STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
DL Wilson Construction Company	)	OAH Case No. 2020-ABC-03807
	)	Agency Case No.: INS-WCA 20-2-004

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 to DL Wilson Construction Company (employer) pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 *et. seq.*

On May 29, 2020, the Division referred employer's hearing request contesting the billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether insurer's Final Premium Audit, dated February 14, 2020, correctly added $3,187.51 to the employer's workers' compensation policy premiums for the period October 1, 2018 to October 1, 2019 by including payroll for Charles Martin and David Wilson.

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 Corporation's Final Premium Audit issued February 14, 2020, is AFFIRMED

Notice of Right to Judicial Review

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

Dated September 7, 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**
	)	
DL WILSON CONSTRUCTION COMPANY	)	OAH Case No. 2020-ABC-03807
	)	Agency Case No. INS-WCA 20-2-004

HISTORY OF THE CASE

On February 14, 2020, SAIF Corporation (SAIF or the insurer) issued an Oregon Final Premium Audit Billing (premium audit) to DL Wilson Construction Company (Appellant or the employer). The premium audit indicated the employer owed an additional $3,187.51 in premiums for its workers' compensation coverage for the period October 1, 2018 through October 1, 2019 (audit period or period in issue). On February 26, 2020, the employer requested a hearing with the Department of Consumer & Business Services, Division of Financial Regulation (Department).

On May 29, 2020, the Department referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing. ALJ Allen convened a prehearing conference on July 31, 2020. Special Assistant Attorney General Nate Boughton appeared for SAIF. David L. Wilson appeared for the employer. The purpose of the prehearing conference was to establish a schedule of prehearing events and set a date for hearing. At the prehearing conference, the parties agreed to a telephonic hearing on October 9, 2020. The parties also agreed to file and exchange exhibits and witness lists no later than September 28, 2020

On October 9, 2020, ALJ Allen convened the telephone hearing. Both parties appeared. At the outset of the hearing, Mr. Wilson indicated that he had not yet received any exhibits from the insurer. Mr. Boughton indicated that the insurer had mailed the documents to Mr. Wilson via postal mail, rather than registered or certified mail. In response, Mr. Wilson indicated that several of the businesses in the Portland area, including the employer, had been the victims of mailbox tampering and vandalism associated with ongoing riots in the downtown Portland area. In response, the insurer proposed resetting the hearing and resending the exhibits to Mr. Wilson via certified mail. The parties agreed and the hearing was rescheduled for November 6, 2020.

On November 6, 2020, ALJ Allen again convened a telephone hearing in this matter. At the outset, ALJ Allen addressed SAIF's exhibit offerings. Mr. Wilson confirmed receipt of exhibits marked A1-A3, A5, A6, page 1 of A7, and all pages of A8. Nonetheless, Mr. Wilson indicated that his exhibit package did not extend beyond A8. The ALJ received, and SAIF

confirmed it had filed, 16 separate exhibits. Mr. Wilson's exhibit package appeared to be missing Exhibits A4, and A9 through A16. SAIF proposed sending the documents again and confirming receipt of all documents and pages before reconvening the hearing. Mr. Wilson agreed. Based on party availability, the ALJ reset the hearing to December 18, 2020.

On December 18, 2020, ALJ Allen again convened a telephone hearing. Mr. Boughton appeared on behalf of SAIF. Mr. Wilson appeared on behalf of the employer. Testifying on behalf of SAIF were Stacy Speer-Aritola and Brittnie Holland. Mr. Wilson testified on behalf of the employer. The record closed at the conclusion of the hearing.

ISSUE

Whether SAIF's February 14, 2020 premium audit billing correctly added $3,187.51 to the employer's workers' compensation policy premiums for the period October 1, 2018 to October 1, 2019 by including payroll for Charles Martin and David Wilson.[1]

EVIDENTIARY RULING

Exhibits A1 through A16, offered by SAIF, were admitted into the record without objection. The employer offered no exhibits.

FINDINGS OF FACT

1. The employer is a general contractor, holding Construction Contractors Board (CCB) license 110530, that performs tenant improvements of commercial buildings. The employer's physical address is 3007 NE 181st Street, Portland. The employer performs no work for clients at that address. The employer is registered as a corporation with the Oregon Secretary of State. (Test. of Speer-Aritola; Exs. A8 at 1, 7, A11, and A12.)

2. David L. Wilson is the sole shareholder and corporate officer of the employer, holding the positions of president and secretary for the corporation. (Exs. A2 at 1 and A11 at 1.)

3. The employer initiated workers' compensation insurance coverage with SAIF in January 2017, and maintained that coverage through the period in issue. At the time of initiating the workers' compensation policy, the employer elected to have Mr. Wilson covered under the policy as a non-exempt corporate officer. (Test. of Speer-Aritola and Holland; Exs. A2 at 1 and A4 at 1-2.)

4. Mr. Wilson considers himself retired, and he is in the process of winding up the corporation. (Test. of Wilson.)

5. SAIF regularly conducts audits of workers' compensation insurance policies to

[1] At hearing, SAIF presented argument and evidence regarding the lack of verifiable time records from the employer that would permit allocating more than one time code to work performed by David Wilson. Because the employer did not dispute the assigned classification code in its petition or at hearing, the issue of verifiable time records and class code assignments is not addressed in this order.

ensure that coverage provided (the insurer's risk exposure) and the premiums assigned under the policy match the work performed by an insured employer. SAIF uses classification codes promulgated by the National Council on Compensation Insurance (NCCI) to assign exposure rates to an employer's payroll based on the work performed by its employees. (Test. of Holland; Ex. A14.)

6. On February 11, 2020, SAIF auditor Stacy Speer-Aritola performed an onsite payroll audit of the employer's payroll for the period in issue. Mr. Wilson met Ms. Speer-Aritola at the employer's office and provided payroll summaries from iSolve, a payroll software used by the employer's bookkeeper, as well as a check register for the employer. At the time of the audit, the employer no longer employed office staff at the physical address. (Test. of Speer-Aritola and Wilson.)

7. At the time of the audit, Mr. Wilson told Ms. Speer-Aritola that, while he considers himself retired, he still performed small renovation work for friends during the period in issue. Mr. Wilson also advised the auditor that he generally performed such work alone. (Test. of Speer-Aritola.)

8. According to Mr. Wilson, he and Charles Martin performed minor jobs during the audit period including converting a fitness center into an office, which involved erecting framing for the new space. In addition, Mr. Wilson demolished wood structures for a client in Silverton and removed siding from a barn for another client. (Test. of Speer-Aritola; Ex. A8 at 7-8.)

9. Among the records Mr. Wilson provided to the auditor, SAIF found unreported payroll records for renovation work performed by Mr. Martin totaling $15,660 for the period in issue. SAIF also discovered that, while Mr. Wilson was a covered officer under the policy, the employer reported no wages for him during the period in issue. (Test. of Speer-Aritola; Ex. A8 at 2, 7, 16.)

10. Because Mr. Wilson was covered by the employer's workers' compensation policy, SAIF attributed to him the covered officer minimum wage of $950 per week. Accordingly, SAIF added $49,400 in wages for Mr. Wilson to the adjusted premium calculation. (Test. of Speer-Aritola and Holland.)

11. SAIF assigned NCCI classification code 5403,[2] Carpentry-NOC (not otherwise classified) to the unreported wages for Mr. Martin as well as the minimum allocated payroll for Mr. Wilson because both individuals participated in one or more of the renovation projects identified by Mr. Wilson.[3] Although Mr. Wilson also spent time performing work under other classification codes, SAIF was unable to allocate that time because the employer did not provide verifiable time records demonstrating the time Mr. Wilson spent performing each activity. (Test. of Speer-Aritola; Ex. A8 at 3, 7-8.)

[2] Classification code 5403 applies a rate of 5.33 to every $100 of payroll. (Ex. A9 at 6.)

[3] The employer did not object to the application of classification code 5403 in its request for hearing or at the hearing.

12. Corporate officer pay must be reported for any non-exempt officer, even if the officer takes no salary during the policy period. For the audit period, the corporate officer minimum pay applicable to workers' compensation policies was $950 per week, for a maximum of $49,400. The corporate officer maximum reportable pay for the same period was $3,900 per week, for a maximum total of $202,800. (Test. of Holland; Ex. A4 at 1-2.)

13. SAIF informed the employer of the requirement to report covered officer pay, along with the applicable annual minimum/maximum pay, each year when the employer renewed the policy. (Test. of Holland; Ex. A4.)

14. SAIF's final premium audit billing added $65,060 in wages for the audit period. SAIF then calculated the adjusted premium by multiplying the unreported wages by the rate for the appropriate exposure code and determined that the employer owed $3,187.51 in unpaid premiums.[4] (Test. of Holland and Speer-Aritola; Ex. A9 at 6.)

CONCLUSION OF LAW

SAIF's February 14, 2020 premium audit billing correctly added $3,187.51 to the employer's workers compensation policy premiums for the period October 1, 2018 to October 1, 2019.

OPINION

Appellant challenges SAIF's February 14, 2020 final premium audit asserting that Charles Martin performed no work and received no wages during the audit period and that SAIF incorrectly applied the executive officer minimum weekly salary to David Wilson during the same period. The Oregon Court of Appeals has determined, the employer has the burden to establish that an insurer's premium audit billing is incorrect. *Salem Decorating v. NCCI,* 116 Or App 166 (1992) *rev den* 315 Or 643 (1993). To sustain that burden, Appellant must prove its case by a preponderance of the evidence. *See 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).

The burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). Accordingly, any party advocating a particular position bears the burdens of production and persuasion as to that position.

[4] SAIF calculates premiums by determining the appropriate classification code and multiplying the corresponding exposure rate by every $100 of payroll paid by an employer during a policy period. (Test. of Holland.) According to the audit, the employer's adjusted premium was lower than the result of this calculation ($3,467.70) due to application of an experience rating modification that lowered the adjusted premium. (*See* Ex. A9 at 6.)

At hearing, the employer offered no evidence to refute the payroll records provided to SAIF during the audit showing wages paid to Mr. Martin during the period in issue. Rather, the thrust of the employer's argument centered on the assertion that Mr. Wilson was paid no wages during the period in issue and therefore SAIF should not attribute any wages to him under the workers compensation policy. For the reasons set forth below, those arguments are not persuasive.

ORS 656.027 identifies "subject workers" and provides, in relevant part:

> All workers are subject to this chapter except those nonsubject workers described in the following subsections:
>
> * * * * *
>
> (10) Except as provided in subsection (24) of this section, corporate officers who are directors of the corporation and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed by such officers, * * *[.]
>
> * * * * *
>
> (24)(a) Corporate officers who are directors of a corporation actively licensed under ORS 671.525 or 701.021 and who have a substantial ownership interest in the corporation, regardless of the nature of the work performed[.]

Pursuant to ORS 701.021, all general contractors in Oregon must hold a valid license issued by the CCB. The employer held a valid CCB license at all times during the period in issue. As such, Mr. Wilson may be considered a non-subject worker under ORS 656.027(24). As an employee, Mr. Martin is a subject worker under ORS 656.027. The employer did not dispute Mr. Martin's status at hearing.

ORS 656.039 provides for election of coverage for non-subject workers and provides, in part:

> (1) An employer of one or more persons defined as nonsubject workers or not defined as subject workers may elect to make them subject workers. If the employer is or becomes a carrier-insured employer, the election shall be made by filing written notice thereof with the insurer with a copy to the Director of the Department of Consumer and Business Services. The effective date of coverage is governed by ORS 656.419 (3). If the employer is or becomes a self-insured employer, the election shall be made by filing written notice thereof with the director, the effective date of coverage to be the date specified in the notice.
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> * * * * *

(4) Notwithstanding any other provision of this section, a person or employer not subject to this chapter who elects to become covered may apply to an insurer for coverage. An insurer other than the State Accident Insurance Fund Corporation may provide such coverage. However, the State Accident Insurance Fund Corporation shall accept any written notice filed and provide coverage as provided in this section if all subject workers of the employers will be insured with the State Accident Insurance Fund Corporation and the coverage of those subject workers is not considered by the State Accident Insurance Fund Corporation to be a risk properly assignable to the assigned risk pool.

The evidence in the record demonstrates that in January 2017, the employer elected to have Mr. Wilson covered under the employer's workers' compensation policy. Nothing in the record demonstrates that the employer ever notified SAIF that it wished to terminate that coverage. As such, Mr. Wilson was a subject worker for the period in issue.

OAR 836-043-0110 identifies the state's premium audit program for insurers and provides, in part:

(1) The rates, rating plans and rating systems filed with and approved by the Director of the Department of Consumer and Business Services shall govern the audited payroll and the adjustment of premiums, subject to the provisions of this rule.

(2) For the purpose of determining the premium for an insurance policy producing an annual standard premium of $10,000 or more, the insurer must perform a field audit of the insured at least once annually, except as provided in this section. For as long as the insurer continues to provide coverage to an insured, when the insurer finds that the audit premium difference is less than five percent for each of two consecutive policy years for which the insurer provided coverage, the insurer need audit only every third renewal policy subsequent to the policy most recently audited. If the insurer finds at any audit that the audit premium difference is five percent or greater, the insurer must again audit the insured's policy at least annually until the insurer finds an audit premium difference of less than five percent for each of two consecutive policy years. For each policy year for which a policy is not audited, the insurer shall obtain a payroll report from the insured. For purposes of this section, the basis for the audit premium difference for an insured will be the audited standard premium as defined in each insurer's approved rating system.

(3) An insurer shall perform a field audit of at least five percent of all policies that are issued by the insurer and produce an annual standard premium of less than $10,000 but more than $1,000. In each year when a field audit of such a policy is not performed, the insurer shall perform a desk audit or obtain a payroll report from the insured. If neither a field or desk audit is performed nor a payroll report is obtained, the insurer shall give satisfactory reason to the director.

(4) When an insurer performs an initial or revised audit, the insurer shall send to the insured a written final premium audit billing, as described in this rule and in OAR 836-043-0170.

In addition, OAR 836-043-0115 provides the procedures by which an insurer will conduct such audits and states, in relevant part:

Each insurer shall develop audit procedures that include all of the features described in this rule or, in place thereof, more comprehensive alternative procedures that will consistently achieve minimum standards as measured by the Oregon Test Audit Program under OAR 836-043-0125. The features are as follows:

* * * * *

(2) The auditor must contact a principal or designated representative of the insured who is familiar with the insured's operation, in order to ensure that the insured is properly classified under Basic Manual rules.

(3) Audit practices require the following:

(a) Examining payrolls from the most complete and accurate records;

(b) Determining proper payroll classifications, substantiated by a written description of the insured's operations;

(c) Making sufficient test checks to establish the audit's accuracy and compliance with Basic Manual rules when using summary type records as the payroll source;

(d) Reconciling the total payroll with records not used in the original tabulation; and

(e) Providing guidance on recordkeeping practices to aid in future audits, including, but not limited to, maintenance of verifiable payroll records.

(4) An insurer shall give particular attention to the following factors and circumstances:

(a) Type of entity. With respect to the type of entity being insured, the insurer shall include factors and circumstances as follows:

(A) *If the entity is a corporation, * * * the name, title, classification assignment and total remuneration for each executive officer, member, or partner must be shown separately*. All other officers of the corporation, members of the limited liability company, or partners must also be listed. The insurer shall designate whether each officer, member, or partner is a subject employee under ORS

Chapter 656;

(B) Listings of covered corporate officers, limited liability company members, partners, and proprietors must include a brief description of each person's duties. *The auditor must verify the stipulated maximum and minimum remuneration with respect to non-subject corporate officers who have elected coverage or are covered as provided under ORS 656.027*, and assumed wage for non-subject sole proprietors, partners, and limited liability company members who have elected coverage or are covered as provided under 656.027.

(Emphasis added.)

The record shows that SAIF conducted an annual audit of the employer's payroll records by making contact with Mr. Wilson, the employer's sole corporate officer and shareholder. During the audit, SAIF examined all information provided by the employer, including payroll summaries and verbal statements from Mr. Wilson regarding the nature of work performed during the period in issue. SAIF discovered unreported wages for Mr. Martin in the payroll summaries provided, but the records did not specify the work Mr. Martin actually performed. The employer did not report to SAIF any wages for the covered officer, Mr. Wilson.

In the subsequent premium audit billing, SAIF adjusted the employer's wages to accurately reflect $15,660 in wages the employer paid to Mr. Martin. SAIF also allocated the weekly minimum salary of $950 per week to Mr. Wilson. Because the policy in issue covered a full 52-week period, SAIF allocated $49,400 in wages to Mr. Wilson. Based on the description of work provided by the employer, SAIF determined NCCI class code 5403- Construction NOC to be most appropriate for the $65,060 in total wages. Because the employer did not challenge the appropriateness of that classification, and provided no evidence indicating the work performed was other than as determined by SAIF, this order presumes SAIF's determination was correct. Based on that classification, SAIF applied a rate of 5.33 to every $100 of unreported wages. SAIF then applied an experience rating, resulting in a discount, and calculated the premiums due. Based on the record before me, SAIF correctly determined that the employer owed unpaid premiums of $3,187.51.[5]

The employer argues that SAIF should not attribute any wages to Mr. Wilson because he did not take a salary during the period in issue and he does not remember electing to be covered by the policy. The employer's arguments are unpersuasive.

Insured employers are required to report a minimum annual salary for all nonexempt corporate officers as established by NCCI. OAR 836-043-0115. The employer's workers' compensation policy identifies that annual minimum and maximum reportable salary and instructed the employer how to calculate partial year wages for covered officers where appropriate. That requirement would be superfluous if an employer was only required to report the actual salary taken by a covered officer. At hearing, the employer provided no evidence to support its position that it was only required to report actual wages paid to Mr. Wilson. As such,

[5] As there was no challenge by the employer at hearing to SAIF's calculations, this order does not reproduce the underlying mathematical calculations.

the employer failed to prove SAIF incorrectly attributed $950 per week to Mr. Wilson as a covered officer during the audit period.

Moreover, Mr. Wilson's inability to recall initiating coverage on himself under the policy more than four years before the hearing is insufficient to overcome SAIF's evidence in the record. At hearing, SAIF presented the Workers' Compensation Submission Summary completed on behalf of the employer to initiate coverage. Exhibit A2. That document identifies David L. Wilson as the sole owner and officer of the employer and indicates he was to be covered under the policy. *Id*. at 2. Additionally, SAIF provided the policy endorsement related to corporate officer coverage or exemption. Exhibit A4. That document indicates, in bold print, "All working officers are covered because none are exempt." *Id*. at 1. The record demonstrates that SAIF provided a copy of that endorsement annually to the employer. Mr. Wilson, as the sole corporate officer and shareholder of the employer, knew or should have known he was covered under the policy. The employer elected to include Mr. Wilson in the policy and was therefore required to report wages and pay premiums for him as specified in the policy.

The employer failed to prove, by a preponderance of the evidence, that SAIF incorrectly adjusted its policy premiums based on unreported wages for Mr. Martin and Mr. Wilson for the period in issue.

ORDER

I propose the Department issue the following order:

SAIF Corporation's Final Premium Audit issued February 14, 2020 is AFFIRMED.

/s/ Joe L. Allen
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
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF MAILING

On February 19, 2021, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2020-ABC-03807**.**

By: First Class Mail

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Anesia N Valihov
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