

**BEFORE THE HEARING OFFICER PANEL  
STATE OF OREGON  
for the  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
INSURANCE DIVISION**

In the Matter of the ) **PROPOSED ORDER**  
Final Premium Audit Billing of )  
) Agency Case No INS 02-05-012  
THE PAPER GROUP, INC, )  
an Oregon corporation. )

**HISTORY OF THE CASE**

On May 14, 2002, The Paper Group, Inc., an Oregon Corporation (petitioner or Paper) timely filed a request for hearing challenging the final premium audit billing issued by The SAIF Corporation (SAIF or insurer) on May 1, 2002 for the period of January 1, 2001 through December 31, 2001 (audit period). On July 19, 2002, petitioner submitted a petition outlining its disagreement with the final premium audit billing. On July 11, 2002, the Department of Consumer and Business Services, Insurance Division (the department) referred this matter to the Hearing Officer Panel for hearing.

On November 5, 2002, Administrative Law Judge Ella D. Johnson conducted an in-person hearing in Salem Oregon. Petitioner was represented by M. Lee Wood as its authorized representative pursuant to OAR 137-003-0555(1)(a). Insurer was represented by Assistant Attorney General David B. Hatton. Petitioner's Human Resources Director Ms. Wood testified on its behalf. Insurer called the National Council on Compensation Insurance's (NCCI's) Senior Underwriting Analyst Timothy Hughes and SAIF's Audit Program Analyst DeAnne Hoyt as witnesses. The record closed following the hearing on November 5, 2002.

**OFFICIAL NOTICE**

As noted at hearing, I take official notice of the *Basic Manual of Workers' Compensation and Employers Liability Insurance (Basic Manual)*. The *Basic Manual* is a publication of the National Council on Compensation Insurance (NCCI). It includes the rules insurers follow to arrive at the correct class code for a business and the official description for all class codes filed with the department. The *Basic Manual* is a required part of every insurer's audit procedure guide. OAR 836-43-0115(1)(a). I also take official notice of another publication of NCCI, the *Scopes Manual*. The *Scopes Manual* consists of a numerical listing of class codes with descriptive terminology and examples of types of business activities that have been included in class codes in the past.

**ISSUE**

Whether the insurer incorrectly assessed premium on amounts paid pursuant to petitioner's Paid Time Off plan.

## **EVIDENTIARY RULING**

Petitioner's Exhibits 1 through 18 and insurer's Exhibits A1 through A28 were admitted into the record without objection.

### **FINDINGS OF FACT**

1) NCCI is the authorized rating bureau for workers' compensation in Oregon. As the authorized rating bureau, NCCI develops loss data and lost cost rates for each type of business to ensure that premiums charged employers would cover the cost of injury. The lost cost rates for Oregon already contemplates reduced exposure from sick leave and other types of leave. (Test. of Hughes.)

2) Since 1956, Pape` has been engaged in the business of heavy equipment sales, parts, and service. Pape` first applied for coverage with SAIF on December 30, 1988. At all times relevant herein, SAIF provided workers' compensation coverage to Pape`. (Exs. A1, A2, A3, A7, A8, A11.)

3) Pape` is the parent company of eight subsidiaries, including Pape` Bros., Inc., Pape` Lift, Inc. and Pape` DW, Inc, which are the subject of this final premium audit appeal. Pape` does not and has never had a sick leave program but offers a short term disability insurance plan which pays employees 70 percent of their salary when they are off work due to illness or injury. The short-term disability payments begin the first day after injury and the fourth day of illness or disability. Pape` also provides annual time off and holiday leave to its regular full-time employees.<sup>1</sup> (Exs. 1, 6; test. of Wood.)

4) On January 1, 2001, Pape` instituted a Paid Time Off (PTO) plan. The amount of PTO an employee is entitled to depends on the employee's length of service and employment classification as of January 1 of each calendar year. The amount received each year increases with the length of continuous employment according a schedule set forth in the PTO policy. The PTO plan applies to both exempt and non-exempt employees but exempt employees receive 24 hours less than the non-exempt employees due to their exempt status. (Exs. 2, 3; test. of Wood.)

5) Under the rules for usage for the PTO plan, an employee is required to use 40 hours annually if employed one year or more and must take the PTO in at least one-hour increments. The employees are allowed to carry over unused PTO but the maximum number of accumulated hours cannot exceed one and one half times their annual PTO accrual. Amounts exceeding the maximum are forfeited at the end of each calendar year. Employees with the company less than one year can request payment of a maximum of 40 hours. Employees leaving the company are paid for PTO accrued but not taken. (*Id.*)

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<sup>1</sup> Underlying the company's PTO plan is Pape`'s belief that all of its employees are adults who can best determine how to use their PTO, whether it be for vacation, to go to the doctor or dentist or stay home with a sick family member. (Ex. 6.)

6) Employees can use their PTO for whatever leave they want, including vacation and other types of leave, such as to stay home with a sick child, medical and dental appointments and personal leave. Although employees could use PTO for sick leave, they would normally rely on the short-term disability insurance instead to cover their time off due to illness. Pape` does not distinguish between the different types of leave in its payroll records except for holiday pay which is separately recorded. (Exs. 4, 6, A21; test. of Wood.)

7) Because Pape`'s PTO plan includes all types of leave, it is broader than a standard vacation leave program. (Test. of Hughes.)

8) On April 26, 2002, SAIF conducted an audit on Pape` Bros., Inc., Pape` Lift, Inc. and Pape` DW, Inc. for the audit period. The audit assessed premium on payments made pursuant to the PTO plan because Pape` failed to differentiate in its records between excludable vacation pay and other types of leave such as sick and personal leave. The audit resulted in increased premium due in the amount of \$26,191.40. (Exs. A7, A8, A15, A21; test. of Wood.)

### CONCLUSION OF LAW

The insurer correctly assessed premium on amounts paid pursuant to petitioner's Paid Time Off plan.

### OPINION

The issue to be resolved in this premium audit case is whether the insurer incorrectly assessed premium on amounts paid pursuant to petitioner's Paid Time Off plan. Inasmuch as Pape` is the party seeking redress before the department concerning its final premium audit billing, Pape` has the burden to prove its position on the issue by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166 (1992), *rev den* 315 Or 643 (1993) (in premium audit cases, burden of proof is on the employer); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). I find that Pape` has not met its burden.

Oregon's state special rule concerning what constitutes remuneration for the purposes of premium assessment is found in NCCI's *Basic Manual* (2001) at Rule V-B., which states in relevant part:

#### 2. INCLUSIONS

Remuneration includes:

\* \* \* \* \*

e. Pay for holidays or periods of sickness;

\* \* \* \* \*

### 3. EXCLUSIONS

Remuneration excludes:

\* \* \* \* \*

m. Vacation pay \* \* \*.

(Emphasis in original.)

Petitioner argued that it should not be assessed premium on PTO payments because insurer had no exposure to risk when employees were off work on PTO. Petitioner further argued that, in any event, PTO was identical to vacation pay which is excluded from assessment.<sup>2</sup> However, I am not persuaded by petitioner's arguments.

To begin, I reject petitioner's argument that the PTO plan leave is identical to vacation leave. M. Lee Wood's testimony and the documentation setting forth the provisions of the plan establish that employee's could use the PTO leave for any type of time off. Moreover, Tim Hughes who is an expert in the NCCI rules, testified that under the national rules governing remuneration, vacation, sick leave and holiday leave are all included in premium assessment. He stated that Oregon, on the other hand, has chosen to exclude vacation pay in the state special rule but that all other forms of leave, including personal leave, medical and dental appointments, and sick leave are all included in premium assessment. Mr. Hughes stated that, in his expert opinion, petitioner's PTO plan is broader than just vacation pay because petitioner allows its employees to use PTO for any reason, including leave that is properly part of petitioner's premium assessment. Additionally, he stated that, because petitioner did not separately record vacation pay, all of the PTO plan payments should be included in the premium assessment.

With respect to petitioner's argument that petitioner's PTO payments should be excluded because insurer had no exposure to risk when employees were off work on PTO leave, Mr. Hughes stated that the lost cost rates for Oregon contemplate reduced exposure from employees taking sick leave and other types of leave subject to assessment. Therefore, if petitioner were allowed to exclude all of its PTO plan payments, the effect would be a reduction in the amount of overall subject payroll and NCCI would need to increase the rate in order to cover the cost of injuries.

Furthermore, insurer argued that in previous cases where employers implemented similar plans, the department has determined that the entire amount should be included in the premium assessment. In *Mercy Health Care, Inc.* (Final Order August 27, 1990, INS 89-09-044), the department held that payments made to employees pursuant to an Earned Leave Plan (ELP) were properly included in the premium assessment. Like petitioner's PTO plan, under the provisions

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<sup>2</sup> Petitioner also cites several statutes in support of its argument that the PTO payments should not be included in the premium assessment. Inasmuch as the basis for the assessment is governed by the NCCI rule set forth above concerning remuneration, I do not address petitioner's argument in that regard.

of the employer's ELP, employees accrued time off according to their length of service. Employees could use this accrued leave for a variety of reasons, including vacation, holidays, sick leave, and health care appointments. The employer failed to maintain records concerning the amounts paid to employees for the various types of leave. The department reasoned that, because the employer failed to maintain records of the leave taken, the insurer was unable to differentiate between the type of leave paid and the entire amount was properly included in the employer's premium assessment.

As in *Mercy Health Care, Inc.*, petitioner here failed to maintain records distinguishing between excluded vacation leave and other types of leave which are included in premium assessment. Accordingly, in light of Mr. Hughes expert testimony and the department's previous rulings concerning similar plans, I conclude that SAIF properly included all payments made to employees pursuant to the PTO plan in Pape's premium assessment for the audit period.

### **ORDER**

I propose that the department order that SAIF's final premium audit billing for the audit period is correct and payable.

Dated: January 24, 2003

/s/ Ella D. Johnson  
Ella D. Johnson, Administrative Law Judge  
Hearing Officer Panel

### **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:

Mitchell D Curzon  
Chief Enforcement Officer  
Oregon Insurance Division  
350 Winter Street NE Room 440  
Salem OR 97301-3883