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

In the Matter of the Petition of	)	Case Nos. INS 06-02-007,
	)	06-04-028
	)	
DAVE'S LOAM & TOPSOIL, INC.	)	
An Oregon Corporation	)	**PROPOSED ORDER**

HISTORY OF THE CASE

Dave's Loam & Topsoil, Inc. (hereinafter "Dave's Loam" or employer) appealed its final premium audit billing (INS 06-02-007) and also requested a hearing contesting the decision of the Oregon Workers' Compensation Rating System Review and Advisory Committee (ORAC) concerning classification codes assigned to its workers.

Both matters were referred to the Office of Administrative Hearings[1] and they were consolidated for hearing on August 17, 2006 in the OAH offices on Cherry Avenue in Salem. Dave Krantz, the principal of Dave's Loam, appeared and represented employer in the hearing. SAIF Corporation appeared through Theresa Smith and was represented by Shannon Rickard of the Department of Justice. The National Council on Compensation Insurance (NCCI) appeared telephonically through Tim Hughes. Dave Krantz, Theresa Smith and Tim Hughes testified at hearing. The record closed on the day of the hearing.

ISSUES

1. Whether SAIF correctly classified employer's hauling business under Code 7219 when hauling materials for another company.

2. Whether, if there was a misclassification, the premium audit should be reduced. Employer concedes that a ruling against it on the classification issue (Issue 1), would lead to a ruling against it on the premium audit issue as well. SAIF contends that a finding of misclassification on Issue 1 would not change the amount of the premium audit in question.

EVIDENTIARY RULINGS

SAIF offered Exhibits A1 through A16 into evidence, and they were admitted without objection.

[1] 06-02-007 was referred to the OAH on February 14, 2006, and 06-04-028 was referred on April 25, 2006.

STIPULATED FACTS

The parties stipulated that when employer hauled materials it owned, SAIF classified the workers under Code 8232. When employer hauled the same materials owned by another entity, the workers were classified under Code 7219.

FINDINGS OF FACT

1. Dave's Loam & Topsoil, Inc. operates a business hauling rock, dirt and loam in dump trucks owned by employer. Employer employs six or more drivers who make several different trips in the trucks each day. Sometimes the driver will be carrying a load of rock owned by employer, to deliver to one of employer's customers. Other times, the driver may be carrying a load of rock or other material, owned by a contractor other than employer, from one jobsite to another. There were times when neither the driver nor Dave Krantz, the prinicipal of employer's corporation, knew whether a load of rock or other material belonged to another contractor or to Dave's Loam.

2. Employer's workers' compensation coverage was cancelled and went to the "assigned risk" pool for new coverage. SAIF Corporation, the insurer to which employer was assigned, evaluated the classification codes and concluded that the drivers should be classed under Class 7219, a general hauling code. (Ex. A4 at 2). The workers' had previously been classed under Class 8232, the code for rock dealers. (Ex. A5 at 3).

3. When employer objected to this reclassification, it was told that Class 7219 applied when the materials being hauled did not belong to employer, while Class 8232 would apply in any situation where employer's driver was delivering materials owned by employer. SAIF told employer that it could use both classification codes with the proper payroll records showing the split by classification. (Test. of Smith). Employer objected that the record-keeping between the two types of deliveries would be prohibitively time-consuming for his drivers. The rate for work performed under Class 8232 is less than the rate under Class 7219. (*Id*.).

ADMINISTRATIVE NOTICE

At the hearing, I took administrative notice of the accuracy of the *Basic Manual or Workers' Compensation and Employers Liability Insurance*, as well as of the *Scopes of Basic Manual Classifications.* I accept these documents, and in particular the portions of the document which are part of this record, as the authoritative definitions of what the work entails under Classes 7219 and 8232.

CONCLUSIONS OF LAW

Class 7219 is the correct code for employer's employees when hauling materials belonging to others.

The final premium audit appealed by employer is correct.

OPINION

The conflict between SAIF and its insured has been clearly presented by the parties: If employer hauls a truckload of rock and actually owns the rock, the workers are classed under Class 8232. If an identical truckload of rock is hauled but the rock belongs to another contractor, the workers are classed under the higher (more expensive) Class 7219. In other words, the ownership of the materials being hauled is the basis for the change in classification. Employer contends that the ownership of the materials does not change the risk to its employees, and argues that the less expensive Class 8232 should apply to its employees.

While employer's questioning of this criterion is reasonable—there being no clearly evident reason why the ownership of the load would increase the risk—employer must do more than question the application of Class 7219. SAIF's conclusions are deemed correct, and employer has the burden to prove, by a preponderance of the evidence, that SAIF's conclusions were wrong. *Salem Decorating v. Nat'l Council on Comp. Ins.*, 116 Or App 166, 170 (1992), *rev den* 315 Or 643 (1993). Employer has not met its burden in this case.

The Importance of Ownership. A review of the two classification codes shows that, although one can think of a situation where the loads are exactly the same except for ownership of the load, the ownership provides an important difference. The two classification codes reflect the difference. SAIF correctly described Class 8232 in its policy information page sent to employer:

> **8232 14 ROCK DEALER – NO CRUSH – NO DIG – DR**
>
> Class 8232 applies to your employees involved in direct labor, supervision or driving, who are engaged in the yard operations of a building material dealer. Merchandise sold may include sand, gravel, crushed stone, rock, cement, concrete ready mix * * * Operations include the handling of merchandise, loading and unloading, pick up and delivery * * *.

(Ex. A5 at 3).[2] *See also*, Ex. A15. The classification is very specific to rock and building material dealers. That specificity is important when compared to Class 7219:

> **7219 05 TRUCKING – NOC – DR**
>
> Class 7219 applies to your employees involved in direct labor, supervision, and driving who are engaged in the hauling of general merchandise, including explosives or ammunition, under contract for one or more individuals or concerns provided you have no equity in the items hauled and such operations are not subject to another classification. * * *

(Ex. A4 at 2). *See also*, Ex. A16. While Class 8232 is *specific* to rock and building material dealers, Class 7219 is a *general* hauling classification.

[2] I am using SAIF's summaries because I find that they lend clarity to the classifications that are somewhat harder to grasp with the language of the Scopes Manual.

The specificity is the important difference. An insurer offering workers' compensation coverage to a building material company is able to assess the risk to the company's employees based upon the work performed and the materials handled. The variety of materials is ascertainable. However, a contract hauler may or may not know the contents of the load he is hauling. It could be, as employer noted, the exact same type of rock as that delivered in the shipment that is owned by the company. However, it could be something different and much more dangerous, such as explosives or ammunition. The distinction drawn between the two classes is a reasonable one, and employer has failed to show that it is incorrect.

Keeping Records. Moreover, although employer contends that it is impossible for its drivers to keep records of which load is which (i.e. an owned load or a contract hauling load), I do not accept the accuracy of that statement. Employer did keep such records for several months in 2004, resulting in a substantial savings to the company. I do not doubt that it is inconvenient to keep such records, and it will undoubtedly increase the amount of bookkeeping necessary to justify the lower rate, but that is a business decision which only employer can make.

Final Premium Audit. Employer contended that the final premium audit was too high, and based that contention upon its argument that Class 8232 applied instead of Class 7219. I have found that SAIF correctly assigned Class 7219 to the contract hauling part of the business. Accordingly, I find that the premium audit amount is correct and would affirm that decision.

PROPOSED ORDER

I propose that the department issue the following final order:

SAIF Corporation correctly assigned Class 7219 to employer's contract hauling business.

SAIF's final premium audit dated January 18, 2006, is correct and payable.

DATED this 21st day of September 2006.

/s/ Rick Barber
Rick Barber, 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:

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

CERTIFICATE OF SERVICE

On the 21st day of September 2006, I mailed the foregoing PROPOSED ORDER in Reference No. **0602007.**

BY FIRST CLASS MAIL:

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/s/ Karen Snyder
Karen Snyder
Hearing Coordinator