

1
2 STATE OF OREGON
3 DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
4 DIVISION OF FINANCIAL REGULATION

5 IN THE MATTER OF:) FINAL ORDER
6 PAUL BRONG MACHINE WORKS,) OAH No. 2019-ABC-03321
7 LLC) Agency Case No. INS-WCA 19-10-007
8

9 **Procedural History**

10 The Director of the Oregon Department of Consumer and Business Services (Director),
11 by and through the Division of Financial Regulation, (Division), commenced the above entitled
12 administrative proceeding to review a workers' compensation insurance final premium audit
13 billing (billing) issued by SAIF Corporation (SAIF) to Paul Brong Machine Works, LLC
14 pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon
15 Administrative Rules (OAR) 836-043-0200 *et. seq.*

16 On December 2, 2019, the Division referred employer's hearing request contesting the
17 billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether
18 SAIF's Final Premium Audit, dated September 23, 2019, was correct. By Proposed Order dated
19 June 5, 2020, Senior Administrative Law Judge Samantha A. Fair (ALJ) affirmed SAIF's Final
20 Premium Audit, dated September 23, 2019.

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22 **Findings of Fact, Conclusions of Law and Opinion**

23 The Director adopts, and incorporates herein by this reference, the findings of fact,
24 conclusions of law, and reasoning of the Proposed Order as the findings of fact, conclusions of
25 law, and reasoning of this Final Order.

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27 **Order**

28 SAIF's Final Premium Audit issued September 23, 2019 is AFFIRMED and the Stay of
29 Collections issued December 23, 2019 is vacated.

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Final Order Paul Brong Machine Works, LLC
Agency Case No. INS-WCA 19-10-007, OAH Case No. 2019-ABC-03321

December 18, 2020

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Dated January 8, 2021

TK Keen
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
)	
PAUL BRONG MACHINE WORKS,)	OAH Case No. 2019-ABC-03321
LLC)	Agency Case No. INS-WCA 19-10-007
)	

HISTORY OF THE CASE

On September 23, 2019, SAIF Insurance (SAIF) issued a Final Premium Audit Billing (Audit Billing) to Paul Brong Machine Works, LLC (PBMW) for the period July 1, 2018, to July 1, 2019 (the audit period). On October 29, 2019, PBMW filed a request for hearing with the Department of Consumer and Business Services, Division of Financial Regulation (Department). On November 20, 2019, PBMW filed a Petition with the Department, requesting a hearing and a stay of collection during the pendency of the contested case proceeding.

On December 2, 2019, the Department referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matter.

On December 11, 2019, PBMW filed an Amended Petition with the Department.

On December 23, 2019, the OAH issued an Order Granting Stay of Collection that stayed collection on the Audit Billing during the pendency of the contested case proceeding.

On February 12, 2020, ALJ Fair convened a telephone prehearing conference. George Passino, sole member of PBMW, appeared as PBMW's authorized representative. Voula Chandrashekar also appeared on behalf of PBMW. SAIF appeared and was represented by attorney Joy Wang. Jamie Powell, premium audit analyst, also appeared on behalf of SAIF. ALJ Fair scheduled the matter for an in-person hearing on May 19, 2020, and set deadlines for submission of witness lists and exhibits.

On April 13, 2020, with the agreement of PBMW and SAIF, the OAH converted the in-person hearing to a telephone hearing.

On May 19, 2020, ALJ Fair convened a telephone hearing. PBMW appeared and was represented by Mr. Passino. PBMW did not present any evidence. SAIF appeared and was represented by Ms. Wang. Mr. Powell testified on SAIF's behalf. The record closed on May 19,

2020, at the conclusion of the hearing.

ISSUES

Whether SAIF's September 23, 2019 Final Premium Audit Billing correctly billed PBMW by:

- Classifying all payroll for Thomas Myers to classification code (Code) 7380; and
- Including Thomas Myers' commissions as payroll.

ORS 737.318, OAR 836-042-0001 *et seq.* and OAR 836-043-0001 *et seq.*

EVIDENTIARY RULINGS

Exhibits A1 through A30, offered by SAIF, were admitted into the record without objection.

FINDINGS OF FACT

1. PBMW is a specialty machine shop located in Portland, Oregon. It performs design, fabrication and repair of single-piece machined parts for its customers. It fabricates and repairs parts in a variety of materials, including aluminum, steel and food-grade plastic. PBMW does not perform assembly of end-product components. (Ex. A7 at 4.)

2. PBMW employs Thomas Myers. Mr. Myers regularly performs a variety of job duties, including outside sales, machine work, supervision of machinists, and delivery of PBMW's manufactured parts to its customers. (Exs. A7 at 1; A13 at 1; test. of Powell.) In addition to his regular pay, PBMW pays Mr. Myers a commission on any sales he makes. (Ex. A13 at 7.) For the audit period of June 19, 2017, to June 30, 2018, SAIF allocated Mr. Myers' payroll to Code 7380 and Code 3629 on an estimated percentage basis as a one-time exception to the requirement for verifiable time records. At that time, SAIF provided information to PBMW on how to keep verifiable time records for Mr. Myers' payroll and informed PBMW that it would need such records to allow future payroll allocations. (Exs. A5 at 1; A6 at 19-25; A8 at 3; A10 at 1; A13 at 2, 7.)

3. During the 2018-2019 audit period, Mr. Myers completed daily time cards that included the following information: his name, date worked, job number, times worked for each job number, and total hours worked for each job number and for each day. The job numbers were either a six-digit number, such as 161351, or the two-digit number 60. Other than time cards that noted his sick, vacation, or holiday time, there was no other information included on Mr. Myers' time cards. (Exs. A11; A13 at 7.)

4. PBMW compiled a work summary for Mr. Myers' work time during the 2018-2019 audit period. The summary included dates worked and divided his hours worked into two columns, "Machinist" and "Sales/Supervisory (60)." (Ex. A12 at 1.) There were additional

columns for holiday, sick and vacation time and a final column for total paid hours per day. The summary included no other information. (Ex. A12.) For some of the dates, the summary's division of Mr. Myer's machinist and sales/supervisory 60 time conflicted with the information on his time cards. (Exs. A11 and A12; test. of Powell.)

5. On September 23, 2019, SAIF issued PBMW a Final Premium Audit Billing for the audit period. SAIF assigned Code 3629 as the principal classification code for PBMW's business. SAIF classified all of Mr. Myers' payroll to Code 7380 and included his commissions in PBMW's payroll. (Exs. A7 at 1, A8 at 3, 16-17; test. of Powell.)

6. On October 22, 2019, PBMW advised SAIF that all work performed by Mr. Myers was as a machinist except for the time reported under the sales/supervisory 60 code. (Ex. A10 at 1.) On December 17, 2019, PBMW advised SAIF that the six-digit numbers on Mr. Myers' time cards are job numbers for the machine work Mr. Myers performed. (Ex. A13 at 7.)

7. The National Council on Compensation Insurance, Inc. (NCCI) is the workers compensation rating organization for Oregon and publishes a *Basic Manual* and a *Scopes Manual* with its rules and classifications. NCCI defines the terms and classification codes for work performed by employees for use by workers compensation insurance providers. (Test. of Powell.)

8. The NCCI's *Basic Manual* Rule 2B defines "payroll" and provides, in part:

For purposes of this manual, the terms "payroll" and remuneration" mean money or substitutes for money.

1. Includes:

* * * * *

a. Wages or salaries * * *.

b. Total pay received by an employee for commissions and draws against commissions[.]

(Ex. A15 at 1.) (Emphasis in original.) There are no exclusions or exceptions for the inclusion of commissions as payroll for workers compensation premiums. (Exs. A15 at 1-2; A16 at 1; test. of Powell.)

9. The NCCI's *Basic Manual* Rule 2G addresses employees who perform job duties that relate to more than one Code. It 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.

* * * * *

4. Some employees qualify for division of payroll between two or more basic classification codes and also engage in operations that are classified by Codes * * * 8742, * * *. The payroll for these standard exception operations must be allocated to the basic classification code with the largest amount of payroll applicable to that employee.

(Ex. A15 at 5.) (Emphasis in original.)

10. The NCCI's *Scopes Manual* defines Code 3629, titled "Machined Parts MFG, NOC," and provides, in part:

Applies only to employers that machine single piece parts for others[.]

(Ex. A17 at 1.)

11. The NCCI's *Scopes Manual* defines Code 7380, titled "Drivers, Chauffeurs, Messengers, and Their Helpers NOC – Commercial," and provides, in part:

Code 7380 is applied to commercial drivers * * * provided they are not otherwise classified in the **Basic Manual**. These employees are common to many businesses and are Standard Exceptions assigned to Code 7380 unless they are specifically included within the phraseology of a basic classification that applies to an employer.

The term "drivers" refers to employees who engage in duties on or in connection with vehicles * * *.

* * * * *

An important distinction between Code 7380 and trucking classifications such as Code 7219 is that trucking classifications generally applies to the

transportation of goods not owned by an employer, whereas Code 7380 generally is applicable to the driving of vehicles and/or the transportation of goods owned by an employer.

(Ex. A19 at 1.) (Emphasis in original.)

12. The NCCI's *Scopes Manual* defines Code 8742, titled "Salespersons or Collectors-Outside," and provides, in part:

Code 8742 is applied to outside salespersons or collectors. * * *.

Salespersons or collectors as defined in the *Basic Manual* are employees engaged in such duties away from the employer's premises. Code 8742 is not available for employees who deliver merchandise. These employees are assigned to the driver's classification applicable to the risk even though these employees may also collect or sell. * * *.

* * * * *

Special Conditions:

- When outside salespersons or collectors regularly and frequently perform duties at the premises of their employers, their total payroll is assigned to the highest rated classification representing any part of their work.

(Ex. A22 at 1.) (Emphasis in original.)

13. The NCCI's *Basic Manual* further defines Code 8742 and provides, in part:

c. Salespersons or Collectors – Outside (Code 8742)

* * * * *

(1) This classification is assigned to employees who perform these duties away from the employer's premises.

(2) This classification is not assigned to employees who:

(a) Deliver merchandise.

(b) Use vehicles to deliver or pick up goods[.]

(Ex. A25 at 1.) (Emphasis in original.)

14. Supervisors are normally assigned the same Code as the workers they supervise. (Ex. A13 at 4.)

15. Of the Codes 3629, 7380 and 8742, Code 7380 is the highest rated classification. (Test. of Powell.)

CONCLUSIONS OF LAW

SAIF correctly billed PBMW when it:

- Reclassified payroll for Thomas Myers to Code 7380; and
- Included Thomas Myers' commissions as payroll.

OPINION

In its Amended Petition to the Department, PBMW disputed SAIF's classification of the entirety of Mr. Myers' payroll as Code 7380 and disputed the inclusion of his commission as payroll during the audit period. PBMW bears the burden to establish that SAIF's premium audit is incorrect. *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993) (the employer has the burden to establish that an insurer's premium audit billing is incorrect). To sustain this burden, PBMW must prove its case by a preponderance of the evidence. *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, 402 (1987).

Pursuant to ORS 737.310, ORS 737.560 and OAR 836-043-0001 *et seq.*, NCCI is the rating organization licensed in Oregon to establish and file rates and classifications for workers' compensation insurance. OAR 836-043-0005(14). NCCI produces a *Basic Manual* and a *Scopes Manual* for workers' compensation rates and classifications that are used by Oregon insurers in their audit procedures. OAR 836-043-0115.

The NCCI's *Basic Manual* Rule 2B defines "payroll" to include wages and commissions. The NCCI manuals provide no exceptions or exclusions to the inclusion of commissions in an employee's pay for purposes of workers compensation insurance. SAIF correctly included Mr. Myers' commission in PBMW's total assessed payroll.

Mr. Myers performs a variety of job duties for PBMW, primarily outside sales, machine work, supervision of machinists, and delivery of PBMW's manufactured parts to its customers. As a machine shop that machines single piece parts with no assembly into end products, PBMW's primary classification for the work performed in its shop is Code 3629. When Mr. Myers performs machine work at PBMW, his work would qualify for PBMW's primary Code 3629. Mr. Myers also supervises other machinists. When performing work as a supervisor, his work would continue to qualify for Code 3629.

Mr. Myers delivers PBMW's finished products to its customers. As a commercial driver transporting goods owned by his employer, Mr. Myers' delivery work would qualify for Code 7380.

Mr. Myers also performs outside sales work for PBMW. However, pursuant to the NCCI's *Basic* and *Scopes Manuals*, Code 8742 is not applicable to Mr. Myers' outside sales work because he also delivers PBMW's finished products (merchandise) to its customers. Pursuant to the normal requirements of the *Scopes Manual*, Mr. Myers' outside sales work would be assigned to the driver's classification, here Code 7380. However, Mr. Myers also regularly and frequently performs work at PBMW's machine shop. As such, the *Scopes Manual's* special condition requires Mr. Myers' payroll to be assigned to the highest rated classification representing any part of his work, which again would be Code 7380. Therefore, the Codes applicable for Mr. Myers' work duties are 3629 and 7380.

Oregon law allows an individual employee's payroll to be divided among different Codes when the employee performs work applicable to more than one Code, so long as the employer maintains verifiable payroll records to support such a division of an employee's payroll. Verifiable payroll records do not simply mean the actual payroll records used by the employer. Payroll records must meet the specific criteria outlined in OAR 836-042-0060(4) to qualify as verifiable. OAR 836-042-0060 provides, in 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.

(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.

Mr. Myers is an hourly worker and his time cards, which he completed, reported his time on an hourly basis. Therefore, his payroll records meet the criteria of OAR 836-043-0190(4)(a).¹

Mr. Myers' time cards contain two descriptions of his job duties: a six-digit number that the employer uses to identify a client's job project and the number 60. The time cards do not contain any information regarding the duties performed for either of those numbers. The payroll summary identifies the number 60 as sales and supervisory work and classified all other work as machinist. As noted above, sales work would normally be assigned to Code 8742, but, because Mr. Myers regularly performs other work for the employer including delivering merchandise to the customers, his sales work would be assigned to Code 7380. Because he supervises machinist performing work assigned to Code 3629, his supervisory work would be assigned to Code 3629. Therefore, the number 60 includes work performed in multiple classifications. Additionally, the payroll records lack specificity regarding its description of the actual work performed by Mr. Myers. Absent information about Mr. Myers' specific duties, the payroll records associated with such work are not verifiable because they do not provide the necessary detail to allow the insurer to correctly classify his machinist, supervisory, outside sales and delivery services work.

Mr. Myers' payroll records fail to include a description of duties he performed that would enable SAIF to accurately assign different classification codes to his hours worked. In order to allocate Mr. Myers' work, PBMW would need to provide additional explanations or interpretations of the records. Therefore, Mr. Myers' time cards and payroll summary fail to meet the requirements of OAR 836-042-0060(4)(c).

¹ Because Mr. Myers is an hourly employee, the requirements of OAR 836-043-0190(4)(b) are not applicable.

The payroll summary's division of Mr. Myer's machinist and sales/supervisory 60 time conflicted with his time cards. Therefore, the payroll summary is not supported by the original entries from Mr. Myers' time cards. The payroll summary does not meet the requirements of OAR 836-042-0060(4)(d).

OAR 836-043-0190(4)(c) and (d) requires verifiable payroll records to include an accurate and complete description of the work performed that would enable the insurer to determine the correct Codes without needing additional explanations from the employer. Because the time cards and the payroll summary, which are PBMW's only supporting payroll documentation, contain inaccurate or incomplete descriptions of the work performed, the payroll records are not verifiable. Pursuant to OAR 836-043-0190(3), absent verifiable payroll records, Mr. Myers' payroll must be assigned to the highest rated classification exposure, here Code 7380. SAIF properly classified Mr. Myers' payroll as Code 7380.

ORDER

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

SAIF's September 23, 2019 Final Premium Audit Billing, for the audit period July 1, 2018, to July 1, 2019, is AFFIRMED. Paul Brong Machine Works, LLC is liable for the adjusted premium.

The Order Granting Stay of Collection, issued on December 23, 2019, 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 June 5, 2020, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2019-ABC-03321.

By: Electronic Mail

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CERTIFICATE OF MAILING

On June 5, 2020, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2019-ABC-03321.

By: Electronic Mail

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

Anesia N Valihov
Hearing Coordinator