STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
INDEPENDENT DIESEL SERVICES, INC.	)	OAH No. 2017-ABC-00969
	)	DFR Case No. INS-WCA 17-09-001

Procedural History

On August 28, 2017, Travelers Casualty and Surety Company (Travelers) issued a Final Premium Audit Billing to Independent Diesel Services, Inc. (IDS) for the period June 15, 2016 to June 15, 2017. On September 6, 2017, IDS requested a hearing with the Department of Consumer & Business Services Division of Financial Regulation, Premium Audit Work (Department). On September 27, 2017, the Department referred the hearing request to the Office of Administrative Hearings (OAH).

On December 13, 2017, Senior Administrative Law Judge (ALJ) Bernadette H. Bignon convened a telephone hearing. The record closed at the conclusion of the telephone hearing. On January 24, 2018 ALJ Bignon issued a Proposed Order.

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

Travelers' August 28, 2017 Final Premium Audit Billing 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: January 30, 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
PREMIUM AUDIT WORK

IN THE MATTER OF:	)	**PROPOSED ORDER**
	)	
INDEPENDENT DIESEL SERVICES, INC.	)	OAH Case No. 2017-ABC-00969
	)	Agency Case No. INS-WCA 17-09-001
	)	
	)	

HISTORY OF THE CASE

On August 28, 2017, Travelers Casualty and Surety Company (Travelers) issued a Final Premium Audit Billing to Independent Diesel Services, Inc. (IDS) for the period June 15, 2016 to June 15, 2017. On September 6, 2017, IDS requested a hearing with the Department of Consumer & Business Services Division of Financial Regulation, Premium Audit Work (Department). On September 14, 2017, the Department sent IDS the form for filing a Petition to complete the request for hearing. On September 22, 2017, IDS filed a Petition with the Department requesting a hearing and a stay of collection during the pendency of the contested case proceeding.

On September 27, 2017, the Department referred the hearing request to the Office of Administrative Hearings (OAH).

On September 27, 2017, the OAH issued an Order Granting Stay of Collection during the pendency of the contested case proceeding. On October 9, 2017, the OAH assigned Senor Administrative Law Judge (ALJ) Bernadette H. Bignon to preside over the matter.

On October 23, 2017, ALJ Bignon convened a telephone prehearing conference. Patrick Frazier, President of IDS, appeared on behalf of IDS. Travelers appeared and was represented by authorized representative Craig McGregor. ALJ Bignon scheduled a telephone hearing for December 13, 2017, and set deadlines for the submission of witness lists and exhibits.

ALJ Bignon convened the telephone hearing on December 13, 2017, from OAH offices in Tualatin, Oregon. Mr. Frazier appeared, without counsel, and testified as the authorized representative of IDS. Mr. McGregor appeared, without counsel, as the authorized representative of Travelers and testified. The record closed at the conclusion of the telephone hearing on December 13, 2017.

ISSUE

Whether Travelers's August 28, 2017 Final Premium Audit Billing correctly billed IDS for the audit term June 15, 2016 to June 15, 2017 based on IDS's policyholder audit report response, including IDS's last four Federal Quarterly Tax Returns (Form 941).

EVIDENTIARY RULING

Exhibits A1 through A4, offered by Travelers, and Exhibits R1 and R2, offered by IDS, were admitted into the record without objection.

FINDINGS OF FACT

1. IDS performs heavy truck repair in Sandy, Oregon. IDS employed five individuals who performed heavy truck repair, one janitorial employee (terminated during audit period) and one clerical office employee during the audit period at issue. Patrick Frazier, as IDS president, was subjection to an exclusion endorsement on the policy. (Ex. A1; test. of Frazier.)

2. IDS has been insured with Travelers for its workers compensation and employer's liability insurance for seven years, through various brokers, up to and including the audit period at issue. IDS's operations have remained the same while covered under its policy with Travelers. (Test. of Frazier; *see* Ex. A4.) Travelers' policy with IDS authorizes Travelers to audit IDS, including examining its relevant records, during the policy period and within three years after the policy period ends. Travelers utilizes information developed from any such audit to determine final premiums. (Test. of Frazier.)

3. IDS uses Paychex, a third party payroll-services company, for its payroll and accounting services. Paychex, on behalf of IDS, provided projected payroll amounts to Travelers for each premium billing cycle, including the audit period at issue. For the audit period at issue and the prior two audit years, there were no changes in IDS operations or payroll information reported to Travelers. (Test. of Frazier.)

4. On April 24, 2017, Travelers issued to IDS a Notice of Non-Renewal of its workers compensation policy. (Test. of Frazier; Ex. R1.)

5. On or about June 15, 2017, Travelers sent IDS notice of a premium audit for the period June 15, 2016 to June 15, 2017, including a policyholder audit report questionnaire. Travelers requested that IDS return the completed audit report by June 30, 2017, along with copies of its last four Employer's Quarterly Federal Tax Returns (Form 941) or State Unemployment Wage Reports. (Ex. A2; test. of McGregor.)

6. Travelers did not receive a response from IDS to its June 15, 2017 notice and request for information. Per its policy and practice, Travelers completed an audit based on payroll estimates from previous years provided by Paychex for IDS. (Test. of McGregor.) Additionally, Travelers's practice is to increase the policy premium by 50 percent if the employer does not provide records in response to an audit request. (*Id*.; Ex. A2 at 1-4.)

7. On August 22, 2017, Travelers issued a Final Premium Audit Billing to IDS showing a premium charge, prior to the audit, of $5,608, and an additional premium charge of $6,647 for a total premium charge of $12,255. (Pleading – Referral Packet; test. of McGregor.)

8. Upon receiving the August 22, 2017 final billing, Frazier contacted Travelers and spoke to an auditor. After talking to the auditor, Frazier completed the June 15, 2017 policy holder audit report and returned it to Travelers along with IDS's last four Employer's Quarterly Federal Tax Return wage reports (Form 941). (Test. of Frazier; Ex. A2)

9. On August 28, 2017, Travelers revised its audit of IDS for the period at issue, based on the completed policy holder audit report and the four accompanying Form 941 returns submitted by Frazier. The revised audit reduced the August 22, 2017 total audit amount of $12,255 by $4,245. The total premium charge for the period at issue was therefore reduced to $8,010. (*See* Exs. A1, A3; test. of McGregor.)

10. On August 28, 2017, Travelers issued a Final Premium Audit Billing to IDS based on the Revised Audit, showing $8,010 as the Total Premium Charge for the period at issue. (Ex. A3.) On September 13, 2017, Travelers billed IDS for $2,402, the remaining balance due on the premium for the period at issue. (Pleading – Referral Packet; test. of Frazier.)

11. Sometime between June 15, 2015 and April 24, 2016, IDS had a workers' compensation claim filed against its policy with Travelers; the only claim ever filed on the IDS policy. Frazier filed the Petition to contest the August 28, 2017 Final Audit Premium Billing because he believed Travelers' non-renewal was due to the claim on the policy and not because of the reasons Travelers wrote in its notice of non-renewal, dated April 24, 2017. Frazier also believed Travelers audited IDS and increased the premium due to the claim. (Test. of Frazier.) Travelers had previously billed IDS on the estimated payroll data provided by Paychex and IDS paid those premiums as billed. (*Id*.; test. of McGregor.)

CONCLUSION OF LAW

Travelers's August 28, 2017 Final Premium Audit Billing correctly billed IDS for the audit term June 15, 2016 to June 15, 2017.

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).

IDS contends that Travelers' premium audit billing statement for the period July 15, 2016 to July 15, 2017 was incorrect because it was higher than previous years' statements and there had been no change in IDS's operations between previous years and the period at issue.[1] For the reasons that follow, IDS failed to show that Travelers' premium audit was incorrect.

Per its contract, Travelers retained the right to audit IDS during a policy coverage period and up to three years following the end of a policy period. For premium assessments prior to the period at issue, Travelers relied on payroll estimates provided by Paychex on IDS's behalf for assessing and billing IDS for its policy premium. The final premium audit billing was initially based on payroll estimates from Paychex plus a fifty percent increase assessed according to Travelers' business practices because IDS failed to respond to the June 15, 2017 audit notice and records request. The final audit was then revised based on payroll data IDS provided after IDS received the final premium audit billing.

IDS did not contest the audit because it believed the revised audit contained calculation errors or was based on incorrect information. Rather, IDS objected to the increased amount because IDS's representative believed the audit and subsequent increase were the result of IDS having filed its first claim under the workers' compensation policy during the period at issue. The record did not support IDS's argument.

The evidence showed that Travelers assessed prior years' audits using payroll estimates rather than data from IDS's records. Travelers was not obligated to audit IDS each year or to request payroll records and tax documents. The fact that Travelers performed an audit and issued a revised premium audit billing based on IDS's actual data for the period at issue did not result in an incorrect or invalid audit assessment and billing. Based on the record produced at hearing, IDS failed to meet its burden to show that Travelers' premium audit was incorrect.

ORDER

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

Travelers' August 28, 2017 Final Premium Audit Billing is AFFIRMED.

Bernadette H. Bignon
Administrative Law Judge
Office of Administrative Hearings

[1] Frazier's disagreement with Travelers' non-renewal of its workers' compensation policy was not addressed at hearing as it was outside the jurisdiction of the contested case referral.

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 January 24, 2018, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2017-ABC-00969**.**

By: First Class

Patrick Frazier
Independent Diesel Services, Inc.
PO Box 1763
Sandy OR 97055

Craig McGregor
The Travelers Indemnity
39 W 556 West Halida Lane
Geneva IL 60134

By: Electronic Mail

Gail Gage, Agency Representative
Insurance Division
350 Winter Street NE
Salem OR 97301

Ryan Clark for Alesia K Vella
Hearing Coordinator