STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
	)	
DCY Construction, LLC	)	OAH Case No. 2023-ABC-06280
	)	Agency Case No.: INS-WCA 23-10-03
and	)	
	)	
SAIF CORPORATION	)	

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 DCY Construction, 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 28, 2023, 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 August 1, 2023, was correct. By Proposed Order dated May 30, 2024, Administrative Law Judge (ALJ) Bradley A. Schmidt Affirmed the August 1, 2023 Final Premium Audit Billing, for the audit period December 21, 2021, to January 1, 2023.

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 August 1, 2023 is AFFIRMED and the Stay of Collections issued November 30, 2023 is lifted.

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 November 13, 2024

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

IN THE MATTER OF:	**PROPOSED ORDER**
DCY CONSTRUCTION, LLC	OAH Case No. 2023-ABC-06280 Agency Case No. INS-WC 23-10-03

HISTORY OF THE CASE

On August 1, 2023, workers' compensation insurer SAIF issued an Oregon Final Audit Billing to DCY Construction, LLC (DCY), which required payment of a total premium of $18,688.01 based upon a subject payroll of $240,753.00. On September 28, 2023, DCY requested a hearing from the Department of Consumer & Business Services (Department) to contest the Final Audit Billing. DCY also requested a stay of collection on the disputed portion of the Final Audit Billing. On November 28, 2023, the Department referred the hearing request to the Office of Administrative Hearings (OAH) for the scheduling of a contested case hearing. The OAH assigned Senior Administrative Law Judge (ALJ) Bradley A. Schmidt to preside over the matter.

On November 30, 2023, OAH Presiding ALJ Monica A. Whitaker granted the requested stay of collection on the disputed portion of the Final Audit Billing pending the outcome of the contested case hearing.

On January 12, 2024, ALJ Schmidt convened a telephone prehearing conference to review the issues, schedule the hearing, and set related deadlines. Special Assistant Attorney General (SAAG) Allison Lesh represented SAIF. Kathleen Saludares and Sara Wong also attended from SAIF. Certified Spanish interpreter Jannette Rohtert attended to provide interpretation services.[1] No one appeared at the conference on behalf of DCY. ALJ Schmidt scheduled the matter for a WebEx video conference hearing to commence on May 1, 2024.

On May 1, 2024, ALJ Schmidt convened the video conference hearing. DCY part-owner Duniel Canada Machado represented DCY but did not testify.[2] DCY Accountant Yuniel Alberto Rodriguez Mojena (referred to at hearing and hereinafter as Mr. Rodriguez) testified for DCY.

[1] DCY had requested the presence of a Spanish language interpreter for the conference.

[2] Corporate entities contesting workers' compensation insurance premium audit billings may be represented by an authorized representative who is not an attorney. OAR 137-003-0555(1), (2); ORS 737.505(2); OAR 836-005-0112.

SAAG Lesh represented SAIF. SAIF Premium Audit Specialist Marylou Salgado and SAIF Premium Audit Analyst Ena Pullman testified for SAIF. Certified interpreter Laura Leavitt provided Spanish language interpretation services. The Department did not participate in the hearing.

Testimony concluded on May 1, 2024, but the record remained open until May 2, 2024, for SAIF to submit an additional exhibit. The record closed on May 2, 2024, after receipt of that exhibit.

ISSUE

Whether SAIF correctly calculated DCY's payroll for the period December 21, 2021 to January 1, 2023, in its August 1, 2023, Final Premium Audit Billing. ORS 656.005; ORS 656.027; ORS 656.029; ORS 656.128.

EVIDENTIARY RULING

SAIF's Exhibits A1 through A39 were admitted into evidence without objection.

FINDINGS OF FACT

1. DCY is a limited liability company based in Portland, Oregon, engaged in the business of interior and exterior painting of residential and commercial buildings. (Ex. A3 at 5, 7, 14; test. of Pullman.) DCY is owned in equal part by Mr. Machado and Yalesky Consuegra Figueroa, with Mr. Machado acting as manager. (Ex. A3 at 5.) DCY was incorporated in approximately December 2021 and performed no services to clients for remuneration prior to 2022. (*Id*. at 9; test. of Rodriguez.)

2. On January 5, 2022, DCY applied for a workers' compensation insurance policy for Mr. Machado and additional employees under classification 5474, Painting NOC and Shop Operations, Drivers. (Exs. A3 at 5-6, A5 at 2.) According to the Oregon Scopes of Basic Manual Classifications for Workers' Compensation and Employers Liability Insurance, classification 5474 "applies to employers that paint exteriors and interiors of commercial or residential concrete, stone, or wood structures regardless of height," such as "auditoriums[,] houses of worship[,] office buildings[,] stores, and [] theaters." (Ex. A35 at 1-2.)

3. On January 25, 2022, SAIF issued a workers' compensation policy to DCY for the period December 21, 2021 to January 1, 2023. (Ex. A5 at 1-3.) The policy placed all of DCY's expected payroll within classification 5474. (*Id.* at 3.)

4. During the period December 21, 2021 through January 1, 2023, DCY both hired employees and contracted with outside laborers to provide its painting services. (Ex. A13 at 5-7.) For the following outside laborers who used their own equipment to provide painting services, DCY contracted to rent the equipment from the laborers and agreed to pay for repairs to equipment damaged while used for DCY's benefit: Carlos Salazar, Luis Molina, Rafael Del Toro, Ricardo Dominguez, and Y. Ramirez Nunez. (Exs. A2 at 1-2, A4 at 1-2, A7 at 1-2, A9 at

1-2, A10 at 1-2; test. of Saludares.)

5. According to DCY's financial records as maintained in QuickBooks, DCY had a total of four employees in addition to Mr. Machado working as painters during the period December 21, 2021 through January 1, 2023. (Ex. A13 at 5.) DCY's financial records showed total gross payroll to these four employees during the period December 21, 2021 through January 1, 2023 as follows:

Quarter	Amount
Q4 2021	$0
Q1 2022	$0
Q2 2022	$5,770
Q3 2022	$17,700
Q4 2022	$19,160
Total:	$42,630

(*Id.* at 6; Ex. A12 at 1-2.)

6. According to DCY's financial records as maintained in QuickBooks, DCY also made payments to outside laborers during the period December 21, 2021 through January 1, 2023 as follows:

Individual	Amount
Claudino Batista	$1,100
Domingo Delgado	$2,200.00
Carlos Salazar	$23,377.00
Luis Molina	$19,401.00
Rafael Del Toro	$22,665.00
Ricardo Dominguez	$30,825.00
Y. Ramirez Nunez	$39,940.00
Total:	**$139,508.00**

(Ex. A13 at 7.) These payments included labor, equipment rental, and repair fees. (Ex. A16 at 2-3; test. of Rodriguez.) However, the records maintained by DCY, including the checks issued for the payments, did not separate or label the specific purpose(s) of payments disbursed to these individuals (*e.g.*, labor, equipment rental, or equipment repair). (Ex. A13 at 4, 7; test. of Rodriguez.) DCY's financial records did not provide a way for anyone other than Mr. Machado to determine, based upon his own recollection of events and the dates listed on the checks, what amounts were paid to these individuals for what purpose in any given payment. (Test. of Rodriguez.)

7. Carlos Salazar, Luis Molina, Rafael Del Toro, Ricardo Dominguez, and Y. Ramirez Nunez did not have Oregon contractor's licenses, Oregon business licenses, or their own workers' compensation insurance policies during the period December 21, 2021 through January

1, 2023. (Exs. A20 at 1, A21 at 1, A22 at 1, A23 at 1, A24 at 1, A25 at 1, A26 at 1, A27 at 1, A28 at 1, A29 at 1, A30 at 1-2; test. of Pullman.)

8. On January 6, 2023, SAIF notified DCY that it would be performing an audit of DCY's payroll records for the period December 21, 2021 through January 1, 2023, through its contracted auditor, Lowry & Associates, Inc. (Ex. A11 at 1.) On May 23, 2023, Lowry & Associates, Inc., performed a virtual (remote) audit of DCY's payroll, including a review of the following records: Individual Gross Payroll Report, Federal 941 Quarterly Reports, Individual Sub/Contract Labor Report, and the QuickBooks Payroll Summary. (Exs. A12 at 1-2, A13 at 1-7; test. of Pullman, Rodriguez.) DCY's accountant participated in the audit and concurred with auditors' determination of gross payroll and contract labor costs as listed above. (Ex. A13 at 1, 7; test. of Rodriguez.) By that time, Mr. Machado had not provided any information to DCY's accountant that any of the contract labor costs should have been classified as payments for equipment rental or repairs. (Test. of Rodriguez.)

9. On August 1, 2023, SAIF issued to DCY the Final Premium Audit Billing for the period December 21, 2021 through January 1, 2023, in which it concluded that all of DCY's reported payroll and contract labor costs were subject payroll. (Ex. A15 at 1.) SAIF also added a $58,615 assumed wage for Mr. Machado since he was included in the policy. (Ex. A15 at 2; test. of Pullman.) The annual assumed wage for LLC members for policies starting in 2021 was $56,900. (Ex. A15 at 1; test. of Pullman.) For the audit period, this resulted in total subject payroll of $240,753 under classification 5474. (Ex. A15 at 2, 5; test. of Pullman.)

10. After receiving the Final Premium Audit Billing, Mr. Machado reviewed with DCY's accountant the checks issued to the individuals identified as contract laborers during the period December 21, 2021 through January 1, 2023. Based upon the dates of the checks and his recollection of events, Mr. Machado informed DCY's accountant which payments should have been designated as equipment rentals and repairs rather than as payments for labor. (Test. of Rodriguez.)

11. On September 27, 2023, based upon the review of checks with Mr. Machado, DCY's accountant reported to SAIF a corrected total of $23,740 in contract labor costs, asserting that the remaining $115,768 recorded in DCY's financial records as contract labor costs should have instead been categorized as equipment rental or equipment repair costs. (Ex. A16 at 2-3; test. of Rodriguez.) DCY also provided to SAIF its equipment rental contracts with Carlos Salazar, Luis Molina, Rafael Del Toro, Ricardo Dominguez, and Y. Ramirez Nunez. (Exs. A2 at 1-2, A4 at 1-2, A7 at 1-2, A9 at 1-2, A10 at 1-2; test. of Rodriguez.) DCY did not provide to SAIF an itemized list of payments to individuals identified in its records as contract labor to demonstrate which payments were misclassified and why. It also did not provide receipts or any other records to corroborate its new contract labor estimate. (Ex. A16 at 2-3; test. of Pullman, Rodriguez.)

12. As of the time of hearing, DCY still had not provided to SAIF any receipts or other documentary evidence or testimony regarding any specific payments made to any of the individuals identified in its financial records as contract laborers to explain why any given payment should not be counted as subject payroll. (Test. of Pullman, Rodriguez.)

CONCLUSION OF LAW

SAIF correctly calculated DCY's payroll for the period December 21, 2021 to January 1, 2023, in its August 1, 2023, Final Premium Audit Billing.

OPINION

DCY contends that SAIF miscalculated its subject payroll in the August 1, 2023, Final Premium Audit Billing.[3] DCY thus bears the burden to establish that SAIF's premium audit is incorrect by a preponderance of the evidence. *See Salem Decorating v. NCCI*, 116 Or App 166, 170 (1992), *rev den*, 315 Or 643 (1993) (the insured has the burden to establish that an insurer's premium audit billing is incorrect); ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (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 false. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987).

ORS chapter 656 governs workers' compensation in the state of Oregon. According to ORS 656.023, "Every employer employing one or more subject workers in the state is subject to this chapter."

ORS 656.005 contains the following relevant definitions:

> (13)(a) "Employer" means any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal corporations, school districts and other public corporations or political subdivisions, that contracts to pay a remuneration for the services of any worker.
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> * * * * *
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> (d) For the purposes of this chapter, "subject employer" means an employer that is subject to this chapter as provided in ORS 656.023.
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> * * * * *
>
> (22) "Payroll" means a record of wages payable to workers for their services and includes commissions, value of exchange labor and the reasonable value of board, rent, housing, lodging or similar advantage received from the employer. However, "payroll" does not include overtime pay, vacation pay, bonus pay, tips, amounts payable under profit-sharing agreements or bonus payments to reward workers for safe working practices. Bonus pay is limited to payments that are not anticipated under the contract of employment and that are paid at the sole discretion of the employer. The exclusion from payroll of

[3] DCY did not contest the categorization of its workers within classification 5474.

bonus payments to reward workers for safe working practices is only for the purpose of calculations based on payroll to determine premium for workers' compensation insurance, and does not affect any other calculation or determination based on payroll for the purposes of this chapter.

* * * * *

(27) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and includes the amount of tips required to be reported by the employer pursuant to section 6053 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto, or the amount of actual tips reported, whichever amount is greater. The State Accident Insurance Fund Corporation may establish assumed minimum and maximum wages, in conformity with recognized insurance principles, at which any worker shall be carried upon the payroll of the employer for the purpose of determining the premium of the employer.

(28)(a) "Worker" means any person, other than an independent contractor, who engages to furnish services for a remuneration, including a minor whether lawfully or unlawfully employed and salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an adult in custody or ward of a state institution or as part of the eligibility requirements for a general or public assistance grant.

* * * * *

(c) For the purposes of this chapter, "subject worker" means a worker who is subject to this chapter as provided in ORS 656.027.

(29) "Independent contractor" has the meaning given that term in ORS 670.600.

Under ORS 656.027, all workers in Oregon are considered subject workers except those falling within specific, enumerated categories, such as domestic servants, some corporate officers, newspaper carriers, and foster service providers. Under ORS 670.600(2)(c), individuals employed in the alteration or improvement of buildings must have a contractor license issued by the Oregon Construction Contractors Board to be considered independent contractors rather than subject workers. ORS 701.005(5)(a); ORS 701.021.

Under ORS 656.128, LLC members may be covered under a workers' compensation insurance policy based upon a written application to the insurer. "Thereupon, the insurer may accept such application and fix a classification and an assumed monthly wage at which such person shall be carried on the payroll as a worker for purposes of computations under this

chapter." ORS 656.128(1).

Applying the statutory framework set forth above, the evidence supported a finding that DCY's contract laborers should be considered subject workers for purposes of workers' compensation insurance. There was no evidence that any of DCY's contract laborers had an Oregon contractor license. Because of the nature of DCY's business and the work assigned—altering or improving residential and commercial buildings by painting them—laborers would need their own contractor's licenses to be considered independent contractors under ORS 670.600(2)(c). Moreover, the evidence showed that DCY applied to have Mr. Machado included under its workers' compensation policy, and that SAIF was thus entitled to add an assumed wage for Mr. Machado into DCY's payroll under ORS 656.128(1).

DCY also challenged the premium audit by contending that portions of the payments disbursed to its contract laborers were for equipment rental and/or repairs rather than for wages. In support of its argument, DCY provided the testimony of its accountant, who explained how Mr. Machado was able, based upon the dates of the disbursals and his own personal recollection, to sort out which payments were for which purpose. DCY also provided the equipment rental and repair contracts it executed with five of its contract laborers.

This evidence was persuasive to establish the general proposition that some amount of the money included by SAIF in DCY's subject payroll was excludable. According to ORS 656.005(27), wages are pay for "service rendered," not a reimbursement for use of an individual's personal equipment. Similarly, the definition of "payroll" in ORS 656.005(22) makes no reference to equipment rental or repair. Therefore, to the extent that the contract labor costs included these other payments, they may not reflect actual subject payroll.

However, the evidence did not establish, more likely than not, the excludability of any specific payment or amount from DCY's subject payroll. DCY's records made no distinction between the payments disbursed to its contract laborers. The checks themselves did not include any annotations that would allow an outside individual to sort the payments without direct consultation with Mr. Machado. According to the testimony, Mr. Machado was able to sort the checks based upon the dates of payment, but no check register or timeline of payments was submitted into evidence. There were no receipts or other records to corroborate the contract labor payroll amount ultimately alleged by DCY. Mr. Machado did not testify. The only testimony DCY provided was that of its accountant, who could provide no independent verification of the alternate numbers DCY proposed. There was thus no direct evidence to allow the factfinder to determine that any one payment was, more likely than not, excludable from payroll.

It should be noted that Oregon's workers' compensation laws and rules do not set a standard for proving the degree to which the payroll information relied upon by the insurer contained errors. However, in the analogous situation of division of payroll, the Department has required verifiable payroll records before an administrative decision can alter the result of a premium audit billing. OAR 836-042-0060. Where an employer seeks to divide an individual worker's pay between two or more classifications, OAR 836-042-0060(1) states:

> 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 * * *.

(Italics added.)

This rule reflects a logical extension of the policy concerns addressed within ORS chapter 656. ORS chapter 656 represents 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). By requiring verifiable payroll records, OAR 836-042-0060 safeguards employees from the potential for inadequate coverage that could occur should employers be able to split an employee's payroll based upon mere estimates rather than contemporaneous records.

In furtherance of the same policy concern, DCY should be required to supply something more than what it has in this case to prove that its payroll records are incorrect. Given that OAR 836-042-0060 does not directly apply here, that need not necessarily take the form of verifiable payroll records. However, some other robust form of records, or a combination of records and supporting testimony, must be required to show, more likely than not, that a corrected payroll amount suggested by the insured should be used to recalculate the premium audit. Otherwise, the potential for inadequate coverage is too great.

Moreover, according to ORS 656.005(22), "'Payroll' means a *record* of wages payable to workers for their services * * *." (Italics added). The only *record* DCY provided was its QuickBooks summary, which reflected the numbers utilized by SAIF in its premium audit billing.

Put simply, DCY failed to meet its burden of proof. As a result, the full contract labor costs contained within DCY's records must be counted as subject payroll for the premium audit. The premium audit billing must be affirmed.

ORDER

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

SAIF's August 1, 2023, Final Premium Audit Billing issued to DCY Construction, LLC, for the period December 21, 2021 to January 1, 2023, is AFFIRMED. DCY Construction, LLC, is liable for the adjusted premium.

Bradley A. Schmidt
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

Unless otherwise stated in this order, the Office of Administrative Hearings (OAH) has no reason to believe that a party to this proceeding is subject to the Servicemembers' Civil Relief Act (SCRA). If a party to this proceeding 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.

CERTIFICATE OF MAILING

On May 30, 2024, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2023-ABC-06280**.**

By: Electronic Mail

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