STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
Atherly Contracting, LLC	)	OAH No. INS 1511023
	)	Agency Case No.: INS 15-11-023

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 Atherly Contracting, LLC, (employer) pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 *et. seq.*

On November 12, 2015, the Division referred employer's hearing request contesting the billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether insurer's Final Premium Audit, dated June 19, 2015, was correct. By Proposed Order dated April 18, 2016, Senior Administrative Law Judge Joe L. Allen Affirmed the insurer's Final Premium Audit, dated June 19, 2015.

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

Order

SAIF Corporation's Final Premium Audit issued June 19, 2015 is AFFIRMED.

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 March 2, 2017

Laura Cali Robison
Administrator, Division of Financial Regulation
Insurance Commissioner and Chief Actuary
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**
	)
ATHERLY CONTRACTING, LLC	) OAH Case No.: INS 1511023
	)

HISTORY OF THE CASE

On June 19, 2015, SAIF Corporation (SAIF or insurer) issued an Oregon Final Premium Audit Billing (premium audit) to Atherly Contracting, LLC (Appellant). The premium audit indicated Appellant owed an additional $5,874.92 in premiums for its workers compensation coverage. The premium audit covered the period April 1, 2014 through April 1, 2015. On or about August 11, 2015, Appellant requested a hearing.

On November 12, 2015, the Division referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Alison G. Webster to preside at hearing. On December 18, 2015, Senior ALJ Webster convened a prehearing conference. The purpose of the prehearing conference was to identify issues for hearing and to establish a date for hearing. Following the prehearing conference, Senior ALJ Webster became unavailable to preside over this matter. The OAH reassigned the case to Senior ALJ Joe L. Allen.

A hearing was held on February 17, 2016, in Salem, Oregon. Holly O'Dell, Managing Attorney for SAIF's legal services division, appeared on behalf of the insurer. Testifying on behalf of SAIF was Eric Williams. Darst Atherly, President of Appellant, appeared as the authorized representative and testified on behalf of Appellant. The record closed at the conclusion of the hearing.

ISSUE

Whether SAIF's Final Premium Audit, dated June 19, 2015, is correct.

EVIDENTIARY RULING

Exhibits A1 through A10, offered by the insurer, were admitted into the record without objection. Exhibit A11 was admitted into the record over Appellant's objection. Exhibit R1, offered by Appellant, was also admitted into the record without objection.

FINDINGS OF FACT

1. Appellant performs a variety of work in the logging industry including timber felling, brush clearing, and reforestation activities. (Test. of Atherly.)

2. On or about May 16, 2014, Appellant entered into a contract with the United States Department of Agriculture (USDA) to perform certain work in the Bend Fort Rock Ranger District in the Deschutes National Forest (herein after BFR contract). (Ex. R1.)

3. The BFR contract is labeled as a "site prep cutting" contract. (Ex. R1 at 1.) The BFR contract called for hand cutting of trees and lopping of slash on approximately 729 acres of forestland. Under the BFR contract, Appellant was to remove all live trees not needed to meet average spacing requirements or not otherwise designated within the contract as trees to be preserved. In addition, the BFR contract called for, inter alia, the removal of cull[1] and dead trees. (Ex. R1 at 5 and 6.)

4. In addition, the BFR contract called for treatment of slash through removal of limbs (lopping) and cutting felled trees to specified lengths (bucking). Further, the contract specified that any brush cutting necessary to achieve the contract objectives was considered incidental. (Ex. R1 at 7; test. of Williams.)

5. The National Council on Compensation Insurance (NCCI) develops rating classifications for use by insurance companies when allocating risk to various occupations. These classifications are set forth in the Basic and Scopes manuals published by NCCI. In addition, the State of Oregon periodically develops special rules regarding rating classifications of specific occupations. Insurers are required to follow NCCI classifications and Oregon rules when allocating risk in a worker compensation policy. (Test. of Williams.)

6. NCCI's Basic Manual provides in part:

> 2702 LOGGING OPERATIONS – NONMECHANIZED EQUIPMENT OPERATIONS AND DRIVERS
>
> This classification will apply to the operations of any logging site that does not meet the qualifications for Code 2725. Separately classify slash piling and/or burning as Code 0124; brush cutting performed in a reforested, plantation, or natural growth area, including the incidental cutting of seedling/sapling tress less than 8 inches in diameter at breast height (DBH) when part of a brush cutting contract, as Code 0124[.]

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[1] The BFR contract provides specific definitions for cull trees. (Ex. R1 at 5.) Within these definitions, only one provides specifications as to the target trees' diameter and reads as follows:

> (2)(b) *Wester Gall Rust/ Bole Cankers*: Trees 1 to 8 inches DBH with one or more visible bole infections that encompass 50 percent or more of the bole's circumference.

(*Id.*; emphasis original.)

(Ex. A3 at 2; underline original.)

7. NCCI's Scopes Manual provides a definition for classification code 2702, which reads, in relevant part:

> **PHRASEOLOGY** LOGGING OR TREE REMOVAL – NONMECHANIZED OPERATIONS
>
> * * * * *
>
> **Description:**
>
> Code 2702 applies to all types of logging and tree removal operations regardless of the size of timber being harvested or removed. It is assigned to the cutting of young trees 2 to 3 inches in diameter used for fence posts and fence sections as well as the felling of huge trees several feet in diameter. It applies to stump removal when the operation is performed in connection with other logging or tree removal operations * * *.
>
> **Analogy Assignments:**
>
> * * * * *
>
> The thinning of timberland or mitigation of fires by removing small trees using chain saws is considered within the scope of this classification.

(Ex. A4 at 1 and 2; **bold** original.)

8. In addition, the Scopes Manual provides state exceptions to the standard classification code 2702 and provides, in pertinent part:

> **(OR)** LOGGING OPERATIONS – NON-MECHANIZED EQUIPMENT OPERATIONS & DRIVERS
>
> This classification will apply to the operations at any logging site that does not meet the qualifications for Code 2725. Separately classify slash piling and/or burning as Code 0124; brush cutting performed in a reforested, plantation, or natural growth area, including the incidental cutting of seedling/sapling trees less than 8 inches at in diameter at breast height (DBH) when part of a brush cutting contract as Code 0124[.]

(Ex. A5 at 4; **bold** and underline original.)

9. The Scopes Manual's description for classification code 0124 provides, in relevant part:

OR – REFORESTATION – BRUSH CUTTING & DRIVER.

Performed in a reforested , plantation, or natural growth area. This includes the incidental cutting of seedling/sapling trees less than 8 inches * * *DBH when part of a brush cutting contract. Fuels reduction by thinning small trees, regardless of size, is separately rated under the appropriate Logging Operation classifications, either Code 2702 or Code 2725.

* * * * *

Other reforestation-related activities to be separately rated are:

* * * * *

5. Tree thinning—the removal or small trees for fuels reduction or timber stand improvement—2702[.]

(Ex. A2 at 1 through 3; **bold** and underline in the original.)

10. In order for the insurer to allocate payroll to separate class codes, the employer must provide verifiable time records for any employees it claims are eligible for more than one classification code due to an interchange of labor during the audit period. (Test. of Williams.)

11. During the period of coverage, an employer will provide the insurer with payroll reports in which the employer allocates payroll among the various classes of employees within its organization. Employers may provide such reports on a monthly, quarterly, or annual basis. (Test. of Williams.)

12. When performing an audit of premiums allocated to a logging operation such as Appellant's, the insurer will review maps of the job site as well as those of adjacent sites, if applicable. In addition, the insurer will review all available verifiable time records, contracts, and subcontracts in order to determine what type of work the employer is engaged in on the site in issue. (Test. of Williams.)

13. Once the insurer completes the premium audit, the employer can submit additional information to support its allocation of certain employees to different classification codes. (Test. of Williams.) The insurer considers all information provided by an employer before making a final premium audit decision. (*Id.*)

14. In order for the insurer to allocate labor to classification code 0124 when performed under the terms of a logging contract, the employer must provide sufficient information to show all logging activities have ceased on the site, including verifiable time records (VTRs). In order to qualify, the VTRs must identify to applicable contract, the specific site where the work was performed, and a description of the work performed. In order for the insurer to apply code 0124, the employer must demonstrate that all logging activities at the site have been completed. (Test. of Williams.)

15. When assigning classification codes to the work performed under the BFR contract, the insurer looked at the purpose of the contract and the specific work to be performed. The insurer then reviewed the classification codes reported by Appellant and compared the work to the definitions provided in the Basic and Scopes Manuals. (Test. of Williams.)

16. For the audit period, Appellant reported work performed under the BFR contract to be code 0124. Upon review of the contract, site maps, and time records provided, the insurer determined that the work performed did not qualify for classification code 0124 and reallocated the labor to code 2702. The insurer determined the work required under the BFR contract was tree thinning and tree removal from a forest stand, rather than reforestation or brush cutting. (Test. of Williams.)

17. Appellant provided time records for work it determined should be allocated to classification code 0124. The description of the work performed on each time record indicated only "reforestation and site prep." (Test. of Williams.) The insurer determined the description was insufficient to show all logging work on the subject site had concluded. (*Id.*)

CONCLUSION OF LAW

Appellant failed to establish the insurer's Final Premium Audit, dated June 19, 2015, is incorrect

OPINION

In matters challenging a final premium audit, the employer bears the burden of proving the audit is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). To satisfy this burden, Appellant 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).

Appellant contends SAIF incorrectly allocated some or all hours of certain employees to classification code 2702, non-mechanized logging, rather than the less costly classification code 0124 applicable to reforestation activities. As the proponent of this position, Appellant bears the burden of proof. Specifically, in order to support a finding that the claimed employees should be assigned classification code 0124, Appellant bears the burden of providing verifiable time records for each employee it proposes to reclassify demonstrating such employees were not working on a site where traditional logging was also taking place. At the hearing, Appellant acknowledged it could not produce such time records to support its claim. Instead, Appellant offered evidence that the contract under which its employees performed the subject work identified the work as site preparation cutting rather than logging. Appellant asserted that such site preparation activities are part of reforestation and therefore the insurer should allocate the work to the 0124 classification code.

NCCI requires that, in order for employees to be allocated to the reforestation classification code, no traditional logging can occur on the same site at the same time. Under the explanations and definitions provided by NCCI, traditional logging activities can only be allocated to classification code 0124 when they are performed under the terms of a brush cutting contract and are incidental to the primary work to be performed under such a contract. Appellant claims SAIF should classify work performed under the BFR contract to the reforestation rather than traditional logging job classifications based on the nomenclature of the government contract, rather than definitions provided by NCCI in the Basic and Scopes manuals. Appellant argues that, under OAR Chapter 629, site preparation is a function of reforestation and that because the BFR contract is labeled as "site prep cutting" the work performed logically falls within reforestation activities. I am not persuaded by Appellant's argument.

OAR Chapter 629 Division 610 provides reforestation rules applicable to forestlands under the jurisdiction of the Oregon Department of Forestry.[2] Contrary to Appellant's assertions, the cited sections of OAR Chapter 629 govern only the methods and timing of reforestation by landowners after logging activities. *See*, OAR 692-610-0030, -0040, and -0070. These sections do not define, however, terms applicable to the logging industry for purpose of determining worker compensation insurance premiums. Further, none of the sections cited by Appellant actually defines the terms "reforestation" or "site preparation." Appellant provides no support for its assertion that SAIF must disregard the definitions and explanations in the NCCI Basic and Scopes manuals because administrative rules for the Department of Forestry mention site preparation in the context of reforestation activities.

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[2] OAR 629-610-0000 identifies the purpose of the division and provides, in part:

> (1) Timely reforestation of forestland is an essential factor in assuring continuous growing and harvesting of forest tree species, considering landowner objectives and consistent with the sound management of timber and other forest resources. Reforestation or other forms of revegetation are also important for the continued productivity and stabilization of soils exposed as a result of operations.
> (2) OAR 629-610-0000 through 629-610-0090 shall be known as the reforestation rules.
> (3) The purpose of the reforestation rules is to establish standards to ensure the timely replacement and maintenance of free to grow forest tree cover following forest operations at or above stocking levels that will use the tree growth potential of forestlands in Oregon.
> (4) The reforestation rules are designed to:
> (a) Define forestland subject to reforestation requirements;
> (b) Describe the conditions under which reforestation shall be required;
> (c) Specify the minimum number of trees per acre;
> (d) Specify the maximum time period allowed for establishment of such trees after an operation reduces stocking;
> (e) Describe the acceptable species for reforestation;
> (f) Describe the conditions under which revegetation shall be required in lieu of reforestation; and
> (g) Specify the conditions under which an exemption from the reforestation requirements may be approved.

In addition, Appellant argued that the BFR contract was a brush cutting contract and, therefore, any tree removal performed under the contract was properly allocated to classification code 0124. At the hearing, Appellant testified that he based this argument on his belief that the contract did not call for the removal of trees in excess of six inches DBH. Again, I disagree with Appellant's argument.

Under the terms of the BFR contract, Appellant was tasked with removing trees within a forest stand that were determined to be excess, cull, or dead trees, as well as others. In addition, the contract called for the treatment of slash by lopping and/or bucking. The BFR contract also indicated that any brush removal performed by Appellant was considered incidental to the objectives. Nothing in the contract limited the size of trees subject to removal, with the exception of the identification of certain cull trees.

The insurer determined the work performed under the BFR contract was tree thinning and tree removal from a forest stand, rather than reforestation or brush cutting. Tree thinning and removal from a forest is an activity properly allocated to classification code 2702 according to NCCI's Basic and Scopes manuals. Appellant failed to provide sufficient evidence to show the work performed was done under the terms of a brush cutting contract. Moreover, Appellant failed to provide verifiable time records to show that, during the audit period, all logging activities had ceased at the sites where it asserted classification code 0124 should be applied.

Appellant failed to meet its burden to demonstrate that the work performed under the contract in issue should be allocated to the reforestation classification code.

ORDER

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

SAIF Corporation's Final Premium Audit issued June 19, 2015 is AFFIRMED.

Joe L. Allen
Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

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 **Division of Financial Regulation** within 30 days following the date of service of this Proposed Order. You may send exceptions via email to gail.m.gage@oregon.gov , or via mail to:

Gail M. Gage
Compliance Specialist 3
Division of Financial Regulation
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF SERVICE

On the 18th day of April 2016, I mailed the foregoing PROPOSED ORDER in Reference No. **1511023.**

BY FIRST CLASS MAIL:
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