STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
Sutten Group, LLC	)	OAH No. 2017-ABC-00606
	)	Agency Case No.: INS-WCA 17-04-006

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 Property & Casualty Insurance Company of Hartford (The Hartford, or the insurer) to Sutten Group, LLC (Sutten Group) (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 May 18, 2017, 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 April 24, 2017, was correct. By Proposed Order dated September 12, 2017, 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

The Hartford's April 3, 2017 Final Premium Audit Billing is MODIFIED. The correct premium for Sutten Group, covering the period February 1, 2016 to February 1, 2017, is $372.

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 January 24, 2018

TK Keen
Deputy Administrator, Division of Financial Regulation
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:	)	**PROPOSED ORDER**
	)	
SUTTEN GROUP, LLC[1]	)	OAH Case No. 2017-ABC-00606
	)	Agency Case No. INS-WCA 17-04-006
	)	

HISTORY OF THE CASE

On April 3, 2017, Property & Casualty Insurance Company of Hartford (The Hartford, or the insurer) issued a "Statement of Premium Adjustment – Workers' Compensation & Employer's Liability" (premium audit billing) to Sutten Group, LLC (Sutten Group) covering the period February 1, 2016 to February 1, 2017. On April 24, 2017, Sutten Group received the billing. On April 27, 2017, Sutten Group requested an administrative hearing.

On May 12, 2017, Sutten Group filed a Petition with the Department of Consumer & Business Services (Department), Division of Financial Regulation (Division) requesting to stay the collection of $384 in disputed charges, pursuant to ORS 737.505(5). On May 18, 2017, 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 May 24, 2017, Senior ALJ Rick Barber issued an Order Granting Stay of Collection.

On June 23, 2017, ALJ Rackstraw held a telephone prehearing conference. Matthew Sutten represented Sutten Group. Andrew Sutton was also present. No one appeared for The Hartford. A telephone hearing was scheduled for July 17, 2017. On June 26, 2017, the OAH mailed notice of the hearing to the parties.

On July 17, 2017, ALJ Rackstraw held a telephone hearing. Matthew Sutten represented Sutten Group and testified as a witness. Andrew Sutten was also present, but he did not testify. No one appeared for The Hartford. The record closed at the conclusion of the hearing.

On July 25, 2017, the premium audit assistant director of The Hartford, Ann Marie Bruno-Rakowitz, sent an email to the OAH and Sutten Group. ALJ Rackstraw marked the email

[1] Sutten Group, LLC became Sutten Group, Inc. on December 16, 2015. (Test. of M. Sutten.) However, Sutten Group's workers' compensation policy through The Hartford, for the period at issue, was written for Sutten Group, LLC.

communication as Exhibit R1, reopened the evidentiary record to admit Exhibit R1 therein, and closed the record on July 25, 2017.[2]

ISSUE

Whether Sutten Group has established that The Hartford's April 3, 2017 premium audit billing is incorrect.

EVIDENTIARY RULINGS

At the hearing, Sutten Group's Exhibit A1 was admitted into the record without objection.

The Hartford's email, received on July 25, 2017 and marked as Exhibit R1, was also admitted into the record.

In addition, an Amended Annual Report from the Oregon Secretary of State's Corporation Division, dated December 16, 2015, and submitted to the Division on or about May 12, 2017, has been marked as Exhibit A2 and admitted into the record.[3]

FINDINGS OF FACT

1. Matthew Sutten is the president and majority shareholder of Sutten Group, Inc., an Oregon corporation whose business activity is real estate sales. Andrew Sutten is Matthew's son. (Test. of M. Sutten; Exs. A1, A2.)

2. Sutten Group, Inc. was formerly Sutten Group, LLC. (Test. of M. Sutten.) Sutten Group, Inc. registered as a domestic business corporation on December 16, 2015, with Matthew Sutten as the registered agent and president, and Andrew Sutten as secretary. (Ex. A2; test. of M. Sutten.)

3. On December 16, 2015, the Board of Directors for Sutten Group held an annual meeting. At the meeting, Andrew Sutten was elected to serve as an officer of the corporation (secretary) for wages of $10 per hour. In addition, five shares of Sutten Group stock was transferred from Matthew Sutten to Andrew Sutten. (Ex. A1 at 1-2; test. of M. Sutten.)

4. Sutten Group obtained workers' compensation coverage for Andrew Sutten through a local agent of The Hartford for the policy period February 1, 2016 to February 1, 2017. For unknown reasons, the policy was incorrectly written for Sutten Group, LLC instead of Sutten Group, Inc. (Test. of M. Sutten; *see* Ex. A1.)

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[2] The Hartford had an opportunity to present evidence and argument at the hearing, but did not avail itself of that opportunity. The late-filed Exhibit R1 was admitted into the record because it was favorable to Sutten Group.

[3] Any party who objects to the admission of Exhibits R1 or A2 may file such objection(s), in writing, with the Office of Administrative Hearings within five (5) days of the issuance of this Proposed Order.

5. During the policy period, no one worked for Sutten Group besides Andrew Sutten. (Test. of M. Sutten.)

6. After receiving a billing for the policy period, Sutten Group paid a balance of $380 to The Hartford. (Test. of M. Sutten; *see* April 12, 2017 Premium Audit Billing.) Sometime later, Matthew and/or Andrew Sutten received information leading him/them to believe that Sutten Group was not required to maintain workers' compensation coverage for Andrew, based on his status as a corporate officer, part-owner of the corporation, and direct family member of the majority owner. As a result, Sutten Group contacted The Hartford, canceled the policy, and requested that the Hartford refund the $380 Sutten Group had previously paid for the policy. (Test. of M. Sutten.)

7. On April 12, 2017, The Hartford issued a premium audit billing to Sutten Group, covering the period February 1, 2016 to February 1, 2017. The billing notified Sutten Group that the total earned premium for the policy period was $384, and that because Sutten Group had previously paid $380, the balance due was $4. (April 12, 2017 Premium Audit Billing.)

8. On April 27, 2017, Sutten Group requested an administrative hearing, via email, to challenge the premium audit billing and seek a $380 refund from The Hartford. (April 27, 2017 Hearing Request; test. of M. Sutten.) On the email correspondence, Andrew Sutten noted that his title was "Administrative Assistant." (*See* April 27, 2017 Hearing Request.)

9. On July 25, 2017, the premium audit assistant director of The Hartford, Ann Marie Bruno-Rakowitz, sent an email to the OAH and Sutten Group that stated, in relevant part:

> I have reviewed this audit and while the final audit did charge the min amount for the officer. [*sic*] Then a revised audit processed as of 5/11/17 with zero Basic of Premium that resulted in a return premium of $8.00.
>
> We include the Policy minimum premium of $170, Expense Constant $180, OR WC administrative fund $22, Terrorism zero and Catastrophe zero = $372 minus deposit $380 = $8.00 Return premium. I hope this helps to address any concerns, please advise should you have any further questions in this matter[.]

(Ex. R1.)

CONCLUSION OF LAW

Sutten Group has not established that The Hartford's April 3, 2017 Final Premium Audit Billing is incorrect. However, on July 25, 2017, The Hartford reduced the premium for the period February 1, 2016 to February 1, 2017 from $384 to $372.

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).

The Hartford's April 12, 2017 premium audit billing states that Sutten Group's total premium for the period February 1, 2016 to February 1, 2017 is $384. Sutten Group contends that the billing is incorrect, and should be zero, because Andrew Sutten was a corporate officer, part-owner of the corporation, and direct family member of the majority owner during that time period and was therefore exempt from workers' compensation coverage. Sutten Group seeks a refund of the $380 paid to The Hartford for the policy. In a document issued post-hearing (Exhibit R1), The Hartford contends that the correct premium for the time period at issue is $372.

The threshold issue is whether Andrew Sutten was a nonsubject worker, and therefore exempt from workers' compensation coverage, during the period February 1, 2016 to February 1, 2017. If he was exempt, the remaining issue is whether Sutten Group is entitled to a refund for the $380 it paid to The Hartford for the coverage.

ORS 656.017(1) requires a subject employer to ensure that "subject workers of the employer and their beneficiaries will receive compensation for compensable injuries as provided by this chapter and that the employer will perform all duties and pay other obligations required under this chapter[.]" ORS 656.023 defines a "subject employer" as an "employer employing one or more subject workers in the state."

Pursuant to ORS 656.027, all workers are subject to ORS Chapter 656 except for the nonsubject workers described in the following 28 subsections:

> (1) A worker employed as a domestic servant in or about a private home[.]
>
> (2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker.
>
> (3)(a) A worker whose employment is casual[.]
>
> * * * * *
>
> (b) For the purpose of this subsection, "casual" refers only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than $500.

(4) A person for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the [U.S.]

(5) A worker engaged in the transportation in interstate commerce of goods, persons or property for hire by rail, water, aircraft or motor vehicle[.]

(6) Firefighter and police employees of any city[.]

(7)(a) Sole proprietors[.]

(8) [P]artners who are not engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto[.]

(9) [M]embers, including members who are managers, of limited liability companies, regardless of the nature of the work performed[.]

(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 the following limitations:

(a) If the activities of the corporation are conducted on land that receives farm use tax assessment * * *[.]

(b) If the activities of the corporation involve the commercial harvest of timber * * *[.]

(c) When labor or services are performed under contract, the corporation must qualify as an independent contractor.

(11) A person performing services primarily for board and lodging received from any religious, charitable or relief organization.

(12) A newspaper carrier[.]

(13) A person who has been declared an amateur athlete under the rules of the [U.S.] Olympic Committee or the Canadian Olympic Committee[.]

(14) Volunteer personnel participating in the ACTION programs, organized under the * * * Foster Grandparent Program and the Senior Companion Program[.]

(15) A person who has an ownership or leasehold interest in equipment and who furnishes, maintains and operates the equipment[.].

(16) A person engaged in the transportation of the public for recreational down-river boating activities on the waters of this state[.]

(17) A person * * * performing volunteer * * * [ski program or patrol activities.]

(18) A person 19 years of age or older who contracts * * * to distribute newspapers to the general public[.]

(19) A person performing foster parent or adult foster care duties[.]

(20) A person performing services on a volunteer basis for a nonprofit, religious, charitable or relief organization[.]

(21) A person performing services under a property tax work-off program[.]

(22) A person who performs service as a caddy at a golf course in an established program[.]

(23)(a) Partners who are actively licensed under ORS 671.525 or 701.021 and who have a substantial ownership interest in a partnership[.]

(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. For all other corporations licensed under ORS 671.510 to 671.760 or 701.021, the maximum number of exempt corporate officers shall be whichever is the greater of the following:

(A) Two corporate officers; or

(B) One corporate officer for each 10 corporate employees.

(b) When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005(30),[4] the corporation qualifies as an

[4] ORS 656.005(30) defines a "worker" as follows:

> "Worker" means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the

> independent contractor. Any corporation licensed under ORS 671.525 or 701.021 and involved in activities subject thereto is conclusively presumed to be an independent contractor.
>
> (25)(a) Limited liability company members who are members of a company actively licensed under ORS 671.525 or 701.021 and who have a substantial ownership interest in the company, regardless of the nature of the work performed[.]
>
> (26) A person serving as a referee or assistant referee in a youth or adult recreational soccer match[.]
>
> (27) A person performing language translator or interpreter services[.]
>
> (28) A person who operates, and who has an ownership or leasehold interest in, a passenger motor vehicle that is operated as a taxicab or for nonemergency medical transportation[.]

(Emphasis added.)

Because Sutten Group was a corporation engaged in real estate sales during the time period at issue, Andrew Sutten could only qualify as a nonsubject worker under ORS 656.027 if he met the criteria in either subsection (10) or (24) of the statute.[5]

To qualify as a nonsubject worker under ORS 656.027(10), Andrew must be a director of the corporation and have a "substantial ownership interest in the corporation." First, the record contains no evidence that Andrew was a director of Sutten Group during the relevant time period. The minutes from the December 16, 2015 annual meeting of the Sutten Group board of directors lists both Matthew and Andrew Sutten as present, but only Matthew as a director. *See* Exhibit A1 at 1. Second, there is no evidence that Andrew has a substantial ownership interest in Sutten Group. Rather, the record contains evidence of Andrew holding only five shares of stock, transferred from Matthew to Andrew on December 16, 2015. Sutten Group has not established that Andrew is a nonsubject worker under ORS 656.027(10).

For Andrew to qualify as a nonsubject worker under ORS 656.027(24)(a), Sutten Group would need to be "actively licensed under ORS 671.525 or 701.021." ORS 671.525 pertains to landscape construction and contracting licenses issued by the Landscape Contractors Board, and

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> direction and control of an employer and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an inmate or ward of a state institution or as part of the eligibility requirements for a general or public assistance grant[.]

[5] Although ORS 656.037 pertains to real estate, the statute only exempts from workers' compensation coverage a "qualified real estate broker" or "qualified principal real estate broker." There is no evidence that Andrew was a real estate broker, and was working as such for Sutten Group, during the period at issue.

ORS 701.021 pertains to construction contracting licenses issued by the Construction Contractors Board. Because there is no evidence that Sutten Group is licensed by either of those Boards, Andrew does not qualify as a nonsubject worker under subsection (24)(a). Moreover, Andrew does not qualify as a nonsubject worker under subsection (24)(b), because Sutten Group does not meet the criteria to be conclusively presumed to be an independent contractor and Sutten Group did not otherwise establish that it qualifies as an independent contractor.

Because Andrew did not meet the criteria for any of the subsections in ORS 656.027, he was not exempt from workers' compensation coverage as a nonsubject worker during the time period at issue. And, even if Sutten Group had established that Andrew was an exempt worker, I am aware of no authority that would require The Hartford to reimburse Sutten Group for coverage that Sutten Group elected to have,[6] paid for, and received.

In sum, because Andrew was a subject worker during the period at issue, Sutten Group was a subject employer, subject to ORS 656.017(1). *See* ORS 656.023. Sutten Group has not argued or established any other basis for a finding that The Hartford's April 12, 2017 premium audit billing is incorrect. However, because The Hartford subsequently reduced the premium for the period at issue from $384 to $372, the premium audit billing should be modified in accordance with that revised premium amount.

ORDER

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

The Hartford's April 3, 2017 Final Premium Audit Billing is MODIFIED. The correct premium for Sutten Group, covering the period February 1, 2016 to February 1, 2017, is $372.

Jennifer H. Rackstraw
Senior Administrative Law Judge
Office of Administrative Hearings

[6] ORS 656.039(1) provides that "[a]n employer of one or more persons defined as nonsubject workers or not defined as subject workers may elect to make them subject workers." ORS 656.039(4) states that "[n]otwithstanding any other provision of this section, a person or employer not subject to this chapter who elects to become covered may apply to an insurer for coverage."

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 the following address:

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

CERTIFICATE OF MAILING

On September 12, 2017 I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2017-ABC-00606.

By: First Class Mail

Sutten Group, LLC
250 S. 47th St.
Springfield OR 97478

Andrew Sutten
Sutten Group, LLC
250 S. 47th St.
Springfield OR 97478

The Hartford
The Hartford
12381 S. Crest Dr.
Olathe KS 66061

Ryan Squatrito
The Hartford
12381 S. Crest Dr.
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By: Electronic Mail

Gail Gage, Agency Representative
Insurance Division
350 Winter Street NE
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Alesia K Vella
Hearing Coordinator