

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Premium Audit of)	Case No. INS 03-01-016
)	
WRG FIRE TRAINING & SIMULATION SYSTEMS, INC., An Oregon Corporation.)	CORRECTED PROPOSED ORDER
)	
)	

HISTORY OF THE CASE

Employer timely filed a hearing request within 60 days from receipt of the final premium audit billing as required by ORS 737.505(4). The Director of the Department of Consumer and Business Services, Insurance Division (director or department) referred the matter for hearing to the Office of Administrative Hearings (OAH) on March 6, 2003.

On November 12, 2003, OAH Administrative Law Judge (ALJ) Ella D. Johnson convened a hearing on employer's premium audit appeal. At the outset of the hearing, employer asked for a continuance to obtain an attorney to represent the employer. Employer's motion for a continuance was granted. On July 28, 2004, the hearing was reconvened.¹ William R. Gee represented petitioning employer WRG Fire Training & Simulation Systems, Inc. (petitioner or WRG) as its authorized representative pursuant to ORS 183.457 and OAR 137-003-0555(1). Assistant Attorney General David B. Hatton represented responding insurer SAIF Corporation (insurer or SAIF). Petitioner called Gee and his wife, Barbara Gee, to testify. Insurer called SAIF auditor Gretchen Amann and Cundri Insurance Agent Paul Johnson² to testify. The record closed that day following the hearing.

On October 14, 2004, the department notified OAH that there was an error in the Evidentiary Ruling section of the Proposed Order and requested that the order be corrected. I find that the department's request is appropriately granted. Accordingly, I issue this Corrected Proposed Order to correct that error. Appeal rights will continue to run from the original date of the Proposed Order issued on September 7, 2004, inasmuch as this correction does not change the outcome of the order.

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 an NCCI publication.

¹ The delay between the first and second dates of the hearing was due to the employer's unavailability.

² Ms. Johnson appeared by telephone.

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 insurer incorrectly added new classifications and reclassified and retroactively billed petitioner for payments reported in Class Code 3030 (Iron/Steel Works and Drivers) to Code 5040 (Fire Escape Installation/Outside Buildings).

EVIDENTIARY RULING

The record consists of petitioner's Exhibit P1 and SAIF's Exhibits A1 through A37, which were admitted into evidence without objection.

FINDINGS OF FACT

(1) WRG is a privately owned Oregon corporation incorporated in 1999, under the name of WRG Fire Training Systems, Inc. William Gee and his wife, Barbara Gee, own the corporation and serve as the corporate officers.³ On March 20, 2003, the name of the corporation was legally changed to WRG Training and Simulation Systems, Inc. (Ex. A24.) WRG is currently engaged in the business of selling and erecting fire training props and towers for fire departments and military installations to train first responders. Prior to 2001, WRG designed and fabricated the props at the shop located in Sherwood, Oregon. The props consisted of fabricated metal structures in the form of dumpsters, storage lockers, tanks, cabinets, platforms and household furniture and appliances. The props can be set on fire and doused with water repeatedly. (Exs. A1, A17; test. of Mr. Gee.)

(2) NCCI is the licensed rating bureau for workers' compensation insurance in Oregon. On January 1, 2000, WRG applied for workers' compensation insurance through the Cundri Insurance Agency (Cundri or agency) for coverage by SAIF and AOI Compwise. When WRG first applied for insurance, it had three employees. The application completed by the agency stated that the business of the corporation was engaged in the "fabrication of training props for fire departments" and the proper classification was Code 3030. At all times relevant herein, SAIF provided coverage to WRG. (Exs. A1, A2.)

(3) Cundri handled all of WRG's insurance needs. The agency carried 11 policies for various types of insurance for WRG. WRG relied on Cundri to advise it on its insurance. WRG thought the agency had a good understanding of its business. In the beginning, WRG communicated with SAIF almost entirely through Cundri. (Test. of Mr. Gee.)

³ During the audit period, Mr. Gee was the President and CEO of the corporation. Now, Mrs. Gee is the CEO and President of WRG.

(4) SAIF issued a policy on January 6, 2000, assigning for the policy period of January 6, 2000 to January 1, 2001: Class Code 3030 for the manufacturing of the props, Code 5102 (Door, Door Frame or Sash-Metal or Metal Covered) for any installation and Code 7380 (Drivers, Chauffeurs & Their Helpers) for any delivery. SAIF provided WRG with a copy of its "Tool Box" which contained information about division of payroll between class codes and contained examples of verifiable time cards. The letter from SAIF instructed WRG to notify the insurer of any changes to its business. The mailing was addressed to WRG, not Cundri. The premium rate for Code 3030 was set at \$5.94 per \$100 of payroll. (Exs. A3, A6.) The policy was renewed on January 1, 2001 for the policy period of January 1, 2001 to January 1, 2002. (Ex. A7.)

(5) Thereafter, WRG reported its entire payroll for each quarter in Code 3030. (Ex. A10.) On March 13, 2001, SAIF conducted an audit of WRG's payroll records through a contract auditor. The audit for the period of January 6, 2000 through December 31, 2000 revealed that WRG over reported payroll and that it had some Washington labor during the period. There were no recommended changes to the class codes assigned to the policy and the contact auditor was told only about the fabrication work completed in the shop. The audit resulted in a credit of \$56. SAIF sent WRG a copy of the Tool Box again that provided instruction on verifiable timecards and division of labor between the classifications. (Exs. A1, A12, A23; test. of Amann.)

(6) WRG continued to report its entire payroll in Class Code 3030. (Ex. A15.) After the September 11, 2001 attack on New York and Washington DC, WRG's business grew quickly, tripling in size and sales from \$70,000 to \$153, 000. (Ex. 25 at 3; test. of Gee and Jones.) At the end of 2001, WRG started assembling and erecting towers of over two stories. The manufacturer shipped the training tower kit directly to the job site. WRG employees performed the installation of the towers.⁴ They assembled and erected the tower. A crane is used to raise the structural members into place. The structure is roofed and the tower and the roof are covered with metal siding and the props are bolted to the floor. WRG employees also installed fire hydrants, water pipes, above ground water tanks, and sprinkler systems. A subcontractor installed the propane tanks from which WRG employees installed propane lines into the structure and on the props. An electrical subcontractor also installed all of the electrical equipment, including the control panels, which controlled the fire burn. (Exs. A17, A28; test. of Gee and Amann.)

(7) On September 13, 2002, NCCI conducted a test audit. The test audit added Code 5040 and Code 8742 (Outside Sales). It also noted that WRG's payroll was underreported and that no verifiable time cards were maintained and there was an interchange of labor. (Ex. A17 at 12.)

(8) The audit conducted by SAIF auditor Gretchen Amann added numerous class codes to the policy after discovering that the business operations had changed. This included Code 5040 and Code 8742. Because verifiable time cards allocating time between the various class codes were not kept and there was an interchange of labor between the codes, the entire payroll

⁴ Although the audits indicated that WRG prepared the site by pouring the concrete slabs and footings, Mr. Gee disputed that in his testimony. Ms. Amann, however, stated that WRG did prepare the site for the tower and assigned class codes for concrete and excavation.

was reclassified billed at the rate for the highest rated classification, Code 5040. The premium rate for Code 5040 is \$27.91 per \$100 of payroll. The premium rate for Code 8742 is \$.42 per \$100 of payroll. The billing was retroactive because WRG failed to notify SAIF that its business had changed. (Exs. A17, A19; test. of Amann.)

(9) On December 11, 2002, WRG reported to Cundri Insurance Agency that it now was part of the Homeland Security Defense Team and was assembling and erecting steel two steel structures over two stories high for use in training first responders. WRG also noted that it was installing these structures on military bases in Washington and California and other states under contract with the federal government. WRG's discussions with the insurance agency concerned the bonding and liability issues, not workers' compensation classifications. Cundri noted that the current assigned class codes did not reflect this new operation and indicated the class codes were under study for correction. (Exs 25 at 3-4, A26.) SAIF was not aware that WRG was performing installation of the towers until October 2002, when NCCI's test audit was reported to the insurer and the subsequent audit was completed. (Ex. A26.) Cundri was also unaware that WRG had changed its business operations to add the installation of the towers until after the audits. (Test. of Johnson.)

(10) The final premium audit billing for the audit period issued on January 3, 2003 resulted in an increased premium of \$15,502. WRG thereafter submitted time cards, but they were not verifiable because there was no description of the work performed. (Ex. A20.) A subsequent adjustment to the audit by SAIF Audit Program Analyst Teresa Smith allowed a division of the payroll between Code 5040 (field time) and 3030 (shop time). (Ex. 23.) Smith concluded on April 11, 2003 that there was no code, which specifically describes the type of operation WRG was engaged in and that the applicable code, therefore, was to be assigned by analogy to the code that best described the business. The audit adjustment resulted in a \$4,000 reduction in premium assessed for the audit period. (Ex. A26.)

(11) WRG suffered significant losses on its military contracts because the reclassification and retroactive billing in accordance with the highest rate classification, Code 5040, and the lower initial bid using the lower-rated Code 3030. SAIF subsequently assisted WRG in obtaining partial compensation for the policy period of 2002 to 2003. WRG thereafter withdrew its request for hearing challenging the final premium audit billing the subsequent policy period. (Ex. A35; test. of Mr. Gee.)

CONCLUSIONS OF LAW

Insurer correctly added new classifications and reclassified and retroactively billed petitioner for payments reported in Class Code 3030 (Iron/Steel Works-& Drivers) to Code 5040 (Fire Escape Installation/Outside Building).

OPINION

Jurisdiction lies with the director. ORS 737.505. The issue to be resolved is whether Class Code 5040 is the correct classification for employer's business operation. Inasmuch as WRG is the party seeking redress before the department concerning SAIF's reclassification of its

business operations for the audit period, it has the burden of proof in establishing its position on the issue by a preponderance of the evidence. See ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in an administrative hearing is by a preponderance of the evidence); *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). I conclude that WRG has failed to meet its burden.

The *Basic Manual* sets forth the rules that insurers use in classifying insureds' business for the purpose of assessing premium for workers compensation insurance. Rule 1 A 2 states that "it is the business of the employer within a state that is classified, not the separate employments, occupations or operations within the business."⁵

The *Basic Manual* also addresses the issue here, stating that if "no basic classification clearly describes the business, the classification that most closely describes the business must be assigned." Rule 1D2 at R7. However, that does not resolve the dispute here because the parties disagree concerning which classification most closely describes WRG. There is no classification for the type of work that specifically describes the performed by WRG in its business.

At hearing, WRG first argued that Class Code 5040 was an incorrect classification and that Code 3030 adequately describes the work performed by WRG. The *Scopes Manual* describes Class Code 5040 in pertinent part as follows:

PHRASEOLOGY IRON OR STEEL ERRECTION – FRAME STRUCTURES⁶

CROSS-REF. *Iron or Steel Erection – Metal Bridges; Iron or Steel Erection – Iron – Exterior- includes work on balconies, fire escapes, staircases, fireproof shutters: Iron or Steel: Erection – Radio, Television , or Water Towers, Smokestacks or Gas Holders. * * * * **

SCOPE Code 5040 is applied to insureds engaged in the erection of iron or steel frame structures including assembling or fabricating at the job site. It contemplates the raising of the structural members into place using a crane or boom and securing by bolting, welding or riveting the frame or skeleton of buildings in excess of two stories in height, i.e. hotels, apartment houses, office buildings, automobile parking garages, factories, warehouses, etc.

(Emphasis in original.)

Additionally Class Code 3030 states in pertinent part:

⁵ The *Basic Manual* Rule 1A further states that the purpose of the classification system is to group employers with similar operations "into classifications that reflects the exposures common to those employers [and t]he rate charged reflects the exposure to loss common to those employers."

⁶ SAIF rephrased the phraseology of the code to state (Fire Escape Installation/Outside Buildings).

PHRASEOLOGY IRON OR STEEL FABRICATION: IRON OR STEEL WORKS – SHOP – STRUCTURAL - & DRIVERS

Applies to fabricating or assembling structural iron or steel. Blast furnace or convertor operation, casting of steel, or rolling mills to be separately rated.

SCOPE Code 3030 is restricted to a permanently located shop in which an insured engages in the fabrication or assembly of structural iron or steel products such as bars, I-beams, channels, angles, plates and other large metal members of a structure. Others subsequently use these products in the construction of buildings or bridges. Code 3030 is not applicable to the actual construction of buildings or bridges.

* * * * *

Code 3030 is applicable to risks engaged in the manufacture of iron or steel structural parts subsequently used by others in the manufacture of heavy machinery . Code 3030 does not contemplate the manufacture of heavy equipment machinery. Code 3030 does not contemplate the risks engaged in the manufacture of complete machinery. * * * * *

(Emphasis in original.)

Although it is clear that Code 3030 was the appropriate code for WRG’s business operations prior to 2001 when WRG began assembling and erecting the fire towers, Code 5040 became the correct code for the business operations. The evidence establishes that, at the end of 2001, WRG started assembling and erecting steel towers of over two stories, which were already fabricated and shipped as a kit to the job site. WRG assembled and erected the towers using a crane to raise the structural members into place. WRG then roofed and covered the tower and roof with metal siding and installed the props by bolting them to the floor. WRG also installed fire hydrants, water pipes, above ground water tanks, and sprinkler systems. This work is more consistent with Code 5040 than Code 3030 because the work was not fabricating parts for use by others and it was not done in WRG’s shop, but rather at the job site. Moreover, Code 5040 contemplates the erection of iron or steel frame structures including assembling the structure at the job site. It also contemplates the raising of the steel structure into place using a crane and securing the structure by bolting it into place for structures in excess of two stories. This is what WRG does with respect to the towers, although the buildings are for training and not for use or occupancy as an apartment or warehouses. Finally, Ms. Smith, SAIF’s audit program analyst and an expert in the classification system, confirmed in a letter to WRG that there were no codes that specifically described WRG’s business and that Code 5040 was the appropriate code by analogy because it best describes WRG’s business activities.

WRG next argued at hearing that Cundri was SAIF’s agent and that Cundri was fully apprised of WRG business operations. WRG also argued that SAIF should not be permitted to retroactively bill WRG because Cundri failed to inform the business regarding verifiable time records and that all insurer communication was through Cundri. To begin, Ms. Jones, a Cundri

agent, testified that the agency did not know about the change in WRG's business operations until after the audit was completed. The telephone log of client calls maintained by the agency supports her testimony concerning the agency's knowledge. Consequently, I do not find WRG's argument in that regard to be persuasive. WRG's second argument is likewise unpersuasive. SAIF sent WRG a copy of the Tool Box, not once but twice. The Tool Box contained information about the classifications, explaining the division of labor into various class codes, and had examples of verifiable time records. The letters containing the Tool Box were sent directly to WRG, not to Cundri. Consequently, I conclude that SAIF did not fail to inform and educate WRG about the classification system and the need to maintain verifiable time cards.

Finally, I find that SAIF properly retroactively reclassified and billed WRG at the higher rated Code 5040. OAR 836-043-0190 states in relevant part:

If an insurer determines the workers' compensation insurance policy of an insured needs reclassification, the insurer:

(1) May bill additional premium for the revised classification after the insurer has provided the insured at least 60 days written notice of the reclassification.

(2) Shall bill retroactively to policy inception or date of change in insured's operations for any reclassification that results in a net reduction of premium.

(3) May, notwithstanding section (1) of this rule, **retroactively bill an insured for reclassification during the policy year without prior notice of reclassification if:**

(a) The insured knew or should have known that the employees were misclassified;

(b) The insured provided improper or inaccurate information concerning its operations; or

(c) The insured's operations changed after the date information on the employees is obtained from the insured.

(Emphasis added.)

The evidence establishes that WRG failed to inform SAIF or its agent, Cundri, that its business operations had changed. Consequently, under the above rule, SAIF was entitled to retroactively reclassify and bill WRG at the higher rate. Based on the record, I conclude that SAIF correctly classified WRG's business in Class Code 5040. Accordingly, SAIF's reclassification and retroactive billing of the payroll for the audit period pursuant to the rate for Code 5040 is affirmed.

ORDER

SAIF's reclassification and retroactive billing of WRG's business for the audit period of January 1, 2001 to December 31, 2001 is correct and payable.

IT IS SO ORDERED.

Dated this day of October 2004 in Salem, Oregon.,

/s/ Ella D. Johnson
Ella D. Johnson, 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:

Department of Consumer and Business Services
Mitchel D. Curzon, Chief Enforcement Officer
Insurance Division
350 Winter Street NE Room 440
Salem, OR 97301-3883