STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF	)	FINAL ORDER
WILLAMETTE POWER ROOFING	)	OAH No. 2018-ABC-02183
AND PRESSURE WASHING, INC.	)	DFR Case No. INS-WCA 18-09-0005

Procedural History

On August 8, 2018 SAIF Corporation issued a Final Premium Audit Billing to its insured, Willamette Power Roofing and Pressure Washing, Inc. (Willamette). On September 4, 2018, Willamette requested a hearing through the Division of Financial Regulation of the Department of Consumer and Business Services.

Administrative Law Judge (ALJ) Barber convened a hearing on May 14, 2019, in Salem, Oregon. The hearing record closed on May 14, 2019. ALJ Barber issued a Proposed Order on June 24, 2019 affirming the Final Premium Audit Billing. There were no Exceptions filed by any party.

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 dated June 24, 2019 as the findings of fact, conclusions of law, and reasoning of this final order.

Order

SAIF Corporation's Final Premium Audit Billing for the policy year April 1, 2017 through April 1, 2018, issued August 8, 2018 SAIF is AFFIRMED and the Stay of Collections issued November 6, 2018 is vacated.

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: November 25, 2019

Andrew Stolfi
Administrator, Division of Financial Regulation
Insurance Commissioner
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**
	)	
WILLAMETTE POWER ROOFING	)	OAH Case No. 2018-ABC-02183
AND PRESSURE WASHING, INC.	)	Agency Case No. INS-WCA 18-09-0005
	)	
	)	

HISTORY OF THE CASE

On August 8, 2018, SAIF Corporation issued a Final Premium Audit Billing to its insured, Willamette Power Roofing and Pressure Washing, Inc. (Willamette). On September 4, 2018, Willamette requested a hearing through the Division of Financial Responsibility (DFR) of the Department of Consumer and Business Services.

On October 31, 2018, DFR referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Dove Gutman to preside at hearing. ALJ Gutman convened a prehearing conference on February 13, 2019, and the parties agreed to hold the hearing on May 14, 2019. Thereafter, the case was reassigned to ALJ Rick Barber for hearing.

ALJ Barber convened the hearing on May 14, 2019, in Salem, Oregon. Rania Abi Haidar, Willamette's owner, represented Willamette and testified. SAIF Counsel Joy Wang represented SAIF. In addition to her own testimony, Ms. Abi Haidar called Ghassan Dika as a witness. SAIF presented the testimony of Premium Audit Analyst Tracy Meyer. The hearing record closed on May 14, 2019.

ISSUE

Whether SAIF's Final Premium Audit Billing for the policy year April 1, 2017 through April 1, 2018, was correct.

EVIDENTIARY RULINGS

Exhibits A1 through A17, offered by SAIF, and Exhibits R1 and R2, offered by Willamette, were admitted into evidence without objection.

FINDINGS OF FACT

1. Willamette Power Roofing and Pressure Washing (Willamette) is a corporation engaged in the business of roofing, roof repair, roof cleaning and pressure washing, and non-roof-related pressure washing. (Test. of Dika). Although insured with SAIF Corporation since 2012, Willamette's workers initially were leased through ALLPEO, a Professional Employer Organization (PEO) that handled payroll and insurance matters as well for Willamette. During that period, ALLPEO handled all of the workers' compensation matters with SAIF, including premium audits. Willamette received copies of correspondence to and from SAIF. (Test. of Abi Haidar).

Previous Premium Audits

2. At the time of the initial February 12, 2011 application with SAIF, SAIF was informed that Willamette had employees performing regular pressure washing (classification code 9014) and roof pressure washing, which was separately rated along with other roofing-related activities (code 5551). (Ex. A2).

3. In May 2013, SAIF audited Willamette for the policy year April 1, 2012 through April 1, 2013. Denise Graham from ALLPEO was Willamette's contact during the audit. The auditor obtained copies of job contracts from the owner, Ms. Abi Haidar, and noted:

> Auditor found that the hourly division of payroll summaries did not accurately reflect the types of jobs under contract during this policy period and auditor asked for additional information on 7/19/13 from owner to substantiate the breakdown on her employee hours.

(Ex. A4 at 4). The auditor did not receive a response from the owner by July 29, 2013. (*Id.*).

4. On July 30, 2013, SAIF sent a letter to ALLPEO and to Willamette about the audit information. The letter stated in part:

> Going forward, please remember to review the classification descriptions given to you by SAIF to accurately classify the type of work being performed by your employees and remember to adhere to the following division of payroll rules:
>
> *Verifiable time records must be supported by original entries from other records, including, but not limited to, time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager*. The records must include a description of duties performed by the employee, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable.
>
> The record must account for the total hours in each workday, not just those spent in the lower-rated classification. For employees who perform services away from your fixed location, the verifiable record should also include the job number or

customer name. *If verifiable time records are not maintained and available at audit then the payroll for any individual that has duties assignable to more than one classification should be assigned and reported to the highest rated class.*

(Ex. A6 at 1-2; emphasis added). Ms. Abi Haidar does not recall receiving this letter. (Test. of Abi Haidar). However, Ms. Abi Haidar was involved in email communications with SAIF, along with the ALLPEO representative, about the request for verifiable time records in July 2013. (*See, e.g.*, Ex. A7 at 2-3).

5. In 2014, SAIF performed another audit of Willamette, through ALLPEO. At that point, SAIF was apparently satisfied with the division of the labor between codes 5551 and 9014, giving a small reduction in premium paid. (Ex. A8, A9).

The Current Premium Audit

6. In June 2016, Willamette's business relationship with ALLPEO changed. Willamette stopped using leased workers and became responsible for insuring its own employees. At that time, Willamette began using Walter McGraw as its payroll and insurance person. (Test. of Abi Haidar; Ex. A10).

7. On February 24, 2017, SAIF sent the information page to Willamette for the policy year of April 1, 2017 through April 1, 2018. (Ex. A11).

8. On May 21, 2018, SAIF contacted Willamette by letter to confirm that Auditor David Heironimus had set up an audit meeting with McGraw for June 5, 2018. The audit covered the period of April 1, 2017 through March 31, 2018.[1] (Ex. A12).

9. As part of the audit, Heironimus reviewed Willamette's premises, the type of work it performed, and examined several contracts and invoices from June 2018. After completing his review of Willamette's information, he prepared the following notes:

> The auditor met with owner Rania Abi Haidar as well as independent bookkeeper Walter McGraw and reviewed the QuickBooks payroll records and proceeded to aggregate the gross wages for the 4/1/17 – 4/1/18 policy period from the payroll records provided during the appointment and found no deductions (like OT, vacation wages, etc.) shown in their records, thus the gross wages paid equaled the subject wages ($342,011) for the policy year.
>
> The audit then reviewed the job contracts obtained from the owner for the month of June 2017 and compared this with the division of payroll summaries (by employee) obtained from the owner for this same time period to compare the scope of work shown on the contracts versus the type of work listed on their employees timesheets. *Auditor found that the hourly division did NOT accurately reflect the types of work performed showing on the jobs under contract during*

[1] In the records, the policy period is sometimes described as ending on March 31 and sometimes on April 1. There is no meaningful difference between the different descriptions.

this time period. Although 35 of the 37 jobs invoiced during June 2017 would NOT qualify for class 9014 assignment as they involved either roofing replacements, repairs or pressure washing of roofs (all class 5551 activities), the policyholder reported 78% of the field payroll under class 9014 (Pressure Washing) versus only 22% of the wages reported under class 5551 (Roofing & Drivers).

In addition, a review of your policy period Profit & Loss Statement shows over $400,000 spent on supplies and materials and just over $19,000 in dumping fees, indicating that most of your projects were roofing oriented versus just simple pressure washing of walkways, driveways and patios (class 9014 activities). The bulk of your income showing (89%) on the profit/loss statement was coded under 'services' instead of pressure washing, roofing, roof repairs, roof treatment, etc., which made it difficult to distinguish which type of services was being performed and accounted for during the policy period.

Based upon the above audit findings, the audit will reclassify all of the subject wages that were reported to class 9014 ($213,824) by the policyholder to code 5551 (Roofing & Drivers) as there is no verifiable division of payroll records available to substantiate any division of payroll into class 9014. A review of the job contracts also suggests that the bulk of the work performed last policy year involved work on the roof which may have included but is not limited to replacing, repairing, pressure washing roofs, applying zinc/copper, and *related clean-up of debris sprayed off the roof; these are all considered class 5551 activities and not class 9014* (pressure washing of patios, siding, walkways, drivers that are not part of a roofing/roof cleaning contract).

Lastly, the audit included $3,803 in remuneration that was coded "Daily Labor" in your profit & loss statement as not shown under payroll expenses/wages. Payments made to casual laborers/day laborers are considered SUBJECT wages and should be reported to SAIF along with any regular employee's wages. This amount was also classified to code 5551, the governing classification of your business.

(Ex. A13 at 7; italic emphasis added).

10. On August 8, 2018, SAIF issued its Final Premium Audit Billing which, consistent with the audit and the description quoted above, reclassified the subject wages reported by the employer in class 9014 (power washing) into code 5551 (roofing & drivers) because the audit was unable to find any verifiable time records to support the use of the 9014 class code. The audit further placed the "Daily Labor" amount of $3,803 into code 5551. Based upon the audit, SAIF adjusted the premium amount, increasing it by $20,536.07. (Ex. A14).

11. Willamette requested a hearing on the Final Premium Audit Billing and, on October 15, 2018, prepared a Petition setting forth its issues with the audit:

The auditors assumed all employees are on roofs for the length of the 8 hour work shift.
*Employees only spend 50% of their shifts on roofs.
*Supervisors do not go up on roofs for work, they spend hours at the office, too.

(Ex. A15 at 1). Willamette's Petition sought to have SAIF "divide the hours between on roof and on flat surfaces." Willamette also requested a stay of collection of the increased amount of premium SAIF was seeking, pending the outcome of the hearing. (*Id*. at 2).

12. Tracy Meyer is a Premium Audit Analyst for SAIF. Part of her job is to review audits (to "audit the audits") in cases where the insured contests the Final Premium Audit Billing. She reviewed the audit in this case after Willamette requested a hearing. As part of her review, she let Willamette's ownership know they could submit more information, including time records. However, Willamette did not provide any verifiable time records that would change SAIF's position in the case. (Test. of Meyer).

13. There is a class code difference between pressure washing performed as part of a roofing activity (both on the roof and on the ground) and pressure washing of decks and other ground level areas that is unrelated to roofing activities. In 2011, when SAIF began covering Willamette, it provided the following summaries of the class codes to Willamette (quoted in part):

5551 01 ROOFING-ALL KINDS-DR

* * * * *

Class 5551 *applies to your employees* involved in direct labor, supervision, and driving who are *engaged in roofing activities of all kinds*. Roofs may be flat, sloped, or built-up. Materials may include hot tar, hot or cold composition material including polyurethane foams or resin and concrete aggregates, metal, shingle, slate, tile, or paper. Class 5551 also applies to waterproofing of roofs, insulation of roofs, and installation of roof decks made of composition planks and tiles.

This class applies to pressure or power washing of the roof, replacement of worn or damaged roofing materials, and the application of a preservative or anti-moss treatment. Class 5551 also applies to the repair or maintenance of your equipment and vehicles used for this work only when performed at the job site.

* * * * *

9014 24 MOBILE PWR/PRS CLEAN BY CONT NOC/DR

9014 Mobile Power or Pressure Cleaning Service by Contractor NOC & Drivers. Applies to the cleaning of building exteriors, sidewalks, vehicles, and equipment using portable water or steam power cleaning systems. Power or pressure

> cleaning of roofs is separately rated to Class 5551- Roofing & Drivers. * * * Any repair, building renovation or cleaning in connection with construction or erection work to be separately rated.

(Ex. A3; italic emphasis added). In Oregon, the cleaning of roofing debris on the ground as part of a roofing job is classified under class 5551. (Test. of Meyer).

14. Willamette's field supervisor is Ghassan Dika. In addition to supervising the crews, Dika is the estimator for Willamette. Estimating the cost of a project sometimes involves climbing onto the roof, and sometimes it does not. Willamette's workers in the field are split between roofers and roof repairers, earning $20-25 per hour; roof cleaners, earning $23 per hour or by job; and ground crew, earning $12-14 per hour. Willamette can keep track of the tasks and hours based on the hourly wage. Dika sets the hours for each employee daily. The roof repairers and roof cleaners receive training about working on roofs; the ground crew work at pressure washing, including washing the debris that comes off of the roof. (Test. of Dika).

15. During the policy period, Willamette's invoices and contracts generally did not differentiate between the time the ground-level pressure washers were working as part of a roofing job and when they were working on a separate, non-roof-related pressure washing job. (Ex. A17; Test. of Meyer).

16. Ms. Abi Haidar has been working with Mr. McGraw and with SAIF to appropriately keep track of the different tasks each employee performs, and is working to make sure there are verifiable time records in the periods after the policy year at issue here. However, during the policy period in question here, Willamette did not keep verifiable time records. (Test. of Abi Haidar).

CONCLUSION OF LAW

SAIF's Final Premium Audit Billing for the policy year April 1, 2017 through April 1, 2018, was correct.

OPINION

Willamette contends that SAIF's Final Premium Audit Billing is incorrect. Willamette has the burden of proof to establish that the audit billing is incorrect. *Salem Decorating v NCCI*, 116 Or App 166 (1992), *rev den* 315 Or 643 (1993). The burden is one of preponderance of the evidence. Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987).

Willamette contends that SAIF should have split its employees' time between the most expensive class code 5551 (roofing) and the less expensive 9014 (pressure washing) class code. Willamette had split its payroll into those categories, with 78 percent attributed to pressure washing and 22 percent attributed to roofing. However, SAIF disagreed with Willamette's interpretation of its payroll, based at least in part on Oregon Administrative Rule (OAR) 836-

042-0060, which states in part:

> **Conditions for Division of Payroll of Individual Employees**
>
> (1) When there is an interchange of labor, the payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, *provided verifiable payroll records maintained by the employer disclose a specific allocation for each such individual employee*, in accordance with the standards for rebilling set forth in OAR 836-043-0190 and this rule.
>
> (2) This rule does not apply to a single employee whose duties vary within exposure areas normally anticipated by the scope of a single classification or who spends only a limited amount of time, on an infrequent or irregular basis, in a classification exposure that is not a normal job function for that employee. As used in this section, "infrequent or irregular" means that the time spent in the classification exposure is limited, is not anticipated in the normal duties of the employee and occurs only randomly.
>
> (3) *When verifiable payroll records are required* with respect to a single employee *and the employer does not maintain them as required in this rule, the entire payroll of the employee shall be assigned to the highest rated classification exposure* in accordance with the standards for rebilling set forth in OAR 836-043-0190.
>
> (4) For purposes of this rule, payroll records of an employee are verifiable if they have the following characteristics:
>
> (a) The records must establish a time basis, and the time basis must be hourly or a part thereof, daily or part thereof, weekly or part thereof, monthly or part thereof or yearly or part thereof;
>
> (b) For each salaried employee, the records must also include time records in which the salary is converted to an hourly, daily, weekly, monthly or yearly rate and then multiplied by the time spent by the employee in each classification exposure;
>
> (c) The records must include a description of duties performed by the employee, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable; and
>
> (d) The records must be supported by original entries from other records, including but not limited to time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager. Estimated ratios or percentages do not comply with the requirement of this subsection and are not

acceptable for verification. Verifiable records must be summarized in the insured employer's accounting records.

(Emphasis added).

Three portions of this administrative rule were important to SAIF's premium audit decision in this case, and also important to my decision here. First, subsection (1) requires that a worker's time and payroll are to be reported to his or her governing class code—the one best describing the duties—and may only be divided into more than one class code if there are verifiable time records to accurately show the split between the two duties.

Second, subsection (4) describes in some detail what information an employer must provide for a time record to be verifiable. At hearing, Ms. Abi Haidar conceded that she was unable to provide verifiable time records for this policy period.

Third, when there are no verifiable time records, the rule requires the insurer to assign the payroll to the highest rated classification. Therefore, without records to show that Willamette's workers split their work schedule between roofing-related activities (which are all class 5551) and the regular power-washing (class 9014), SAIF was required by rule to assign all of the payroll to the highest-rated class code, class code 5551.

Although it is apparent that Ms. Abi Haidar is working with her employees and with SAIF to develop a verifiable time record system and to make sure that her employees are properly classified for insurance purposes, by her own admission in her testimony there were no verifiable time records for the policy period of April 1, 2017 through April 1, 2018. As a result, SAIF's only alternative was to assign the payroll to code 5551, the roofing code, because it was the highest classification in use. SAIF's Final Premium Audit Billing at issue here must be affirmed.

ORDER

I propose that SAIF Corporation's August 8, 2018 Final Premium Audit Billing, for the policy period April 1, 2017 through March 31, 2018, be AFFIRMED.

Rick Barber
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 MAILING

On June 24, 2019 I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2018-ABC-02183**.**

By: First Class Mail

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