STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
TRITAC SHOOTING SOLUTIONS,	)	OAH No. 15-10-001
LLC	)	Agency Case No.: 15-10-001

Procedural History

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

Tritac is an indoor shooting range and retail gun store with approximately five to six employees. When the insurer audited the business for the 2014 policy year, the insurer determined that the only appropriate classification code for all of the employees was 9180.[1] Tritac disagreed with the insurer's interpretation, seeking a separate Code 8017[2] for the work in support of the gun shop. Tritac appealed the determination to The Oregon Review and Advisory Committee (ORAC).

On August 3, 2015 ORAC issued a Case Summary and Decision to Tritac denying its request to apply Classification Code 8017 to a portion of its business. On August 13, 2015, Tritac filed an appeal of the ORAC decision with the Division. On October 1, 2015 the Division referred the hearing request to the Office of Administrative Hearings (OAH).

By Proposed Order dated January 12, 2016, Administrative Law Judge Rick Barber granted employer's motion for summary determination based upon the following Conclusion of Law: Tritac is not currently entitled to an exception from classification code 9180 for its

[1] Scopes Manual , National Scopes, Posted 18 Dec 2015. 9180 - Amusement Device Operation, Cross-Ref Club – Shooting & Drivers.

[2] Scopes Manual , National Scopes, Posted 18 Dec 2015. 8017 Store – Retail

employees when they are working in the retail store, but will be if Tritac begins keeping verifiable time records.

On February 11, 2016, the National Council on Compensation Insurance, Inc. (NCCI), the authorized representative for ORAC, served exceptions upon the Division. Tritac filed a Response to the NCCI Exceptions on February 12, 2016. On April 1, 2016, the Division forwarded the exceptions and the response to OAH. On April 21, 2016 ALJ Rick Barber submitted a Response to Exceptions.

The Director has reviewed the entire record and additional submissions in this matter.

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 and the Response to Exceptions as the findings of fact, conclusions of law, and reasoning of this final order.

Order

TRITAC SHOOTING SOLUTIONS LLC's Motion is GRANTED. ORAC/NCCI will be directed to apply code 9180 to Tritac employees when they are working in the retail store once Tritac keeps verifiable time records.

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 Insurance Division.

Dated July 14, 2016

John Paul Jones
Deputy Administrator
Department of Consumer and Business Services

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

IN THE MATTER OF:	) **PROPOSED ORDER**
	)
TRITAC SHOOTING SOLUTIONS, LLC	) OAH Case No.: INS 15-10-001
	) Agency Case No.: 15-10-001

HISTORY OF THE CASE

On August 3, 2015, the Oregon Review and Advisory Committee (ORAC) issued a Case Summary and Decision to Tritac Shooting Solutions, LLC (Tritac), denying its request to apply Classification Code 8017 to a portion of its business.[1] On August 13, 2015, Tritac member Steven Weiss filed an appeal of the ORAC decision with the Insurance Division (Division) of the Department of Consumer and Business Services (DCBS).

On October 1, 2015, the Division referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Rick Barber to preside at hearing. On November 18, 2015, ALJ Barber convened a prehearing conference. Victoria Dorsey, an attorney with the National Council on Compensation Insurance, Inc. (NCCI), represented ORAC in the prehearing.[2] Mr. Weiss appeared for Tritac. The parties agreed to set the hearing for December 7, 2015.

Hearing was held as scheduled on December 7, 2015, by telephone. Mr. Weiss appeared and testified. Ms. Dorsey represented ORAC. NCCI Regulatory Service Manager Tim Hughes testified for ORAC. The record closed on December 7, 2015.

ISSUES

Whether Tritac is entitled to an exception from classification code 9180 for its employees when they are working in the retail store.

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[1] The matter first arose in the context of a premium audit dispute between Tritac and its workers' compensation carrier, SAIF Corporation, about a premium audit for the policy period of January 8. 2014 through January 1, 2015. Because Tritac recognized that it would not prevail on the premium audit matter (where ORAC issues can be tried concurrently), it chose to dismiss that matter and pursue this ORAC matter separately.

[2] ORAC is the local body that determines classification codes, and any exceptions to those codes in Oregon, on behalf of the national rating body, NCCI. OAR 836-043-0210 to -0240. NCCI often (as in this case) takes no position on the dispute and acts as a neutral, taking notes and formulating a written decision based upon the ORAC members' discussion and approved by ORAC's members.

EVIDENTIARY RULINGS

Exhibits 1 through 13 were admitted into evidence without objection.

FINDINGS OF FACT

1. Weiss and his son are the members of Tritac Shooting Solutions, LLC, an indoor shooting range and retail gun store in Salem. Weiss is retired, having previously worked as an expert witness concerning utility rates in several states. (Test. of Weiss).

2. The layout of the store and shooting range is as set forth in the schematic in Exhibit 9. The store and the shooting range share a cement wall, and the shooting range can only be entered by two doors with a security pad at each door. All shooters must enter through those two doors from the retail store into the shooting range. There is a bulletproof window next to the doors, in the area where the shooters are. Roughly 70 percent of Tritac's gross receipts come from the shooting range. Members and visitors pay a daily or monthly fee to use the range. The other income is from the retail store, which sells handguns, ammunition and related items, and does the scheduling for the shooting range. Tritac also rents handguns for use in the shooting range. (Test. of Weiss).

3. Tritac has five to six employees. In the process of selling handguns, the employees supervise potential purchasers as they try out the gun in the shooting range. They enter the shooting range with the customer as the customer tests the weapon. As of the time of the hearing, Tritac was not keeping verifiable time records between the two locations, but (if the separate code was granted), would use the electronic keypads on the doors to separate and verify how much time an employee spent in each location. (Test. of Weiss).

4. When the employee enters the shooting range, he or she puts on protective gear, including goggles and ear protection. Tritac has a contractor come in twice yearly to remove the lead slugs from the "bullet trap" behind the shooting range, and to remove lead contaminants from the range and the trap. Tritac's employees do some daily or weekly cleaning of the range with protective clothing and gear, including full suit protection and respirators. (Test. of Weiss).

5. SAIF is Tritac's workers' compensation carrier. When it audited the business for the 2014 policy year, SAIF determined that the only appropriate classification code was 9180, the code for the shooting range, which it considered the primary business based upon percentage of receipts. Tritac disagreed with SAIF's interpretation, and contested SAIF's Final Premium Audit Billing. Weiss recognized that his lack of verifiable time records for that policy year lowered his chances of prevailing on the premium audit, so he withdrew that hearing request and requested a change in the code from ORAC. (Test. of Weiss).

6. The classification procedure is used to assign one basic code to a business of the employer within a state. It is the business that is classified, not separate employments or occupations within the business. For a second classification code to be assigned, an employer must establish entitlement to that second code. The Basic Manual, produced by NCCI, provides the rules that insurers use to determine an insured's risk and to assign classification codes to

those risks. The "Scopes Manual" is also produced by NCCI, and fleshes out the intent of the classification codes. (Test. of Hughes; Ex. 3).

7. After considering the positions of Tritac and SAIF, ORAC went into executive session. SAIF is a standing member of ORAC and may have participated in the discussion in executive session but abstained from voting because of its involvement in the dispute. (Ex. 5 at 3; Test. of Hughes). After reviewing the case and the Basic Manual and Scopes Manual, the committee concluded:

> In executive session, committee members discussed the following summary information:
>
> - It is estimated that 70% of the work performed by the employees is in support of the firing range.
> - While the time spent in the range may be less than the time spent in the gunshop, the employees are nevertheless, potentially exposed to lead contaminates and potential hearing loss.
> - It is difficult to delineate the work in support of the range as opposed to the gunshop. Some job duties are in direct support of the range (e.g., selling range memberships, renting guns and selling ammunition and targets that are then used in the range).
> - Some businesses assigned to Code 9180, such as downhill skiing operations are allowed to use Code 8017 for ski shop employees where ski equipment is rented and repaired. However, in the case of TSS' operation, the job duties are so co-mingled that a clear delineation of the work in support of the range versus the gunshop cannot be clearly confirmed.
>
> After further discussion, a motion was made, seconded and passed by majority vote (the SAIF representative abstained as SAIF is [the] carrier on the disputed policy) and it was
>
> **RESOLVED**, that all of the operations of TSS are correctly classified to Code 9180.

(Ex. 5 at 3). NCCI did not take a position in the discussion on this case, and Hughes' participation involved taking notes and writing the decision for ORAC's approval. (Test. of Hughes).

CONCLUSION OF LAW

Tritac is not currently entitled to an exception from classification code 9180 for its employees when they are working in the retail store, but will be if it begins keeping verifiable time records.

OPINION

Tritac seeks to include a second classification code, 8017, along with the 9180 code that

SAIF has applied to all of Tritac's business. Tritac has the burden of proof to show that there is a reason to apply a second code to its operation. Tritac must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

The Basic Manual provides the rules for assigning classification codes—used in rating the various exposures for employees of businesses—to risks in workers' compensation insurance coverage. In general, a more dangerous risk of injury will be covered at a higher rate. For instance, an employer with office workers will have a lower rate than an employer of loggers or truck drivers.

An insurer rates the insured's business, not the specific activities of each person in a business. (*Basic Manual*, Rule 1.A.2). SAIF's position in its premium audit, and the ORAC decision on this appeal, is that Tritac's entire business must be assigned class code 9180 and that Tritac is not entitled to a second classification code for its retail operation (gun store).

However, it is not uncommon for an insured to have more than one classification code applied to its business. The entitlement to the additional code is determined under the following rule:

3. Assignment of More Than One Basic Classification

* * * * *

More than one basic classification may be assigned to an insured who meets conditions a, b or c below. Operation means activities, enterprises, processes, secondary businesses or undertakings.

a. The insurer's principal business is described by a basic classification that requires certain operations or employees to be separately rated.

Refer to User's Guide for an example.
b. The insured conducts one or more of the following operations:

- Construction or erection
- Farming
- Employee leasing, labor contracting, temporary labor services
- Mercantile business

c. The insured conducts more than one operation in a state.

(1) For purposes of this rule, an insured is conducting more than one operation in a state if portions of the insured's operations in that state are not encompassed by

> the classification applicable to the insured's principal business. To qualify for a separate classification, the insured's additional operation must meet all of the following conditions:
>
> - Be able to exist as a separate business if the insured's principal business in the state ceased to exist.
> - Be located in a separate building, or on a separate floor in the same building, or on the same floor physically separated from the principal business by structural partitions. Employees engaged in the principal business must be protected from the operating hazards of the separate additional operations.
> - Maintain proper payroll records. *Refer to Rule 2-G for the description of proper payroll records.*

(*Basic Manual*, Rule 1.D.3; emphasis in original).

Tritac contends that it qualifies for a second classification code in either of two ways. First, under Rule 1.D.3.b, it contends that it is a "mercantile business." Second, it contends that it has met the criteria in 1.D.3.c.

Not a Mercantile Business. The term "mercantile" is not defined in the Basic Manual, so I give the word its plain meaning:

> **mercantile** * * * **1:** of or relating to merchants or trading **:** appropriate to or characteristic of merchants **:** engaged in trade * * * **2:** of, relating to, or having the characteristics of mercantilism * * * **3:** having or exhibiting the motives of a merchant[.]

(*Webster's Third New International Dictionary* (2002 Ed.) at 1412). Tritac argues that its gun store is a mercantile business because it sells guns, ammunition and accessories. However, Tritac is only partially a mercantile business; the shooting range is not a mercantile business.[3] Because the "mercantile business" exception could only apply to part of Tritac's business, it does not qualify for the exception.

More than One Operation. Under subsection c(1), however, Tritac's argument is more convincing. There are three parts to this subsection: Tritac must show: 1) that its retail gun store could exist if the shooting range ceased to exist; 2) that the two businesses are physically separated; and 3) that Tritac has maintained proper payroll records—that is, verifiable time records as required by Oregon law. I will address these three criteria in reverse order.

a. verifiable time records. ORAC's review in this case was addressing a question in the

[3] Although the *Webster's* definition does not make this clear, the general meaning of a mercantile business, in this ALJ's opinion, is a store with many different types of merchandise rather than a specialized store like Tritac operates. Whether this general meaning is correct is not at issue, because it is clear that the larger portion of Tritac's operation is a shooting range, which does not fall under the "mercantile" definition.

abstract. Tritac admits that it has not kept verifiable time records, and concedes that a decision in Tritac's favor here would not affect the amounts of premium owed up to this point.

However, given Weiss's testimony at hearing, there is every reason to believe that keeping verifiable time records would be possible if Tritac installed a time system as part of the secure doors between the shooting range and the store. As Weiss argued, the risk is easily delineated between the retail store and the shooting range based upon where the employee is. Properly set up, the time system would give accurate data about the split of time between the two areas. Whether Tritac actually installs such a system, and whether it presents a clear enough record to satisfy Tritac's insurer, are questions that cannot be answered in this decision. However, assuming that verifiable time records are kept, Tritac has established the other necessary factors.

b. physical separation. Tritac has established that there is adequate physical separation between the shooting range and the retail store. They are on the same floor of the building, but separated by a reinforced wall. Tritac employees work in both places, but wear protective gear when entering the shooting range to either work with a shooter or to clean the area. When the workers are in the retail area, they are protected from the shooting range by the wall and a small window of bulletproof glass. In addition, the door between the two areas contains two security keypads, enhancing the separation.

c. ability to stand alone as a business. Hughes testified that the committee was concerned about Tritac's ability to run the retail gun store independently if the principal business—the shooting range—did not exist. The committee speculated that the business would not survive, but Weiss testified that the two businesses could exist independently. He testified that there are other gun stores in Salem, but only his has a shooting range. The fact that other gun stores are in business in the area—and the fact that Weiss, who is in the business, has testified that his store could survive—is sufficient evidence to outweigh the committee's speculation about the viability of the store.

The committee emphasized the fact that much of the activity in the store involves work that is supportive of the shooting range. The employees schedule the range, sell memberships, and rent firearms to the public to use on the range. Based upon Weiss's testimony and the documents in the record, that information is accurate. However, there is no rational basis to conclude that using a computer or a calendar and a pen to schedule shooting time (or to sell a membership) has the same risk as actually being on the shooting range. The presence of the two doors, both of which must be opened with a keycard, separates the risks.

In summary, I disagree with the committee's conclusions about how the rule should apply to Tritac. This is an interpretation of the ORAC decision only, and would not have any effect on Tritac now, because it does not keep verifiable time records and does not have a time system that interfaces with the keycard system. If Tritac begins to keep verifiable time records, it should be able to use the 8017 code for its retail store.

ORDER

I propose the Department of Consumer and Business Services, Insurance Division issue the following order:

That the August 3, 2015 ORAC Case Summary and Decision be overturned, and that Tritac be allowed to use classification code 8017 if it regularly provides verifiable time records to its insurer, in keeping with Oregon law.

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. You may send exceptions via email to gale.m.gage@oregon.gov, or via mail to:

Gale M. Gage
Division of Financial Regulation
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF SERVICE

On the 12th day of January 2016, I mailed the foregoing PROPOSED ORDER in Reference No. **1510001.**

BY FIRST CLASS MAIL:

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