STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
Assured Quality Homecare, Inc.	)	OAH No. INS 2017-ABC-00241
	)	Agency Case No.: INS-WCA 16-09-003

Procedural History

The Director of the Oregon Department of Consumer and Business Services (Director), by and through Division of Financial Regulation, (Division), commenced the above entitled administrative proceeding to review a workers' compensation insurance final premium audit billing (billing) issued by Liberty Mutual Insurance (insurer) to Assured Quality Homecare, Inc., (employer) pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0101 *et. seq.*

On September 15, 2016, 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 May 3, 2016, was correct. By Proposed Order dated April 13, 2017, Administrative Law Judge Jennifer H. Rackstraw affirmed the insurer's Final Premium Audit, dated May 3, 2016.

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

Liberty Mutual's May 3, 2016 Final Audit Billing, for audit period April 5, 2015 to February 10, 2016, 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 Division of Financial Regulation.

Dated May 11, 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 & BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF THE FINAL PREMIUM AUDIT OF:	)	**PROPOSED ORDER**
	)	OAH Case No. 2017-ABC-00241
ASSURED QUALITY HOMECARE, INC.	)	Agency Case No. INS-WCA 16-09-003

HISTORY OF THE CASE

On May 3, 2016, Liberty Mutual Insurance (Liberty Mutual, or the insurer) issued a Final Premium Audit Billing to Assured Quality Homecare, Inc. (Assured Quality, or the employer), covering the period April 5, 2015 through February 10, 2016. Assured Quality received the billing in approximately mid-June 2016. By letter dated June 24, 2016, Assured Quality requested an administrative hearing. On August 10, 2016, Assured Quality filed a Petition with the Department of Consumer & Business Services (Department), Division of Financial Regulation (Division). On September 15, 2016, the Division referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned the matter to Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw.

On October 25, 2016, ALJ Samantha A. Fair of the OAH held a telephone prehearing conference.[1] Attorney Michael McCord appeared for Assured Quality. Attorney Matthew Hedberg appeared for Liberty Mutual. The parties agreed to a hearing on January 24, 2017.

On or about October 25, 2016, Assured Quality filed an Amended Petition to stay the collection of the disputed charges, pursuant to ORS 737.505(5).[2] On October 26, 2016, ALJ Rackstraw issued an Order Granting Stay of Collection.

On January 24, 2017, ALJ Rackstraw held a hearing in Tualatin, Oregon. Mr. McCord represented Assured Quality. Mr. Hedberg represented Liberty Mutual. The following persons testified: Cynthia Theil, a senior underwriter for Liberty Mutual; Clyde Rapozo, a field audit manager for Liberty Mutual; Bruce Morgan, the chief financial officer for Assured Quality; and Danielle Grubb, a records custodian for FrankCrum. The record closed at the conclusion of the hearing.

[1] ALJ Rackstraw was unavailable on that date.

[2] ORS 737.505(5) states that "[t]he director may, upon a showing of good cause, stay any workers' compensation insurer's collection effort on a final premium audit billing during the pendency of an appeal[.]" Pursuant to OAR 836-043-0170(5), "[t]he director may delegate to the Office of Administrative Hearings the authority to grant or deny the insured's request for a stay."

ISSUES

1. Whether Assured Quality's January 26, 2016 request to cancel its workers' compensation insurance policy with Liberty Mutual should be retroactive to December 16, 2015.

2. Whether Assured Quality has established that Liberty Mutual's May 3, 2016 Final Premium Audit is incorrect.

EVIDENTIARY RULINGS

Liberty Mutual's Exhibits A1 through A10 and Assured Quality's Exhibits R1 through R3 were admitted into the record without objection.

FINDINGS OF FACT

1. Assured Quality is an Oregon corporation that provides various care services to individuals in their homes, including housekeeping, transportation, assistance with activities of daily living (*e.g.* bathing, mobility, toileting, *etc.*), medication management, and nursing services. (Ex. A1 at 2-3.) Corporate officers Diego Morgan (chief executive officer) and Bruce Morgan (chief financial officer) opt out of workers' compensation insurance. (Test. of Morgan; *see* ORS 656.027(10), (24).[3]) Bruce Morgan receives no salary. (Test. of Morgan; Ex. A1 at 3.)

2. Assured Quality applied for an assigned risk policy through the State of Oregon.[4] On April 5, 2014, Liberty Mutual began a one-year period of workers' compensation coverage for Assured Quality. Thereafter, Assured Quality renewed the policy for another one-year period, effective April 5, 2015. (Test. of Theil; *see* Ex. A5 at 11.) The policy contains an "Oregon Cancellation Endorsement," which states, in relevant part:

---

[3] ORS 656.027 provides that all workers are subject to the workers' compensation laws in ORS Chapter 656 except for the nonsubject workers described, in part, in the following subsections:

> (10) Except as provided in subsection (24) of this section, corporate officers who are directors of the corporation and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed by such officers, [subject to limitations not relevant in this matter.]
>
> * * * * *
>
> (24)(a) Corporate officers who are directors of a corporation actively licensed under ORS 671.525 or 701.021 and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed. If all officers of the corporation are members of the same family and are parents, spouses, sisters, brothers, daughters or sons, daughters-in-law or sons-in-law or grandchildren, all such officers may elect to be nonsubject workers[.]

[4] *See* ORS 656.730 (tasking the Department to promulgate an assigned risk plan for certain subject employers).

D. Cancellation

1. You may cancel this policy. You must mail or deliver advance written notice to us, stating when the cancellation is to take effect. If you provide for other insurance or self-insurance, your cancellation of coverage will take effect upon the effective date of that insurance.

2. We may cancel this policy. We will mail to you advance written notice stating when the cancellation is to take effect.

* * * * *

c. If we cancel for nonpayment, we will mail notice of cancellation at least 10 days before the cancellation is to take effect.

(Ex. A5 at 41; bold in original.)

3. On December 16, 2015, Assured Quality "leased" all of its employees to a Professional Employer Organization (PEO), FrankCrum.[5] Effective December 16, 2015, FrankCrum was responsible for all payroll, benefits, and workers' compensation insurance coverage for the leased employees. (Exs. A8, R1 at 1-2; test. of Morgan, Grubb; *see* Exs. R3, A4.) Under the Client Service Agreement between FrankCrum and Assured Quality, a person would become a leased employee of FrankCrum only upon meeting five conditions: 1) the person performs or will perform work for Assured Quality as an employee; 2) the person has completed and executed the Employment Forms; 3) Assured Quality has delivered the completed and properly executed forms to FrankCrum's payroll department; 4) FrankCrum has received, reviewed, and accepted such forms; and 5) FrankCrum notifies Assured Quality in writing that the person has been accepted as a Leased Employee. (Ex. R1 at 1.)

4. The Agreement between Assured Quality and FrankCrum states, in part:

[T]his Agreement will become effective on the first day of the payroll period for which Client begins submitting payroll hours to us.

* * * * *

[N]otwithstanding anything herein to the contrary, all employees of your company must be Leased Employees unless you notify us in writing of the identification of any individuals who are to be specifically excluded from the terms of this Agreement and we have agreed in writing to exclude such individuals as Leased Employees.

[FrankCrum] shall process payroll for all Leased Employees for whom you have submitted timely, accurate, and complete payroll information during each payroll period occurring during the term of this Agreement.

[5] *See* ORS 656.850 and OAR 436-050-0400 (pertaining to worker leasing companies).

> * * *. You assume full responsibility for payroll, workers' compensation claims, benefit claims (including, but not limited to, health insurance claims and pension claims), tax obligations, and any and all other obligations or claims pertaining in any way to any individual for whom payroll information is not supplied during any payroll period (except as may be required by law), or who is not a Leased Employee and is listed as or paid in whole or in part by you as an employee, independent contractor, sub-contractor, intern, volunteer, student, or in any other capacity[.]
>
> * * * * *
>
> [U]nless you and we have otherwise agreed in writing, we will provide workers' compensation insurance coverage for Leased Employees as of the Effective Date of this Agreement. * * *. In the event you allow an applicant to perform services for you during any time period prior to our acceptance of the applicant as a Leased Employee and the applicant is injured during that period, we and our carrier are not responsible for providing workers' compensation benefits to that injured applicant, regardless of whether you submitted payroll information for such applicant. In no event will any independent contractor or sub-contractor be covered by our workers' compensation policy. * * * [You] acknowledge and agree that that you are solely responsible for all matters, including without limitation, workers' compensation insurance benefits and claims that result from injuries and wages that occur while an employee is not acting in the capacity of a Leased Employee or is acting outside the scope of his or her employment, and that you have a legal obligation to secure workers' compensation coverage for any employees that are not Leased Employees, as required by law[.]

(Ex. R1 at 1-2.)

5. On January 26, 2016, Liberty Mutual received a written "Cancellation Request" from Assured Quality, listing the effective date of coverage as December 15, 2016. (Exs. A2 at 3, A6 at 2; test. of Theil.) On the request, Assured Quality specified that the reason for the cancellation was because it had moved its workers' compensation coverage to FrankCrum,[6] effective December 16, 2015. (Ex. A6 at 2.) On January 27, 2016, Liberty Mutual confirmed receipt of the "Cancellation Request" and requested a copy of Assured Quality's replacement workers' compensation policy. (Ex. A7.)

6. On January 28, 2016, Liberty Mutual received a letter from FrankCrum that stated, in relevant part:

> This will confirm that Frank Winston Crum Insurance Company, Inc. is the current workers' compensation carrier and assumes all obligation and

[6] The reference to "FredCrum" on the Cancellation Request is presumably an error.

> liability in connection with workers' compensation injuries as set forth below:
>
> 1. Coverage is limited to injuries sustained by any employees that are leased by FrankCrum to Assured Quality Homecare, Inc.
>
> 2. Coverage is limited to injuries sustained as of the effective date of the Services Agreement, December 16, 2015[.]
>
> 3. Coverage is limited to those leased employees for which Assured Quality Homecare, Inc. * * * is reporting payroll hours.

(Ex. A8; *see* Ex. A2 at 4.)

7. Liberty Mutual canceled Assured Quality's policy, effective February 10, 2016, for nonpayment of premiums. (*See* Exs. A1 at 3, A2 at 4; test. of Theil.)

8. Assured Quality does not use subcontractors. (Test. of Morgan.) Assured Quality had no reported workers' compensation claims from December 16, 2016 through February 10, 2016. (Ex. A2 at 4.)

9. Liberty Mutual conducted a premium audit for Assured Quality, covering the period April 5, 2015 to February 10, 2016. (Ex. A1 at 1-14.) The Premium Audit Report states, in part:

> AUDIT NOTES:
>
> * * * * *
>
> No subcontracted labor accounts noted.
>
> * * * * *
>
> [Assured Quality] entered into a PEO leasing agreement with FrankCrum Insurance. The first payroll paid from this PEO was 1/25/16.
>
> * * * * *
>
> Subcontractors – No subcontracted labor was hired during the policy period. The insured does not use subcontracted labor in the normal course of their operations.
>
> * * * * *
>
> This audit was performed on a paid basis using Time 4 Payroll registers and QuickBooks payroll summaries. Payroll was reconciled to the Federal 941's.

(*Id.* at 3.)

10. The Premium Audit Report shows that during the period January 9, 2016 to February 10, 2016, Assured Quality had gross payroll totaling $66,233 for work in its Redmond location.[7] The classification codes corresponding to that payroll are 8742 (Salespersons or Collectors) and 8835 (Homemaker Service Care Providers). (Ex. A1 at 2, 4.)

11. On May 3, 2016, Liberty Mutual issued a Final Premium Audit Billing to Assured Quality, covering the period April 5, 2015 through February 10, 2016. (Ex. A10.) By letter dated June 24, 2016, Assured Quality disputed the billing on the ground that Liberty Mutual erred in not backdating Assured Quality's cancelation request to December 16, 2015. By letter dated July 18, 2016, Liberty Mutual informed Assured Quality that "obtaining coverage through a PEO is not duplicate coverage and does not warrant a back dated cancellation of our workers[']compensation policy." (Ex. A9 at 1.)

CONCLUSIONS OF LAW

1. Assured Quality's January 26, 2016 request to cancel its workers' compensation insurance policy with Liberty Mutual should not be retroactive to December 16, 2015.

2. Assured Quality has not established that Liberty Mutual's May 3, 2016 Final Premium Audit is incorrect.

OPINION

An employer has the burden of proving, by a preponderance of the evidence, that an insurer's premium audit is incorrect. *See Salem Decorating v. NCCI*, 116 Or App 166, 170 (1992); ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *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 than not true. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987).

Assured Quality contends that Liberty Mutual's premium audit is incorrect because it charges premiums for the period December 16, 2015 through February 10, 2016. Assured Quality contends that it had coverage from a PEO, FrankCrum, during that time period, and that the cancellation request of January 26, 2016 should therefore be retroactive to December 16, 2015.

[7] Assured Quality's home office is in Klamath Falls, but there are also offices in Redmond, Eugene, Pendleton, The Dalles, and Coos Bay. (Ex. A1 at 2.)

Liberty Mutual contends that retroactive cancellation of a workers' compensation insurance policy is appropriate only if an employer had duplicate coverage in place. Liberty Mutual argues that the coverage Assured Quality obtained through FrankCrum was not duplicate coverage because it only covered leased employees, and not Assured Quality as a whole. Conversely, Assured Quality's policy with Liberty Mutual was under Assured Quality's name – with its own FEIN,[8] covered locations, class codes, and payroll – and all policy documentation and endorsements referred to the "insured" as Assured Quality. *See* Exhibit A5. Liberty Mutual contends that while Assured Quality transferred its leased employees to the PEO, any non-leased employees – including uninsured subcontractors, independent contractors, or volunteers – would still have been covered under the Liberty Mutual policy.

ORS 656.419 states, in part:

> (1) A workers' compensation insurance policy issued by an insurer under this section shall provide that the insurer agrees to assume, without monetary limit, the liability of the employer, arising during the period the policy is in effect, for prompt payment of all compensation for compensable injuries that may become due under this chapter to subject workers and their beneficiaries.
>
> * * * * *
>
> (4) Coverage of an employer under a workers' compensation insurance policy continues until:
>
> (a) The expiration of the term of the policy; [or]
>
> (b) The coverage is canceled prior to the expiration date of the policy as provided by ORS 656.423 or 656.427[.][9]

(Emphasis added.)

[8] Under OAR 436-162-0005(10), a "FEIN" is "the federal employer identification number or other federal reporting number used by the Internal Revenue Service (IRS) to identify a business entity and by the insurer, insured, or employer for federal tax reporting purposes."

[9] ORS 656.427 pertains to an insurer's termination of a workers' compensation insurance policy and states, in relevant part:

> (2) An insurer may cancel a workers' compensation insurance policy * * * under this section as follows:
>
> * * * * *
>
> (c) If the cancellation of a workers' compensation insurance policy is based on nonpayment of premium, the cancellation is effective not sooner than 10 days after the date the notice is mailed to the employer.

ORS 656.423 pertains to an employer's termination of a workers' compensation insurance policy and states, in part:

> (1) An insured employer may cancel coverage with the insurer by giving the insurer at least 30 days' written notice, unless a shorter period is permitted by subsection (3) of this section.
>
> * * * * *
>
> (3) An employer may cancel coverage effective less than 30 days after written notice is received by an authorized representative of the insurer by providing other coverage * * *. A cancellation under this subsection is effective immediately upon the effective date of the other coverage, on the effective date of certification as a self-insured employer or on a date agreed upon in writing by the employer and insurer[.]

(Emphasis added.)

The question is whether the policy that Assured Quality had with FrankCrum regarding leased employees constitutes "coverage," for purposes of ORS 656.423.

Liberty Mutual argues that aside from leased employees, the policy with FrankCrum did not pick up any other risk exposures insured under the Liberty Mutual policy. Liberty Mutual contends that although Assured Quality moved its employee pool, effective December 16, 2015, Liberty Mutual was still subject to risk after that date because Assured Quality could have paid remuneration to individuals that were not leased to FrankCrum.

The Agreement between FrankCrum and Assured Quality specifies that Assured Quality is the client (as opposed to "the insured") and is responsible for workers' compensation claims pertaining to "any individual for whom payroll information is not supplied during any payroll period," or who is not a leased employee and is paid by Assured Quality "as an employee, independent contractor, sub-contractor, intern, volunteer, student, or in any other capacity[.]" Exhibit R1 at 1. Under the Agreement, a person becomes a leased employee of FrankCrum only upon meeting five conditions, and if Assured Quality allows an applicant to perform services *prior* to the applicant being accepted as a leased employee and the applicant is injured during that period, FrankCrum is not responsible for providing workers' compensation benefits to the injured applicant. The Agreement also specifies that Assured Quality is responsible for workers' compensation benefits and claims while an employee is not acting in the capacity of a leased employee or is acting outside the scope of his or her employment. *Id.* at 2.

Assured Quality argues that it had no independent contractors or subcontractors and paid no remuneration for services performed after December 16, 2016, because all of its labor from that point forward consisted entirely of leased employees that were covered for workers' compensation through FrankCrum.

First, given the language of the Agreement between Assured Quality and FrankCrum, Assured Quality remained responsible for workers' compensation claims for any person who performed work prior to being accepted as a leased employee of FrankCrum, any person who acted outside of the scope of his or her employment, and any person performing work as an independent contractor, subcontractor, volunteer, or intern. Second, even if Assured Quality did not actually utilize any independent contractors, subcontractors, volunteers, or interns (and did not in fact have persons performing work prior to being accepted as leased employees or working outside of their scope of employment) during the disputed time period, risk exposure to Liberty Mutual nonetheless existed. Third, the record establishes, more likely than not, that Assured Quality had payroll of $66,233 during the period January 9, 2016 to February 10, 2016, under Assured Quality's FEIN.[10] The presence of that payroll suggests that Assured Quality had one or more persons after December 16, 2015 for whom it was responsible for workers' compensation coverage.

In sum, although Assured Quality had workers' compensation coverage for its leased employees as of December 16, 2015, it lacked its own independent coverage. As a result, Liberty Mutual was still subject to risk, and the coverage through FrankCrum was not duplicate coverage sufficient to justify retroactive cancellation of the Liberty Mutual policy. Assured Quality failed to meet its burden of establishing that Liberty Mutual's final premium audit is incorrect.

ORDER

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

Liberty Mutual's May 3, 2016 Final Premium Audit is AFFIRMED.

Jennifer H. Rackstraw
Administrative Law Judge
Office of Administrative Hearings

[10] At hearing, Bruce Morgan testified that he did not know why such payroll showed up in the audit, and he insisted that Assured Quality paid out no remuneration after leasing all of its employees to FrankCrum in December 2015.

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 MAILING

On April 13, 2017 I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2017-ABC-00241**.**

By: First Class Mail

Michael B McCord
McCord & Hemphill, LLC
65 NW Greeley Ave
Bend OR 97703

Emily Drew
Liberty Mutual Group, Inc.
175 Berkeley St.
Boston MA 02116

Matthew E Hedberg
Bullivant Houser Bailey PC
300 Pioneer Tower
888 SW Fifth Avenue
Portland OR 97204

By: Electronic Mail

Gail Gage
Compliance Specialist, DCBS
350 Winter St NE
Salem OR 97301

Alesia K Vella
Hearing Coordinator