF's objections to the remainder of Exhibit R11, pages 4 through 8, which were admitted into the record.

On February 18, 2015, SAIF offered Exhibit A27 and two proposed Exhibits R12. On February 19, 2015, SAIF withdrew its proposed Exhibits R12.² ALJ Fair admitted Exhibit A27, submitted by SAIF, into the record.

FINDINGS OF FACT

1. The Company performs work in the logging industry, including reforestation, timber felling and wildland firefighting. Reforestation includes the cleanup work that occurs after an area has been logged. The work includes cutting live trees, removal of underbrush, lopping slash, hand piling slash, and/or burning slash for the purpose of fuel reduction, natural regeneration, and/or site preparation for replanting. Trees cut during reforestation are non-commercially viable trees, commonly called whips, and the cutting work is commonly called pre-commercial thinning, or whip felling, to indicate that the cut trees are not commercially viable. At the time reforestation work is performed, the loggers of the commercially viable trees and their equipment are no longer on the work site. The Company has separate crews to perform the hand-piling work versus the cutting work. All work performed by the cutters involves cutting trees with chain saws. The Company will train dedicated hand-pilers to perform cutting work. (Test. of Atherly.)

2. During the period April 1, 2012 through April 1, 2013, the Company performed work on the following five job sites located in eastern Oregon:

- Idaho Creek Plantation Thinning Contract in Malheur National Forest (Idaho Creek);
- Sled/Plow Contract in Deschutes National Forest (Sled/Plow);
- Skyliner Stewardship Contract in Central Oregon Acquisition Area (Skyliner);
- Fuzzy/Hunter Cut Skid Deck Contract in Ochoco National Forest (Fuzzy/Hunter); and
- Clyde Stewardship Contract in Boise Cascade (Clyde).

(Test. of Atherly.)³ The live trees cut by the Company's employees on these job sites were not commercially sold.⁴ (*Id.*)

3. The Company assigned on-site foreman to keep hand-written logs of the hours each employee spends on the job sites, which were forwarded to the Company every two weeks. If the foreman was unable to forward the logs to the Company, the foreman called the Company and verbally provided the information. The Company representative recorded the information

² SAIF submitted two alternate versions of the Company's Exhibit R12.

³ The Company also performed wildland firefighting work throughout Oregon; however, the Company was not disputing SAIF's allocation of payroll to the classification code of 2704. (Test. of Atherly; *see* Petition.) Therefore, the Company's firefighting work will not be discussed in this Proposed Order.

⁴ Some logging operations include a thinning sale, which is a commercial sale of pre-commercial trees. (Test. of Atherly.)

and forwarded it to the payroll service. The Company's permanent time records were those records that were forwarded to the payroll service. (Test. of Atherly.) The records included the days worked but rarely listed the month or year.⁵ The records usually noted a general job location, such as a nearby town or the applicable forest, but rarely noted any specific logging unit referenced in the contracts. (Exs. A27 at 1-20; R11 at 4-8.) At the top of the records, there were job designations, such as "Pilers," "Cutting - Fuels Reduction," or "Slash Cutters." (Exs. A27; R11 at 4-8.) Several of the Company's records were not the original records from the field but e-mails sent to the Company's payroll services. (Ex. A27 at 6, 9, 10, and 20.) Several of the time records showed pilers and cutters working the same job location on the same days. (Exs. A27 at 2, 3, 5, 19; R11 at 5.) Employees also worked multiple job sites in the same day. (Test. of Atherly.)

4. The National Council on Compensation Insurance, Inc. (NCCI) produces a Basic Manual and a Scopes Manual that include special classifications for logging in Oregon and other states. (Ex. A3 at 1.) Effective April 1, 2007, NCCI added the new classification code 0124 for reforestation and drivers, which was only used in Alaska, Idaho, Montana and Oregon. (Exs. A2 at 1; R1 at 1.) As provided in the Scopes Manual, classification Code 0124 includes:

AK – REFORESTATION & DRIVERS

Includes commercial pre-thinning of trees. Pre-thinning is the process of removing young trees from a previously logged area to permit the selected remaining trees to grow faster and healthier. * * * * *. This classification may not be assigned to a risk engaged in other logging activities described by another classification. Therefore, Code 0124 is not applicable to risks that engage in both commercial pre-thinning (silviculture) and other logging operations.

AK – REFORESTATION – FUELS REDUCTION AND/OR BRUSH CUTTING, SLASHING & DRIVERS.

Performed in a reforested, plantation, or natural growth area. This includes the cutting of seedling/sapling trees less than 8 inches diameter at breast height (DBH) when part of a brush cutting/disposal contract.

* * * * *

OR – REFORESTATION – FUELS REDUCTION AND/OR BRUSH CUTTING, SLASHING & DRIVERS.

Performed in a reforested, plantation, or natural growth area. This includes the cutting of seedling/sapling trees less than 8 inches diameter at breast height (DBH) when part of a brush cutting/disposal contract.

⁵ In most cases, Atherly identified the month and year for the records by the fax date on the exhibit copies; however, those dates reflected the date that HR Support received the faxed records from the Company. (Test. of Atherly; Exs. A27 and R11 a 4-8.)

* * * * *

OR – REFORESTATION– SLASH PILING AND BURNING & DRIVERS.

When performed after the logging operations have been completed. Wildland or forest fighting by contractor–all operations at location & drivers to be separately rated to Code 2704.

OR – REFORESTATION– SLASHING & DRIVERS.

When performed *after* the logging operations have been completed.

* * * * *

(OR) State Addendum: Code 0124 is applicable to contractors who perform a wide variety of work related to reforestation. Operations are generally performed after a logging show; however, other non-logging related work is often performed by such contractors. Operations specifically assigned to 0124 are:

1. Slash piling and burning – following a logging show, all logging debris is pulled together by tractors or hand. Chain saws may be used to reduce the large pieces to manageable sizes. * * * * *

* * * * *

3. Site preparation – usually performed by hand or machine, this includes the clearing of underbrush and small trees from an area to be replanted.

* * * * *

8. Fuels reduction and brush cutting – performed in a reforested, plantation, or natural growth area. This includes the cutting of seedling/sapling trees less than 8 inches diameter at breast height (DBH) when part of a brush cutting contract.

9. Limbing and/or lop and scatter – for the purpose of timber quality or reduction of ladder fuel when performed from the ground.

10. Girdling – when a ring of bark is cut from the tree in order to kill the tree.

Other reforestation-related activities to be separately rated are:

* * * * *

5. Tree thinning – the removal of small trees for timber stand improvement – 2702[.]

(Ex. R1 at 1-3; emphasis in original.) For Oregon, there was never any intention of classifying the cutting of small trees as Code 0124 except when it was done incidentally in connection with a brush cutting job. Tree thinning is subject to Code 2702, which has no size requirements. (Ex. A8 at 1-2.) The Scopes Manual further provides that classifications are determined by overall business operations. (Test. of Williams.)

5. The Basic Manual includes the Oregon description of classification Code 2702 for nonmechanized equipment operations and drivers. It provides, in part:

This classification will apply to the operations at any logging site which does not meet the qualifications for Code 2725. Separately classify slash piling and/or burning as Code 0124; fuels reduction or brush cutting performed in a reforested, plantation or natural growth area, including the cutting of seedling/sapling trees less than 8” diameter at breast height (DBH) when part of a brush disposal/removal contract as Code 0124, limbing from the ground related to fuels reduction or timber stand improvement as Code 0124[.]

(Ex. A3 at 1-2.)⁶ The Basic Manual also provides that “Slash piling and/or burning to be separately rated as Code 0124, when performed after the logging operations have been completed.” (*Id.* at 1; emphasis in original.) Tree felling involves significant physical hazards to all persons on the job site. Because of this exposure, Code 2702 is a site specific code and applies to all work performed on the job site. (Test. of Williams.)

6. Prior to 2011, the Company reported its payroll to SAIF using both Codes 0124 and 2702 as well as other codes. (Ex. A5, A7.) On September 22, 2011, SAIF issued the Company a Final Premium Audit Billing for the period April 1, 2010 through April 1, 2011. SAIF informed the Company that all wages should be classified as Code 2702, except for forest fire work which would be classified as Code 2704. SAIF waived a portion of the premium, allowing some Code 2702 work to be classified as Code 0124 for that audit period, but advised the Company that, effective December 1, 2011, “all tree thinning, timber falling and pre-commercial tree thinning contracts are to be reported as 2702.” (Ex. A14 at 1.)

7. On December 31, 2012, SAIF issued the Company a Final Premium Audit Billing for the period April 1, 2011 through April 1, 2012. SAIF informed the Company that all tree thinning wages were being re-classified from Code 0124 to Code 2702 beginning December 1, 2011. It waived reclassification of those wages for the period prior to December 1, 2011. (Ex. A19 at 1.)

⁶ Code 2725 is mechanized equipment operations and drivers, i.e. all operators at the logging site are contained in a vehicle or structure. (Ex. A3 at 1; test. of Williams.)

8. On June 16, 2014, SAIF issued the Company the Revised Audit for the period April 1, 2012 through April 1, 2013. SAIF re-classified all wages reported by the Company as Code 0124 to Code 2702; limited per diem to \$75 per day; and limited saw rental exclusion to wages reported to Code 2702.⁷ (Ex. A24.)

Idaho Creek Contract

9. In 2010, the United States Forest Service (USFS) awarded the Idaho Creek contract to the Company for a plantation thinning project “that include precommercial thinning and handpiling of trees up to 9 inches * * *” covering a 31-acre area. (Exs. R4 at 1-2; A17 at 2.) The detail sheet for the Idaho Creek contract referenced “Plantation Maintenance” and called for “fuels treatment” for precommercial thinning and hand piling of “mixed conifer” species up to a maximum of nine inches diameter at breast height (DBH).⁸ (Ex. R4 at 3.) Pursuant to this contract, the Company performed whip cutting and hand piling on the job site, primarily for the purpose of fuel reduction. The site was last logged approximately 20 years prior to the award of the Idaho Creek contract and re-planted after the logging. (Test. of Atherly.)

Sled/Plow Contract

10. In 2010, the USFS awarded the Sled/Plow contract to Gahlsdorf Logging, Inc. (Gahlsdorf) to perform mechanical thinning and bunching of designated material; skidding, limbing and decking; hand thinning or whip-felling of excess material; and treatment of slash by hand or grapple piling. (Ex. R5 at 2, 26.) The contract provided that cut trees included lodgepole pines, mountain hemlocks and white firs up to 16 or 21 inches DBH. (Ex. R5 at 60-65.) Thinning would reduce the stand density of trees primarily to improve growth and enhance forest health. (*Id.* at 32.) Pursuant to the contract, Gahlsdorf heavily logged the job sites. (Test. of Atherly.)

11. Gahlsdorf hired the Company to perform the portion of the Sled/Plow contract that required the whip felling and lopping of live trees. During the performance of the contract, the Company cut dead and distressed lodgepole pines, green trees, and incidental trees as well as clearing brush and cutting small trees. At the time the Company performed its work, Gahlsdorf had completed its logging and removed all of its logging equipment from the job site. There was no written contract between Gahlsdorf and the Company. (Test. of Atherly.)

12. USFS confirmed that the work completed by the Company “was reforestation related and not part of the logging operation.” (Ex. R5 at 1.)

⁷ The Company had not previously reported per diems or saw rental exclusions to SAIF. (Ex. A26 at 2.)

⁸ DBH is a logging term that refers to the diameter of the main trunk of the tree at 4.5 feet above ground level on the uphill side of the tree. (Ex. R6 at 38.)

Skyliner Contract

13. In 2011, the USFS awarded the Skyliner contract to Kornish Forest Contracting, Inc. (Kornish) for the removal of hand slash piles, landing piles and log decks; road reconstructions; precommercial thinning, lopping, bucking and hand piling, and mechanical mastication of brush and slash. (Ex. R6 at 1, 5.) The objective of the Skyliner contract was to reduce the wildfire hazard risk near private property holdings by removing hand piles and slash and thinning of small diameter trees. (*Id.* at 6.) Items 4 and 6 of the contract described precommercial thinning as the hand thinning of trees up to nine inches DBH and required compliance with further specifications listed in Section C of the contract. (*Id.* at 33-34.) Section C required the thinning of western juniper trees up to 12 inches DBH. (*Id.* at 42.)

14. On May 14, 2012, the Company signed a sub-contracting agreement with Kornish to perform work on the Skyliner contract. The agreement required the Company to perform “cutting and sectioning of whip material in Wet Unit 4. Cutting will take place post logging and will comply with contract specifications for Item 4. There are approximately 137 acres of fuels reduction work covered by this agreement.” (Ex. R6 at 56.)

15. On June 1, 2012, the Company signed a second sub-contracting agreement with Kornish to perform work on the Skyliner contract. The agreement required the Company to perform “cutting and hand piling of whip material in Wet Units 1, 2, & 5. Cutting will take place post logging and will comply with contract specifications for Item 6. There are approximately 48 acres of fuels reduction work covered by this agreement.” (Ex. R6 at 57.)

16. Pursuant to its contracts with Kornish, the Company performed pre-commercial thinning and hand-piling after Kornish logged the commercially viable trees and removed its equipment from the job site. (Test. of Atherly.)

Fuzzy Hunter Contract

17. In 2011, the USFS awarded the Fuzzy Hunter contract to Gahlsdorf for mechanized tree felling; skidding, limbing, bucking and decking; slash piling; whip felling; and lopping of slash. (Ex. R7 at 3, 7.) Items 1c, 1d, 2c, 2d, 3c and 3d in the contract included whip felling and lopping of slash. (*Id.* at 2.) Whip felling included the cutting of excess, dead, cut, or cull trees.⁹ (*Id.* at 29.) Excess, cull and dead trees included those trees from 4 to 8 inches DBH. On several of the units, excess and cull trees included lodgepole pines up to 20.9 DBH. On a couple of units, excess and cull trees included ponderosa pine and white fir up to 20.9 DBH. (*Id.* at 52-54.)

18. Gahlsdorf hired the Company to perform the portion of the Fuzzy Hunter contract that required whip felling and lopping of slash to facilitate the regrowth of trees. The Company completed its work after Gahlsdorf logged the commercially viable trees and removed its equipment. There was no written contract between Gahlsdorf and the Company. (Test. of Atherly.)

⁹ Cull trees are live trees that do not meet specifications of usability. Excess trees are trees not needed to meet spacing requirements or a cut tree that is not completely severed. (Ex. R7 at 27.)

19. On October 16, 2014, the USFS confirmed that the work completed by the Company on the Fuzzy Hunter contract, as listed in Items 1c, 1d, 2c, 2d, 3c and 3d in the contract, was:

whip felling of sub-merch following the logging, and lopping of that activity slash.

Those activities are classified as “Site-Prep for Natural Regeneration” and are part of our reforestation target in our Program of Work. The service provided by the contractor to cut this material was therefore reforestation related and not part of the logging operation.

(Ex. R7 at 1.)

Clyde Contract

20. In 2010, the USFS awarded the Clyde contract¹⁰ to Boise Cascade Wood Products, LLC (Boise Cascade) to perform fuels reduction; piling and removal of fuels; tree pruning; tree girdling, road maintenance work; road decommissioning; and commercial harvest of 252 acres. The objectives of the contract were to improve forest health, provide fuel treatments to manage fire effects, improve forest structure, improve road management and decommission, and utilize timber resources. (Ex. R8 at 14.) Pruning required the removal of lateral branches from standing trees left after harvest operations. (*Id.* at 76.) Girdling required the removal of bark from mistletoe-infested trees so that the tree would die. (*Id.* at 79.)

21. Boise Cascade contracted with Clear Pacific, Inc. to perform the portions of the Clyde contract that called for fuels reduction, slash piling, pruning and girdling. Clear Pacific hired the Company to perform work on the Clyde contract. (Ex. R8 at 1-2.) The work performed by the Company for Clear Pacific was “typical of the post logging fuels reduction that [it does]; small diameter tree cutting, generally referred to a brush cutting, or fuels reduction” and included girdling, pruning and piling. (Ex. A17 at 2.) At the time the Company performed its work, Boise Cascade had completed its logging and removed all of its logging equipment. There was no written contract between Clear Pacific and the Company. (Test. of Atherly.)

General Information

22. The Sled/Plow, Skyliner, Fuzzy Hunter and Clyde contracts were all stewardship contracts awarded by the USFS that required extensive logging. Stewardship contracts do not distinguish contracted work as post or pre-logging activities. The Idaho Creek contract was a thinning contract. (Test. of Atherly.)

¹⁰ Neither party had a copy of the accepted contract; however, the Company provided a copy of the bid proposal from USFS (Ex. R8.), which the ALJ accepted as the most accurate representation of the terms of the contract.

Per Diem and Saw Rental

23. The Company pays a per diem of \$123 per day to employees that travel more than 50 miles to reach a job site. The purpose of the per diem is to reimburse employees for expenses they incur for housing and food while traveling away from their homes. The rate is based upon limits set by the U.S. Government Services Administration. The Company does not obtain receipts of actual expenses incurred by the employees. (Test. of Caputo.)

24. The Company pays saw rentals to employees who provide their own chain saws. The saw rental payments are equivalent to 20 percent of the employees' gross pay. The Company considers the saw rental payments to be reimbursement to the employees for the use of the employees' saws. It is a standard in the timber industry for employers to make saw rental payments based upon 20 percent of the employees' gross pay to employees who provide their own chain saws. (Test. of Caputo.)

25. The Basic Manual Rule 2-B provides that "payroll means money or substitutes for money." (Ex. A22 at 4; emphasis in original.)

26. The Basic Manual Rule 2-B-1 provides a list of examples of money or substitutes for money that are included in payroll. (Ex. A22 at 4.) Rule 2-B-1-h provides:

Payment or allowances for hand tools or hand-held power tools used by employees in their work or operations for the insured. These tools may be supplied directly by the employee or to the employee through a third party.

(*Id.*; emphasis in original.)

27. Oregon has adopted some changes to the special classification of logging in the Basic Manual. (Ex. A3 at 1.) In its description for the classification code of 2702 for Oregon, the Basic Manual provides, in part:

Where bucking, falling, or limbing is performed by persons who furnish their own power equipment (such as, but not limited to, chain saws) under an agreement in which the rental value of such equipment is included in the contract price for such operations, not less than 80% of such total amount paid such persons must be included as remuneration for the purposes of establishing the basis of premium or such operations[.]

(*Id.* at 2.) No other classification code provides for the exclusion of saw rental payments other than 2702. (Test. of Williams.)

28. The Basic Manual Rule 2-B-2 provides a list of specific types of money or substitutes for money that are excluded from payroll. (Ex. A22 at 5.) Oregon has adopted its own version of Rule 2-B-2-h, which provides, in part:

Expense reimbursements to employees to the extent that an employer's records substantiate that the expense was incurred as a valid business expense.

Note 1: When it is determined the employee is receiving expense reimbursements and the employer did not maintain verifiable receipts for the incurred expenses, a maximum of \$75 for each such day, * * *.

Note 2: Reimbursed expenses and flat expense allowances, except for hand or power tools, paid to employees may be excluded from the audit provided that all three of the following conditions are met:

* * * * *

The amount of the expense or allowance approximates the actual expense incurred by the employee in the conduct of his or her work.

(*Id.* at 7-8; emphasis in original.)

29. In the Revised Audit, SAIF excluded \$9,926 as saw rental from the Company's total gross payroll. The amount of the saw rental exclusion was limited to 20 percent of the total amount of saw rental the Company paid to employees performing work within classification code 2702. (Ex. A24 at 2.) All saw rental payments made to employees performing work within classification code 2704 were included in payroll for purposes of the Revised Audit. (Exs. A21 1-2; A24 at 2.)

30. In the Revised Audit, SAIF excluded \$23,700 as per diem from the Company's total gross payroll. The amount of the per diem exclusion was limited to \$75 per day per employee. (Ex. A24 at 2.)

CONCLUSIONS OF LAW

SAIF correctly billed the Company by:

1. Properly classifying the majority of the employer's payroll to Code 2702.
2. Properly limiting the saw rental exclusion to employees in the Code 2702.
3. Properly limiting the per diem exclusion to \$75 per day.

OPINION

The Company contests the Revised Audit for the period of April 1, 2012 to April 1, 2013. In its Petition to DCBS, the Company requested the reclassification of payroll from Code 2702 to Code 0124, allowance of saw rentals paid to all employees as an exclusion from payroll, and

allowance of the entire per diem payments to employees as an exclusion from payroll. The Company 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 Company 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).

Pursuant to ORS 737.310, ORS 737.560 and OAR 836-043-0001 *et seq.*, NCCI is the rating organization licensed in Oregon to establish and file rates and classifications for workers' compensation insurance. OAR 836-043-0005(14). NCCI produces a Basic Manual and a Scopes Manual for workers' compensation rates and classifications that are used by Oregon insurers in their audit procedures. OAR 836-043-0115.

Classification Codes 0124 and 2702

The Company contends that its payroll should be classified as Code 0124 because the work was reforestation, fuels reduction or pre-commercial thinning performed post-logging operations. SAIF contends that it properly classified the payroll as Code 2702 because the Company performed work on logging and/or tree thinning contracts. The evidence establishes that SAIF correctly classified the payroll as Code 2702.

The Basic Manual provides that operations at any logging site, which do not meet the qualifications for Code 2725, are Code 2702. The Sled/Plow, Skyliner, Fuzzy Hunter and Clyde contracts provided for the logging of commercially viable trees along with the usual assortment of accompanying activities, such as piling, decking, road construction, and precommercial tree thinning. Code 2702 applies to all activities performed at a logging site. Therefore, because these four contracts were all logging contracts and the Idaho Creek contract was a thinning contract, all activities performed at the logging sites, including the Company's activities, are allocable to Code 2702.

The text of Code 2702 cross-references Code 0124 to provide for the use of that code for specific activities, such as slash piling, fuels reduction or brush cutting, and limbing. The Company argued that it performed reforestation or fuels reduction after logging was complete. However, it is not the terminology used for the work that controls the application of classifications codes.¹¹ Rather, it is the actual work performed. On all five job sites, the Company cut trees using chain saws. Code 0124 only provides two descriptions for activities involving tree cutting: site preparation and brush cutting contracts. There is no evidence in the record that any of the Company's work was for the purpose of site preparation. The Sled/Plow, Skyliner, Fuzzy Hunter and Clyde contracts were logging contracts that included the associated clean-up work, such as slash piling, limbing, whip felling, performed after the commercially viable trees had been logged. The Idaho Creek job site did not involve site preparation as the

¹¹ This is especially true in the field of logging where the industry uses a variety of interchangeable terms, such as precommercial thinning and whip felling.

area was logged and replanted many years prior to the Company's activities. The majority of the Company's work for all five job sites specifically referenced the goal of the work as fuels reduction, not site preparation.

The Scopes Manual for Code 0124 lists fuels reduction and brush cutting in the same paragraph.¹² The Company contended that its tree cutting was only for fuels reduction and, therefore, the eight-inch DBH restriction was not applicable to its activities. However, the only phrase providing for the cutting of trees is in reference to brush cutting, not fuels reduction. Therefore, even if these activities were performed after the logging operations have been completed, rather than as part of the logging contract as supported by the evidence, the activities would still not qualify as Code 0124 because the Company cut trees up to nine inches or more DBH.¹³

On the Clyde and Sled/Plow job sites, the Company performed limbing and, on the Clyde job site, girdling. On all the job sites, the Company performed slash piling. These activities may potentially be allocated to Code 0124, if performed in the absence of any Code 2702 activities. However, Code 2702 is a job site classification code in which all activities performed on a qualifying site must be classified as Code 2702 activities. Because the Company's performance of limbing, girdling and slash piling were all performed in conjunction with its precommercial tree thinning Code 2702 activity, these additional activities must also be classified as Code 2702.

SAIF properly classified the Company's payroll for the activities performed on the five job sites during the audit period as Code 2702.¹⁴

Saw Rental Exclusion

OAR 836-042-0055(1)(f) defines payroll that must be included for determination of workers' compensation premiums. It provides, in part:

“Payroll” means money or substitutes for money that are payable to workers for their services and that are specified or defined by the rating system used by the insurer[.]

¹² The fact that Alaska provided for Code 0124 to include pre-commercial thinning further supports the finding that Oregon specifically intended to exclude pre-commercial thinning from its use of Code 0124.

¹³ The Idaho Creek contract was the only contract that involved strictly post-logging operations. However, the contract provided for the cutting of trees up to 9 inches DBH; therefore, the activities do not qualify as Code 0124.

¹⁴ Both parties agreed that this case did not involve a determination of interchange of labor and thus verifiable time records per OAR 836-042-0060. Instead, the issue was confined to a determination on whether all the activities were Code 0124 or Code 2702. Even if it was necessary to address interchange of labor issues, the Company's time records failed to meet the criteria of verifiable time records as the duties listed on the time records were not defined enough for an insurer to properly classify the assignments and the records were not all original records as required by OAR 836-042-0060.

The Basic Manual Rule 2-B-1-h specifically provides that payments made to employees for the use of hand-held power tools are included in payroll. However, Oregon, in its adopted provisions for Code 2702, provides that at least 80 percent of payments made to employees for the use of their power equipment, such as chain saws, are included in payroll. By implication, this provision allows for an exclusion from payroll of a maximum of 20 percent of payments made to employees for the use of their power equipment in the performance of work classified as Code 2702. Additionally, all saw rental payments made to employees performing work classified as Code 0124 or Code 2704 must be included in the Company's payroll. In its Revised Audit, SAIF correctly limited the exclusion for the Company's saw rental payments to 20 percent of the total payments made to those employees performing work classified as Code 2702.

Per Diem Exclusion

Oregon's adopted version of the Basic Manual's Rule 2-B-2-h limits exclusions from payroll for per diem payments made to employees to \$75 per day unless receipts for actual expenses incurred by the employees are provided. The Company made per diem payments to its employees in the amount of \$123 per day without obtaining any receipts of actual expenses incurred by the employees. Because the Company did not have receipts for the actual expenses, SAIF correctly limited the exclusion from payroll of the Company's per diem payments to employees to \$75 per day.

ORDER

I propose the Department of Consumer and Business Services, Insurance Division issue the following order:

The June 16, 2014 Revised Final Premium Audit Billing, for audit period April 1, 2012 to April 1, 2013, is AFFIRMED.

Samantha Fair

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. You may send exceptions via email to mitchel.d.curzon@state.or.us, or via mail to:

Mitchel D. Curzon
Chief Enforcement Officer
Oregon Insurance Division
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF SERVICE

On the 13th day of April 2015, I mailed the foregoing Proposed Order in Reference No. **1407005**.

BY FIRST CLASS MAIL:

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Mitch Curzon

Carol A Buntjer for Lucy Garcia
Hearing Coordinator