STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
	)	
C & P CONTRACTING, INC.	)	OAH Case No. 2021-ABC-04395
	)	Agency Case No.: INS-WCA 21-12-06
and	)	
	)	
SAIF CORPORATION	)	

Procedural History

The Director of the Oregon Department of Consumer and Business Services (Director), by and through Division of Financial Regulation, (Division), commenced the above entitled administrative proceeding to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation to C&P Contracting, Inc, (employer) pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 *et. seq.*

On February 25, 2021, the Division referred employer's hearing request contesting the billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether insurer's Final Premium Audit, dated January 1, 2021, was correct. By Proposed Order dated June 30, 2021, Senior Administrative Law Judge (ALJ) Samantha A. Fair Affirmed the December 7, 2020 Final Premium Audit Billing, for the audit period September 1, 2019, to September 1, 2020.

Findings of Fact, Conclusions of Law and Opinion

The Director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and reasoning of the Proposed Order as the findings of fact, conclusions of law, and reasoning of this Final Order.

Order

SAIF Corporation's Final Premium Audit issued December 7, 2020 is AFFIRMED and the Stay of Collections issed March 4, 2021 is lifted.

Notice of Right to Judicial Review

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the date the party received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Division of Financial Regulation.

Dated February 22, 2022

TK Keen
Administrator, Division of Financial Regulation
Department of Consumer and Business Services

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER & BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	**PROPOSED ORDER**
	)	
C & P CONTRACTING INC.	)	OAH Case No. 2021-ABC-04395
	)	Agency Case No. INS-WCA 20-12-06
and	)	
	)	
SAIF CORPORATION	)	

HISTORY OF THE CASE

On December 7, 2020, SAIF Insurance (SAIF) issued a Final Premium Audit Billing (Audit Billing) to C & P Contracting Inc. (C & P) for the period September 1, 2019, to September 1, 2020 (the audit period). On February 4, 2021, C& P filed a Petition with the Division of Financial Regulation of the Department of Consumer and Business Services (Department), requesting a hearing and a stay of collection during the pendency of the contested case proceeding.

On February 25, 2021, the Department referred the matter to the Office of Administrative Hearings (OAH).

On March 4, 2021, the OAH issued an Order Granting Stay of Collection that stayed collection for a portion of the Audit Billing during the pendency of the contested case proceeding.

On March 12, 2021, the OAH assigned Administrative Law Judge (ALJ) Joe Allen to preside at hearing. On March 26, 2021, ALJ Allen convened a prehearing conference. Laurie Petersen appeared and represented C & P. Ben Chantland and Russell Petersen also appeared on behalf of C & P. Attorney Joy Wang appeared and represented SAIF. Brittnie Holland also appeared on behalf of SAIF. ALJ Allen scheduled the hearing for June 18, 2021, and set deadlines for the submission of witness lists and exhibits.

On May 6, 2021, the OAH reassigned the matter to ALJ Alison Webster. On June 8, 2021, the OAH reassigned the matter to ALJ Samantha Fair.

On June 18, 2021, ALJ Fair convened a telephone hearing.[1] Ms. Petersen appeared on behalf of C & P. Ms. Wang appeared on behalf of SAIF. Mr. Chantland, president of C & P,

[1] ALJ Fair first attempted to convene the hearing via video conference. However, because of technical difficulties, ALJ Fair changed the format of the hearing to a telephone hearing.

and Mr. Petersen, vice president of C & P, testified on behalf of C & P. Jamie Powell, a SAIF premium audit analyst, testified on SAIF's behalf. John Hoppe from SAIF also appeared but did not testify. The record closed on June 18, 2021, at the conclusion of the hearing.

ISSUE

Whether SAIF's December 7, 2020 Final Premium Audit Billing correctly billed C & P by including Tony DiGeronimo and Russell Petersen's wages in the covered payroll.[2] *See* ORS 737.318, OAR 836-042-0001 *et seq*. and OAR 836-043-0001 *et seq*.

EVIDENTIARY RULINGS

Exhibits A1 through A34, offered by SAIF, were admitted into the record without objection. Exhibits R1 through R3, offered by C & P, were admitted into the record without objection.

FINDINGS OF FACT

1. C & P is licensed by the Oregon Construction Contractors Board (CCB) as a residential general contractor and has a business office and showroom in Eugene, Oregon. It performs bathroom and kitchen remodels, including design and construction. At any given time, it employs a maximum of 10 employees and regularly uses subcontractors for its jobs. (Ex. A7 at 8; test. of Petersen and Chantland.)

2. Mr. Chantland is the president and founder of C & P. He first formed the corporation in 2007 and was its sole shareholder until May 10, 2019, when he split his ownership interest with Mr. Petersen and Tony DiGeronmino. After the May 2019 split, he retained a 40 percent ownership interest. Mr. Chantland oversees the jobs, manages the workers, and assists with construction work as needed at the job sites. (Ex. R1 at 1-2; test. of Chantland.) C & P had previously informed SAIF that Mr. Chantland was the sole owner of C & P. C & P did not advise SAIF of the May 2019 change in its ownership. (Test. of Powell.)

3. Mr. Petersen is the vice president of C & P. He first acquired a 40 percent ownership interest and became the vice president in May 2019. Mr. Petersen manages C & P's remodel center, designs the remodel jobs in consultation with the clients, and bids the jobs. He visits the job sites as needed for the initial designs and subsequent change orders. (Ex. R1 at 1-2; test. of Petersen.)

[2] At hearing, C & P raised an additional issue: whether SAIF applied the correct classification code to Mr. Petersen's wages. However, that issue was not raised in the Petition, and C & P did not amend its Petition to include this additional issue. OAR 836-043-0170(2) requires the insured, here C & P, to file a petition in which "the insured must explain why it believes the billing is incorrect." During the prehearing conference, ALJ Allen confirmed with the parties that the issue for hearing was SAIF's inclusion of corporate officers' wages in the covered payroll. An insured cannot, on the day of the hearing, raise a new issue. Because C & P did not timely raise the classification code issue, the ALJ has no jurisdiction to address it.

4. In May 2019, Mr. DiGeronmino acquired a 20 percent ownership interest in C & P. Mr. DiGeronmino was C & P's corporate secretary and was assigned the role of business manager. (Ex. R1 at 1-2; test. of Chantland.)

5. There is no family relationship between Mr. Chantland, Mr. Petersen and Mr. DiGeronmino. (Test. of Petersen.)

6. On July 28, 2019, SAIF issued C & P a workers' compensation insurance policy for the period September 1, 2019, to September 1, 2020. (Ex. A2 at 1-3.) The policy included an endorsement that provided that the policy "covers all working owners of the Corporation * * * receiving remuneration unless you have specifically elected to exclude them by endorsement No. WC990327." (Ex. A3 at 1.) The policy included endorsement No. WC990327 that provided that "the policy does not cover bodily injury to any person described in the Schedule. The premium basis for the policy does not include the remuneration of such persons." (Ex. A4 at 1.) The only individual listed in the Schedule was Mr. Chantland. (*Id*.) Mr. DiGeronmino was the C & P representative that arranged for the issuance of the policy and the only individual who reviewed its terms. (Test. of Chantland.)

7. In mid-November 2020, Mr. Hoppe, a SAIF auditor, performed a field audit of C & P. During the field audit, he discovered that Mr. Petersen and Mr. DiGeronmino's wages had not been reported to SAIF. (Ex. A7 at 1, 7.) Mr. Hoppe's field audit was the first time SAIF learned of the change in Mr. Chantland's 100 percent ownership of C & P. (Test. of Powell.) The field audit was also the first time that Mr. Chantland and Mr. Petersen discovered that only Mr. Chantland's wages were excluded from the SAIF policy. They also discovered that Mr. DiGeronmino had failed to finalize other corporate documents and had failed to properly oversee C & P's bookkeeping. (Test. of Chantland.)

8. On November 20, 2020, Mr. DiGeronmino left C & P and his ownership interest was evenly distributed between Mr. Chantland and Mr. Petersen. (Ex. A11 at 1; test. of Chantland.)

9. On December 7, 2020, SAIF issued the Audit Billing that included Mr. Petersen and Mr. DiGeronmino's wages as covered payroll. (Ex. A6 at 1.) When C & P filed its Petition with the Department in February 2021, SAIF received, for the first time, the documents (C & P's minutes and bylaws) regarding the May 2019 changes in C & P ownership. (Ex. A9 at 1-2; test. of Powell.)

CONCLUSION OF LAW

SAIF's December 7, 2020 Final Premium Audit Billing correctly billed C & P by including Tony DiGeronimo and Russell Petersen's wages in the covered payroll.

OPINION

In its Petition to the Department, C & P disputed SAIF's inclusion of Mr. DiGeronimo and Mr. Petersen's wages in the covered payroll. C & P bears the burden to establish that SAIF erred in its premium audit billing. *Salem Decorating v. NCCI,* 116 Or App 166 (1992) *rev den*

315 Or 643 (1993) (the employer has the burden to establish that an insurer's premium audit billing is incorrect). To sustain this burden, C & P must prove its case by a preponderance of the evidence. *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987).

ORS 656.017 through ORS 656.174 are part of a "statutory scheme that seeks to ensure that workers are, in fact, covered by workers' compensation insurance." *In the Matter of the Compensation of Sparks*, 171 Or App 65, 69 (2000). ORS 656.017 requires every employer to maintain assurance with the Department that subject workers will receive compensation for compensable injuries by qualifying as a carrier-insured employer or a self-insured employer. C & P is a carrier-insured employer through its SAIF-issued workers' compensation policy and must provide coverage for its subject workers through that policy.

ORS 656.027 provides, in part:

> All workers are subject to this chapter except those nonsubject workers described in the following subsections:
>
> * * * * *
>
> (24)(a) Corporate officers who are directors of a corporation actively licensed under ORS 671.525 (landscaping) or 701.021 (construction) and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed. If all officers of the corporation are members of the same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such officers may elect to be nonsubject workers. For all other corporations licensed under ORS 671.510 to 671.760 or 701.021, the maximum number of exempt corporate officers shall be whichever is the greater of the following:
>
> (A) Two corporate officers; or
>
> (B) One corporate officer for each 10 corporate employees[.]

OAR 436-050-0050 provides, in part:

> (1) A corporation, limited liability company, or partnership may elect to provide workers' compensation coverage for otherwise nonsubject workers.
>
> (a) A carrier-insured employer must make the election to the insurer in writing on or before the effective date of the policy. An election remains in effect until a revised election is given to the insurer.

* * * * *

> (2) If an employer that is subject to a maximum number of exempt corporate officers, members, or partners under ORS 656.027 does not file an initial election, or is not in compliance with ORS 656.017 and 656.407, then the exempt individuals will be determined in the following order:
>
> (a) For a corporation:
>
> (A) President;
>
> (B) Secretary, if any;
>
> (C) Vice President, if any;
>
> * * * * *
>
> (4) For the purposes of clarifying terms used in ORS 656.027:
>
> * * * * *
>
> (c) "Substantial ownership" means a percentage of ownership equal to or greater than the average percentage of ownership of all the owners, or ten percent, whichever is less.

C & P is actively licensed as a residential general contractor by the CCB, as required by ORS 701.021.[3] During the audit period at issue, Mr. Chantland, Mr. Petersen and Mr. DiGeronmino were corporate officers and each held at least a 20 percent ownership interest in C & P. Pursuant to OAR 436-050-0050(4)(c), because each officer had in excess of ten percent ownership interest, they were corporate officers who had substantial ownership interests in C & P.

C & P is a corporation actively licensed under ORS 701.021, with a maximum of 10 employees, and whose corporate officers are not members of the same family. Pursuant to ORS 656.027(24)(a), C & P can have a maximum of two corporate officers as nonsubject workers. Mr. Chantland's income was excluded as a corporate officer during the period at issue pursuant

[3] ORS 701.021(2) provides, in part:

> A person or joint venture that undertakes, offers to undertake or submits a bid to do work as a contractor in preparation for or in connection with a residential structure must have one of the following endorsements:
>
> (a) Residential general contractor[.]

to endorsement No. WC990327 of the SAIF policy. Therefore, C & P would only be eligible to exclude one additional corporate officer's wages, either Mr. DiGeronmino or Mr. Petersen's wages but not both.

The SAIF policy in effect for the period at issue contained an endorsement that the corporate officers would be covered by the policy unless C & P specifically excluded them. C & P only elected to exclude Mr. Chantland from coverage. Therefore, pursuant to the terms of the policy and OAR 436-050-0050(1), C & P elected to provide workers' compensation insurance coverage for Mr. Petersen and Mr. DiGeronmino, which made them subject workers during the audit period at issue. Because C & P made an initial election to only exclude Mr. Chantland from coverage, OAR 436-050-0050(2) is not applicable and Mr. DiGeronmino (the secretary) cannot be excluded from coverage.[4]

Because Mr. Petersen and Mr. DiGeronmino were subject workers, pursuant to ORS 656.017, C & P must provide workers' compensation coverage for them through its SAIF policy. SAIF's inclusion of the payments to these individuals as subject payroll was appropriate. SAIF's Audit Billing, with its adjusted premium for the audit period, is correct and C & P is liable for the adjusted premium.

Pursuant to ORS 737.505(4) and (5), the stay, issued by the OAH on March 4, 2021, is lifted upon the Department's issuance of a final order.

ORDER

I propose the Department of Consumer & Business Services' Division of Financial Regulation issue the following order:

SAIF's December 7, 2020 Final Premium Audit Billing, for the audit period September 1, 2019, to September 1, 2020, is AFFIRMED. C & P Contracting Inc. is liable for the adjusted premium.

The Order Granting Stay of Collection, issued on March 4, 2021, shall be lifted with the issuance of the Final Order.

Samantha A. Fair
Administrative Law Judge
Office of Administrative Hearings

[4] For a corporation that fails to make any election regarding coverage for its corporate officers, OAR 436-050-0050(2) provides a mechanism to determine which officers are excluded from coverage.

EXCEPTIONS TO PROPOSED ORDER

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 **Division of Financial Regulation** within 30 days following the date of service of this Proposed Order. You may send exceptions via email to gail.m.gage@oregon.gov, or via mail to:

Gail M. Gage
Compliance Specialist 3
Division of Financial Regulation
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF MAILING

On June 30, 2021 I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2021-ABC-04395**.**

By: Electronic Mail

C & P Contracting Inc.
Laurie Peterson
1138 W. 7th Pl.
Junction City OR 97448
Email: lauriepetersen12@gmail.com

Brittnie Holland
SAIF Corporation
400 High Street SE
Salem OR 97312
Email: PremiumAuditHearings@saif.com

Joy Wang, Special Assistant Attorney General
SAIF Corporation
400 High Street SE
Salem OR 97312
Email: joywan@saif.com

By: Electronic Mail

Gail Gage, Agency Representative
Division of Financial Regulation
350 Winter Street NE
Salem OR 97301

Cortney Hokanson
Hearing Coordinator