STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
MSL, Inc.	)	OAH No. 2019-ABC-03065
	)	Agency Case No.: INS-WCA 19-7-034

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 SAIF Corporation (SAIF) to MSL, Inc. (MSL) pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 *et. seq.*

On August 29, 2019, the Division referred MSL's hearing request contesting the billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether SAIF's Final Premium Audit, dated May 13, 2019, was correct. By Proposed Order dated June 15, 2020, Senior Administrative Law Judge Jennifer H. Rackstraw, (ALJ) Affirmed SAIF's Final Premium Audit, dated May 13, 2019.

Exceptions

On July 14, 2020, MSL filed Exceptions to the Proposed Order. The Exceptions were not persuasive.

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.

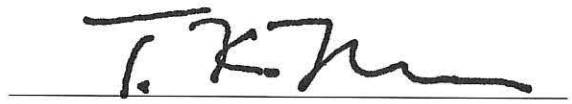
Order

SAIF's Final Premium Audit issued May 13, 2019 is AFFIRMED and the Stay of Collections issued September 9, 2019 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 Division.

Dated December 23, 2020



TK Keen
Acting 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**
	)	
MSL, INC.	)	OAH Case No. 2019-ABC-03065
	)	Agency Case No. INS-WCA 19-7-034

HISTORY OF THE CASE

On May 13, 2019, the SAIF Corporation (SAIF) issued a Final Premium Audit Billing to MSL, Inc. (MSL) for the period January 1, 2018 to January 1, 2019. MSL received the billing on or about June 10, 2019. On June 28, 2019, MSL requested an administrative hearing to dispute the billing.

On August 22, 2019, MSL filed a Petition with the Department of Consumer & Business Services (Department), Division of Financial Regulation (Division), reiterating the request for a hearing and requesting a stay of the collection of $1,929.75 in disputed charges, pursuant to ORS 737.505(5).[1]

On August 29, 2019, the Division referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned the matter to Senior Administrative Law Judge (ALJ) Joe L. Allen. On September 9, 2019, Presiding ALJ Monica A. Whitaker issued an Order Granting Stay of Collection.

On October 23, 2019, ALJ Allen held a telephone prehearing conference. MSL's president, Charles Wiper, represented MSL. Special Assistant Attorney General Nate Boughton represented SAIF. SAIF Premium Audit Analyst Jessica Matshe also appeared. The parties agreed to a hearing on March 10, 2020.

On December 9, 2019, the OAH reassigned the matter to ALJ Jennifer H. Rackstraw.

On March 10, 2020, ALJ Rackstraw held a telephone hearing. Mr. Wiper represented MSL and testified. MSL's human resources manager, Rachel Canada, also testified for MSL. Mr. Boughton represented SAIF. Ms. Matshe testified for SAIF. SAIF auditor John Sprague and SAIF Premium Audit Manager Robert Miller were present, but did not testify. SAIF analyst

[1] 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."

Brittany Holland was also present as an observer. The record closed at the conclusion of the hearing.

ISSUES

1. Whether MSL's payroll records satisfy the criteria for verifiable time records set forth in OAR 836-042-0060 to support a division of payroll for employees Canada, Desser, Jones, and Rogers during the period January 1, 2018 to January 1, 2019.

2. Whether MSL has established that SAIF's May 13, 2019 Final Premium Audit Billing, for the period January 1, 2018 to January 1, 2019, is incorrect.

EVIDENTIARY RULINGS

SAIF's Exhibits A1 through A32 and MSL's Exhibits R1 through R17 were admitted into the record without objection.

FINDINGS OF FACT

1. Charles Wiper is the president of MSL, Inc. (MSL), an Oregon corporation that operates various businesses, including a ski park and a funeral home. Rachel Canada has been the Human Resources manager for MSL for approximately 10 years. (Test. of Wiper, Canada; *see* Ex. A24 at 3.)

2. The National Council on Compensation Insurance (NCCI) has developed rating classifications for insurance companies to utilize when allocating risk to various occupations. To determine the appropriate classification code[s] for an insured's business, Oregon workers' compensation insurers are governed by the rules set forth in NCCI's *Basic Manual* and the phraseology set forth in NCCI's *Scopes Manual*. (Test. of Matshe; *see* OAR 836-043-0005(14) (defining NCCI as "a rating organization that is licensed in Oregon to make and file rates, rating values, classifications and rating plans for workers' compensation insurance[.]")

3. NCCI's *Basic Manual* addresses employees who perform job duties that relate to more than one Code (an "interchange of labor") and provides, in part:

> Some employees may perform duties directly related to more than one properly assigned classification * * *. Their payroll may be divided among the properly assigned classifications provided that:
>
> * * * * *
>
> 2. The employer maintains proper payroll records, which show the actual payroll by classification for that individual employee.
>
> a. Records must reflect actual time spent working within each job classification and an average hourly wage * * *.

> **Note**: If payroll records do not show the actual payroll applicable to each classification, the entire payroll of the individual employee must be assigned to the highest rated classification that represents any part of his or her work.

(Ex. A4 at 5; emphasis in original.)

4. An insurer estimates an employer's exposure for a specific policy term and then performs an audit after that term expires to determine the actual exposure.[2] An auditor typically meets with an employer representative and reviews the employer's payroll records. Payroll records might include payroll journals and a payroll distribution report. An auditor typically looks to an employer's timecards to see where the exposure lies for employees who have an interchange of labor and who fall into more than one classification. (Test. of Matshe.)

MSL's Premium Audit History

5. MSL has been audited numerous times over the years. Prior to April 2014, SAIF never informed MSL that the time records it was using to divide an employee's wages among multiple classifications were not verifiable. (*See* Exs. A7, A8 at 2, A9 at 1, A10, A12; test. of Matshe.)

6. In April 2014, Robert Miller, who was then a SAIF premium auditor, conducted a premium audit of MSL for the period January 1, 2013 to January 1, 2014. (*See* Exs. A7, A8; test. of Matshe.) Jan Chase, an outside certified public accountant (CPA) for MSL, assisted Mr. Miller with the audit. (Exs. A7 at 1, A9 at 1.) In the audit "workbook" for the audit period at issue, Mr. Miller noted, in part:

> The insured has all employees maintain a time record (* * * Timekeeper) and that document is used to record the employees [*sic*] time along with the department that they worked in for each day they worked. The record includes space to record multiple departments within a day (with in/out time information) and some employees routinely move between departments.
>
> The Timekeeper form format is not verifiable – the reason for this is that nowhere on the form does it include a description of the work performed. Some employees took it upon themselves to make notes, but many of the forms I reviewed had no description at all. The previous audit (2011) accepted the time records based on the fact that the VTR's included a department number which implied what work was performed – the department entry was considered the description. For this period, the insured was operating under the premise that their time records were verifiable based on previous audit results.

[2] *See* ORS 737.318 (regarding an insurer's obligation to maintain a premium audit program). *See also* OAR 836-043-0101 through -0170 for rules pertaining to Oregon's premium audit program.

> Because the previous audit allowed a division with records that were not verifiable (due to no description) I am allowing the divisions for this period. I explained the issue to the audit contact and stated that effective 5/1/14 any and all time record must have a description of the work performed for any employee [for whom] they wish to divide their wages among multiple classes[.]

(Ex. A7 at 4.)

7. By letter to MSL dated April 23, 2014, Mr. Miller wrote that MSL lacked verifiable time records for dividing an employee's wages among multiple classifications during the audit period at issue. In the letter, Mr. Miller discussed the characteristics for payroll records to be considered verifiable, and stated the following with respect to MSL's payroll records for the audit period:

> The problem with your time records[3] is that they did not, in most cases, have a description of the work performed as required by [the applicable administrative rule.] Your Timekeeper document allows the employees to enter the department(s) for each day along with the time worked; the only indication of what kind of work they were doing is from the department number they wrote in. This is not considered verifiable because the department number is not a description of the work performed.
>
> I understand that this type of documentation was considered acceptable in the past and previous audits allowed your divisions. Because you were not made aware of the problem at prior audits, this policy period will allow the division. Effective 5/1/14 however, all division of payroll must be supported with time records that meet all of the required characteristics; this means that the time record must include a description of the work performed. Failure to include an appropriate description will result in applying the highest rated class to all subject wages for each employee that interchanged between classes[.]

(Ex. A8 at 1-2.)

8. In April 2015, Mr. Miller conducted a premium audit of MSL for the period January 1, 2014 to January 1, 2015. (*See* Exs. A10, A12.) Ms. Chase again assisted Mr. Miller with the audit. (*See* Exs. A10 at 1, A11.) In the audit "workbook" for the audit period at issue, Mr. Miller noted, in part:

> The insured has all employees maintain a manual time record and that document is used to record the employees [*sic*] time along with the department that they worked in for each day they worked. The record includes space to record multiple departments within a day (with in/out

[3] *See* Exhibit A6 for the time records pertinent to the January 1, 2013 to January 1, 2014 audit period.

> time information) and some employees routinely move between departments. For this period there were only a handful of employees that interchanged due to the poor ski conditions.
>
> The prior audit noted that the time records had a problem that they did not include a description of the work performed. I allowed the division based on the department code that was shown on the time records and gave notice that effective 5/1/14 * * * the time records must include more than just a department code. A description was needed.
>
> I was provided records for most employees (5/1/14-12/31/14) that interchanged. The time records included descriptions for the lower rated class (most employees interchanged between 2 classes), but when it came to class 9180 work there was no description included. Because 9180 was the highest rated class, they did not see the need to include a description – it was th[eir] expectation that the hours with no description would default to class 9180.

(Ex. A10 at 3.)

9. In a letter to MSL dated May 1, 2015, Mr. Miller wrote, in part:

> I am happy to say that the time records that I reviewed did have the needed information and were verifiable.
>
> Please remember that the division of payroll records need to include a description of the work performed and it must be noted by the employee or the employee[’s] direct[] supervisor or manager. The time records provided for the audit showed that the hours that were associated with the lower rated classes did have short descriptions. Those descriptions are vital and without them dividing an employees [*sic*] wages is not allowed.

(Ex. A12 at 1-2.)

10. In April 2016, John Sprague, a SAIF premium auditor, conducted a premium audit of MSL for the period January 1, 2015 to January 1, 2016. (*See* Exs. A13, A14; test. of Matshe.) Ms. Chase assisted Mr. Sprague with the audit. (*See* Ex. A13 at 1.) In the audit “workbook” for the audit period at issue, Mr. Sprague noted, in part:

> [F]or this period there were only a handful of employees that interchanged due to the poor ski conditions.
>
> I reviewed time records for employees (for policy period) that interchanged. For the most part the records included a brief description for the classes employees interchanged in (most employees interchanged between 2 classes). In speaking with Bookkeeper Jan Chase during the

> audit I explained to her that while the hours the employees worked by class were accurate and reconciled to the reported subject payroll that going forward employees would need to be more consistent with entering descriptions of the work done. Jan voiced some concerns about the amount of information that needed to be provided * * * by the employees. We reviewed a SAIF VTR template during the audit to give her an example of the detail required by * * * [the administrative rule.] Jan stated [that] now that she had an example and fully understood the amount of detail needed * * * she would make some minor changes to the time cards that would enable the employees to be more consistent in entering a description of the work they were doing.

(*Id*. at 3.)

11. In a letter to MSL dated April 27, 2016, Mr. Sprague wrote, in part:

> [T]he verifiable time records (VTR's) were discussed with Jan during the audit. While there ha[ve] been improvements in the VTR's since the last audit there is still room for improvement with the employees [*sic*] description of duties entered on the time cards. The SAIF VTR template left with Jan during the audit is an excellent example of a VTR that meets the division of payroll requirements outlined in OAR 836-042-006[0]. Going forward employees will need to provide a more consistent description of their duties on time cards to avoid having their entire subject payroll reclassified to the highest rated class they worked in.

(Ex. A14 at 1-2.)

Audit Period of January 1, 2018 to January 1, 2019

12. By letter dated January 28, 2019, SAIF informed MSL that it had selected MSL for a premium audit of its workers' compensation policy for the period January 1, 2018 through January 1, 2019 (audit period at issue). The letter stated that a SAIF employee would contact MSL within 90 days to schedule an appointment for the review, and it included information to help MSL prepare for the review. (Ex. A23.)

13. During the audit period at issue, MSL consisted of two businesses: Rest Haven Memorial Cemetery and Funeral Home (Rest Haven or RHMP), located at 3900 S. Willamette Street in Eugene, Oregon; and Willamette Pass Ski Area (Ski Area), located on Highway 58 in Crescent Lake, Oregon. The two businesses are located approximately 65 miles from each other. (Exs. A25 at 4, A22; test. of Canada.)

14. Rest Haven operates a cemetery and a funeral home. Payroll for Rest Haven includes grounds work for the cemetery and the service, repair, and maintenance of equipment used in the cemetery. Such work is classified under Code 9220. For the audit period at issue,

payroll for the funeral home director (Code 9620) was included in another legal entity (and not MSL). (Ex. A25 at 4; *see* Ex. A20 at 4.)

15. The Ski Area offers skiing and snowboarding to the public. Employees at the Ski Area may perform work in sales, lift operations, grooming, ski patrol, mountain management, parking lot attendance, ski instruction, race crew, janitorial work, snow making, bus driving (of skiers), and equipment maintenance and repair. Such work is classified under Code 9180. (Ex. A25 at 4; *see* Ex. A20 at 3.)

16. The Ski Area also includes a restaurant/lounge inside the lodge, called Summit House Pizza. The food service offered at Summit House Pizza is classified under Code 9079. The lodge also includes a ski rental shop and small gift shop, for which payroll is classified under Code 8017. All equipment rental work is performed at the Ski Area. The lodge also includes an area where clerical office employees work and perform the counting of money. Such work is classified under Code 8810. (Ex. A25 at 4; *see* Ex. A20 at 1-3.)

17. During the audit period at issue, MSL also had an office located at 5941 West 5th Avenue, in Eugene. Some administrative tasks were performed at that office, including answering email and telephone inquiries, conducting prospective employee interviews, and performing human resources management tasks. Such administrative tasks are classified under Code 8810. (Ex. A25 at 4; *see* Ex. A20 at 2.)

18. MSL operates multiple busses to transport skiers and employees to and from the Ski Area. Such bussing is classified under Code 9180. The busses are parked at the West 5th Avenue office. During the off-season (*i.e.* non-ski season), MSL has attempted to lease its busses and drivers to private groups for tour bus operations. Such operations are classified under Code 7382. (Ex. A25 at 4; *see* Ex. A20 at 1, 3.)

19. Code 8742 would apply to MSL employees engaged in outside sales or customer relations duties performed outside of the office. (Ex. A25 at 4; *see* Ex. A20 at 2.)

20. At all times pertinent to the audit period at issue, MSL kept weekly "Timekeeper" timesheets for each employee. (Exs. A19 at 1-6, A24 at 3, R13 at 1-21, test. of Matshe.) The top of each timesheet listed the employee's name, an employee number, the total hours worked for the week, and the pay period. The timesheet then listed all seven days of the week, with a separate table for each day. Each table had a space for a supervisor's initials, a department number, time in, time out, and the department hours worked. (*See* Exs. A19 at 1-6, R13 at 1-21.) During the audit period at issue, none of the timesheets included comments or descriptive text to indicate what kind of tasks or work the employees performed. (*See* Exs. A19 at 1-6, A24 at 3, R13 at 1-21; test. of Matshe.)

21. MSL has a document titled "Time Sheet Codes," which contains two columns: Payroll Code and Description. (Ex. R2 at 1.) The following are some examples from that document:

Payroll Code	Description
100	Mountain Management
101	Vehicle Maintenance – Town[4]
102	Vehicle Maintenance – Mountain
104	Facility Maintenance
105	Facility Improvements
119	Janitorial
137	Bus Driver – Employee Transportation
147	Office Personnel – Town
151	Human Resources
154	Human Resources – Town
429	RHMP – Grounds

(*See id*.) On the above document, the employer intends for Payroll Code 151 to correspond with "Human Resources – Mountain." (Test. of Canada.)

22. MSL has a document titled "Workers Comp and Tax Data," which contains three columns: Description; Department Code; and Subject to LTD Tax.[5] (Ex. R1 at 1.) The following are some examples from that document:

Description	Department Code
Mountain Management	100-9180
Vehicle Maintenance – Town	101-9220
Vehicle Maintenance – Mountain	102-9180
Facility Maintenance	104-9180
Facility Improvements	105-9180
Janitorial	119-9180
Bus Driver – Employee Transportation	137-7382
Office Personnel – Town	147-8810

(*See id*.)

23. A Paylocity Distribution Report (Distribution Report) for the audit period at issue shows the number of hours each employee worked in a given department, as well as the total number of hours all employees worked in that department. (*See* Ex. R16 at 1-38.)

24. The Distribution Report shows that during the relevant time period, MSL's Human Resources Manager, Rachel Canada, worked 18.75 hours in Department 101 (Vehicle Maintenance – Town). The report does not provide any further detail about her work in that department. (*See* Ex. R16 at 1.) Code 9220 applies to the maintenance of vehicles used in

[4] "Town" refers to MSL's operations in Eugene, while "Mountain" refers to MSL's operations at the Ski Area. (Test. of Canada, Matshe.)

[5] The information in this column is not relevant to the issues in this case.

cemetery operations. Code 9620 applies to the maintenance of vehicles used in funeral home operations. Code 9180 applies to the maintenance of vehicles used in ski park operations. Code 9079 applies to the maintenance of vehicles used in restaurant operations. Code 7382 applies to non-garage employees involved in labor, supervision, and driving who are engaged in the operation of bus companies, including charter buses and tour lines. The maintenance and repair of such vehicles falls under Code 8385 (Bus Company – Garage Employees). (Ex. A20 at 1, 3-4.)

25. The Distribution Report shows that during the relevant time period, Ms. Canada worked 20 hours, William Desser worked 294.50 hours, and Jeff Jones worked 120.5 hours in Department 104 (Facilities Maintenance).[6] The report also shows that during the relevant time period, Mr. Jones worked 29.75 hours in Department 119 (Janitorial). The report does not provide any further detail about the work the employees performed in those departments. (*See* Ex. R16 at 4-5, 26-27.) Code 7382 applies to janitorial work performed in bus company operations. Code 8017 applies to the repair and maintenance of equipment, structures, and buildings used in sporting goods retail operations. Code 9079 applies to the routine maintenance and repair of equipment, structures, and buildings used in restaurant operations. Code 9180 applies to the repair and maintenance of equipment, buildings, and structures used in ski park operations. Code 9220 applies to grounds maintenance, the care and maintenance of graves, and the general maintenance and repair of equipment, buildings, and structures used in cemetery operations. Code 9620 applies to the maintenance and repair of a funeral home or crematorium. (Ex. A20 at 1-4.)

26. The Distribution Report shows that during the relevant time period, Bennett Rogers worked 130.75 hours in Department 120 (Grooming) and 11.25 hours in Department 109 (Rental Shop – Mountain). The report does not provide any further detail about his work in those departments. (*See* R16 at 7-9, 28.) Code 9180 (Ski Tows – Operation) applies to workers at winter sports areas who operate ski tows and artificial snow-making machinery, perform instruction, conduct ski patrols, perform parking lot attendance duties, and sell lift tickets. Ski shop employees who work where ski equipment is rented and repaired are not classified under Code 9180. Code 8017 (Sporting Goods – Retail) applies to workers involved in direct labor and supervision who are engaged in the operation of a retail store. There are at least two exceptions to the applicability of Code 8017 for workers in a retail establishment: 1) workers meeting the clerical criteria for Code 8810; and 2) workers engaged in pick-up and delivery operations.[7] (*See* Ex. A20 at 1-3.)

27. The Distribution Report shows that during the relevant time period, Ms. Canada worked 7 hours in Department 147 (Office Personnel), 158.50 hours in Department 151 (Human Resources),[8] and 640.50 hours in Department 154 (Human Resources – Town). The report does not provide any further detail about her work in those departments. (*See* Ex. R16 at 34-36.)

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[6] Employees Canada, Desser, and Jones are MSL's highest paid employees. (Test. of Canada.)

[7] Under such circumstances, a worker would be classified under Code 7380 (Drivers). (*See* Ex. A20 at 1.)

[8] Department 151 refers to Human Resources work with regard to "Mountain" operations. (Test. of Canada.)

28. Code 8810 (Office Clerical) applies to office workers who perform only bookkeeping, drafting, and other clerical duties in an area that is physically enclosed by structural partitions and is devoted exclusively to those specific activities. (Ex. A20 at 2.)

29. With regard to restaurant, funeral home, and bus company/terminal operations, office workers performing only clerical duties who are physically separated from the rest of the operation are classified under Code 8810. With regard to retail store operations, office employees who perform clerical duties, such as bookkeeping or typing, are classified under Code 8810 if they work in areas that are physically separated and distinguishable from the store operation by floors, walls, partitions or other physical barriers and there are no products displayed for sale, there is no inventory stored, and there are no products purchased in those areas. With regard to ski park operations, office workers who perform only clerical duties and who are physically separated from the rest of the operations are classified under Code 8810. Counters and desks do not constitute physical separation in the context of ski park operations. (Ex. A20 at 1, 3-4.)

30. On April 30, 2019, Jason Miles, a SAIF premium auditor, met with Ms. Chase to discuss MSL's premium audit for the audit period at issue. (*See* Exs. A24 at 1, 8.) Mr. Miles concluded that during the audit period at issue, MSL had no exposure to Codes 7382, 8742, and 9620. (Ex. A25 at 4; *see* Ex. A26.) Mr. Miles also concluded that MSL did not meet the criteria set forth in the administrative rule for verifiable time records, OAR 836-042-0060, with regard to employees Canada, Desser, Jones, and Rogers. Mr. Miles determined that MSL's payroll records lacked an adequate description of the work performed by those employees, thereby preventing him from determining the employees' correct classification assignments. He therefore assigned all the payroll for the four employees to the classification with the highest rating applicable to them (Code 9180), concluding that MSL's records did not support a division and allocation of payroll for the employees. (*See* Exs. A24, A25, A27; test. of Matshe.) For the audit period at issue, Mr. Miles did not reclassify MSL's policy as a whole, and he did not add any new classification codes to the policy. (Test. of Matshe.)

31. On May 13, 2019, SAIF issued a Final Premium Audit Billing, notifying MSL of a premium audit adjustment in the amount of $1,929.75 for the audit period at issue. (Exs. A25, A26; test. of Matshe.) The Final Premium Audit Billing stated, in part:

> The audit was completed using the Paylocity Labor Distribution Report for the policy period, which was reconciled to Quarterly Tax numbers. The gross payroll was acquired from the payroll summary and excluded exempt officer pay, the premium portion of overtime, vacation pay, the taxable amount of employee health insurance, and tips to determine pay subject to workers[s'] compensation insurance.
>
> * * *. Additionally, wages for employees with interchange between class codes were re-assigned to the classification with the highest rating applicable to that employee. These wages were re-assigned due to the insufficient detail of their work performed per OAR [836-042-0060]. The

> previous audit documented conversations around this issue with bookkeeper Jan Chase. Please read below regarding the usage of verifiable time records[.]
>
> * * * * *
>
> Employees must track all time. Records are not verifiable if they only track a single exposure or class.
>
> Verifiable records must be summarized in the insured employer's accounting records.

(Ex. A25 at 1-2.)

32. Sometime after learning of SAIF's premium audit adjustment for the audit period at issue, Ms. Canada drafted a document titled "2018 hours by class." (Ex. R12 at 1.) The document lists, among other things, the hours that Ms. Canada, Mr. Desser, and Mr. Jones worked in 2018, organized by class Code. The document provides, in part, the following data for Ms. Canada for 2018:

Class	**Department**	**Hours**
9220	101	18.75
9180	103	76.5
9180	104	20
9079	112	2.5
9180	118	1.75
9180	120	7
8810	147	7
8810	151	158.5
8810	154	640.5
9220	429	1109.75

(*Id*.) Similarly, the employer has documentation, broken down by each pay period, showing the number of hours that each employee worked in a given department. (*See* Ex. R14.)

CONCLUSIONS OF LAW

1. MSL's payroll records do not satisfy the criteria for verifiable time records set forth in OAR 836-042-0060 to support a division of payroll for employees Canada, Desser, Jones, and Rogers during the period January 1, 2018 to January 1, 2019.

2. MSL has not established that SAIF's May 13, 2019 Final Premium Audit Billing, for the period January 1, 2018 to January 1, 2019, 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"); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (the standard of proof that generally applies in agency proceedings is the preponderance 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).

MSL contends that SAIF's Final Premium Audit Billing, for the audit period at issue, is incorrect because SAIF improperly assigned payroll for employees Canada, Desser, Jones, and Rogers to the highest rated classification exposure, Code 9180. MSL argues that SAIF has misinterpreted the applicable administrative rules and that MSL's payroll records are sufficient to support a division of payroll for those four employees, pursuant to OAR 836-042-0060(1).

SAIF contends that MSL's payroll records for the audit period failed to include a description of the work performed by the employees at issue, the records do not meet the requirements under OAR 836-042-0060(4) for verifiable time records, and SAIF's auditor correctly assigned the entire payroll for those employees to Code 9180, pursuant to OAR 836-042-0060(3).

ORS 737.310(10) directs the Department to prescribe, by rule, the conditions under which a division of payroll between different manual classifications is permitted for purposes of computing workers' compensation premiums. The Department has prescribed those conditions in OAR 836-042-0060, which provides, in pertinent part:

> (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.
>
> * * * * *
>
> (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.[9]
>
> (4) For purposes of this rule, payroll records of an employee are verifiable if they have the following characteristics:

[9] OAR 836-043-0190 was repealed, effective January 1, 2013. (*See* Ex. A32 at 1-2.)

> (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. * * *. Verifiable records must be summarized in the insured employer's accounting records.

(Emphasis added.)

MSL contends that the Labor Distribution Report for the audit period at issue (Exhibit R16) satisfies the requirements of OAR 836-042-0060(4)(c) and that the report is supported by entries from "other records" such as employee time sheets (Exhibits A19 and R13), thereby satisfying OAR 836-042-0060(4)(d).

SAIF contends that even when reviewing the Labor Distribution Report in conjunction with the employee time sheets (as well as documents such as Exhibits R1, R2, R12, and R13), the records lack a description of the work that employees Canada, Desser, Jones, and Rogers performed that is sufficient to enable SAIF to determine their correct classification assignments and meet the requirements of OAR 836-042-0060(4)(c).

During the audit period at issue, MSL maintained weekly time sheets for each employee. Each time sheet included information such as an employee's name and number, the total hours worked per week, the pay period, a supervisor's initials, a department number, in and out times, and the number of department hours worked. MSL separately maintains a document titled "Time Sheet Codes," which lists various "Payroll Code[s]" and "Description[s]." Exhibit R2 at 1. The "Codes" on that document correspond to the "Department Number[s]" that appear on the weekly time sheets. Testimony of Canada.

The employer's Distribution Report lists the name of each Department next to its corresponding Department Number (*e.g.*, "Mountain Management (100)"). For the audit period

at issue, the report shows the number of hours each employee worked in a given department, as well as the total number of hours all employees worked in that department. *See* Exhibit R16.

The issue is whether the above-cited records, either alone or in conjunction with one another, provide a description of duties performed by employees Canada, Desser, Jones, and Rogers that is sufficient to enable SAIF to determine the correct classification assignment for those employees during the audit period at issue.

To glean any information from the weekly time sheets regarding the work activity that an employee performed on a given day, an insurer would need to consult the "Time Sheet Codes" document or the Distribution Report. By so doing, the insurer would know how many hours an employee worked in a given numbered Department and the corresponding name of that Department. Alternatively, an insurer could look solely at the Distribution Report to determine how many hours an employee worked in a given numbered Department and the corresponding name of the Department.

Notwithstanding the names of the employer's various Departments, neither the time sheets, the "Time Sheet Codes" document, nor the Distribution Report include comments or descriptive text to indicate what kind of tasks or specific work the employees performed. MSL contends, however, that the Department names are sufficiently descriptive to meet the requirements of OAR 836-042-0060(4)(c).

SAIF Premium Audit Analyst Jessica Matshe conceded at hearing that some of the Department names listed on the Distribution Report might be sufficiently descriptive to enable an insurer to reasonably determine an employee's correct classification assignment for the work hours corresponding to that Department name. For example, Ms. Matshe considers the Department name "Lift Maintenance" (Department 103) to be sufficiently descriptive for audit purposes. Testimony of Matshe; *see* Exhibit R16 at 1. This is a reasonable conclusion, given that the Department name implies that any maintenance performed would be with specific regard to a lift (or lift-related components), and there is no classification Code assigned to MSL aside from Code 9180 that applies to the repair and maintenance of ski park equipment. *See* Exhibit A20 at 1-4.

SAIF contends, however, that for the four employees at issue, the Department Codes and corresponding Department names are insufficiently descriptive to meet the requirements of OAR 836-042-0060(4)(c), thereby impeding SAIF from determining the correct classification assignment for those employees during the audit period at issue. The record supports that contention.

For example, the Distribution Report shows that during the relevant time period, Ms. Canada worked 18.75 hours in Department 101 (Vehicle Maintenance – Town). Because neither the report nor any "other records" maintained and offered by the employer provide further detail about Ms. Canada's 18.75 hours of work in that department, multiple classification Codes might

apply, including Code 9220 (re: vehicles for cemetery operations), Code 9620 (re: vehicles for funeral home operations), or Code 9180 (re: vehicles used in ski park operations).[10]

Furthermore, the Distribution Report shows that during the relevant time period, Mr. Jones worked 29.75 hours in Department 119 (Janitorial), and Ms. Canada worked 20 hours, Mr. Desser worked 294.50 hours, and Mr. Jones worked 120.5 hours in Department 104 (Facilities Maintenance). Because neither the report nor any "other records" maintained and offered by the employer provide further detail about the employees' hours of work in those departments, multiple classification Codes might apply, including Code 7382 (janitorial work for bus company operations), Code 8017 (repair and maintenance of equipment, structures, and buildings for retail operations), Code 9079 (routine maintenance and repair of equipment, structures, and buildings for restaurant operations), Code 9180 (repair and maintenance of equipment, buildings, and structures for ski park operations, Code 9220 (grounds maintenance, care and maintenance of graves, and general maintenance and repair of equipment, buildings, and structures for cemetery operations), and Code 9620 (maintenance and repair of a funeral home or crematorium).

In addition, the Distribution Report shows that during the relevant time period, Mr. Rogers worked 130.75 hours in Department 120 (Grooming) and 11.25 hours in Department 109 (Rental Shop – Mountain). Because neither the report nor any "other records" maintained and offered by the employer provide further detail about Mr. Rogers' work in Department 109, more than one classification code might apply to that work. *See* Exhibit A20 at 1-3 (noting at least two exceptions to the applicability of Code 8017 for workers in a retail establishment: 1) workers meeting the clerical criteria for Code 8810; and 2) workers engaged in pick-up and delivery operations).

Finally, the Distribution Report shows that during the relevant time period, Ms. Canada worked 7 hours in Department 147 (Office Personnel), 158.50 hours in Department 151 (Human Resources), and 640.50 hours in Department 154 (Human Resources – Town). Because neither the report nor any "other records" maintained and offered by the employer provide further detail about Ms. Canada's work in those departments, more than one classification code might apply to that work. For example, Code 8810 (Office Clerical) applies to office workers who perform only bookkeeping, drafting, and other clerical duties in an area that is physically enclosed by structural partitions and is devoted exclusively to those specific activities. However, office/clerical duties performed with regard to the operation of a restaurant, funeral home, ski park, or retail establishment could potentially fall under a classification Code specific to one of those operations. *See* Exhibit A20 at 1-4. For example, with regard to retail store operations, clerical work performed by an office employee falls under Code 8017 if the employee works in an area that is not physically separated and distinguishable from the operation of the store, or if there are products displayed for sale or inventory stored in the employee's work area. *See id*. at 1.

[10] Although the Department name references that the vehicle maintenance was performed with regard to "Town" (versus "Mountain"), the buses that MSL used to transport skiers and employees to and from the Ski Park were maintained at the West 5th Avenue office, in "Town," thus creating some ambiguity as to which classification code might apply. (*See* Ex. A25 at 4.)

In sum, MSL has not established by a preponderance of the evidence that it maintained verifiable payroll records for the audit period at issue, in accordance with the criteria set forth in OAR 836-042-0060(4)(c). Because MSL did not satisfy the conditions required for a division of payroll for employees Canada, Desser, Jones, and Rogers, the entire payroll for those employees was properly assigned to the highest rated classification exposure, Code 9180, pursuant to OAR 836-042-0060(3).

ORDER

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

MSL, Inc.'s May 13, 2019 Final Premium Audit Billing is AFFIRMED.

Jennifer H. Rackstraw
Senior 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
P.O. Box 14480
Salem, OR 97309-0405

CERTIFICATE OF MAILING

On June 15, 2020, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2019-ABC-03065**.**

By: First Class and Electronic Mail

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CERTIFICATE OF MAILING

On June 15, 2020, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2019-ABC-03065**.**

By: Electronic Mail

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

Anesia N Valihov
Hearing Coordinator