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

IN THE MATTER OF:	)	FINAL ORDER
Scotti McLain	)	OAH Case No. 2024-ABC-06572
	)	Agency Case No.: INS-WC 24-05-16

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 Great American Insurance Group (GAIG) to an individual sole-proprietor, Scotti McLain (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 June 7, 2024, the Division referred employer's hearing request contesting the billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether GAIG's Final Premium Audit, dated May 21, 2024, was correct. By Proposed Order August 26, 2024, Senior Administrative Law Judge (ALJ) Samantha A. Fair reversed GAIG's May 21, 2024 Final Premium Audit Billing for the audit period May 1, 2023 to May 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

GAIG's Final Premium Audit issued May 21, 2024 is REVERSED. The Order Granting Stay of Collection, issued on June 27, 2024, is lifted consistent with this Final Order reversing the Final Premium Audit.

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 May 8, 2026

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**
	)	
SCOTTI MCLAIN	)	OAH Case No. 2024-ABC-06572
	)	Agency Case No. INS-WC 24-05-16
	)	
	)	

HISTORY OF THE CASE

On May 21, 2024, Great American Insurance Group (GAIG) issued a Final Premium Audit Billing to Scotti McLain for the period of May 1, 2023, to May 1, 2024. On May 21, 2024, Ms. McLain filed a request for hearing with the Division of Financial Regulation (Division) of the Department of Consumer and Business Services. On May 31, 2024, Ms. McLain filed a Petition with the Division.

On June 7, 2024, the Division referred the matter to the Office of Administrative Hearings (OAH).

On June 26, 2024, ALJ Fair convened a prehearing conference. Ms. McLain appeared. Greg Smith appeared and represented GAIG. Jason Branch, a GAIG master premium auditor, and Jay Bombard, a GAIG division senior vice president, also appeared on behalf of GAIG. ALJ Fair scheduled the hearing for August 15, 2024, and set deadlines for the submission of witness lists and exhibits.

On June 27, 2024, Ms. McLain filed an Amended Petition, requesting a stay of collection. On June 27, 2024, ALJ Fair granted the request and issued an Order Granting Stay of Collection.[1]

On August 15, 2024, ALJ Fair convened a telephone hearing. Ms. McLain appeared and testified. GAIG was represented by Mr. Smith. Mr. Branch and Mr. Bombard testified on behalf of GAIG. The record closed on August 15, 2024, at the conclusion of the hearing.

ISSUE

Whether GAIG's May 21, 2024 Final Premium Audit Billing correctly billed Ms. McLain by adjusting her annual payroll to $68,900. ORS 656.128(1) and ORS 737.318.

[1] Ms. McLain's request for a stay was discussed during the prehearing conference. GAIG had no objections to the request.

EVIDENTIARY RULINGS

Exhibits A1 through A7, offered by GAIG, were admitted into the record without objection.

FINDINGS OF FACT

1. The National Council on Compensation Insurance's[2] (NCCI's) *Basic Manual* includes an Oregon-specific rule for premium determinations for sole proprietors. The rule provides, as follows:

> Base the premium for each partner or sole proprietor treated as an employee on the payroll amount shown in the * * * rates miscellaneous values. Assign the payroll of partners or sole proprietors to classification and rates applicable to employees.

(Ex. A7.) Effective January 1, 2023, the Oregon Miscellaneous Values listed $68,900 as the annual payroll for sole proprietors in accordance with the *Basic Manual's* rule. (Exs. A4 and A7.)

2. Ms. McLain is a sole proprietor who performs janitorial services without the assistance of any other individuals. (Test. of McLain.)

3. Ms. McLain sought workers' compensation insurance coverage for herself. On April 28, 2023, she completed a Commercial Application and a Workers Compensation Application (Applications) with the assistance of an insurance agent. (Ex. A1; test. of McLain.) In the Applications, Ms. McLain disclosed that she was an individual who performed janitorial work in Oregon with the expected class code of 9014 and an estimated annual payroll of $29,400. (Ex. A1.)

4. In response to her Applications, GAIG issued a Workers Compensation and Employers Liability Insurance Policy (Policy) to Ms. McLain providing her workers' compensation coverage, effective May 1, 2023, to May 1, 2024 (policy period). The Policy noted the following information: (1) Ms. McLain was a sole proprietor who sought coverage for herself; and (2) she performed janitorial services in Oregon with the appropriate class code of 9014. (Ex. A2.) GAIG charged Ms. McLain an annual premium of $1,286 for coverage under the Policy based upon the class code of 9014 and an annual payroll of $29,400. (*Id.*; test. of Bombard.)

5. At the conclusion of the policy period, GAIG performed an audit. (Test. of Branch.) On May 8, 2024, Ms. McLain completed GAIG's Self-Audit form for the policy period. In the Self-Audit form, Ms. McLain indicated she performed janitorial services in Oregon by herself

[2] NCCI is the licensed rating organization used by Oregon insurers. OAR 836-042-0045.

and had gross earnings of $17,000 in 2023.[3] (Ex. A3.) During the audit, GAIG did not discover any information regarding Ms. McLain's work that was different from the information she had previously provided in her Applications other than her representation of $17,000 in gross earnings. (Test. of Branch.)

6. On May 21, 2024, GAIG issued Ms. McLain a Final Premium Audit Billing for the policy period, adjusting her annual premium by an additional $1,313. The adjustment was solely attributable to GAIG using $68,900 as her annual payroll for the policy period. (Ex. A6; test. of Branch.) GAIG attributed her with a payroll of $68,900 for the policy period based upon the *Basic Manual's* rule and the Oregon Miscellaneous Values for the premium determination of a sole proprietor. (Ex. A5; test. of Branch.) Ms. McLain's representation of her annual payroll in the Self-Audit had no impact upon GAIG's audit results. Regardless of any representation she made about her payroll, GAIG would have set her annual payroll at $68,900. (Test. of Branch.)

CONCLUSION OF LAW

GAIG erred in the May 21, 2024 Final Premium Audit Billing by adjusting Ms. McLain's annual payroll to $68,900.

OPINION

Ms. McLain disputed GAIG's increase of her payroll from $29,400 to $68,900 and the resulting $1,313 increase in her premium. Ms. McLain bears the burden to establish that GAIG erred in changing her payroll and increasing her premium from the amount originally quoted. *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, Ms. McLain must prove her 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).

ORS 737.318 requires a workers' compensation insurer to maintain a premium audit program "to aid in achieving equitable premium charges to Oregon employers." Pursuant to ORS 737.318(2), the Department of Consumer and Business Services promulgated administrative rules for a premium audit system. OAR 836-043-0110(3) allows for an insurer's audit of policies with annual premiums between $1,000 and $10,000. GAIG performed an audit of the Policy issued to Ms. McLain.

Ms. McLain is a sole proprietor who performs janitorial work without the assistance of any other individuals. She applied to GAIG for workers' compensation insurance for herself as a sole proprietor for the policy period. ORS 656.128(1) provides, in part:

> Any person who is a sole proprietor, * * *, may make written application

[3] Because of a misunderstanding of the information sought, Ms. McLain put her 2023 income in the Self-Audit form instead of her income for the policy period. (Test. of McLain.)

> to an insurer to become entitled as a subject worker to compensation benefits. 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.

OAR 436-60-0025(7) provides:

> **Owners and corporate officers.** If the worker is a sole proprietor, partner, officer of a corporation, or limited liability company member, the insurer must calculate the rate of compensation based on the assumed wage used to determine the employer's premium.

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* for workers' compensation rates and classifications that are used by Oregon insurers in their audit procedures. OAR 836-043-0115. The *Basic Manual* includes a rule for the determination of the premium for sole proprietors that requires the use of an assumed payroll based on Oregon Miscellaneous Values. Effective January 1, 2023, the Oregon Miscellaneous Values listed the assumed annual payroll for a sole proprietor as $68,900. Therefore, GAIG should use this assumed annual payroll of $68,900 to establish the premium for the Policy. However, the ALJ's inquiry does not end here.

Within the law, there exists a doctrine of equitable estoppel that may apply when one party makes representations to another party. The party benefiting from 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 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). If these factors are present, the party making the false representation is estopped from taking advantage of their own wrong by asserting any legal claim or right.

In this matter, Ms. McLain disclosed accurate information about her circumstances to GAIG when she sought workers' compensation insurance. She stated that she was a sole proprietor who performed janitorial work with the class code of 9014 in Oregon. GAIG then issued the Policy with a disclosed premium of $1,286, based upon her estimated payroll of $29,400, which Ms. McLain accepted. At the time GAIG issued the Policy, it had all the facts necessary to accurately determine the premium pursuant to the *Basic Manual* and the Oregon Miscellaneous Value. However, GAIG misrepresented the premium to Ms. McLain by using her estimated annual payroll, rather than the assumed annual payroll, when it issued the Policy. Thus, GAIG made a false representation of the amount of required premium for the Policy; GAIG made the representation when, as the insurer, it was aware of the application of the *Basic*

Manual and the Oregon Miscellaneous Values; GAIG made the representation about the premium to induce action by Ms. McLain; and Ms. McLain, reasonably and justifiably relying on GAIG's representation of the accurate premium amount, purchased the Policy. In sum, because the doctrine of equitable estoppel is applicable in this matter, GAIG cannot now claim that it must increase Ms. McLain's premium by $1,313 to reflect the requirements of the *Basic Manual* and Oregon Miscellaneous Values after falsely claiming to Ms. McLain that her premium was only $1,286, which induced her to accept the Policy.

The result achieved by the application of the doctrine of equitable estoppel is further supported by Oregon Supreme Court dictum in the *Matter of the Compensation of Mark Pilling vs. Travelers Insurance Company*, 365 Or 236 (2019). In *Pilling*, the parties disputed whether the insured's application for coverage complied with the requirements of ORS 656.128. The Oregon Supreme Court concluded that ORS 656.128 required that the specific person obtaining coverage be identified in the application but that it was not necessary for that person to be identified as a partner. In reaching that conclusion, the Oregon Supreme Court noted the following:

> The information in the application enables the insurer to set a rate for coverage, but—as the policy issued by insurer in this case states—an insured can be audited and *the rate can be adjusted if the audit reveals information that differs from that in the application*.

Pilling, 365 Or at 242 n 4 (emphasis added.). Thus, the Oregon Supreme Court references the purpose of the audit – to adjust premiums based upon the discovery of *new* information unknown at the time of the application for coverage. *See also* ORS 737.310(13) (insurer cannot retroactively increase premium for audited changes in classification unless the insured knew that employees were misclassified, insured provided inaccurate information, or insured's operations changed during the policy period). This purpose (to make changes based upon new information) also effects the goal of the premium audit program as noted in ORS 737.318 (to achieve equitable premium charges to Oregon employers). In this matter, GAIG had all the information it needed to offer a Policy to Ms. McLain that reflected an accurate premium based upon the *Basic Manual* and Oregon Miscellaneous Values. However, it did not do so, and, at this late juncture, it cannot retroactively increase her premium. Any such retroactive increase would be inequitable.

The evidence established that GAIG erred when it increased Ms. McLain's premium in the Final Premium Audit Billing. Ms. McLain does not owe the proposed increase of $1,313 to her premium for the Policy.

ORDER

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

Great American Insurance Group's May 21, 2024 Final Premium Audit Billing, issued to Scotti McLain for the period of May 1, 2023, to May 1, 2024, is REVERSED. Scotti McLain is not liable for any increase from the original estimated 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

CERTIFICATE OF MAILING

On August 26, 2024, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2024-ABC-06572**.**

By: Electronic Mail

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