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2 STATE OF OREGON
3 DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
4 DIVISION OF FINANCIAL REGULATION

5 IN THE MATTER OF:) FINAL ORDER
6 Pacific Partitions, LLC) OAH No. 2018-ABC-02251
7) DFR Case No. INS-WCA 18-10-0003
8

9 **Procedural History**

10 On August 7, 2018, SAIF Corporation (SAIF) issued a Final Premium Audit Billing
11 (Audit Billing) to Pacific Partitions, LLC (Pacific Partitions) for the period April 1, 2017, to
12 April 1, 2018, (audit period). On October 1, 2018, Pacific Partitions filed a request for hearing
13 with the Department of Consumer and Business Service, Division of Financial Regulation
14 (Department). On November 30, 2018, Pacific Partitions filed a Petition with the Department
15 requesting a hearing and a stay of collection during the pendency of the contested case
16 proceeding.
17

18 On December 3, 2018, the Department referred the matter to the Office of Administrative
19 Hearings (OAH). On December 28, 2018, the OAH issued an Order Granting Stay of Collection
20 during the pendency of the contested case proceeding. Administrative Law Judge Samantha Fair
21 convened a hearing on January 24, 2020, in Tualatin, Oregon. Pacific Partitions failed to appear.
22 SAIF appeared and was represented by Legal Counsel, Joy Wang. Premium Audit Analyst
23 Brittnie Holland, and Premium Auditor Jessica Matshe, also appeared on behalf of SAIF. The
24 record closed on January 24, 2020, at the conclusion of the hearing.
25

26 **Exceptions**

27 Pursuant to ORS 183.460, any exceptions to the January 28, 2020 Proposed Final Order
28 must have been received by the Department of Consumer and Business Services on or before
29 Thursday, February 27, 2020. An additional email communication was received on March 19,
30 2020 from Edward Romayor, on behalf of Pacific Partitions, LLC. A spreadsheet of information
31 was attached to the email message. Neither the email or the attachment will be considered in the

Final Order In the Matter of Pacific Partitions, LLC DFR Case No.: INS-WCA 18-10-0003

OAH Case No. 2018-ABC-02251

August 13, 2020

1 Final Order.

2
3 **Findings of Fact, Conclusions of Law and Opinion**

4 The Director adopts, and incorporates herein by this reference, the findings of fact,
5 conclusions of law, and reasoning of the Proposed Order as the findings of fact, conclusions of
6 law, and reasoning of this Final Order.

7
8 **Order**

9 SAIF's August 7, 2018 Final Premium Audit Billing, for the audit period April 1, 2017 to
10 April 1, 2018, is AFFIRMED. Pacific Partitions, LLC is liable for the adjusted premium.

11
12 The Order Granting Stay of Collection, issued on December 28, 2018, is lifted.
13
14

15 **Notice of Right to Judicial Review**

16 A party has the right to judicial review of this order pursuant to ORS 183.480 and
17 ORS 183.482. A party may request judicial review by sending a petition for judicial review to
18 the Oregon Court of Appeals. The court must receive the petition within 60 days from the date
19 this Order was served on the party. If the order was personally delivered to a party, then the date
20 of service is the date the party received the order. If the order was mailed to a party, then the
21 date of service is the date the order was mailed to the party, not the date the party received the
22 order. If a party files a petition, the party is requested to also send a copy of the petition to the
23 Division of Financial Regulation.

24 

25 Dated: August 13, 2020

26 _____
27 TK Keen
28 Acting Administrator, DFR
29 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 BY DEFAULT
)	
PACIFIC PARTITIONS, LLC)	OAH Case No. 2018-ABC-02251
)	Agency Case No. INS-WCA 18-10-0003
)	
)	

HISTORY OF THE CASE

On August 7, 2018, SAIF Insurance (SAIF) issued a Final Premium Audit Billing (Audit Billing) to Pacific Partitions, LLC (Pacific Partitions) for the period April 1, 2017 to April 1, 2018 (the audit period). On October 1, 2018, Pacific Partitions filed a request for hearing with the Department of Consumer and Business Services, Division of Financial Regulation (Department). On November 30, 2018, Pacific Partitions filed a Petition with the Department requesting a hearing and a stay of collection during the pendency of the contested case proceeding.

On December 3, 2018, the Department referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Dove Gutman to preside over the matter and scheduled it for a prehearing conference on January 25, 2018.

On December 28, 2018, the OAH issued an Order Granting Stay of Collection during the pendency of the contested case proceeding.

On January 30, 2019, the OAH rescheduled the prehearing conference to March 15, 2019. On March 14, 2019, Pacific Partitions requested a postponement. ALJ Gutman granted the postponement and rescheduled the prehearing conference to May 22, 2019.

On May 22, 2019, ALJ Gutman convened a telephone prehearing conference. Attorney Chrys Martin appeared on behalf of Pacific Partition. SAIF appeared and was represented by attorney Joy Wang. Michele Summerlin also appeared on behalf of SAIF. ALJ Gutman scheduled the hearing for October 14, 2019, and set deadlines for submission of witness lists and exhibits.

On September 11, 2019, the OAH reassigned the matter to ALJ Samantha Fair. On September 13, 2019, Pacific Partition requested a postponement of the hearing. On September 17, 2019, Mr. Martin withdrew as Pacific Partition's attorney and ALJ Fair granted the

postponement request and converted the hearing into a status conference.

On October 14, 2019, ALJ Fair convened a status conference. Edward Romayor, a member and authorized representative of Pacific Partitions, appeared on its behalf. Ms. Wang and Brittnie Holland, a premium audit analyst appeared on behalf of SAIF. ALJ Fair scheduled the hearing for January 24, 2020, and set deadlines for the submission of witness lists and exhibits.

On January 6, 2020, SAIF filed its witness list and Exhibits A1 through A15. Pacific Partitions did not file any witness list or exhibits.

ALJ Fair convened a hearing on January 24, 2020, in Tualatin, Oregon. Pacific Partitions failed to appear.¹ SAIF appeared and was represented by Ms. Wang. Ms. Holland and Jessica Matshe, a SAIF premium auditor also appeared on behalf of SAIF. The record closed on January 24, 2020, at the conclusion of the hearing.

ISSUE

Whether SAIF's August 7, 2018 Final Premium Audit Billing correctly billed Pacific Partitions by including as payroll payments made to Ricardo Acevedo Aros, Isidro Alvarez, Antonio Gonzalez Alvarea, Valentin Barocio, Antonia Bautista, Cesar Carillo, Santiago Ceja, Alvaro Duenas, Salvador Gaona, Carlos Gonzalez, Joel Hernandez, Antonio Marcelino Reyes, Andres Miramontes Gomez, Fidelmar Molina, Hermolindo Mora, Benjamin Nava, Emanuel Nava, David Ochoa, Juan Orosco, Raul Salinas Tobon, Hertsel Shadian, Arturo Solis Sosa, John Tackacs, and Elvin Yovani Ramirez.

EVIDENTIARY RULINGS

Exhibits A1 through A15, offered by SAIF, were admitted into the record without objection.

FINDINGS OF FACT

1. Pacific Partitions, headquartered in Portland, Oregon, is a licensed commercial general contractor that works primarily on commercial tenant improvement projects, such as installation and repair of drywall, metal stud framing, acoustical ceiling grid installation, and insulation work. Its employees are field employees who work at the projects' locations. (Ex. A8 at 8.)

2. Classification Code 5020 includes individuals engaged in the installation of acoustic ceilings. Classification Code 5102 includes individuals engaged in metal stud framing. Classification Code 5445 includes individuals engaged in hanging, taping and finishing drywall. Classification Code 5479 includes individuals engaged in the installation of insulation. Classification Code 5445 is the highest-rated Classification Code. (Ex. A8 at 8.)

¹ OAR 836-043-0170(8) allows the Department to dismiss the insured's request for hearing based on certain specified grounds that do not include the failure of the insured to appear at the hearing. Therefore, this Proposed Order by Default is issued.

3. Pacific Partitions does not maintain time records that show the specific job duties that workers are performing. (Ex. A6 at 4.)

4. On June 27, 2018, SAIF performed an audit of Pacific Partitions' payroll records. (Ex. A8 at 1.) Pacific Partitions' records showed a number of checks, totaling \$385,739, made payable to the following individuals: Ricardo Acevedo Aros, Isidro Alvarez, Antonio Gonzalez Alvarea, Valentin Barocio, Antonia Bautista, Cesar Carillo, Santiago Ceja, Alvaro Duenas, Salvador Gaona, Carlos Gonzalez, Joel Hernandez, Antonio Marcelino Reyes, Andres Miramontes Gomez, Fidelmar Molina, Hermolindo Mora, Benjamin Nava, Emanuel Nava, David Ochoa, Juan Orosco, Raul Salinas Tobon, Hertsel Shadian, Arturo Solis Sosa, John Tackacs, and Elvin Yovani Ramirez (the listed individuals).² The listed individuals performed remodel work for Pacific Partitions. Pacific Partitions' records failed to indicate the specific job duties performed by each of the listed individuals. (Exs. A8 at 7-8; A9 at 4.) The records only included the check numbers, payees' names and payment amounts for checks paid to the listed individuals from April 7, 2017 through March 23, 2018. (Ex. A8 at 16-23.) SAIF assigned the listed individuals the Classification Code 5445 and informed Pacific Partitions to provide additional documentation regarding the listed individuals if it wanted the payments made to them removed as subject payroll. (*Id.* at 8.) SAIF's auditor also contacted Pacific Partitions on two occasions in July 2019 seeking any additional documentation Pacific Partitions had concerning the work performed by the listed individuals. Pacific Partitions did not provide any additional documentation to SAIF. (Exs. A8 at 9; A9 at 1-4.)

5. On August 7, 2018, after receiving a communication from Pacific Partitions that the listed individuals performed work in Washington State, SAIF informed Pacific Partitions that it must provide documentation to support any claim that the listed individuals are Washington subject workers in order to have them excluded from SAIF's adjusted premium. SAIF indicated that such documentation could include copies of a Washington State workers' compensation insurance policy,³ time cards that reflect that all work performed by the listed individuals occurred in Washington State, or copies of contracts for the Washington State jobs. (Ex. A9 at 7.)

6. On a sheet of paper, Pacific Partitions provided SAIF a list titled "Washington State Projects for 2017." The list included 10 different Washington State addresses and the business name associated with each address. The list included no other information. (Ex. A12 at 29.)

7. At the time that SAIF issued Pacific Partitions a workers' compensation insurance policy for the period April 1, 2017, through April 1, 2018, Pacific Partitions had previously informed SAIF that its employees did not travel out of Oregon. (Exs. A2 at 3; A4 at 1.) SAIF issued the policy to provide coverage for work performed in Oregon. (Ex. A4 at 1.)

² None of the listed individuals have a construction contractors' license. (Ex. A8 at 8.)

³ Mr. Romayor previously held a Washington State workers' compensation insurance policy. That policy was cancelled on August 31, 2015. (Ex. A9 at 5.)

CONCLUSION OF LAW

SAIF's August 7, 2018 Final Premium Audit Billing correctly billed Pacific Partitions by including as payroll payments made to Ricardo Acevedo Aros, Isidro Alvarez, Antonio Gonzalez Alvarea, Valentin Barocio, Antonia Bautista, Cesar Carillo, Santiago Ceja, Alvaro Duenas, Salvador Gaona, Carlos Gonzalez, Joel Hernandez, Antonio Marcelino Reyes, Andres Miramontes Gomez, Fidelmar Molina, Hermolindo Mora, Benjamin Nava, Emanuel Nava, David Ochoa, Juan Orosco, Raul Salinas Tobon, Hertsel Shadian, Arturo Solis Sosa, John Tackacs, and Elvin Yovani Ramirez.

OPINION

In its Petition, Pacific Partitions asserted that the listed individuals performed services strictly in Washington State and therefore were not Oregon subject workers and exempt for purposes of workers' compensation insurance.⁴ The Court of Appeals determined in *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993), that the employer has the burden to establish that an insurer's premium audit billing is incorrect. To sustain this burden, Pacific Partitions must prove its case (that Pacific Partitions' payments to the listed individuals are exempt from subject payroll for purposes of workers' compensation insurance) by a preponderance of the evidence.⁵ *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Responsibility for Workers' Compensation Insurance

ORS 656.017 through ORS 656.174 are part of a "statutory scheme that seeks to ensure that workers are, in fact, covered by workers' compensation insurance." *In the Matter of the Compensation of Sparks*, 171 Or App 65, 69 (2000).⁶ *Sparks* further states that the "rule has been that general contractors are responsible for providing coverage to all persons working under the contract." *Id.* Thus, ORS 656.027(1) provides that "[a]ll workers are subject to this chapter except those nonsubject workers described" in a series of specifically enumerated classes. None of those enumerated classes are applicable in this matter.

ORS 656.017 requires every employer to maintain assurance with the Department that subject workers will receive compensation for compensable injuries by qualifying as a carrier-

⁴ OAR 836-043-0170(2) requires the insured to file a petition with the Department in which "the insured *must* explain why it believes the billing is incorrect." (Emphasis added.) The issue for the hearing is confined to the issues raised in Pacific Partitions' Petition, which was confirmed at the October 14, 2019, status conference.

⁵ During the October 14, 2019 status conference, the ALJ informed Mr. Romayor that Pacific Partitions had the burden to prove that the Audit Billing was in error.

⁶ *Sparks* involved a general contractor of a construction project who contracted with a subcontractor to perform drywall services. A worker for the subcontractor was injured while performing work on the construction project. *Sparks* at 67.

insured employer or a self-insured employer. ORS 656.005 defines “employer,” “worker,” and “subject worker.” It provides, in part:

(13)(a) “Employer” means any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal corporations, school districts and other public corporations or political subdivisions, who contracts to pay a remuneration for and secures the right to direct and control the services of any person.

* * * * *

(28) “Subject worker” means a worker who is subject to this chapter as provided by ORS 656.027.

* * * * *

(30) “Worker” means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer[.]

ORS 656.023 further defines “subject employer” as “[e]very employer employing one or more subject workers in the state is subject to this chapter.” Pursuant to ORS 656.017, Pacific Partitions must have a workers’ compensation insurance policy to provide coverage for its subject workers performing services in Oregon.

In the Audit Billing, SAIF included as payroll for subject workers the payments made by Pacific Partitions to the listed individuals. As noted above, Pacific Partitions has the burden of proof that SAIF’s inclusion of these payments was incorrect. In support of its assertion that the listed individuals strictly performed services on projects located in Washington State, Pacific Partitions only provided a sheet of paper with a list of Washington State projects. The list failed to indicate any information as to which individuals worked those projects, when they worked on those projects, or what duties they performed during those projects. There were also no time records for any of the listed individuals that detailed such information. Despite repeated requests from SAIF, including suggestions for potentially satisfactory documentation, Pacific Partitions failed to produce any documentation that the listed individuals were paid for services only performed in Washington State. Therefore, Pacific Partitions presented no evidence that the listed individuals were not subject workers as defined in ORS 656.005(28) and 656.027. The listed individuals are subject workers, and, pursuant to ORS 656.017, Pacific Partitions must provide workers’ compensation coverage for them through its SAIF policy.

Because the listed individuals were “subject workers,” SAIF’s inclusion of the payments to the listed individuals as subject payroll was appropriate. SAIF’s Audit Billing, with its adjusted premium for the audit period, is correct and Pacific Partitions is liable for the adjusted premium.

Pursuant to ORS 737.505(4) and (5), the stay, issued by the OAH on December 28, 2018,

is lifted upon the Department's issuance of a final order.

ORDER

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

SAIF's August 7, 2018 Final Premium Audit Billing, for the audit period April 1, 2017 to April 1, 2018, is **AFFIRMED**. Pacific Partitions, LLC is liable for the adjusted premium.

The Order Granting Stay of Collection, issued on December 28, 2018, will be lifted with the issuance of the Final Order.

Samantha A. Fair

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 January 28, 2020 I mailed the foregoing Proposed Order by Default issued on this date in OAH Case No. 2018-ABC-02251.

By: First Class Mail

Edward Romayor
Pacific Partitions, LLC
PO Box 66233
Portland OR 97290

Brittnie Holland
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Joy Wang, Special Assistant Attorney General
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Lucy M Garcia
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