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 05-06-009**
	)	
TCSH, LLC,	)	
dba Pacific Personnel Services of the Northwest	)	**PROPOSED ORDER**

HISTORY OF THE CASE

Petitioning employer timely appealed SAIF's final premium audit billing for the period of January 1, 2004 through December 31, 2004 (audit period). On June 9, 2005, the Department of Consumer and Business Services, Insurance Division (the department) referred this matter to the Office of Administrative Hearings (OAH).

On September 28, 2005, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing in this premium audit appeal. Petitioning employer TCSH, LLC, dba Pacific Personnel Services of the Northwest (petitioner or Pacific Personnel) was represented by member Trina Hoggard without benefit of counsel. Assistant Attorney General David B. Hatton represented responding insurer SAIF Corporation (insurer or SAIF). Trina Hoggard and Shannon Hoggard, job placement specialist, testified on petitioner's behalf. Katherine L. Sim, customer service representative, testified on insurer's behalf. The record closed the same day.

ISSUE

Whether insurer is estopped from assessing premium as set forth in the final premium audit.

EVIDENTIARY RULINGS

The record consists of insurer's Exhibits A1 through A6, which were admitted into evidence without objection.

FINDINGS OF FACT

(1) Pacific Personnel is a temporary employment agency that provides workers for various businesses performing a wide variety of job duties. Typically, Pacific Personnel receives a request for a placement from a client and quotes a price based on wages, taxes, workers' compensation premium and its fee. (Testimony of Trina Hoggard.)

(2) In 2002, when the policy opened, SAIF provided a policy and a Tool Box to Pacific Personnel containing information concerning class codes and bonuses. (Ex. A3.) Class Code 9910 Office Clerical applies to office employees who only perform work in a physically enclosed area devoted exclusively to these specific activities. (Ex. A3-26.) Bonuses paid more than twice in a policy year are considered anticipated and are included in the premium audit. (Ex. A3-42.)

(3) Following the 2003 audit, Pacific Personnel instituted a policy of telephoning its SAIF customer service representative each time it received a request for placement in a new job duty in order to ascertain the appropriate class code. (Testimony of Trina Hoggard and Shannon Hoggard.)

CONCLUSION OF LAW

Insurer is not estopped from assessing premium as set forth in the final premium audit.

OPINION

Inasmuch as Pacific Personnel is the party seeking redress before the department concerning SAIF's final premium audit billing, it has the burden of presenting evidence to support its position. *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 437 (1982) (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). 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).

Pacific Personnel contends that insurer is barred by the doctrine of equitable estoppel from assessing premium as set forth in the final premium audit. In particular, Pacific Personnel argues that it reasonably relied on verbal advice from insurer concerning whether bonuses are included in premium and which class codes apply to certain job descriptions. Pacific Personnel further argues that it quoted prices to its clients based on this verbal advice and that the price difference is not recoverable.

Under the doctrine of equitable estoppel, a party may be precluded by its act or conduct or by silence when there is a duty to speak, from asserting a right which it otherwise would have had. *Mitchell v. McIntee*, 15 Or. App. 85 (1973). The court has set forth the elements of equitable estoppel in Oregon. To constitute estoppel by conduct, there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have induced to act upon it. *Coos County v. State of Oregon*, 303 Or 173, 180-181 (1987),

quoting *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502 (1908):

An agency of the government may be estopped to assert a claim inconsistent with a previous position it has taken. For estoppel to be established, the party asserting it must (among other things) have relied on the governmental agency's misstatements, and the party's reliance must have been reasonable. *See Dept. of Trans. v. Hewett Professional Group,* 321 Or 118 (1995). "'* * * [I]t is well established that there can be no estoppel unless there was not only reliance, but a right of reliance, and that reliance is not justified where a party has knowledge to the contrary of the fact or representation allegedly relied upon * * * .'" *Palm Gardens, Inc. v. OLCC,* 15 Or App 20, 35 (1973).

Here, petitioner contends that it made telephone calls to insurer seeking advice concerning whether bonuses paid to workers are included in premium and which class codes apply to certain job duties and that it charged its clients according to insurer's advice. However, even if these telephone contacts took place, it was unreasonable for petitioner to rely on verbal advice provided by some unidentified person at insurer's office. To begin, the verbal advice would reflect only the accuracy of the verbal question asked. Next, the purported verbal advice contravenes the written information provided to petitioner in the Toolbox and the 2002 policy. For these reasons, I conclude that insurer is not estopped from assessing premium as set forth in the final premium audit.

ORDER

SAIF's final premium audit billing for the audit period of January 1, 2004 through December 31, 2004 is correct and payable.

_____ Date: October 27, 2005
Catherine P. Coburn, 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
Oregon Insurance Division
350 Winter Street NE Room 440
Salem, OR 97301-3883