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

IN THE MATTER OF:	)	FINAL ORDER
	)	
Johnsons Quality Construction, Inc.	)	OAH Case No. 2023-ABC-06306
	)	Agency Case No.: INS-WCA 23-11-03
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 Revised Final Premium Audit Billing (billing) issued by SAIF Corporation (SAIF) to Johnsons Quality Construction, Inc, (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 December 22, 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 Revised Final Premium Audit, dated November 11, 2023, was correct. By Proposed Order dated August 27, 2024, Senior Administrative Law Judge (ALJ) Joe L. Allen Affirmed the November 11, 2023 Revised Final Premium Audit Billing, for the audit period March 1, 2021, to March 1, 2024.

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 Revised Final Premium Audit issued November 11, 2023 is AFFIRMED and the Stay of Collections issued December 26, 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 June 5, 2025

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**
	)	
JOHNSONS QUALITY	)	OAH Case No. 2023-ABC-06306
CONSTRUCTION, INC.	)	Agency Case No. INS-WC 23-11-03

HISTORY OF THE CASE

On November 11, 2023, SAIF Corporation (SAIF or the insurer) issued a Revised Oregon Final Premium Audit Billing to Johnson Quality Construction, Inc. (Appellant) for the period March 1, 2021 through March 1, 2024 (the period in issue). On November 14, 2023, Appellant requested a hearing disputing the inclusion of $25,500 in subject payroll, categorized as reimbursements to employees resulting in additional premiums added to its workers' compensation policy for the period in issue.

On December 22, 2023, the Department of Consumer & Business Services Division of Financial Regulation, Premium Audit Work (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. On January 31, 2024, ALJ Elizabeth Jarry convened a prehearing conference on behalf of ALJ Allen. Sara Wong, Special Assistant Attorney General (SAAG) appeared with Kathleen Saludares, premium audit analyst for SAIF. Appellant did not appear at the PHC. The purpose of the prehearing conference was to identify the issues for hearing, establish a schedule for prehearing filings, and set a date for hearing.

On May 30, 2024, SAIF submitted its proposed exhibits and witness lists. On May 31, 2024, Appellant requested an extension to the exhibit filing deadline, SAIF did not object and the ALJ granted the extension. Appellant filed its exhibits on June 6, 2024.

A hearing was held on June 20, 2024 before ALJ Allen, by telephone. Appellant appeared without counsel. Khirenda Johnson acted as the representative for the employer at hearing. The employer did not present any witnesses at hearing. SAAG Wong appeared on behalf of SAIF. Testifying on behalf of SAIF were Stacy Speer-Aritola, premium auditor, and Kathleen Saludares, premium audit analyst. The ALJ held the record open for receipt of the parties' written closing arguments. SAIF submitted its written closing argument on July 18, 2024. Appellant submitted its written closing argument on August 1, 2024. On August 2, 2024, SAIF advised the OAH that it would not be filing a reply brief. The record closed on August 2, 2024.

ISSUE

Whether SAIF's Revised Final Premium Audit, dated November 11, 2023, is incorrect because the insurer failed to exclude payments made to employees for fuel and materials reimbursements.

EVIDENTIARY RULINGS

Exhibits A1 through A41, offered by SAIF, were admitted into the record without objection. Exhibits R1, R1.2, and R2, offered by the employer, were also admitted into the record without objection.

FINDINGS OF FACT

Employer's business

1. The employer, Johnson Quality Construction, Inc., is a general contractor that performs a variety of large and small construction projects including residential and small commercial remodeling, roof repair, residential siding, general residential repairs, snow removal, etc. (Ex. A13 at 5.)

2. The employer is located in Elgin, Oregon. The employer has crew members located in the Portland area who often travel to eastern Oregon to perform work for the employer. (Ex. A14 at 1-2.)

3. The employer maintains at least three separate business accounts, at Community Bank in Joseph, Oregon, including a General Account ending in 5278, a JQC Inc Payroll Account ending in 5294, and an account designated as Employee Account ending in 6231. (*See* Exs. R1 and R2.)

4. The employer transfers money from its General and JQC Inc accounts to the Employee Account for employees to use for purchases while working at various job sites. All purchases are made through use of a debit card attached to the Employee Account. (Exs. R1, R1.2, and R2.)

March 13, 2023 Premium Audit Billing.

5. On March 13, 2023, SAIF issued a Final Premium Audit Billing to the employer for the period in issue. In that billing, SAIF reclassified pay previously reported to various classification codes to code 5645 (Carpentry – Dwellings 3 Stories or Less – Siding). (Ex. A13 at 1-5.)

6. In addition, SAIF identified several payments made outside of reported payroll which it determined should be included in subject payroll, also included in class code 5645, because the employer did not provide receipts or other acceptable verification demonstrating

those payments were made for qualifying reimbursements. (Ex. A13 at 2-3; test. of Speer-Aritola.)

7. Among the additional payments included in subject payroll in the March 2023 Audit were $25,560 in transfers to the employer's Employee Account. These amounts were added to subject payroll based on the employer's indications to SAIF that employees used the employer's Employee Account to make debit card purchases while on the job. (Ex. A13 at 3; test. of Speer-Aritola and Saludares.)

8. In addition, SAIF included disbursements, listed in the employer's records as "Cash App" payments, to employees Adolfo Diaz Sandoval ($6,100), Tyler Dodd ($4,700), and Wayne Lauricella ($700) as well as one payment made to Shawn Johnson listed as "siding materials." (Ex. A13 at 3; test. of Speer-Aritola.)

9. SAIF also included as subject payroll one payment to Jimmie Teeter for $473, listed as payroll expense in the employer's banks statements but not included in payroll records. (Ex. A13 at 2; Test. of Speer-Aritola.)

10. Based on the employer's records provided during the audit, SAIF calculated $37,273 should be added to subject payroll. With this additional subject payroll, SAIF determined the employer's total subject payroll for the period in issue was $300,947. (Ex. A13 at 3-4; test. of Saludares.)

11. According to the March Final Premium Audit Billing, the employer's original estimated premiums for the period in issue were $12,693.82. Based on the total subject payroll calculated in the audit, SAIF determined the final premiums due for the period in issue were $22,627.48 (a difference of $9,933.66). (Ex. A13 at 8-9.)

12. In the March Final Premium Audit Billing, SAIF calculated the employer owed additional premiums of $2,472.24 for the period March through June 6, 2021 and $7,461.42 for the period July 17, 2021 through March 1, 2022, totaling 9,933.66 for the period in issue.[1] (Ex. A13 at 8-9.)

Employer's supplemental documentation.

13. On or about April 12, 2023, the employer filed a petition appealing SAIF's March Final Premium Audit Billing. In that petition, the employer disputed SAIF's reallocation of certain employee hours to code 5645. In addition, the employer objected to SAIF's calculation of additional subject payroll based on transfers to the Employee Account, "Cash App" transfers directly to certain employees, and the purchase of siding materials from a former employee. The employer disputed that it owed $9,933.66 in additional premiums for the period in issue. (Ex. A14 at 1-2.)

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[1] The employer's workers' compensation policy lapsed between June 6 and July 17, 2021. Therefore, SAIF did not include subject payroll for that period in its calculations of final premiums due. (Test. of Saludares.)

14. Following issuance of the March Final Premium Audit Billing, the employer also provided SAIF with select pages from its Employee Account for the period in issue. (Exs. A16 and A17.)

15. In addition, the employer provided SAIF with an internally prepared document purporting to identify each transfer to, and expenditure from, the Employee Account, as well as Cash App transfers to employees. That document also showed multiple bonuses paid out during the period in issue, including three each for Mr. Diaz and Mr. Dodd. (Ex. A18 at 1-2.)

16. Along with the explanatory document, the employer provided receipts for $440 for a siding purchase. (Ex. A19; test. of Saludares.)

17. The employer also provided multiple receipts showing fuel and unidentified sundry purchases from gas stations and other retailers. (Exs. A19 through A31; test. of Saludares.)

18. The employer also provided two hand-written receipts reflecting reimbursement of $300 each to Tyler Dodd and Adolfo Diaz for two DeWalt Skill Saw purchases. (Ex. A32; test of Saludares.)

November 7, 2023 Revised Premium Audit Billing.

19. On November 7, 2023, SAIF issued a Revised Premium Audit Billing based on the additional records provided by the employer following the March 2023 billing. In that revised billing, SAIF reclassified payroll for certain employees as requested by the employer and deducted $4,162 from additional subject payroll based on fuel receipts provided. SAIF also deducted $1,140 based on receipts for tool and siding purchases. (Test. of Saludares; Ex. A35 at 1.)

20. SAIF rejected certain receipts because it determined the documentation was insufficient to demonstrate the associated purchases were made by employees in the conduct of their work or otherwise for a verifiable business reason. (Ex. A35 at 1; test. of Saludares.)

21. SAIF reduced the amount of additional subject payroll by $5,202. Accordingly, the revised billing reflected $32,771 in additional subject payroll. (Test. of Saludares.) SAIF determined the employer's total subject payroll for the period in issue was $295,745 (Ex. A35 at 3.)

22. In the November Revised Final Premium Audit Billing, SAIF recalculated the employer owed total premiums of $7,030.59 for the period March through June 6, 2021 and $14,953.44 for the period July 17, 2021 through March 1, 2022, totaling $21,984.03 for the period in issue.

23. SAIF applied the rate for highest exposure classification codes applicable to the employer's work (5645) and determined the additional premiums owed by the employer for the period in issue to be $2,583. (Test. of Saludares.)

Employer's dispute with revised billing.

24. On November 8, 2023, the employer sent an email to the Department and SAIF indicating it would be appealing the November Revised Premium Audit Billing because it disagreed with SAIF's inclusion in subject payroll of $25,500 from the Employee Account which it maintained was used solely for fuel and materials purchases for the business. (Ex. A36 at 1.)

25. On December 13, 2023, the employer filed a petition appealing the November Revised Premium Audit Billing. In that petition, the employer indicated, in part, "SAIF is trying to include charges from a JQC owned account that employees used to purchase materials in our audit. We do not agree with paying workman's [*sic*] comp on materials." Ex. A37 at 1.)

26. In the petition, the employer indicated the November Revised Premium Audit Billing charged $21,984.03 as premiums for the audit period. In the space provided for indicating the amount of premiums in dispute, the employer entered "0". The employer left blank the space provided for it to enter the amount of premiums it believes were owed for the audit period. (Ex. A37 at 3; test. of Saludares.)

NCCI Basic Manual rules regarding excludability of payments to employees outside of payroll.

27. For workers' compensation policies, Oregon has adopted rules promulgated by the National Council on Compensation Insurance (NCCI).[2] Those rules, contained in NCCI's *Basic Manual*, include instructions on when certain expenditures may be excluded from subject payroll by an insurer. (Test. of Speer-Aritola and Saludares.)[3]

28. NCCI's *Basic Manual* requires an insurer to include expense reimbursement to employees in subject payroll if the employer's records do not verify that the employee expense was incurred as a valid business expense. (Ex. R41 at 1-2; test. of Saludares.)

29. To verify an expense was incurred as a valid business expense and thus qualifies as a reimbursement outside subject payroll, SAIF requires an employer to provide receipts and other documentation showing the purpose of the expenditure and other documentation tying the expense to the employer's business needs. (Test. of Speer-Aritola and Saludares.)

30. NCCI's *Basic Manual* permits an insurer to exclude from subject payroll meal reimbursements where an employer demonstrates the reimbursement was made for late work performed by the employee. (Ex. A41 at 2.)

31. NCCI's *Basic Manual* provides that an insurer may exclude from subject payroll

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[2] See also OAR 836-043-0005(14) which reads, "'National Council on Compensation Insurance, Inc.' and "NCCI" mean a rating organization that is licensed in Oregon to make and file rates, rating values, classifications and rating plans for workers' compensation insurance, and is an organization that authorized workers' compensation insurers may be members for the purpose of satisfying ORS 737.560.

[3] ORS 737.205(2) provides for insurers to subscribe to licensed rating organizations. Pursuant to OAR 836-042-0045(1), NCCI is the licensed rating organization used by Oregon insurers.

unanticipated bonuses to employees in certain circumstances. To qualify for exclusion, the bonus(es) must be unanticipated and may not occur more than twice during a policy period. To be considered unanticipated, the bonus(es) must be at the sole discretion of the employer, not part of an established compensation plan and not based on performance metrics. (Ex. A41 at 2; test. of Saludares.)

CONCLUSION OF LAW

The employer failed to show SAIF's Revised Final Premium Audit, dated November 11, 2023, is incorrect.

OPINION

The employer challenges SAIF's revised final premium audit billing because it believes certain dollar amounts transferred to a bank account designated for employee use and paid out through debit card transactions should have been excluded because those expenditures constitute valid business expenses, either through direct purchase or employee. In disputes involving premium audit billings for workers' compensation policies, the Oregon Court of Appeals has determined that the employer bears the burden to establish that an insurer's premium audit billing is incorrect. *Salem Decorating v. NCCI,* 116 Or App 166,170 (1992) *rev den* 315 Or 643 (1993). To sustain that burden, the employer 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, 402 (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.

At hearing, the parties spent considerable time exploring the disputed amounts of subject payroll and additional premiums at issue in the Revised Premium Audit Billing. SAIF correctly pointed to varied amounts disputed by the employer that neither represented the total additional subject payroll or the ultimate calculation of final premiums due for the period in issue. In turn, the employer spent significant time exploring its perceived lack of clarity in the Revised Premium Audit Billing, demonstrating that neither the total of additional subject payroll ($32,771) or the total additional premiums due – $2,583, as testified to by Ms. Saludares – appear anywhere in the Revised Premium Audit Billing. While the employer's confusion is understandable, ultimately the apparent lack of clarity in the revised billing is not the issue in dispute according to the employer's petition. In that petition, the employer objected to the inclusion of disbursements from its Employee Account to subject payroll. Moreover, SAIF's revised billing format comports with requirements of the Department.

OAR 836-043-0170(6) addresses, *inter alia*, the required elements of a premium audit billing and provides, in relevant part:

> Subject to the exception provided in section (7) of this rule, for purposes of ORS 737.318(3)(d) and 737.505(4) to (5), OAR 836-043-0110 and this rule, the final premium audit billing of an insured is the first document issued by the insurer to the insured after the insurer's initial or revised audit of the insured that contains all of the elements specified in this section. Failure by the insurer to include any of the elements renders the billing incomplete as a final premium audit billing for purposes of ORS 737.318 and 737.505 and renders the debt uncollectible until all elements are included. An invoice issued by an insurer based on a payroll report without having performed an audit is not considered a final premium audit billing. The elements are as follows:
>
> (a) The results of the audit;
>
> (b) If the final premium audit billing is based on an initial audit, the amount of the difference between the estimated standard premium reported by the insured for the entire policy period and the final standard premium calculated after the policy period is over, pursuant to the audit;
>
> (c) *If the final premium audit billing is based on a revised audit, the amount of the difference between the final standard premium calculated after the policy period is over, pursuant to the initial audit, and the final standard premium, calculated pursuant to the revised audit*[.]

Emphasis added.

SAIF's Revised Premium Audit Billing of November 7, 2023 reported revised subject payroll and determined the final standard premium due for the period in issue. That billing reported revised numbers that were reflected as the difference between the final standard premium calculated in the initial Premium Audit Billing of March 13, 2023 and the revised billing. Based on a reduction of additional subject payroll between the two audits, SAIF's revised billing reflected a reduction in *additional* premiums for the period in issue. While this may not provide the level of clarity sought by the employer, SAIF's reporting method, for final premiums due, in the Revised Premium Audit Billing adheres to the requirements of OAR 836-043-0170(6). Also, any lack of clarity in the numbers presented in the two audits was clarified through the testimony of SAIF's Premium Audit Analyst, Ms. Saludares, who testified the total of additional premiums due for the period in issue is $2,583. Thus, the only relevant issue for hearing is whether the employer established that SAIF failed to exclude valid business expenses from the final calculation of subject payroll for the period in issue

NCCI's *Basic Manual* requires an insurer to include expense reimbursement to employees in subject payroll if the employer's records do not verify that the employee expense was incurred as a valid business expense. To verify an expense was incurred as a valid business expense and thus qualifies as a reimbursement outside subject payroll, SAIF requires an employer to provide receipts and other documentation showing the purpose of the expenditure and other documentation tying the expense to the employer's business needs. Additionally, NCCI's *Basic Manual* permits an insurer to exclude from subject payroll meal reimbursements only where an employer demonstrates the reimbursement was made for work performed by the employee beyond that individual's normal working hours.

At the hearing, the employer offered multiple bank statements and an internally prepared bank register purporting to show the purpose of each expenditure. Nonetheless – with the exception of those disbursements that correspond with fuel receipts previously provided to SAIF – the bank statements fail to provide sufficient detail to allow SAIF, or the ALJ, to identify what was purchased or the purpose of those purchases. While the employer claimed all disbursements to, and the funds subsequently disbursed through, the Employee Account were for legitimate business expenditures, it failed to provide documentation identifying the purpose of each expenditure and/or the job or project associated with each disbursement. Nothing in the record demonstrates officers or employees used this account solely for business purposes and not personal needs. To the extent each expenditure correlated to a receipt provided by the employer, SAIF gave the employer credit and reduced total subject payroll in the Revised Premium Audit Billing. Additionally, the employer's bank statements and internally prepared bank register fail to establish the employer's claims that certain expenditures from Employee Account were for meal reimbursements for crew members working late. *See* Exhibits R1, R1.2, and R2. The employer's documentation fails to establish work hours for any employee, whether employees were away from their local work area overnight, or whether any employee was working beyond their normally scheduled work shift when expenses for various eateries in the record were incurred.

While not an issue raised in the petition, at hearing the employer also disputed the inclusion of "cash app" transfer entries to individual employees that it claimed as "bonuses" paid to the employees. NCCI's *Basic Manual* provides circumstances under which an insurer may exclude from subject payroll unanticipated bonuses to employees. To qualify for exclusion, a bonus must be unanticipated and may not occur more than twice during a policy period (here the period in issue). To be considered unanticipated, a bonus must be payable at the sole discretion of the employer, not part of an established compensation plan and not based on any preestablished performance metrics. Even if the employer had raised this issue in its petition, the evidence at hearing defeats the employer's contention that these bonuses should be excluded. The employer's internally prepared document demonstrates that it paid these bonuses to Mr. Diaz and Mr. Dodd three times each during the policy period. Accordingly, under NCCI rules, these disbursements do not qualify for exclusion and SAIF was required to treat them as subject wages.

In summary, because the employer failed to establish the disputed expenditures from the Employee Account constituted valid business expenses, SAIF appropriately treated these disbursements as subject wages for the purpose of calculating worker's compensation premiums due for the period in issue. Further, because the employer failed to establish that bonuses paid during the period in issue met the NCCI requirements for excludability, SAIF appropriately treated each distribution as subject wages and correctly determined that the employer was required to pay additional workers' compensation insurance premiums for the period in issue based on those additional subject wages.

ORDER

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

SAIF Corporation's Revised Final Premium Audit Billing, dated November 7, 2023, is AFFIRMED. The employer shall pay $2,583 in additional workers' compensation premiums for the period in issue.

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

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 August 27, 2024, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2023-ABC-06306**.**

By: Electronic Mail

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