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STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:) FINAL ORDER
323 Logistics, LLC) OAH Case No. 2022-ABC-05344
) Agency Case No. INS-WCA 22-03-03

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 323 Logistics, LLC (Employer) pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 et. seq.

On May 10, 2022, 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 March 1, 2022, was correct.

By Proposed Order dated November 21, 2022, Administrative Law Judge (ALJ) Samantha A. Fair modified the March 2, 2022 Billing, as follows:

323 Logistics LLC is liable for the portion of the adjusted premium due to SAIF’s inclusion of bonuses and paid time off (PTO).

323 Logistics LLC is not liable for the portion of the adjusted premium due to SAIF’s change in the Code assigned to Dylan Rosen and Tabatha Gronlund’s payroll. SAIF must reduce its adjusted premium bill by the amount caused by its change of Mr. Rosen and Ms. Gronlund’s subject payroll from Code 8810 to 7231.

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

2
3 The Director adopts, and incorporates herein by this reference, the findings of fact,
4 conclusions of law, and reasoning of the Proposed Order as the findings of fact, conclusions of
5 law, and reasoning of this Final Order.
6

7 **Order**

8 SAIF Corporation’s Final Premium Audit issued December 13, 2019 is MODIFIED. 323
9 Logistics LLC is liable for the portion of the adjusted premium due to SAIF’s inclusion of
10 bonuses and PTO. 323 Logistics LLC is not liable for the portion of the adjusted premium due
11 to SAIF’s change in the Code assigned to Dylan Rosen and Tabatha Gronlund’s payroll. SAIF
12 must reduce its adjusted premium bill by the amount caused by its change of Mr. Rosen and Ms.
13 Gronlund’s subject payroll from Code 8810 to 7231.
14

15 The Amended Order Granting a Stay of Collection, issued on May 13, 2022, is lifted with the
16 issuance of this Final Order
17

18 **Notice of Right to Judicial Review**

19
20 A party has the right to judicial review of this order pursuant to ORS 183.480 and
21 ORS 183.482. A party may request judicial review by sending a petition for judicial review to
22 the Oregon Court of Appeals. The court must receive the petition within 60 days from the date
23 this order was served on the party. If the order was personally delivered to a party, then the date
24 of service is the date the party received the order. If the order was mailed to a party, then the
25 date of service is the date the order was mailed to the party, not the date the party received the
26 order. If a party files a petition, the party is requested to also send a copy of the petition to the
27 Division of Financial Regulation.
28

29 Dated May 3, 2023



30 TK Keen
31 Administrator, Division of Financial Regulation
32 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**
)
323 LOGISTICS LLC) OAH Case No. 2022-ABC-05344
) Agency Case No. INS-WCA 22-03-03

HISTORY OF THE CASE

On March 1, 2022, SAIF Corporation (SAIF) issued a Final Premium Audit Billing (Audit) to 323 Logistics LLC (the Company) for the period of November 1, 2020, to November 1, 2021. On March 8, 2022, the Company filed a request for hearing with the Division of Financial Regulation (Division) of the Department of Consumer and Business Services. On May 9, 2022, the Company filed a Petition with the Division. In the Petition, the Company contested the change in classification of employees from classification code (Code) 8810 to Code 7231; the inclusion of bonuses in subject payroll; and the inclusion of paid time off (PTO) in subject payroll. The Company also requested a stay of collection.

On May 10, 2022, the Division referred the matter to the Office of Administrative Hearings (OAH). On May 12, 2022, the OAH issued an Order Granting Stay of Collection. On May 13, 2022, the OAH issued an Amended Order Granting Stay of Collection.

The OAH assigned Administrative Law Judge (ALJ) Samantha A. Fair to preside at hearing. On June 23, 2022, ALJ Fair convened a prehearing conference. William Swaney, sole member of the Company, appeared on the Company's behalf. Attorney Joy Wang Clark appeared on SAIF's behalf. Ena Pullman also appeared on behalf of SAIF. ALJ Fair scheduled the hearing for September 21, 2022, and set deadlines for the submission of witness lists and exhibits.

On September 1, 2022, SAIF requested to postpone the hearing. On September 1, 2022, ALJ Fair granted the request and rescheduled the hearing for October 31, 2022.

ALJ Fair convened a telephone hearing on October 31, 2022. The Company appeared and was represented by Mr. Swaney, who testified.¹ SAIF was represented by Ms. Clark.² Ms. Pullman, a SAIF premium audit analyst, also appeared for SAIF and testified. Ashley Schaffert, a SAIF premium auditor, testified on SAIF's behalf. The Division did not appear. The record closed on October 31, 2022, at the conclusion of the hearing.

¹ Jennifer Swaney appeared as an observer.

² Chad Kosieracki, another attorney with SAIF, appeared as an observer.

ISSUES

Whether SAIF's March 1, 2022 Final Premium Audit Billing correctly billed 323 Logistics LLC by:

- Classifying all payroll for Dylan Rosen and Tabatha Gronlund to Code 7231 instead of Code 8810;
- Including employee bonuses as subject payroll; and
- Including PTO as subject payroll.

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

EVIDENTIARY RULINGS

Exhibits A1 through A20, offered by SAIF, were admitted into the record without objection. Exhibits R1 through R3, offered by the Company, were admitted into the record without objection.

FINDINGS OF FACT

Workers' Compensation Insurance Classifications and Rates

1. 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. The nature of a company's business determines the Code assigned to its employees with a few standard exceptions. One of those standard exceptions is employees that perform administrative or clerical office work whose payroll can be assigned to Code 8810 while the other employees' payroll will be assigned to the Code that represents the nature of the company's business. (Test. of Pullman.)

2. 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 * * *.

* * * * *

c. Bonuses * * *.

* * * * *

e. Pay for holidays, vacation, or periods of sickness[.]

(Ex. A17 at 1.) (Emphasis in original.) Oregon provides additional language for the inclusion of bonuses and vacation pay as payroll. (*Id.* at 2.) The Oregon State Rule Exceptions in the *Basic Manual* excludes the following from payroll:

n. Bonus pay that is not anticipated under the contract of employment and is paid at the sole discretion of the employers * * *.

o. Vacation Pay

Note: Paid Time Off (PTO) * * * or other similar plans that combine various “time off” components, may exclude vacation pay that is identifiable and summarized[.]

(*Id.*) (Emphasis in original.)

3. NCCI’s *Scopes Manual* defines Code 7231, titled “Mail, Parcel or Package Delivery and Courier or Messenger Service Companies – All Employees and Drivers,” and provides, in part:

Applies to couriers, messengers, and others who deliver nonowned envelopes, parcels or packages exclusively for local delivery. * * *.

Code 7231 is intended to apply to those employers that deliver and, as a messenger and courier service of nonowned mail, parcel or packages, or under contract with private enterprises, provide a pickup and delivery service for mail consisting of small individual parcels or packages in addition to envelopes. * * *. However, these employers also, as a contract messenger and courier service, deliver nonowned items or pick up mail or parcels from their customers and deliver to locations specified by the customer, performing a local delivery service comparable to that provided by the US Postal Service.

* * * * *

Equipment and Materials:

- Hand trucks

Additional Applications and Information:

* * * * *

- This classification also includes mechanics and garage employees who maintain, service, or repair the equipment[.]

(Ex. A19 at 1-2.) (Emphasis in original.)

4. NCCI's *Scopes Manual* defines Code 8810, titled "Clerical Office Employees NOC," and provides, in part:

Code 8810 is applied to clerical office employees provided they are not otherwise classified in the Basic Manual. * * *.

Code 8810 employees are common to so many businesses that they are considered to be Standard Exceptions unless they are specifically included within the phraseology of a basic classification. The duties of a clerical office employee include creation or maintenance of financial or other employer records, handling correspondence, computer composition, technical drafting, and telephone duties, including sales by phone. The clerical office classification continues to apply to a qualified clerical office employee who performs a duty outside of a qualified clerical office area when that duty does not involve direct supervision or physical labor and is directly related to that employee's duties in the office. * * *. However, for purposes of this rule, the definition of clerical duties excludes * * *; any work exposed to the operative hazards of the business; * * *.

A clerical office is a work area separated and distinguishable from all other work areas and hazards of the employer by floors, walls, partitions, counters, or other physical barriers.

A clerical office excludes work or service areas and areas where inventory is located, products are displayed for sale, or to which the purchaser customarily brings the product from another area for payment[.]

(Ex. A20 at 1-2.)

5. The rate charged by workers' compensation insurers for Code 7231 is \$7.45 for every \$100 of payroll and the rate for Code 8810 is \$0.11 for every \$100 of payroll. (Ex. A15 at 6.)

The Company's Operations

6. The Company, with Mr. Swaney as the sole member, operated as a third-party delivery service provider for Amazon (commonly called delivery service partners or DSPs). The Company's business location was in the Amazon fulfillment warehouse located in Portland, Oregon. Employees performing the Company's delivery services arrived at the warehouse, loaded their vans with prepackaged parcels stored on the warehouse floor, and delivered the

parcels to Amazon's customers in St. Helens and Scappoose, Oregon. (Exs. A14 at 7; A15 at 14; test. of Swaney.) Two Company employees, Mr. Rosen and Ms. Gronlund, worked in the warehouse and performed office tasks such as scheduling, dispatching, filing reports, training, and daily supervision of the drivers. (Ex. A14 at 2; test. of Pullman.)

7. When reporting to work, Mr. Rosen and Ms. Gronlund entered the Amazon warehouse, made an immediate right and walked along a marked path that led to, and through, an enclosed area where each DSP³ had an assigned area. The enclosed area was against one wall of the warehouse and was surrounded by a chain link fence with a locked gate. The marked path ran between the delivery service work areas and a chain link fence. The chain link fence extended approximately halfway to the ceiling of the warehouse. In the assigned area for the Company, there were desks, computers, filing cabinets and metal racks. The metal racks held water bottles, snacks, cellphones, blue safety vests (whose use is required by Amazon), hand carts, and jugs of automotive windshield wiper fluid. There were no partitions between the metal racks and the desks where Mr. Rosen and Ms. Gronlund worked. Other DSPs, similarly equipped, had assigned areas in the enclosed area directly adjacent to the Company's assigned area. There were no partitions or physical barriers between the DSPs' assigned areas. (Ex. R3 at 1; test. of Swaney.) All package handling by the delivery drivers occurred in the warehouse area, not the enclosed DSP area. (Test. of Swaney.)

8. The Company published an employee handbook (Handbook) that included its employment procedures and policies. (Ex. A13 at 1-2.) The Handbook included a PTO policy that stated, in part:

The Company provides paid time off (PTO), which combines vacation, sick days, a family member's illness, personal business, weather problems and any other personal time off under one policy for employees to use for illness or personal time away from work. * * *. The amount of PTO is based on hours actually worked with the Company.

To the extent applicable, this policy is designed to comply with all applicable state and local paid sick leave laws. Eligible employees that work in a jurisdiction that mandates paid sick leave may use PTO for paid sick leave reasons. If the PTO accrual in this policy is insufficient to comply with any paid sick leave mandate, the Company will provide additional PTO as needed to comply with applicable law. * * *.

* * * * *

All requests for PTO should be made to the employee's supervisor or Management as soon as possible. * * *. Normally at least a two-week advanced notice is expected and necessary for foreseeable requests to be approved. If the PTO is needed for unforeseen illness or emergency situations * * *, then employees should provide as much notices as

³ The Company was one of several DSPs located at the Portland Amazon warehouse. (Test. of Swaney.)

reasonably possible. * * *.

* * * * *

PTO is intended for personal time off and is not intended to be used to make up for hours not worked in a given week in order to bring time up to weekly standard hours. The Company will pay for actual time (hours) worked and PTO is available for personal time away from work with supervisory approval.

(*Id.* at 30.)

9. Employees primarily used PTO for unexpected illnesses and planned time off, such as vacations. The Company kept track of PTO used for vacation time for individual employees in its ADP software program. The Company has not reviewed or provided documentation to SAIF or for the hearing that identified payroll for vacation distinguishable from other PTO.⁴ (Ex. A6 at 1; test. of Swaney.)

10. The Company provided bonuses to its employees as required by its contract with Amazon. Employees received the following bonuses: advertised sign-on bonuses for new hires; bonuses when an employee worked a fifth or sixth day during a pay period; and a variety of metric bonuses based upon successful achievements, such as all delivery routes successfully covered and high safety scores for deliveries. The employees were aware of the requirements to obtain these bonuses. (Test. of Swaney.)

SAIF's Issuance of a Policy to the Company

11. Approximately August 2020, the Company filed an application for coverage with SAIF. (Exs. A2 at 1; A3 at 8.) In its application, the Company described its business operations as follows:

Exclusive Amazon Contract. Operates out of Amazon warehouse where they pick up pre picked and packed bins of parcels to be delivers, picking and packing by Amazon. Employees do load their own Ford Transit Van. Biz has 15 vans that are leased.

(Ex. A2 at 1.) The Company estimated its payroll at \$300,000 with a Code of 7219, titled "Trucking." (*Id.* at 2.) At the time it filed the application, the Company had a workers' compensation policy with Old Republic. (Ex. A3 at 3.)

12. During the application process, Mr. Swaney discussed the Company's operations and its location in the Amazon warehouse with SAIF Representative Nan Angelo. Ms. Angelo informed Mr. Swaney that she was familiar with DSPs' operations and the location because SAIF, with her as the representative, provided coverage for other DSPs that were housed in the

⁴ Mr. Swaney decided that the time it would take to go through the individual ADP entries to isolate the reported vacation time was not worth any potential savings on SAIF's audit. (Test. of Swaney.)

same Amazon warehouse. She advised Mr. Swaney that employees housed in the Amazon warehouse that performed administrative duties for the other DSPs had payroll assigned to Code 8810. (Test. of Swaney.) Because of the COVID pandemic, Ms. Angelo did not meet with Mr. Swaney in person or inspect the business location as she normally would during an application process. She did not ask Mr. Swaney to provide any photos of the Company's assigned area in the warehouse. (Ex. R1 at 4; test. of Swaney.) It did not occur to Mr. Swaney to submit a photo. Mr. Swaney relied upon Ms. Angelo's expertise to determine what SAIF needed to process the Company's application. (Test. of Swaney.)

13. During the application process, Mr. Swaney also spoke with SAIF Representative Courtney Merriott to discuss safety protocols. Ms. Merriott informed Mr. Swaney she was familiar with the DSPs that operated in the same Amazon warehouse and SAIF's assignment of payroll Codes of 7231 or 8810 to the DSPs' employees. (Test. of Swaney.)

14. On August 18, 2020, Ms. Angelo emailed Mr. Swaney and stated, in part:

Our underwriting team has confirmed that 7231 Package Delivery is the appropriate class for your drivers and you will see that reflected in the quote, we also added 8810 Office Clerical on an 'If Any' basis, this means it has been endorsed to your policy but will not incur any charges unless you have payroll that can be applied to this class.

(Ex. A3 at 4.) When he filed the application with SAIF, Mr. Swaney was the only employee who performed administrative duties for the Company. As the sole member of the Company, he was an exempt individual and his payroll was excluded from subject payroll for purposes of determining the premium. In their discussions, Ms. Angelo informed Mr. Swaney that if the Company hired employees to perform administrative work, he would report their payroll to SAIF with Code 8810. (Test. of Swaney.)

15. Ms. Angelo provided Mr. Swaney a summary of the Codes 7231 and 8810 requirements. (Test. of Swaney.) The Code 8810 summary stated, in part:

Class 8810 applies to office employees who perform bookkeeping, drafting and other clerical work in a physically enclosed (by structural partitions) area devoted exclusively to these specific activities.

(Ex. A5 at 1.) Mr. Swaney reviewed SAIF's summary of the Code 8810 requirements. He discussed the delineation of duties between drivers (Code 7231) and administrative staff (Code 8810) with Ms. Angelo. (Test. of Swaney.)

16. Based upon his review of SAIF's summary of the Codes, his discussions with Ms. Angelo, her representation that other DSPs performing the same services in the same location as the Company used Code 8810 for employees performing administrative work at the warehouse, his reliance on her expertise as a workers' compensation insurance representative, and SAIF's quote of the insurance premium, Mr. Swaney changed the Company's insurance provider to SAIF with the expectation that when the Company hired additional employees to perform

administrative duties he would report that payroll to SAIF with the assigned Code 8810. (Ex. A16 at 1; test. of Swaney.) On October 30, 2020, SAIF issued the Company a workers' compensation policy for the period November 1, 2020, to November 1, 2021. The policy was issued based upon a quoted subject payroll of \$300,000, billed to Code 7231 at the \$7.45 rate for an annual premium of \$22,350. The policy included the additional Code 8810 at the rate of \$0.11 but, at that time, did not include any subject payroll as Mr. Swaney, an exempt individual, was the only employee performing administrative work. (Ex. A4 at 1-3; test. of Swaney.)

17. In December 2020, the Company hired Ms. Gronlund and subsequently hired Mr. Rosen, Jennifer Swaney and Patrick Swaney to perform administrative work. Mr. Swaney reported the payroll for these individuals to SAIF as Code 8810 in the monthly payroll reports he filed with SAIF. (Ex. A7 at 1-9; test. of Swaney.)

18. On January 26, 2021, Ms. Angelo spoke with Mr. Swaney, regarding his concerns about an increase in the premium. She advised him that, although "the rates are guaranteed for the year as quoted," the premium increased because the Company's reported payroll was higher than the amount on which the quote was based. (Ex. A6 at 1.)

19. The Company ceased its business operations by September 30, 2021. (Ex. A14 at 7.) SAIF never visited the business location or requested a photograph of the location during the Company's tenure with SAIF. (Test. of Swaney.)

SAIF's Audit of the Company

20. On October 29, 2021, SAIF notified the Company that its workers' compensation policy was selected for audit for the period November 1, 2020, to November 1, 2021. (Ex. A9 at 1.) During the audit, SAIF asked Mr. Swaney to provide a photograph of the Company's location in the Amazon warehouse, which he provided. (Test. of Swaney.) On February 18, 2022, SAIF Auditor Ashley Schaffert informed Mr. Swaney that the chain link fence did not create a physically separated space and the administrative worker was "still exposed to the environmental hazards of the job (noise, machinery fumes, etc.) and there are also supplies stored right behind the desk." (Ex. A10 at 5-6.) Ms. Schaffert informed Mr. Swaney that to maintain the Code 8810 the employees needed to be housed outside of the warehouse or have floor to ceiling walls between the administrative employees and the warehouse activities. (*Id.*)

21. On March 1, 2022, SAIF issued the Company the Audit, reassigning Mr. Rosen and Ms. Gronlund's payroll from Code 8810 to Code 7231 "due to warehouse exposure." (Ex. A15 at 1.) In the Audit, SAIF noted that these employees "worked at desks located inside the Amazon fulfillment warehouse. While the desks were located behind a chain link fence in the warehouse, the employees were still exposed to the environmental hazards of the job, including but not limited to loud noise from the equipment used in the loading and unloading operations, as well as fumes from the equipment."⁵ (*Id.*) SAIF also included the Company's bonuses and PTO

⁵ SAIF excluded Mr. Swaney's payroll as an exempt member of the Company. (Ex. A15 at 1.) SAIF also excluded the payroll for Jennifer and Patrick Swaney because they performed administrative work while telecommuting from their non-Oregon locations. (Exs. A14 at 3; A15 at 1; test. of Swaney.)

in the subject payroll. (*Id.* at 1-2.)

22. For the audited period of November 1, 2020, to November 1, 2021, SAIF determined the total audited payroll⁶ for the Company's workers was \$1,124,606 and billed all the payroll at the Code 7231 rate. (Ex. A14 at 1, 31-35.) The total audited payroll included subject payroll of \$15,314 for Ms. Gronlund and \$34,404 for Mr. Rosen. (*Id.* at 31-35.)

23. If Mr. Swaney had been aware that housing Mr. Rosen and Ms. Gronlund at the Amazon warehouse would have disqualified them from Code 8810, he would have found an alternative work location for them that would have satisfied SAIF's usage of Code 8810. (Test. of Swaney.)

CONCLUSIONS OF LAW

SAIF's March 1, 2022 Final Premium Audit Billing correctly billed 323 Logistics LLC by:

- Classifying all payroll for Mr. Rosen and Ms. Gronlund to classification code (Code) 7231;
- Including employee bonuses as payroll; and
- Including PTO as payroll.

OPINION

In its Petition to the Division, the Company disputed SAIF's classification of two employees' payrolls as Code 7231 and disputed the inclusion of employee bonuses and PTO as payroll. The Company 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, the Company 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.

Inclusion of Bonuses and PTO

⁶ Audited payroll was the net payroll after deductions for all three Swaneys' payroll and some overtime payroll. (Ex. A14 at 1.)

The *Basic Manual* Rule 2B defines “payroll” to include vacation pay. Oregon specifically excludes vacation pay from payroll but only when vacation pay can be identified and summarized. The Company provided its employees with PTO that included compensation for illnesses, emergencies, personal business and vacations. Although the Company tracked employees’ vacation requests in its accounting software program, it provided no documentation of the PTO compensation paid to employees exclusively for their vacation requests. In the absence of any evidence identifying and summarizing vacation pay, all PTO compensation paid to the Company’s employees must be included in payroll.

The *Basic Manual* Rule 2B also defines “payroll” to include bonuses. Oregon excludes bonuses from payroll when they are unanticipated and disbursed within the sole discretion of the employer. Because of its contract with Amazon, the Company had no discretion for its distribution of bonuses to its employees. Additionally, bonuses were paid when specific, anticipated actions occurred: accepting employment, working a fifth or sixth day in a pay period, and meeting certain delivery and route metrics. Because the bonuses were anticipated and the Company had to offer and pay these bonuses pursuant to its contract with Amazon, all bonus compensation must be included in payroll.

Change in Code from 8810 to 7231

SAIF asserted that Mr. Rosen and Ms. Gronlund’s work area failed to comply with the requirements for Code 8810 as delineated by the *Scopes Manual* because of the presence of inventory in the assigned area and the lack of a physical barrier that separated and distinguished the work area from all other work areas and hazards of the employer. The Company disputed this characterization, noting the space, marked path and chain link fence. The Company also asserted that it reasonably relied on SAIF’s pre-Audit representations that payroll for administrative employees would be assigned to Code 8810. Thus, the Company essentially argues that the doctrine of equitable estoppel applies and SAIF is prohibited from retroactively changing the Code from 8810 to 7231.

A party asserting the application of equitable estoppel must prove (1) the existence of a false representation; (2) made with knowledge of the facts; (3) made with the intention that it would induce action by the other party; and (4) that actually induced the other party to act upon the representation. See *Wilkinson v. PERB*, 188 Or App 92 (2003); *Swift & McCormick Metal Processors Ass’n, Inc. v. Durbin*, 117 Or App 605 (1993). Additionally, that party’s reliance on the false representation (defined as an ambiguous or misleading representation) must be reasonable and justifiable. *Employment Div. v. Western Graphics Corp.*, 76 Or App 608, 612-615 (1985).

When Mr. Swaney consulted with SAIF about changing the Company’s workers’ compensation insurer from Old Republic to SAIF, Mr. Swaney discussed the Company’s services and location with two SAIF representatives. During the course of these discussions, both SAIF representatives asserted, not only their familiarity with DSPs’ services, but their familiarity with the exact business location from which these DSPs operated. On August 18, 2020, Ms. Angelo informed Mr. Swaney that the payroll for the Company’s prospective

administrative employees would qualify for Code 8810. On January 26, 2021, Ms. Angelo further stated that “the rates are guaranteed for the year as quoted.” Exhibit A6 at 1. However, despite these representations made by its employees, SAIF changed two administrative employees’ payroll from Code 8810 to Code 7231 in the Audit. SAIF, through its representatives, made misleading (and thereby false) statements to the Company.

Although Ms. Angelo was unable to visit the location because of the COVID restrictions, she specifically represented to Mr. Swaney that SAIF assigned Code 8810 to the other DSPs’ administrative employees housed in the same location as the Company used. She and Ms. Merriott informed Mr. Swaney of their familiarity with the location in which these DSP administrative employees worked. As SAIF demonstrated during its audit, if Ms. Angelo had any concerns about the location being an inappropriate setting for Code 8810 work, she could have requested a photo of the assigned work area at the time she made the quote. The evidence supports a finding that she made no such request because of her familiarity with the location from prior policies she had arranged for SAIF to issue to other DSPs in that same location. In sum, Ms. Angelo and Ms. Merriott, as representatives of SAIF, made false representations to Mr. Swaney that administrative employees located in the DSP area of the Amazon warehouse were Code 8810 employees and made these false representations with knowledge of the facts.

Ms. Angelo and Ms. Merriott worked for SAIF, a workers’ compensation insurer. Their services included reviewing applications for the issuance of quotes and policies and performing safety reviews for potential new clients. Unlike Ms. Angelo and Ms. Merriott, Mr. Swaney owned and operated a DSP. It was reasonable and justifiable for Mr. Swaney to rely on the expertise of SAIF’s representatives for the interpretation of whether the payroll for administrative employees located in the DSP area of the Amazon warehouse qualified as Code 8810 payroll.

SAIF provided the Company with a description of Code 8810 requirements, including that such work must be performed “in a physically enclosed (by structural partitions) area devoted exclusively to these specific activities.” Exhibit A5 at 1. There was a partition between the DSP area and the warehouse in the form of a chain link fence. Although there were supplies in the employees’ area, such as work vests and cellphones, the description provided by SAIF to the Company did not include any prohibition on inventory, as is provided in the actual description for Code 8810 in the *Scopes Manual*. The description provided by SAIF to the Company was inadequate to warn Mr. Swaney that the chain link fence would be deemed an inadequate structural partition and that nearby storage of inventory would disqualify Mr. Rosen and Ms. Gronlund as Code 8810 employees. *See Also Western Graphics Corp.*, 76 Or App at 615 (equitable estoppel applied because the Employment Department’s publication to the employer was incomplete and misleading).

Finally, Ms. Angelo and Ms. Merriott’s false representations were made during the course of discussions with Mr. Swaney regarding the possibility of the Company changing its workers’ compensation insurer from Old Republic to SAIF. Therefore, their representations were made to induce the Company to change insurers, which the Company did indeed do. In conclusion, SAIF’s representations were false; made with knowledge of the facts; the Company justifiably and reasonably relied upon the representations; were made to induce the Company to

change insurers; and the Company changed insurers and remained with SAIF until it ceased its operations. SAIF is therefore equitably estopped from changing the payroll for Mr. Rosen and Ms. Gronlund from Code 8810 to 7231. SAIF must reduce its adjusted premium bill by the amount caused by its change of Mr. Rosen and Ms. Gronlund's subject payroll from Code 8810 to 7231.

ORDER

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

SAIF's March 1, 2022 Final Premium Audit Billing, for the audit period November 1, 2020, to November 1, 2021, is MODIFIED.

323 Logistics LLC is liable for the portion of the adjusted premium due to SAIF's inclusion of bonuses and PTO.

323 Logistics LLC is not liable for the portion of the adjusted premium due to SAIF's change in the Code assigned to Dylan Rosen and Tabatha Gronlund's payroll. SAIF must reduce its adjusted premium bill by the amount caused by its change of Mr. Rosen and Ms. Gronlund's subject payroll from Code 8810 to 7231.

The Amended Order Granting Stay of Collection, issued on May 13, 2022, 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 November 21, 2022, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2022-ABC-05344.

By: Electronic Mail

William Swaney
323 Logistics, LLC
1513 SW 6th Street
Battle Ground WA 98604
Email: info@323logistics.com

Ena Pullman
SAIF Corporation
400 High Street SE
Salem OR 97312
Email: enapul@saif.com

Joy Clark
Assistant Attorney General
SAIF Corporation
400 High Street SE
Salem OR 97312
Email: joycla@saif.com

By: Electronic Mail

Gail Gage, Agency Representative
Division of Financial Regulations
350 Winter Street NE
Salem OR 97301

Nate Boughton, Special Assistant Attorney General
Saif Corporation
400 High Street SE
Salem OR 97312

Sherry Fox Hames
Hearing Coordinator