STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
MILWAUKIE DRYWALL, LLC	)	OAH Case No. 2022-ABC-05690
	)	Agency Case No.: INS-WCA 22-09-02

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 Milwaukie Drywall, 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 November 15, 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 July 8, 2022, was correct. By Proposed Order dated May 3, 2023, Senior Administrative Law Judge Samantha A. Fair Affirmed the July 8, 2022 Final Premium Audit billing for the audit period.

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 December 13, 2019 is AFFIRMED and the December 15, 2022 Order Granting a Stay of Collections is DISMISSED.

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 October 5, 2023



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**
	)	
MILWAUKIE DRYWALL, LLC	)	OAH Case No. 2022-ABC-05690
	)	Agency Case No. INS-WCA 22-09-02
	)	

HISTORY OF THE CASE

On July 8, 2022, SAIF Corporation (SAIF) issued a Final Premium Audit Billing (Audit) to Milwaukie Drywall, LLC (the Company) for the period of October 1, 2020, to October 1, 2021. On September 5, 2022, the Company filed a request for hearing with the Division of Financial Regulation (Division) of the Department of Consumer and Business Services. On November 7, 2022, the Company filed a Petition with the Division. In the Petition, the Company contested SAIF's inclusion as payroll payments made to several individuals. The Company also requested a stay of collection.

On November 15, 2022, the Division referred the matter to the Office of Administrative Hearings (OAH). On December 15, 2022, the OAH issued an Order Granting Stay of Collection.

On December 28, 2022, ALJ Fair convened a prehearing conference. Attorney Dori Brattain appeared on the Company's behalf. Special Assistant Attorney Generals Chad Kosieracki and Nate Boughton appeared on SAIF's behalf. Brittnie Holland and Ena Pullman also appeared on behalf of SAIF. ALJ Fair scheduled the hearing for April 20, 2023, and set deadlines for the submission of witness lists and exhibits.

On April 20, 2023, ALJ Fair convened a telephone hearing. The Company was represented by Ms. Brattain. SAIF was represented by Mr. Boughton. Loudes Cutti, a qualified Spanish interpreter, provided translation services for the hearing. Testifying on behalf of the Company were: Ublado Ochoa Macias (Mr. Ochoa), the sole owner of the Company; Miguel Diaz, friend and housemate of Mr. Ochoa; and Lesly Collins, owner of Northwest Profit Solutions that provides bookkeeping services for the Company. Testifying on behalf of SAIF were: Edward Dolfay, a SAIF premium auditor; and Ena Pullman, a SAIF premium audit analyst. The record closed on April 20, 2023, at the conclusion of the hearing.

ISSUE

Whether SAIF's July 8, 2022 Final Premium Audit Billing correctly billed the Company by including as payroll payments made to Abelardo Avila Alcazar, Alejandra Garcia, Alejandra Miranda Morales, Alfonso Duarte, Angel Garcia Manual, Angel Urias, Arnulfo Montero, Benjamin Carrillo, Benjamin Rebollar, Daboberto Guadarra, David Diaz, Enrique Pavon, Eulogio Vazquez, Gerardo Mora, Grisel Tinoco, Irami Avila, Irene Enriquez, Joel Garcia, Jorge Carrillo, Jose Luis Perez, Jose Perez Ramos, Jose Rodriquez, Juan Carlos Carrillo Jimenez, Juan Manual Mata, Juan Perez, Leticia Matias Cruz, Luis Diaz, Marcos Aguilar, Mariano Vargas Pacheco, Maricela Arellano, Martin Chavira Valle, Oscar Alonso Chaves, Oscar Aonso Magana, Patricia Carrillo, Rafael Alcantar, Ramon Mendez, Ricardo Ayala, Roberto Campos, Roberto Melgar Gonzalez, Salvador Rebollar, Sergio Joel Santos Orneto, Sugueidy P. Huerta Galindo, Teresa Tinoco, Veronica Toro, Vicente Ayala Corona, and Victor Montero (Worker or collectively called the Workers). ORS 656.027 and ORS 656.029.

EVIDENTIARY RULINGS

Exhibits A1 through A113, offered by SAIF, were admitted into the record without objection. Exhibits R1 through R25, offered by the Company, were admitted into the record without objection.

FINDINGS OF FACT

1. The Company is a limited liability company and an Oregon-licensed contractor located in Milwaukie, Oregon. (Ex. A2 at 1.) Mr. Ochoa is the sole member of the Company. The Company has no employees other than Mr. Ochoa, although Mr. Ochoa's brother occasionally assists him. (Test. of Ochoa.)

2. The Company installs drywall for the interior walls and ceilings of residential homes in the Portland metropolitan area. When the Company secures a contract to provide these installation services, the Company arranges for one of the Workers to view the job site and submit a bid to the Company for the drywall work. The Worker's verbally-presented bid to the Company will include the total cost for the job, not an hourly rate, based on the size of the installation. Once the Company accepts the bid, the Worker brings a crew to the job site and performs the installation of the drywall. The Company reviews the completed installation and, if approved, then pays the Worker. If the installation does not meet the Company's standards, then the Worker and the crew will return to the job site and fix the work before payment is made. (Test of Ochoa.) When mistakes occur, Mr. Ochoa demonstrates for the Workers and their crews how the installation are to be performed in order to repair the incorrect installations. (Test. of Diaz.) The Company relies on the Workers to bring a crew to complete every job. (Test. of Ochoa.)

3. The Workers and their crews provide their own tools for the drywall installation. The Workers regularly provide the drywall but sometimes the Company provides the drywall. The Company does not reimburse the Workers for any costs or expenses. The Workers and their crews provide their own transportation to the job sites, and, other than the determination as to

when the installation must be completed, the Workers determine when the crews will perform the work. (Test. of Ochoa.)

4. The Workers do not work from the same business location as the Company. The Company does not provide any employee benefits to the Workers. (Test. of Ochoa.)

5. The Workers are not licensed contractors with the Oregon Construction Contractors Board (CCB), and the Company never checks with the CCB on the licensing status of the Workers. (Exs. A15 through A105; test. of Ochoa.) The Company understands the Workers are not bonded or insured contractors. The Company never checks on whether the Workers or their crews have workers' compensation coverage. (Test. of Ochoa.) The Company has some of the Workers complete an IRS W-9 form, in which the Workers provide their taxpayer identification numbers.[1] (Exs. 1 through 22.)

6. The Company has its own drywall installation tools. Occasionally, Mr. Ochoa performs drywall installation for the Company. Most of Mr. Ochoa's time is spent on securing work at the job sites and administrative tasks. The Company relies on the Workers and their crews to perform the majority of its installation services. (Test. of Ochoa.)

7. On August 27, 2020, SAIF issued a workers' compensation policy to the Company for the period October 1, 2020, to October 1, 2021. (Ex. A4 at 1-2.) On November 2, 2021, SAIF informed the Company that it would perform an audit of its payroll records for the period October 1, 2020, to October 1, 2021. (Ex. A7 at 1.) On May 25, 2022, SAIF performed an audit of the Company's records at its bookkeeper's office. The Company reported no payroll to SAIF. (Test. of Dolfay.) During the October 1, 2020, to October 1, 2021 period, the Company paid the Workers, listed as subcontractors in the Company's bookkeeping records, a total of $1,057,847. (Ex. A10 at 1; test. of Dolfay.) The Company did not have any certificates of insurance, demonstrating proof of workers' compensation insurance, from any of the Workers. (Test. of Dolfay.) In the July 8, 2022 Final Premium Audit Billing, SAIF adjusted the Company's premium by including the $1,057,847 as subject payroll. (Ex. A11 at 1-2.)

CONCLUSION OF LAW

SAIF's July 8, 2022 Final Premium Audit Billing correctly billed the Company by including as payroll payments made to the Workers.

OPINION

In its Petition to the Division, the Company disputed SAIF's inclusion of payments made to the Workers 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

[1] The Company only had W-9 forms for about half of the Workers. (Exs. 1 through 22.)

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).

Responsibility for Workers' Compensation Insurance Pursuant to ORS 656.029

ORS 656.017 through ORS 656.174 are part of a "statutory scheme that seeks to ensure that workers are, in fact, covered by workers' compensation insurance." *In the Matter of the Compensation of Sparks*, 171 Or App 65, 69 (2000). *Sparks* further states that the "rule has been that general contractors are responsible for providing coverage to all persons working under the contract." *Id*. Thus, ORS 656.027(1) provides that "[a]ll workers are subject to this chapter except those nonsubject workers described" in a series of specifically enumerated classes that includes the independent contractor.

The Company argued that it hired the Workers as independent contractors, who operated their own businesses, to perform its drywall installation services. As such, the Company argued that it was relieved of any responsibility to provide workers' compensation insurance to those individuals who actually performed the work. This same argument was raised by K-Mart Corporation in *K-Mart Corp. v. Claussing*, 162 Or App 558 (1999), a case which dealt with the application of ORS 656.029.

ORS 656.029 provides, in part:

> (1) If a person awards a contract involving the performance of labor where such labor is a normal and customary part or process of the person's trade or business, the person awarding the contract is responsible for providing workers' compensation insurance coverage for all individuals, other than those exempt under ORS 656.027, who perform labor under the contract unless the person to whom the contract is awarded provides such coverage for those individuals before labor under the contract commences. If an individual who performs labor under the contract incurs a compensable injury, and no workers' compensation insurance coverage is provided for that individual by the person who is charged with the responsibility for providing such coverage before labor under the contract commences, that person shall be treated as a noncomplying employer and benefits shall be paid to the injured worker in the manner provided in this chapter for the payment of benefits to the worker of a noncomplying employer.
>
> * * * * *
>
> (3) As used in this section:
>
> (a) "Person" includes partnerships, joint ventures, associations, corporations, limited liability companies, governmental agencies and sole proprietorships[.]

The Company's business is the installation of drywall for the interior walls and ceilings of residential homes. During the period at issue, the Company contracted with the Workers to perform the drywall installation at the majority of its job sites. Therefore, the Workers and their crews performed labor that was a "normal and customary part" of the Company's business. ORS 656.029(1).

In the *K-Mart Corp.* case, K-Mart contracted with a sole proprietor to provide janitorial services for its retail locations. Pursuant to the terms of the contract with the sole proprietor, the sole proprietor was to provide workers' compensation insurance for its workers. Thus, the parties to the contract understood that the sole proprietor would be hiring additional workers to perform the janitorial services needed by K-Mart. The Court of Appeals agreed with the Workers' Compensation Board's reasoning that, because K-Mart contracted with the sole proprietor with the expectation that the sole proprietor would have additional workers perform the work, the sole proprietor was not "exempt from coverage." *K-Mart*, 162 Or App at 563. The Court concluded that the exemption under ORS 656.027 was only for individual workers, not for those who employed individual workers, *i.e.*, subject employers, such as the sole proprietor in the *K-Mart Corp. Id*. at 562.[2]

The Company is in the same position as K-Mart in regards to its relationship with the Workers. The Company contracted with the Workers to perform the drywall installation, and the Company knew that the Workers would hire a crew to perform the actual drywall installation. The Company was the "person awarding the contract" and the Worker was "the person to whom the contract is awarded." ORS 656.029(1). Additionally, the Company contracted with the Workers in their capacity as subject employers with the expectation that the Workers would hire their crews to perform the labor. Therefore, pursuant to ORS 656.029(1), the Company was responsible for providing workers' compensation insurance coverage for all the workers who performed the drywall installation. Even if the crew performing the drywall installation were indeed independent contractors (and therefore exempt from coverage pursuant to ORS 656.027), pursuant to ORS 656.029(1), the Company remains responsible for providing them workers' compensation insurance because the Workers, the persons awarded the Company's contracts, were not workers "exempt from coverage," but rather subject employers.

ORS 656.029(1) provides an exception to holding the person awarding the contract responsible for providing workers' compensation coverage. That exception applies if "the person to whom the contract is awarded provides such coverage." ORS 656.029(1). Additionally, "the burden is on the [general contractor] to make sure that the [subcontractor] provides the coverage." *Sparks*, 171 Or App at 69. There was no evidence that the Workers provided workers' compensation insurance for the workers. Therefore, the Company was responsible to provide the coverage for those workers who performed the drywall installation.

[2] Additionally, the facts in *Sparks*, another case decided under ORS 656.029(1), are almost exactly the same as this matter. The Petitioner was a general contractor on a construction project that entered into a subcontract with a drywall business. Subsequently, one of the drywall laborers suffered a compensable injury on a job site. The Workers' Compensation Board ruled that Petitioner was responsible for the laborer's coverage under ORS 656.029(1), a ruling that the Court noted and the parties did not contest. *Sparks*, 171 Or App at 67.

In sum, the Company was responsible for providing workers' compensation coverage for all of the Workers' crews who performed the drywall installation services. Because there was no evidence that the Workers provided workers' compensation insurance for their crews that performed the drywall installation services, SAIF properly included the payments made to the Workers as subject payroll.

ORDER

I propose the Division of Financial Regulation for the Department of Consumer & Business Service issue the following order:

SAIF's July 8, 2022 Final Premium Audit Billing issued to Milwaukie Drywall, LLC for the period of October 1, 2020, to October 1, 2021, is AFFIRMED. Milwaukie Drywall, LLC is liable for the adjusted premium.

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

SERVICEMEMBERS' CIVIL RELIEF ACT

No person who is a party to this proceeding, unless stated above, has notified the Office of Administrative Hearings (OAH) that they are a person in military service subject to the Servicemembers' Civil Relief Act (SCRA). The OAH has no reason to believe that a person who is a party to this matter is subject to the SCRA. If a party to the proceeding is a person and is a servicemember who did not appear for the hearing, within the servicemember's period of service, or 90 days after their termination of service, that party should immediately contact the agency to address any rights they may have under the SCRA.