

1
2 STATE OF OREGON
3 DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
4 DIVISION OF FINANCIAL REGULATION
5

6 IN THE MATTER OF:) FINAL ORDER
7 Elements Roofing Contracting, LLC) OAH Case No.: 2019-ABC-03059
8) Agency Case No.: INS-WCA 19-8-005
9

10 **Procedural History**

11 The Director of the Oregon Department of Consumer and Business Services (Director),
12 by and through Division of Financial Regulation, (Division), commenced the above entitled
13 administrative proceeding to review a workers' compensation insurance final premium audit
14 billing (billing) issued by SAIF Corporation to Elements Roofing Contracting, LLC (employer)
15 pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon
16 Administrative Rules (OAR) 836-043-0200 *et. seq.*

17 On August 27, 2019, the Division referred employer's hearing request contesting the
18 billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether
19 insurer's Final Premium Audit, dated April 29, 2019, was correct. By Proposed Order dated
20 September 10, 2021, Senior Administrative Law Judge Joe L. Allen affirmed the April 29, 2019
21 Final Premium Audit Billing, for the audit period March 1, 2018 to December 21, 2018.
22

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

24 The Director adopts, and incorporates herein by this reference, the findings of fact,
25 conclusions of law, and reasoning of the Proposed Order as the findings of fact, conclusions of
26 law, and reasoning of this Final Order.
27

28 **Order**

29 SAIF Corporation's Final Premium Audit issued April 29, 2019 is AFFIRMED
30
31

Final Order

Elements Contracting, LLC

Agency Case No.: INS-WCA 19-8-005 OAH No. 2019-ABC-03059

June 6, 2022

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Dated June 14, 2022

T. K. K.

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
	)	
ELEMENTS CONTRACTING, LLC	)	OAH Case No. 2019-ABC-03059
	)	Agency Case No. INS-WCA 19-8-005

HISTORY OF THE CASE

On April 29, 2019, SAIF Corporation (SAIF or the insurer) issued an Oregon Final Premium Audit Billing to Elements Contracting, LLC (Appellant or the employer). The premium audit indicated the employer owed an additional \$199,597.95 in premiums for its workers' compensation coverage for the period March 1, 2018, through December 31, 2018 (audit period or period in issue). On June 24, 2019, the employer requested a hearing with the Department of Consumer & Business Services, Division of Financial Regulation (DCBS or Department). In the request, the employer acknowledged owing an additional \$35,503.06 for premiums during the period in issue, but disputed owing the remaining \$165,094.89.

On August 27, 2019, the 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. ALJ Allen convened a prehearing conference (PHC) via telephone on November 11, 2019. Joy Wang, Special Assistant Attorney General, appeared on behalf of the insurer. Premium Audit Analyst Jessicah Matshe also appeared for SAIF. Attorney Bradley Baker appeared on behalf of the employer. The purpose of the PHC was to establish a schedule of prehearing events and set a date for hearing. At the PHC, the parties agreed to an in-person hearing on April 2, 2020, at the OAH in Tualatin, Oregon.

Due to unforeseen circumstances related to witness availability, on March 4, 2020, the employer filed a request to reschedule the hearing. SAIF did not object and the ALJ granted the employer's request. The ALJ convened an additional PHC on March 31, 2020 to select a new hearing date. Both parties appeared at the PHC through counsel and agreed to reset the hearing to July 29, 2020. At that time, the hearing location and format remained unchanged.

Due to the COVID-19 pandemic and Governor Kate Brown's executive orders closing state offices to address the pandemic, the OAH scheduled an additional PHC for June 29, 2020 to discuss converting the hearing to a video conference proceeding or, in the alternative, rescheduling the in-person hearing to a later date. Both parties again appeared through counsel. Presiding ALJ (PALJ) Monica A. Whitaker convened the PHC on behalf of ALJ Allen.¹ The

¹ ALJ Allen was unavailable on that date.

parties opposed converting the hearing to a video conference proceeding, so PALJ Whitaker reset the in-person hearing to October 21, 2020, at the Tualatin OAH.

On August 18, 2020, PALJ Whitaker contacted the parties to advise them of the continuing moratorium on conducting in-person hearings at OAH facilities due to the COVID-19 pandemic, and she proposed converting the October 21, 2020 hearing to a video conference proceeding using Skype for Business. On the same date, SAIF responded via email and agreed to the proposed conversion. The employer also responded on the same date, and objected to having a video conference hearing. Despite that objection, based on authority granted in OAR 137-003-0600(1), ALJ Allen converted the October 21, 2020 in-person hearing, *sua sponte*, to a video conference proceeding via Skype for Business. Both parties thereafter filed exhibits in advance of the hearing.

On October 21, 2020, ALJ Allen convened the hearing via Skype for Business. Due to technical difficulties, the employer was unable to access the video conference platform and participate in the hearing. Because such technical difficulties could not be resolved timely, the parties agreed to reset the video conference hearing to November 20, 2020. On October 22, 2020, the employer filed Petitioner's Supplemental Objection to Audit (Supplemental Objection) amending the bases for challenging the final premium audit.

On November 16, 2020, the employer filed a motion for continuance of the hearing due to an essential witness contracting COVID-19. On that date, ALJ Allen granted the motion and converted the November 20, 2020 hearing date to a telephonic PHC for rescheduling purposes. Ms. Wang and Mr. Baker appeared at the PHC and agreed to reset the hearing to January 28, 2021.

On January 25, 2021, the employer filed a motion to reschedule the January 28, 2021 hearing, due to family responsibilities related to the COVID-19 pandemic. SAIF did not object to the motion. The ALJ granted the employer's motion and converted the hearing date to a telephonic PHC to select a new hearing date.

On January 28, 2021, ALJ Allen convened a PHC. Both parties appeared through counsel and agreed to convene the hearing on March 19, 2021.

The hearing occurred, as scheduled, on March 19, 2021, via Skype for Business. Ms. Wang appeared on behalf of SAIF. Testifying on behalf of SAIF were Stacy Speer-Aritola and Jessicah Matshe. Mr. Baker appeared on behalf of the employer, along with Benjamin Crofut, owner of the employer. Karen Noel appeared and testified on behalf of the employer. Because the parties were unable to complete the examination of all witnesses, the hearing was continued to April 2, 2021 via Webex video conference.² Both parties appeared through counsel on April 2, 2021. Ms. Noel testified on behalf of the employer, along with Mr. Crofut and Jowan Matthews. Ms. Matshe again appeared and provided rebuttal testimony on behalf of SAIF. At the conclusion of the hearing, the parties agreed to file written closing arguments on or before

² Between the initial date of hearing and April 2, 2021, the OAH transitioned from Skype for Business to Cisco's Webex video conference software.

April 30, 2021, and written responsive arguments no later than May 14, 2021.

On April 26, 2021, the employer requested a two-week filing extension due to a delay in requesting an audio transcript of the hearing. SAIF did not oppose the request. The ALJ granted the employer's request and set May 14, 2021 as the deadline for filing written closing arguments, and May 28, 2021 as the deadline for filing written responsive arguments. On May 14, 2021, SAIF requested an extension of the closing briefing schedule due to illness. The employer did not object and the ALJ granted to request, extending the deadlines for written closing arguments and responses to May 28 and June 11, 2021, respectively. The parties filed closing and responsive arguments according to that schedule, and the record closed after receipt of the responsive arguments on June 11, 2021.

ISSUE

Whether SAIF's Final Premium Audit, dated May 3, 2019, is incorrect because the insurer:

- Erroneously determined the documents provided by the employer do not constitute verifiable time records;
- Improperly reclassified the subject payroll to the highest rated exposure class available;
- Failed to exclude loans and gifts, payments made to independent contractors, and reimbursements to employees for work-related out-of-pocket expenses from total subject payroll; and/or
- Incorrectly compounded the employer's experience rating and adjusted risk modifications when calculating the adjusted premiums.

EVIDENTIARY RULINGS

Exhibits A1 through A45, offered by SAIF, were admitted into the record without objection. Exhibits R1 through R6 and R8 through R10, offered by the employer, were admitted into the record without objection. The employer's Exhibit R7 was admitted over SAIF's objection that the document was unduly duplicative of Ex A31.

FINDINGS OF FACT

1. SAIF previously issued two workers' compensation insurance policies to the employer for the periods April 1, 2012 through April 1, 2013 (policy 750028) and November 11, 2015 through February 1, 2016 (policy 857149). (Test. of Matshe.)

2. On or about February 27, 2018, the employer submitted an application for workers' compensation insurance coverage under the assigned risk plan. (Ex. A2.) The application described the employer's business operations as a "remodeling company interior and exterior." (*Id.* at 8.) The application allocated estimated payroll between three classification codes: 5645 – Carpentry/Construction – Residential Dwellings Not Exceeding Three Stories in Height; 8810 – Clerical Office Employees NOC; and 7380 – Drivers Chauffeurs Messengers and

Their Helpers NOC – Commercial. (*Id.* at 7.) The application listed Benjamin Crofut as the 100 percent owner/member of the employer excluded from coverage as an exempt officer. The application identified duties performed by Mr. Crofut as carpentry under classification code 5645. (*Id.* at 6.)

3. On March 1, 2018, SAIF issued Policy 881300, providing binding coverage for the employer's workers under classification codes 5645, 8810, and 7380 for the period March 1, 2018 through March 1, 2019 (*i.e.*, the period in issue).³ (Exs. A2 at 19-20, 27 and A3 at 1.)

4. Jowan Matthews served as a supervisor for the employer during the period in issue. During that time, his job duties included visiting active jobsites to ensure that all crew members were at the assigned job and that all safety precautions were being observed. (Test. of Matthews.)

5. On or about May 14, 2018, auditor Darren Ross visited the employer, at its request, to perform a preliminary audit of its payroll records and advise the employer regarding the appropriateness of those records and the classification codes used. Mr. Ross met with Mr. Crofut and Karen Noel, the employer's outside bookkeeper.⁴ The preliminary audit covered March 1, 2018 through March 1, 2019. (Test. of Noel; Ex. A13.)

6. As a result of his audit, Mr. Ross identified significantly underreported payroll in multiple classification codes, including 5645, 8227, 8810, and 5474. Mr. Ross also found that, despite estimating \$20,000 in driver payroll under classification code 7380, the employer's payroll records reflected no pay to drivers during the preliminary audit period. The preliminary audit revealed the employer had likely underestimated its payroll for the audit period by approximately \$486,595. (*See* Ex. A13 at 1-3.)

7. During the preliminary audit, the employer advised Mr. Ross that it had recently reduced its staff by approximately 40 percent to reduce costs. The employer did not provide Mr. Ross with additional payroll records showing updated payroll for the reduced staff. Mr. Ross therefore estimated total payroll for the preliminary audit period based on the employer's March 2018 payroll records. He then extrapolated payroll costs by reducing the total payroll by 70 percent to account for the staffing reduction and allocating the time among the common classification codes applicable to the payroll records in his possession in order to project payroll costs for the remainder of the policy period. (*See* Ex. A13 at 5.)

8. The preliminary audit identified payments to two subcontractors for the installation of rain gutters and one heating and cooling subcontractor. Mr. Ross did not identify any painting subcontractors in the preliminary audit. (*See* Ex. A13 at 3-4.)

³ The policy cancelled prior to the end of the projected coverage period resulting in a final premium audit period shorter than the policy coverage period.

⁴ At hearing, Ms. Noel testified that, while she used to be a full-time employee of Elements Contracting, she became an independent contractor providing bookkeeping services under contract as of March 1, 2018. (Test. of Noel.)

9. In the preliminary audit report, Mr. Ross provided the following description of the employer's operations:

Elements Contracting LLC is a licensed residential and commercial specialty contractor. They operate from their office and yard at 16556 Lower Boones Ferry Road, Lake Oswego OR 97035. They have been in business since 2007.

Elements Contracting specializes in providing repair services to homeowners including re-roofing, roof repair, siding repair, window replacement, * * * some interior finish work, and painting. Most jobs are project specific. They don't do complete interior or exterior remodel jobs. Work is approximately 90% residential and 10% commercial.

* * * * *

Employees use tools common to each trade including hand and power tools, ladders, compressor, paint guns, etc. One or two employees may serve as "clean-up" crew at the job sites. They are at the job sites during work and are to be included in the class of work being performed at the job.

(Ex. A13 at 6.)

10. Based on the scope of work identified by Mr. Crofut and Ms. Noel during the preliminary audit, Mr. Ross added classification codes 5102 to cover payroll for stand-alone window and/or door installations, and 5474 to cover payroll for interior/exterior painting performed by the employer. (Ex. A13 at 8.)

11. After the preliminary audit, Mr. Matthews, Mr. Crofut, and Ms. Noel reviewed previously submitted employee time cards and job contracts, and interviewed employees to allocate time for each employee according to National Council on Compensation Insurance (NCCI) classification codes. The employer's time clock is tied to geolocation software in each employee's cell phone to enable to employer to identify the site where each employee is working. (Test. of Crofut and Matthews.) The employer's biometric time clock tracked employee in/out times using each employee's thumbprint. The time clock did not track any other job or duty-specific information. (Test. of Matthews and Noel.)

12.

13. In Mr. Crofut's opinion, he was able to ascertain the proper scope of each employee's work and job assignment on a given day by speaking to other employees about what occurred at a given site and looking at the scope of work identified in the original job contract. (Test. of Crofut.)

14. The breakdown of time for each employee was provided either by Mr. Crofut, Mr. Matthews, or "someone on site" after the fact. (Test. of Matthews.) For at least a portion of the time allocations, Mr. Matthews used a "guess-timate" of which classification codes to assign

based on time clock entries and the scope of work in the original job contract. (*Id.*)

15. Using the information provided by Mr. Crofut and Mr. Matthews, Ms. Noel developed an excel template into which she downloaded data from the employer's time clock to populate employee data and total hours worked for each week during April 2018. (Test. of Noel; Ex. R5.)

16. On May 21, 2018, Ms. Noel emailed Mr. Ross regarding the employer's proposed revisions to its time sheet format and requested additional classification codes available to the employer based on his recent audit. (Ex. R5 at 2.)

17. In response to Ms. Noel, Mr. Ross responded the same day and stated:

The codes are 5474 - Painting, and 5102 - Window & Door. Note that 5102 is only to be used when the job is a window and door replacement job only. If you are doing siding or other remodeling at the jobsite it goes under 5645.

(Ex. R5 at 1.) Ms. Noel responded to Mr. Ross later that evening via email, attached two PDF documents, and stated, in part:

Attached are two files for Elements Contracting LLC combined May-2018 payrolls. *This period provides an accurate glimpse at our projected monthly payroll expenses.* For your convenience, the summary is on one doc, and the payroll details by employee are on the other. Thank you again for you [*sic*] assistance, Karen[.]

(*Id.* at 1; emphasis added.)

18. Mr. Ross informed the employer that the time card format Ms. Noel provided to Mr. Ross on May 21, 2018 did not meet the requirements of verifiable time records (VTRs), that would allow the employer to engage in a division of payroll for employees performing work covered by more than one classification code, because they failed to track in/out time for each type of work and instead only recorded the total hours worked by each employee. (Test. of Noel.)

19. SAIF issued the results of the preliminary audit to the employer on May 24, 2018. (Ex. A14.)

20. Based on Mr. Ross' preliminary audit and his indication that the employer's proffered time cards were insufficient to constitute verifiable time records, Ms. Noel redesigned the time card format to account for time in and out times by each employee. (Test. of Noel.) This revised time card format included a column for identifying one or more job duty with a legend at the bottom left quadrant that listed corresponding letter codes A through K. Each of those letter codes identified a job title as follows:

A – Roofing

B – Remodeling (including Siding)
C – Painting
D – Carpentry 3 Story
E – Carpentry Finish Work
F – Construction/Erect Permanent
G – ONLY Insulation – stand[-]alone job
H – ONLY Window & Door – stand[-]alone job
I – Drivers /Messengr/Helpr [sic]
J – Salesperson
K – Office Admin[.] [sic]

(See generally Ex. A31; emphasis original; test. of Noel.)

21. At approximately 7:00 p.m. on or about August 1, 2018, in response to cancellation notifications for non-payment of an adequate deposit, SAIF noted the following communications between the employer:

[Received] email from bookkeeper Karen stating:
The business model for Elements Contracting has changed. In Early April-2018 we terminated five (5) of our full-time roofers. We are now using sub-contracting companies, each of which have their own CCB, GL and Worker's Comp insurance. Our focus is now on generating leads, providing estimates, delivering materials, and hauling to the dump. So the classifications have changed from "roofing" to "sales" and "driving[.]" She also revised the email to say it was a total of (8) roofers that were terminated.

I told her the guys that were delivering material to the job site and hauling debris to the dump would fall under the 5551 class since it's associated with the roofing job. She said some of the drivers are driving sales people around to promote and do bids. Those drivers would fall under 8742. Karen revised the worksheet to put payroll from 7380 to 5551. I updated the payroll which decreased the additional deposit amount to \$4,822.84, so the total due today to avoid cancel[lation] should be \$9,033.96 which she is getting online right now to pay. Also advised her of keeping VTR's which they do.

(Ex. A15.)

22. On December 7, 2018, NCCI inspector Earl Bladh conducted an inspection of the employer's operations and thereafter prepared a report as part of NCCI's Classification Inspection Program. During the inspection, Mr. Bladh met with Mr. Crofut and Ms. Noel at the employer's offices on December 7, 2018. (Test. of Noel; Ex. A16 at 1-3.)

23. On December 21, 2018, NCCI issued an Inspection and Classification Report (NCCI report) that identified the employer's business type as follows: "General Contractor remodeling single family dwellings. Employees engaged in roofing, cabinet installation, hanging doors and windows, framing, delivery of materials to jobsites, clerical and estimators." (Ex. A16

at 5.)

24. In the NCCI report, Mr. Bladh provided, in part, the following description of the employer's operations:

Based on the information provided by Ben Crofut, Managing Member of Elements Contracting LLC. [T]he policyholder is doing business as a General Contractor that remodels single family dwellings under three stories high.

* * * * *

Elements Contracting LLC is a licensed general contractor that specializes in the remodeling of single family dwellings, no commercial work. Employees will do roofing repairs and new roofs, framing, and hanging of doors and the installation of windows. Subcontractors are used for siding, seamless gutters, plumbing, electrical, drywall, insulation, painting, concrete, and flooring. No permanent yard maintained by the insured. Delivery drivers will deliver materials for their own workers and some subcontractors.

An estimator will visit the customers to give an estimate for remodeling jobs. They will inspect the interior of the home, take measurements, and assist customers in developing a plan for the remodeling work to be done. No room additions done by the insured only remodeling of existing structures. Most work is done by licensed and insured sub contractors [*sic*].

The insured maintains a separate clerical office. Office employees will answer phones, data entry, bookkeeping, filing and accounting work. Estimators will visit customers to view jobs and write up estimates.

(Ex. A16 at 5-6.)

25. Based on the information provided by Mr. Crofut and Ms. Noel during his inspection, Mr. Bladh determined that certain classification codes previously used by the employer were inapplicable to the scope of work the employer performed as of the date of the inspection. Mr. Bladh therefore deleted the following classification codes from the employer's policy: 5102, applicable to door and window installations; 5479, for installation of insulation not otherwise classified; 5474, pertaining to painting work not otherwise classified; 7380, used for drivers not covered by another classification code; and 8227, used for work performed in an employer's permanent yard. Mr. Bladh also determined that the governing classification code for the employer's operations at the time of the inspection was 5645, rather than 5551. (*See* Ex. A16 at 3-4.)

26. On January 7, 2019, SAIF sent a letter to the employer advising that its workers' compensation policy had been selected for premium audit for the period covering March 1, 2018 through December 21, 2018. The SAIF auditor contacted the employer and set an audit appointment for April 17, 2019. (Test. of Speer-Aritola; Ex. A17 at 1.)

27. On the date scheduled for the premium audit, SAIF's auditor, Stacey Speer-Aritola arrived at the employer's offices but no one from the employer showed up to allow Ms. Speer-Aritola access to the premises. The employer's bookkeeper later responded to an email inquiry from Ms. Speer-Aritola and provided a copy of the employer's payroll records electronically. During the audit, the employer did not meet with the auditor in person and did not return phone calls from the auditor, electing instead to provide all information to the auditor via email. (Test. of Speer-Aritola; Ex. A18 at 3.)

28. A review of the records the employer provided to Ms. Speer-Aritola revealed deficiencies in the payroll record that prevented SAIF from adopting the employer's proffered division of payroll. (Test. of Speer-Aritola and Matshe.) On April 21, 2019, Ms. Speer-Aritola sent an email to the employer stating, in part:

Thank you for uploading some of the time sheets. Unfortunately, they do not include a brief description of work performed (just a letter that relates to the legend - which isn't enough), they are not able to be tied back to the job contracts (not provided) and some clearly not using [*sic*] the correct classification such as class 8742 and 7380. Class 8742 * * * ONLY applies to bidding work, prior to the job starting. When documenting a time sheet for estimating work, it should note who the client is. Class 7380 - this class would apply to picking up materials and bring[ing] back to the shop. Most of the construction classes include drivers and delivery of materials to the job site is included in the classification of that job.

(Ex. R1 at 11.) The employer elected not to respond to this email with additional information and did not provide additional documentation to SAIF to supports its division of payroll. (Test. of Speer-Aritola, Matshe, and Noel.)

29. Based on the information provided by the employer to Ms. Speer-Aritola, as well as information included in the preliminary audit and NCCI inspection, SAIF identified three classification codes applicable to the employer's operations during the period in issue: 5645; 5474; and 8810. The premium audit billing increased the premiums due from the employer by \$165,094.89. (Test. of Speer-Aritola; Ex. R1 at 8.)

30. For Ms. Speer-Aritola's audit (*i.e.*, the current audit), the employer did not provide SAIF with original time records or any of the payroll records it had previously provided to Mr. Ross. (Test. of Speer-Aritola, Matshe, and Noel.)

31. The employer's payroll records provided to SAIF during the current audit varied significantly from those the employer provided to Mr. Ross during the preliminary audit. In the records provided during the current audit, the employer reclassified subject wages it had previously allocated to construction-related codes to driver or salesperson classification codes. In the records provided during the current audit, the vast majority of subject wages on a given jobsite were allocated to driver or salesperson classification codes, often with wages for only one individual on the crew allocated to construction classification codes. The employer's payroll

records provided for the current audit do not contain a description of the actual duties performed by any employee on any given day, or at any given job site. (Test. of Speer-Aritola and Matshe; *see e.g.*, Exs. R5 at 8, 12, 15 and A31 at 105, 113, 114.)

32. Concepciona Juarez provides landscaping and janitorial services to the employer. During the audit, SAIF discovered \$3,611 in payments to Ms. Juarez not included as subject wages. SAIF therefore included payments to Ms. Juarez as subject wages in the audit. (Test. of Speer-Aritola.)

33. During the period in issue, SAIF discovered approximately nine payments to Eric Kruse Painting, totaling \$25,200. SAIF's auditor included these payments as subject wages for the current audit because painting activities were covered under classification code 5474, available to the employer under the policy based on the scope of work reported, and a review of the state Construction Contractor's Boar (CCB) website revealed Mr. Kruse had not been licensed since 2015 and was not licensed for the entirety of the period in issue. (Test. of Speer-Aritola and Matshe.)

34. In the current audit, SAIF included as subject wages a significant amount of payments subsequently characterized by the employer's witnesses at hearing as reimbursements (\$20,773), loans/gifts (\$12,250), and vacation pay (\$8,952.50). The payroll records the employer provided for the current audit do not identify these amounts as such during the audit and the employer. (Test. of Speer-Aritola.)

35. Ms. Noel advised Ms. Speer-Aritola that, during the period in issue, only two employees were eligible for paid vacation time on a take-it-or-lose-it basis, and only one employee took paid vacation time, for which the employer paid the employee \$878.00. SAIF excluded that amount from subject wages during the period in issue. (Test. of Speer-Aritola; Ex. A18 at 4 and 16.)

36. For the current audit, based on a lack of verifiable time records from the employer supporting its proffered division of payroll, SAIF allocated all labor hours to the classification code representing the highest exposure risk, 5645. (Test. of Speer-Aritola and Matshe.)

37. The experience rating modifier and assigned risk adjustment are added to a workers' compensation policy based on the employer's claim and policy history with SAIF and other insurers. An employer's premium rate is calculated by multiplying the base rate by the experience rating modifier as well as the assigned risk adjustment. The process is computer generated with the modifier and adjustment determined at policy inception. The auditor plays no part in the application of those modifiers in the calculation of premiums. (Test. of Matshe; *see also* Ex. A33.)

38. SAIF issued the Final Premium Audit Billing, dated May 3, 2019, to the employer on April 29, 2019. (Ex. A19.)

CONCLUSION OF LAW

The employer failed to establish that SAIF's Final Premium Audit billing, dated May 3, 2019, is incorrect.

OPINION

The employer challenges SAIF's final premium audit billing on four grounds: 1) that SAIF improperly determined the employer's documentation did not qualify as verifiable time records (VTRs), thereby misclassifying the bulk of its subject wages to the highest risk classification available; 2) that SAIF erroneously included loans, gifts, vacation pay, and reimbursements as subject wages; 3) that SAIF failed to exclude payments to independent contractors; and 4) that SAIF miscalculated the applicable rate by compounding the experience rating modification (ERM) and adjusted risk modification (ARM).

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.

ORS 737.310 establishes standards for ratemaking and application of rates and provides, in pertinent part:

The following standards shall apply to the making and use of rates:

(1) Rates shall not be excessive, inadequate or unfairly discriminatory.

* * * * *

(3) Rates for each classification of coverage shall be based on the claims experience of insurers within Oregon on that classification of coverage unless that experience provides an insufficient base for actuarially sound rates.

* * * * *

(8) Risks may be grouped by classifications for the establishment of rates and

minimum premiums. Classification rates for casualty, surety or inland marine risks may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions or both. Such standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

* * * * *

(10) The Director of the Department of Consumer and Business Services, by rule, shall prescribe the conditions under which a division of payroll between different manual classifications is permitted for purposes of computing workers' compensation premiums.

* * * * *

(12) At the time an insurer issues a workers' compensation insurance policy to an insured for the first time, the insurer shall give written notice to the insured of the rating classifications to which the insured's employees are to be assigned and shall provide an adequate description of work activities in each classification. In the event an insurer recommences coverage following its termination, the notice required under this subsection must be given only if the gap in coverage exceeds six months.

(13) If an insurer determines the workers' compensation insurance policy of an insured needs reclassification, the insurer:

(a) May bill an additional premium for the revised classification after the insurer has provided the insured at least 60 days' written notice of the reclassification.

(b) Shall bill retroactively to policy inception or date of change in insured's operations for any reclassification that results in a net reduction of premium.

(c) May, notwithstanding paragraph (a) of this subsection, retroactively bill an insured for reclassification during the policy year without prior notice of reclassification if the insurer shows by a preponderance of the evidence that:

(A) The insured knew that the employees were misclassified, or the insured was adequately informed by the insurer of the proper classification for the insured's employees;

(B) The insured provided improper or inaccurate information concerning its operations; or

(C) The insured's operations changed after the date information on the employees was obtained from the insured.

* * * * *

(15) The director shall adopt rules to carry out the provisions of this section and may by rule specify procedures relating to rating and ratemaking by workers' compensation insurers.

OAR 836-042-0055 provides definitions and sets forth criteria for the inclusion and/or exclusion of certain payments from subject payroll and provides, in relevant part:

(1) As used in OAR 836-042-0050 to 836-042-0060, unless the context requires otherwise:

(a) "Classification" means a grouping of insurance risks according to a classification system used by an insurer.

(b) "Classification System" means a schedule of classifications and a rule or set of rules used by an insurer for determining the classification applicable to risks insured by it.

* * * * *

(d) "Interchange of labor" means an employee or employees who at different times perform duties described by two or more classifications assigned to an employer according to the classification system used by the insurer.

* * * * *

(f) "Payroll" means money or substitutes for money that are payable to workers for their services and that are specified or defined by the rating system used by the insurer, except that payroll may not include vacation pay, incremental pay recorded for overtime work, and payments excluded as provided in section (2) of this rule.

1. *VTRs*

First, the employer argues that the final premium audit billing is incorrect because the insurer failed to consider the employer's time keeping documents as verifiable time records and therefore denied the division of payroll for several employees between separate exposure classifications. The insurer argues, however, that the employer's time keeping documents do not meet the requirements of VTRs set forth in administrative rule and that division of payroll was therefore inappropriate for the period in issue.

Pursuant to the authority granted in ORS 737.310, the Department promulgated OAR 836-042-0060, which sets forth the conditions for the division of payroll of individual employees between classification codes and provides, in part:

(1) 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 set forth in OAR 836-043-0190 and this rule.

(2) This rule does not apply to a single employee whose duties vary within exposure areas normally anticipated by the scope of a single classification or who spends only a limited amount of time, on an infrequent or irregular basis, in a classification exposure that is not a normal job function for that employee. As used in this section, "infrequent or irregular" means that the time spent in the classification exposure is limited, is not anticipated in the normal duties of the employee and occurs only randomly.

(3) When verifiable payroll records are required with respect to a single employee and the employer does not maintain them as required in this rule, the entire payroll of the employee shall be assigned to the highest rated classification exposure in accordance with the standards for rebilling set forth in OAR 836-043-0190.

(4) For purposes of this rule, payroll records of an employee are verifiable if they have the following characteristics:

(a) The records must establish a time basis, and the time basis must be hourly or a part thereof, daily or part thereof, weekly or part thereof, monthly or part thereof or yearly or part thereof;

* * * * *

(c) The records must include a description of duties performed by the employee, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable; and

(d) The records must be supported by original entries from other records, including but not limited to time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager. Estimated ratios or percentages do not comply with the requirement of this subsection and are not acceptable for verification. Verifiable records must be summarized in the insured employer's accounting records.

(Emphasis added.)

Here, the employer contends that its payroll records satisfy the above criteria, whereas

SAIF contends the records do not. The employer contends that the format of its time sheets was based on advice from auditor Darren Ross, after an employer-requested a preliminary audit. The employer asserts that its timesheets are accurate because they were populated using data directly from the employer's automated time clock and that they contain all the necessary data, including a description of the duties performed by each employee on each job site. SAIF, on the other hand, contends the employer's payroll records are not verifiable because they lack a sufficient description of the duties performed by each employee. SAIF asserts that the time codes the employer used on the time sheets are insufficient as descriptions of the duties performed because the codes consist merely of individual letters associated with NCCI classification code titles, rather than actual descriptions of the duties performed by any specific employee on a given job site.

In *Pease v. NCCI*, 128 Or App 471 (1994), the Oregon Court of Appeals accepted the Department's proffered definition of "verifiable" time records, which was "that the accuracy of the insured's classification and job description technique must be capable of independent confirmation by an insurer using records that are maintained by the employer *and available to the insurer at the time of the audit.*" *Id.* at 475 (emphasis added). In *Pease*, the court found that, although employees were supposed to complete their individual timecards throughout the course of the workday, some employees often completed timecards for others at unknown times because many of the employees could not read or write (in either English or Spanish, their native language). The court concluded that, because of the lack of contemporaneous timecards and the uncertainty as to who completed them, the employer's time records could not be audited for accuracy and were therefore not verifiable. *Id.* at 476.

Here, the employer's original daily time records were maintained by an automated time clock. The employer did not, however, provide a copy of those original records to SAIF. Instead, the employer provided at hearing Exhibit R5, which Ms. Noel testified consisted of timecards converted to a spreadsheet to summarize work and wages, but that was never intended to reflect accurate time records. Instead, according to the employer, those documents merely represent a sample format for Mr. Ross to review and determine if such format met the requirements of VTRs. Moreover, the records that the employer asserts qualify as VTRs, specifically those payroll records found in Exhibits A31, were not generated by the employer's time clock. Rather, Ms. Noel created the Excel workbook and exported the time clock records to that workbook for the purpose of creating the purported payroll records. At that time, Ms. Noel was not a direct supervisor of any employee at issue and was, in fact, an outside contractor providing bookkeeping services to the employer.

At hearing, SAIF argued the employer's time records did not qualify as VTRs because they were not prepared by the employee or the employee's direct supervisor, but rather by Ms. Noel, an outside bookkeeper. At hearing, Ms. Noel testified that she created the records at Exhibit A31 with input from *either* Mr. Matthews or Mr. Crofut, but she could not specifically recall which individual provided information pertaining to specific dates, jobsites, or employees. The purported payroll records also did not contain any description of the work performed by the individual employees. Purportedly based on after-the-fact verbal reports from each employee about the job(s) performed on that particular day, Ms. Noel recorded the employee's hours, by job name, on an Excel spreadsheet. According to the testimony, for Ms. Noel, Mr. Crofut, Mr.

Matthews, or anyone else to determine the scope of work an employee performed on any given day requires consulting particular contracts and/or invoices to ascertain the actual work performed. Moreover, Ms. Noel testified that the employer did not provide the original time clock records, upon which Exhibit A31 were based, to SAIF despite SAIF's April 21, 2019 email request for additional supporting documentation. At hearing, Mr. Matthews testified that, for the creation of Exhibit R5 (purportedly meant as only a sample time card for Mr. Ross), he provided the breakdown of individual hours for each employee to Ms. Noel. According to Mr. Matthew's testimony, to obtain that information he referred to the original job contract to determine the scope of work and then spoke with other employees working the same job to determine the actual duties performed by a given employee. Oddly, it appears Mr. Matthews did not speak to the actual employee whose time he was attempting to allocate regarding the duties the employee allegedly performed on a given date. Mr. Matthews also admitted at hearing that he altered the classification codes for time allocated in Exhibit R5 when providing information to Ms. Noel for preparation of Exhibit A31. Mr. Matthews did not, however, explain why, if Exhibit R5 was based on reports from employees on site, he altered the classification codes for some employees to lower exposure non-labor codes in Exhibit A31.⁵ In addition, Mr. Matthews conceded at hearing that, for at least some of the time records, he was using a "guess-timate" by looking at contracts and timecards. Testimony of Matthews.

After considering the employer's record keeping in light of the criteria set out in OAR 836-042-0060(4), I conclude the employer's payroll records are not verifiable. As noted above, Exhibit A31 contains no description of duties performed by the employee, as required by OAR 836-042-0060(4)(c). I agree with SAIF that the employer's designation of the work performed using letter codes referencing NCCI classification code titles or summaries does not satisfy the standard set forth in the relevant rule. Because the payroll records require additional explanation or interpretation to ascertain what duties a given employee performed on any given day on a particular jobsite, the records cannot be considered as verifiable.

Moreover, Exhibit A31 was created by an outside bookkeeper and the records contained therein are not supported by original time cards, calendars, planners, or daily logs prepared by the employee or the employee's direct supervisor or manager. *See* OAR 836-042-0060(4)(d). As such, Exhibit A31 could not be audited for accuracy during the current audit. Additionally, the payroll records the employer provided, both during the audit and at hearing, required additional explanation or interpretation to ascertain the alleged scope of work each employee performed. As such, those records provide insufficient information to allow the auditor to determine the correct classification code assignment for the work performed. For these reasons, the employer's payroll records fail to meet the applicable standard for VTRs.

Because the employer did not maintain verifiable payroll records in accordance with the criteria set out in OAR 836-042-0060(4), it has not satisfied conditions necessary for the division of payroll for individual employees. As such, OAR 836-042-0060(3) requires that the employer's entire labor payroll be assigned to the highest rated classification code applicable to

⁵ Compare, for example, Exhibit R5 at 6 (allocating hours to roofing, carpentry, and painting on a single day) with Exhibit A31 at 108 (reallocating all payroll for the employee to salesperson for the same job/date).

the employer's business. Consequently, it was appropriate for SAIF to assign the entire labor payroll (exclusive of the office clerical payroll) to classification code 5645, Carpentry-Dwellings, Three Stories or Less.⁶ The employer has not satisfied its burden to prove, by a preponderance of the evidence, that SAIF's premium audit for the period in issue is incorrect because SAIF failed to consider any alleged verifiable time records.

2. Class code assignment(s)

Next, the employer contends that SAIF improperly reclassified the subject payroll to the highest rated classification code available under the policy, 5645, resulting in a significant increase in premiums due. By contrast, SAIF argues that the employer's policy identifies it as a general contractor performing residential remodeling and roofing services and, therefore, 5645 is applicable to all general carpentry performed (as opposed to finish carpentry) by the employer. Moreover, SAIF asserts that, because the employer failed to maintain VTRs and because the records provided demonstrate the employer engaged in work constituting carpentry on residential dwellings during the audit period, the employer is required to apply classification code 5645 to all subject payroll pursuant to OAR 836-042-0060(3).⁷ Additionally, SAIF argues that, absent VTRs, subject payroll for all employees on a given jobsite must be allocated to the highest rated classification exposure applicable to work on that site. For the reasons below, I agree with SAIF.

ORS 656.730 identifies the assigned risk plan and provides, in part:

(1) The Director of the Department of Consumer and Business Services shall promulgate a plan for the equitable apportionment among the State Accident Insurance Fund Corporation and all members of workers' compensation rating organizations in the state coverage required by ORS 656.017 for subject employers whose coverage the fund, or any members of such rating organizations, object to providing. The plan shall include provisions authorized pursuant to ORS 737.265 (2), except that:

(a) Regardless of the rating plans adopted by any rating organization, the plan shall provide a rating structure with differing rate tiers for insureds too small to qualify for experience rating and for insureds large enough to be experience rated; and

(b) The plan shall seek and be entitled to receive approval for all classification exceptions approved by the director for any insurer.

(2) If any insurer issuing workers' compensation insurance policies under this chapter refuses to accept its equitable apportionment under such plan, the director

⁶ The appropriateness of the assigned classification code is discussed more fully in subsequent sections of this order.

⁷ The exceptions here include the office clerical allocation, which the employer does not dispute, and the allocation of payments to one individual for painting services under classification code 5474, discussed more fully below.

shall revoke the insurer's authority to issue workers' compensation insurance policies.

OAR 836-043-0005 provides definitions applicable to the workers' compensation insurance plan and provides, in relevant part:

As used in OAR 836-043-0001 to 836-043-0091:

* * * * *

(2) "Application" means the form approved for use in the assigned risk market by the Plan Administrator for the purpose of securing workers compensation insurance under the Plan, which contains the required information as described in NCCI's Assigned Risk Supplement to the Basic Manual for Workers' Compensation and Employers Liability Insurance.

(3) "Assigned risk market" means a state insurance plan that provides employers unable to secure coverage in the voluntary market with a means for insuring their operations through a designated insurance carrier.

* * * * *

(13) "Insurer" means the State Accident Insurance Fund Corporation or a person licensed under ORS chapter 731 for workers' compensation that satisfies its participation obligation by subscribing to the organizing principles. By subscribing to the organizing principles, an insurer shares in the results of the reinsurance pooling mechanisms on a pro-rata basis of their net premiums written within the state. The insurer may be assessed or receive disbursements depending upon the reinsurance pooling mechanism's operating results.

(14) "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.

OAR 836-043-0115 identifies the audit procedures to be used by an insurer and states, in part:

Each insurer shall develop audit procedures that include all of the features described in this rule or, in place thereof, more comprehensive alternative procedures that will consistently achieve minimum standards as measured by the Oregon Test Audit Program under OAR 836-043-0125. The features are as follows:

* * * * *

(4) An insurer shall give particular attention to the following factors and circumstances:

* * * * *

(b) Sources and reconciliation. The insurer shall indicate the source record used to conduct the audit and the record used for reconciliation purposes. The most commonly used records include, but are not limited to, time records, payroll journal, individual earnings records, prepared summary, check book, cash book, petty cash book, general ledger, confidential ledger, bank statements, job cost records and tax returns (Federal, Social Security/State Unemployment). The auditor must be able to reconcile the audit product with the source record and be certain that appropriate records have been examined to verify the inclusion of all payroll. When summary type records are used as the audit source, sufficient sampling of the original payroll records must be made to ensure the inclusion of all payroll. The insurer must be sure that the auditor is able to check and list the dates (and amounts if readily available) of the opening and closing payroll period or periods (e.g., weekly and semi-monthly) in order to establish proper continuity from prior audits and for subsequent audits. This is also necessary for the purpose of proper audit review.

* * * * *

(g) Classifications. The insurer shall determine the proper classifications. The insurer shall explain if the classifications assigned to the insured at audit differ from those shown on the insured's policy information page or bureau Inspection Report. Final premium charges are subject to ORS 737.310. The insurer shall obtain a detailed description of the insured's operations from the person or persons in the insured's organization best able to answer inquiries regarding the following:

- (A) The service or product;
- (B) The raw materials used;
- (C) The process involved; and
- (D) How the product is marketed.

* * * * *

(n) Division of payroll. The insurer shall determine if the insured's records support a division of payroll between different classifications due to an interchange of labor, as provided for by OAR 836-042-0050 to 836-042-0060.

The NCCI Basic Manual (Basic Manual) states that the purpose of the classification system is to group employers with similar operations into classifications so that (1) the assigned classification reflects the exposures common to those employers; and (2) the rate charged reflects the exposure to loss common to those employers. Exhibit A43 at 1. The Basic Manual goes on to state that, “[s]ubject to certain exceptions, it is the business of the employer within a state that is classified, not separate employments, occupations or operations within the business.” *Id.* NCCI recognizes both Basic Classifications, which generally describe the business of the employer, and Standard Exception Classifications, which describe occupations common to a variety of business types, rather than occupations specific to the employer’s business purposes, and generally are not covered by the basic classification applicable to the employer’s business. Under certain circumstances, Oregon permits the use of Classification 8810 for clerical and office employees not engaged in the primary business of the employer. *Id.* at 2. In addition, NCCI also publishes the Scopes Manual, which provides comprehensive descriptions of classification codes along with state-specific classification descriptions.

At policy inception, SAIF identified classification codes intended to cover the scope of work identified by the employer to appropriately account for the employer’s risk exposure. The employer’s application for the policy at issue, like its previous applications, identified it as a general contractor engaged in residential remodeling. Policy 881300 identified classification codes 5645, 5551, 5437, 5474, 8742, and 8810 covering the employer’s general carpentry, roofing, interior finish carpentry, painting, estimating, and office clerical work, respectively. The employer did not dispute the contents of the application or final policy prior to the current audit by SAIF. Of those identified in the policy, classification code 5645, covering carpentry on dwellings of three stories or less, carries the highest exposure rate.

During the preliminary audit conducted by Mr. Ross in 2018, the employer provided additional information regarding the scope of work the employer performed and asked Mr. Ross for additional classification codes it could use to allocate employee time. Mr. Ross responded by suggesting that, based on the information the employer provided, classification codes 5474, covering painting work, and 5102, applicable to window and door installations not included within a larger job, could also be used. Mr. Ross also advised the employer that any siding or remodel work should be allocated to classification code 5645.

By contrast, SAIF identified three classification codes applicable to the employer’s business during the audit at issue: 5645, covering general carpentry performed on residential dwellings of three stories or less; 5474, applicable to painting work not otherwise classified; and 8810, covering all qualifying clerical and office work performed exclusively at the employer’s location, rather than on a jobsite. SAIF’s determination of the scope of work performed by the employer during the audit period and the applicable classification codes was based on the payroll and other records the employer provided (despite finding that the records failed to meet the requirements of VTR’s for purposes of division of payroll), as well as additional input from the employer’s bookkeeper, Ms. Noel.

The Scopes Manual provides the following description of business operations subject to Classification Code 5645 – Carpentry – Dwellings 3 Stories or Less:

Class 5645 applies to your employees involved in direct labor and supervision of all carpentry work in connection with the construction of residential dwellings not exceeding three stories in height when you are the carpentry contractor or general contractor responsible for the entire construction project. A story is defined as fifteen (15) feet in height measured from the lowest point above ground level to the highest point above ground level. Note that housing facilities such as dormitories and assisted living facilities are not considered residential dwellings; they are considered commercial structures under class 5403.

Carpentry work includes the construction of exterior, load bearing walls, using metal studs, sill, rough framework, rough floors, wood or light-gauge steel studs, wood or light-gauge steel joists, rafters, roof deck, all types of roofing materials, sidewall sheathing, siding, insulation, doors, wallboard installation including patching or finishing operations such as spray texturing, lathing, windows, jalousie or jalousie screen, sky lights, stairs, fencing, decking, and detached structures such as garages when constructed in connection with the dwellings. Light-gauge steel framing is generally a thickness of 12 to 25 gauge.

Class 5645 also applies to carpentry repair or remodeling of residential dwellings when that work, whether interior or exterior, takes place along with some framing or structural carpentry renovation of the premises. Merely performing a singular task such as repairing, replacing, or installing wallboard does not amount to residential dwelling carpentry repair or remodeling under class 5645. These singular repair operations are separately rated to the appropriate classifications representing that specific trade. However, when activities of this nature take place in connection with operations that involve some framing or structural renovation of the dwelling, class 5645 applies to these specialty operations.

Residential dwellings include detached, semi-detached, and attached multi-unit residential buildings. The construction of multi-unit residential buildings exceeding three stories in height along with the construction of commercial buildings or structures, including mixed-use buildings, with no height restriction, is separately rated to class 5403. Installation of cabinets, interior trim, countertops, counters, paneling, molding, mantels and wood flooring requiring cutting, sanding, drilling, and attaching using nails, screws, or pegs to be separately rated from other carpentry codes as class 5437. Separately rate painting as class 5474.

Class 5645 also applies to the repair and maintenance of your equipment used for this work only if performed at the job site. If you maintain a permanent yard for the purpose of storage or maintaining your vehicles, equipment, buildings, or structures, class 8227 - Contractors - Permanent Yards would apply to that operation.

Exhibit R2 at 3-4.

The Scopes Manual also states the following with regard to Class Code 5474 – Painting – NOC - & Shop/DR:

Class 5474 applies to your employees involved in direct labor, supervision, and driving who are engaged in painting, including shop operations. This class is the general painting classification. It contemplates exterior and interior painting, surface preparation by methods such as, but not limited to, pressure washing or sandblasting when you also do the painting of residential or commercial structures which are constructed of wood, metal, concrete, stone, or a combination thereof regardless of height. Commercial structures include, but are not limited to, houses of worship, office buildings, stores, theaters, and auditoriums and includes the painting of fire escapes, staircases, balconies, shutters, and window frames or sash. Class 5474 applies to incidental finishing operations such as taping, texturing, filling and sanding of joints and nail holes on wallboard that has been installed by others when performed in conjunction with the painting operations.

The application of waterproofing materials using a brush or a hand pressured caulking gun is classed as 5474 as is the application of liquid tint and plastic film to windows by brush or spraying.

Class 5474 applies to the painting of stripes on parking lots by hand or machine when done by contractors that did not engage in the paving of the parking lot. It applies to painting for camouflage purposes; cleaning building interiors, or machinery and equipment using spray apparatus; the painting of murals on walls; and electrostatic painting of surfaces at your customer's location.

Class 5474 also applies to the repair and maintenance of your equipment and vehicles used for this work only if performed at the job site. If you maintain a permanent yard for the purpose of storage or maintaining your vehicles, equipment, buildings, or structures, Class 8227 – Contractors' - Permanent Yard would apply to that operation. Class 5474 does not apply to the painting of ship hulls nor to the painting of lines and lane indicators on streets or roads. Businesses involved in the application of plastic film on windows or wall paperhanging are to be separately classed as 5491 - Paperhanging. Businesses engaged exclusively in painting at a shop location only, not vehicle painting; engaged exclusively in interior sign painting or lettering at a permanent shop location or their customer's location, or engaged in electrostatic painting of surfaces at a permanent shop location to be classed as 9501 – Painting Shop Only.

Exhibit R2 at 2.

The Scopes Manual states the following regarding Class Code 8810 – Office Clerical; Boy/Girl Scout Council Non-Camp Employees; Drafting Employees; Secretaries and Bookkeepers; Key Punch Operators; Telecommuter-Clerical Employees:

Class 8810 applies to office employees who only perform bookkeeping, drafting

and other clerical work in a physically enclosed (by structural partitions) area devoted exclusively to these specific activities. It also applies to artists, designers, electronic typesetters, proofreaders, and editors who work in a physically enclosed office area where bookkeeping and clerical activities are also performed.

Class 8810 also applies to employees engaged in clerical telecommuter activities. The duties of clerical telecommuter employees include creation or maintenance of financial or other employer records, handling correspondence, computer composition, technical drafting and telephone duties, including sales by telephone. Class 8810 applies to depositing of funds at the bank, purchase of office supplies and pick-up or delivery of mail provided the activities are incidental and directly related to the employees duties performed in their residence office. A residence office is a clerical work area located within the dwelling of the clerical employee and must be separate and distinct from the location of their employer.

Exhibit R2 at 5.

Moreover, the Scopes Manual states the following regarding Class Code 5551:
ROOFING-ALL KINDS & DRIVERS:

Code 5551 applies to all kinds of roofing activities including work on roofs that may be flat, sloped or built[-]up. Types of materials used in the roofing process include hot tar, hot or cold composition material including polyurethane foams or resins and concrete aggregates, metal, shingle, slate, tile or paper. The inclusion of all kinds of roofing under Code 5551 is based on the conclusion that roofing companies generally perform various kinds of roofing using their labor crews interchangeably. This code applies to new roof installations as well as to the repair of roofs and includes drivers. As Code 5551 excludes yard or storage facility employees, Code 8227 is available for division of payroll for roofers who maintain a permanent yard.

* * * * *

Related Operations Not Classified to Code 5551:

* * * * *

When all of the carpentry work in connection with the construction of dwellings is performed by employees of the same contractor, roofing work at these sites is assigned to the appropriate carpentry code: Code 5645 * * *. This exception to the “roofing-all kinds” phraseology is based on the fact that a roof is an integral part of a dwelling that may be under construction.

A34. at 1-2, emphasis original.

In addition, identifies the following with regard to Class Code 7380: DRIVERS, CHAUFFEURS, MESSENGERS, AND THEIR HELPERS NOC-COMMERCIAL:

Code 7380 is applied to commercial drivers, chauffeurs, messengers, and their helpers provided they are not otherwise classified in the *Basic Manual*. These employees are common to many businesses and are Standard Exceptions assigned to Code 7380 unless they are specifically included within the phraseology of a basic classification that applies to an employer.

* * * * *

Code 7380 is a “not otherwise classified” (NOC) classification. This means that Code 7380 applies to an employer’s operation(s) only when no other classification more specifically describes the employer’s operation(s) or when a classification that applies to an employer’s operation that includes driving does not include the type of driving being performed. The following is a representative list of operations somewhat related in nature to Code 7380 operations that are not assigned to Code 7380. * * *.

Exhibit A34 at 4 and 6; emphasis original.

Further, the Scopes Manual provides the following clarification for Class Code 5437: CARPETRY – FINISH WORK ONLY:

5437 – Carpentry-Finish Work Only, Carpentry – Install Cabinet/Interior Trim; Carpentry-Install Finished Wood Floor; Floor Installation, Sanding or Scraping – Wood Floors; Floor Laying-Parquet; Locks-Installation In New Buildings. Includes the installation of cabinets, interior trim, and wood flooring requiring cutting, sanding, drilling, and attaching by use of nails, screws, or pegs. Includes the installation of counter tops made from materials such as but not limited to, laminated plastic, veneer, particleboard, or pressed wood; Corian or similar solid surfaces or high-density plastic base materials; and non[-]laminated solid wood or butcher block. Separately rate installation of granite, tile, marble and other stone countertops to class 5348-Ceramic Tile, Stone, Marble or Mosaic Work.

Class 5437 applies to employees engaged in interior finish carpentry work. Operations include the installation of cabinets, interior trim, cornices, counter tops, counters, finished wood floors, paneling, molding, mantels, parquet floors; finish work only on interior staircases, not including framing construction; installation of locks in new construction only and weather stripping; and refinishing of existing hardwood floors. Installation of counters, counter tops and finished floors also includes the installation of underlayment over rough surfaces, floors or subfloors. Repair and maintenance of your equipment performed at the job site is also included in Class 5437.

Door installations by specialist that involve a great degree of finish work are

included in this class. The “specialist” will generally be required to cut the door to the proper size to fit the existing framework, perhaps do some routing for an interlocking weather-stripping or safety strips, and drill holes for the doorknob, hinges and striker plates.

Permanent yards used for the maintenance of construction equipment and storage of materials is assigned to Class 8227. Installation of laminate wood flooring such as engineered wood flooring installed using glue-downed or interlocking methods is separately classed 5478 – Floor Covering Installation.

Exhibit R2 at 1-2.

For Class Code 8227: CONSTRUCTION/ERECTION- PERMANENT YARD, the Scopes Manual provides, in pertinent part:

Class 8227 applies to employees of contractors who are involved in direct labor and supervision, who are working at the contractor's [sic] permanent yard located away from the job site. These yards are used for the storage of materials and/or the storage and maintenance of equipment and vehicles. Class 8227 includes the mixing of concrete prior to transit or the loading of trucks with ingredients to be mixed during transit as well as the repair or maintenance of metal or wood concrete forms that are used from job to job. Class 8227 also applies to specialists engaged in reconditioning and leasing forms for concrete construction. Work performed in permanent yards by key personnel, such as but not limited to superintendents, foremen, or engineers of construction or erection firms, for periods during which no jobs are in progress, is appropriately assigned to this class. Class 8227 also applies to the repair and maintenance of your buildings and structures used for this work, unloading of materials delivered to the yard and incidental pickup of parts or material for your yard operation, or delivery of parts to be repaired from your yard operation to the repair shop or parts house. Class 8227 does not apply to delivery of materials or equipment to the job site or transportation of material or equipment from the job site. The loading of trucks with materials or equipment to be delivered to the job sites is to be classed under the same class as the drivers, with the exception of the loading of concrete mix. Class 8227 does not apply to the repair or maintenance of your equipment or vehicles or any other activities performed away from the permanent yard location. Class 8227 is not assignable to a specific location when mill, manufacturing or fabrication represents the most payroll at that location; yards at construction or erection sites; or to temporary yards set up for one particular project, even if such project is not completed for a number of years. Such temporary yards are assigned to the classification developing the greatest amount of payroll for the project. While class 8227 applies to your employees unloading materials that have been delivered to the yard, the loading of trucks with materials to be delivered to the job sites is to be classed under the same class as the drivers, with the exception of the loading of concrete mix. Class 8227 is not assignable if Class 5537, Air Conditioning, Heating and Refrigeration Systems, is the governing classification

for your business.

Exhibit R2 at 4.

Finally, with regard to Class Code 8742: ESTIMATOR (categorized as Salesperson by the employer), the Scopes Manual provides, in relevant part:

Code 8742 applies to all types of estimators, including but not limited to estimators performing measurements of inspections in crawl spaces, on ladders, or on roofs of structures in order to complete the estimation. It does not apply where the estimator has concurrent construction duties or is engaged in supervision of construction workers at the same site in which case the appropriate construction classification applies. Also applies to employees making estimates for contractors or others, including but not limited to construction, remodeling, repair, pest control, landscaping or tree removal from residential or commercial property.

Exhibit A34 at 11.

At hearing, there was much dispute over which payroll records most accurately reflected the scope of work performed by the employer during the audit period — those found in Exhibit R5 as SAIF determined; or those in Exhibit A31, as preferred by the employer. The employer's bookkeeper, Ms. Noel, prepared both sets of documents, and she testified inconsistently at hearing about the creation and timing of the documents, as well as the source of various pieces of information in each set. Among these arguments, Ms. Noel asserted that the payroll records in Exhibit R5 were only intended as estimates of time for each employee, that she created the template for the payroll records in Exhibit R5, and that the hours for each employee were populated by the automated time clock.

Despite Ms. Noel's assertions that the records in Exhibit R5 were samples intended only to demonstrate to Mr. Ross the proposed format for the employer's updated timesheets, rather than to reflect actual hours worked or types of work performed, the records identify time worked in increments of hours and increments thereof, and they span multiple weeks during the reported period, rather than just a limited record of one or two days for demonstrative purposes.

Moreover, many of the time records in Exhibit R5 reflect gaps in some employees' work hours, while others records are complete for the entire period. Inconsistencies in the testimony of the employer's witnesses and the payroll records appearing in Exhibit R5 do not support the employer's argument that those records were meant only as a sample for formatting purposes. Rather, the time entries are specific and varied, rather than rounded and uniform as one might expect when estimating for demonstrative purposes. Additionally, those records allocate employee time across multiple codes for many of the days reported. The specificity of the time entries supports Ms. Noel's testimony on cross-examination that the records in Exhibit R5 were populated by the employer's time clock and that the other data therein came from the employer's timecards prior to revisions suggested by Mr. Ross. Thus, the employer failed to demonstrate that SAIF erred in relying on the payroll records at R5 in conducting the audit and determining the appropriate risk exposure.

The employer's payroll records that SAIF relied on during the current audit reflect a varied scope of work with hours allocated across multiple classification codes, including 5551 (roofing), 5437 and 5645 (both applicable to carpentry), 5479 (insulation), 5474 (painting), 5102 (window/door installation), and 8810 (clerical). By contrast, the payroll records reflected in Exhibit A31 reallocated much of the time reflected in Exhibit R5 to classification codes with lower risk exposure, such as 8742 (applicable to estimators and salespersons), 7380 (covering chauffeurs as drivers not covered by other classification codes), and 8827 (applicable to maintenance of vehicles and/or equipment in the employer's permanent yard). At hearing, the employer's witnesses testified inconsistently about the source of information relied upon in altering the classification codes.

At hearing, SAIF's witnesses testified that the employer's use of 8742 and 7380 on any active jobsite were impermissible under the provisions set forth in the NCCI Basic and Scopes manuals. The record established that 8742 can only be used for bidding and estimating work performed prior to any construction work begins on site. At hearing, the employer's witnesses testified that, because many of the jobs performed did not need a full crew, excess employees would hang door flyers in the neighborhood. Accepting the employer's favored interpretation of the payroll records in evidence, each job typically required only one laborer, three to four salespersons hanging flyers for a full workday for the duration of the job which often spanned several days, and often a full-time driver. Because the preponderant weight of the evidence supports SAIF's position that sales and driving classification codes cannot be used on an active jobsite, it is unnecessary to address the implausibility of the employer's assertion regarding the allocation of labor hours between construction and less costly classification codes. Suffice to say I am not persuaded by the employer's evidence.

In addition, SAIF found classification code 8827 was not applicable to the employer as the code applies only to maintenance of equipment and/or vehicles in the employer's own yard. At hearing, there was much dispute over whether the employer maintained a yard. The employer's witnesses testified that the employer maintains a one-acre yard at its current location in Tigard (where it was located during the audit), and maintained a similar yard at its previous location in Lake Oswego (where Mr. Ross conducted the preliminary audit). SAIF's argues, however, that both Ms. Speer-Aritola and Mr. Ross noted observing no permanent yard attached to the employer's offices. Moreover, SAIF points to a subsequent NCCI audit conducted by a separate auditor in December 2018, which also noted no permanent yard maintained by the employer. Ultimately, however, because the employer failed to provide documentation sufficient to permit the division of labor, it is unnecessary to resolve this dispute. Rather, absent a showing to the contrary by the employer, SAIF appropriately allocated all labor hours for each identified job to the classification code representing the highest risk exposure, in this case 5645.

Finally, the employer argues that it is not a general contractor engaged in remodeling but instead is just a roofing company. As such, the employer asserts the classification code representing the highest exposure risk applicable to the scope of work performed is 5551, rather than 5645. Again, the employer's lack of reliable supporting documentation and contradictions in the record weigh against this argument. The employer's argument finds support only in Exhibit A31, discussed at length above and found unreliable. According to the evidentiary

record, SAIF relied upon payroll records pro the employer provided both to SAIF and to a prior auditor to determine the scope of each job performed. Based on a lack of description in those records of the actual work performed by each employee, as well as a lack of supporting documents identifying the scope of work, SAIF applied classification code 5645 because it covers all carpentry work on residential structures (including roofing).

The employer failed to provide original time records, contracts, or other contemporaneous records supporting its favored division of payroll. Based upon the employer's failure to provide such documentation, SAIF was unable to determine the scope of work on any given jobsite during the period in issue and allocated the bulk of labor hours to the highest risk exposure applicable to work performed, *to wit* 5645. SAIF's made its determination based on records available at the time of the audit. The employer failed to prove, by a preponderance of the evidence, that the resulting adjusted premium was incorrect.

3. *Purported ancillary payments* (loans/gifts, payments to ICs, reimbursements)

The employer next argues that, during the period in issue, it regularly reimbursed employees for out-of-pocket expenses, loaned funds to employees and others, extended gifts of company funds, and paid independent contractors for painting, landscaping and janitorial services. The employer asserts that SAIF erroneously added reimbursements to employees totaling \$20,773, as well as loans and gifts to employees and others totaling \$12,250 to subject wages, thereby conflating the total payroll for the audit period. Moreover, the employer argues that SAIF added payments to two independent contractors, Concepciona Juarez in the amount of \$3,611 for gardening and janitorial services, and Eric Kruse in the amount of \$25,200. The employer also claims it paid exempt vacation pay totaling \$8,952.50. The employer argues those amounts should all be deducted from the subject payroll. SAIF disagrees. Each argument is addressed below.

i. *Purported reimbursements.*

Basic Manual *Rule 2-B-1-p* defines payroll to include “* * * expense reimbursements to employees if the employer's records do not confirm that the expense was incurred as a valid business expense.” Exhibit A44 at 2). Similarly, Basic Manual *Rule 2-B-2-h* provides for exclusions from payroll certain reimbursable expenses and states:

Payroll excludes expense reimbursements to employees if the employer's records confirm that the expenses were incurred as a valid business expense.

Reimbursed expenses and flat expense allowances paid to employees may be excluded from the audit only if all three of the following conditions are met:

- (1) The expenses or allowances are incurred for the business of the employer
- (2) The amount of each employee's expense or allowance is shown separately in the records of the employer

(3) The amount of the expense or allowance approximates the actual expense incurred by the employee in the conduct of their work.

Exhibit A44 at 3 (emphasis added).

Here, the employer failed to produce evidence to establish that any payments designated as reimbursements were incurred for the business of the employer, failed to show each employee's expense separately in the accounting records provided, and failed to demonstrate the claimed reimbursements approximated the actual expense incurred by each employee in the conduct of the employee's work. Instead, Ms. Noel testified that the bulk of the claimed \$20,773 in reimbursed expenses was for a move of the employer's offices from Lake Oswego to Tigard. When asked at hearing to identify the actual expenses and/or employees who incurred the alleged expenses, Ms. Noel was unable to identify any such expenses and instead indicated that such information was somewhere in the employer's general ledger. But, upon further examination of the general ledger pages in evidence, Ms. Noel acknowledged that the only indicator supporting the claimed reimbursement was a manually entered memo in the spreadsheet, without any detail identifying the purpose of the expenditure to be reimbursed. Ms. Noel subsequently testified that details for each reimbursement could be located in employer's records that were stapled to canceled checks and kept in an offsite storage facility. Because those records were not offered as evidence at hearing or provided to SAIF during the audit, it is impossible to determine the validity of the purported expenses. As such, it was appropriate for SAIF to include the alleged reimbursement payments as subject payroll under Basic Manual *Rule 2-B-2-h*.

ii. Loans and gifts.

Next, the employer argues SAIF erroneously included in subject wages certain loans and gifts to employees and family members. According to the evidentiary record, the first time SAIF auditors were apprised of those purported loans and gifts was at hearing. At hearing, the employer provided no documentation to support its assertion that certain payments made were dispersed either as a loan or gift. The only evidence supporting this assertion was the testimony of Mr. Crofut indicating that payments to Nate Mispel (his brother) and Kristen Mispel (his mother) were loans rather than payments for work performed.

Based on the lack of supporting documentation in the record, it is unnecessary to address the individual payments made to each individual. Rather, because the employer failed to prove, by a preponderance of the evidence, that those payments should not be included in subject wages, it failed to establish SAIF's final premium audit billing was incorrect.

Nonetheless, discrepancies between Mr. Crofut's testimony and the employer's records merits a brief discussion. As an example, at hearing Mr. Crofut testified that payments to Nate and Kristen Mispel were loans to family members, rather than wages for work performed. A review of the employer's records reveal that it made payments to these individuals from multiple accounts including the general operating and payroll accounts. Exhibit A28 at 4. Moreover, none of those entries includes a notation indicating that such payments were intended as loans or gifts. Rather, at least one of those payment for \$800 to Mr. Mispel includes a notation in the employer's transaction detail that reads, "deck final" and indicates a "bill" was received from

Mr. Mispel on or about July 31, 2018. Exhibit 28 at 3. This evidence weighs against treating the identified payments as loans or gifts.

Because the employer failed to prove, by a preponderance of the evidence, that the claimed payments were loans and/or gifts, rather than wages paid, SAIF properly included those payments as subject wages in the final premium audit.

iii. *Independent contractors.*

The employer contends that Eric Kruse and Concepciona Juarez provided services as independent contractors, rather than employees, and that SAIF therefore incorrectly charged workers' compensation premiums for these individuals. According to the employer, during the period in issue, Mr. Kruse operated Eric Kruse Painting and provided residential and commercial painting services as an independent contractor. Similarly, the employer contends that Ms. Juarez provided janitorial services at its business location and landscaping services at its business location as well as Mr. Crofut's residence. The Oregon Supreme Court, in *S-W Floor Cover Shop v. National Council on Compensation Insurance*, 318 Or 614 (1994), provided a framework for determining whether certain individuals are exempt from workers' compensation insurance coverage, as follows:

A determination first is made as to whether one is a "worker" before a determination is made as to whether that "worker" is a "nonsubject" worker pursuant to one of the exemptions of ORS 656.027. The initial determination of whether one is a "worker" under ORS 656.005(28) continues to incorporate the judicially created "right to control" test. One who is not a "worker" under that test is not subject to workers' compensation coverage, and the inquiry ends. The "nonsubject worker" provisions of ORS 656.027 never come into play. If the initial determination made under ORS 656.005(28) is that one is a worker because one is subject to direction and control under the judicially created "right to control" test, then one goes on to determine under ORS 656.027 whether the worker is "nonsubject" under one of the exceptions of that statute.

Id. at 630-631.

ORS 656.017 requires employers to carry workers' compensation coverage for all "subject workers." ORS 656.005 provides definitions applicable to the workers' compensation statute and provides, in relevant part:

(13)(a) "Employer" means any person * * * who contracts to pay a remuneration for and secures *the right to direct and control the services* of any person.

* * * * *

(28) "Subject worker" means a worker who is subject to this chapter as provided by ORS 656.027.

* * * * *

(30) “Worker” means any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, *subject to the direction and control of an employer* * * *.

(31) “Independent contractor” has the meaning for that term provided in ORS 670.600.

(Emphasis added.)

Thus, a “subject worker” is any worker who is subject to the workers’ compensation statutes. All workers are subject workers unless a statutory exception makes them non-subject workers. ORS 656.005(28); *SAIF v. DCBS, Ins. Div.*, 250 Or App 360 (2012). Whether a person is a “subject worker” depends on whether the person agrees to provide services for remuneration and whether the person’s services are subject to the putative employer’s direction and control. *RJ Enterprises, LLC v. DCBS*, 255 Or App 439, 447 (2013), citing *DCBS v. Clements*, 240 Or App 226, 232 (2010). Accordingly, the primary questions to be answered are whether Mr. Kruse and/or Ms. Juarez were subject to the direction and control of the employer. Importantly, the relevant question is not whether the employer exercised actual control over the putative employee(s). Rather, it is the right to direct and control the activities of the individual that must be determined. As the proponent of independent contractor status for Mr. Kruse and Ms. Juarez, the employer bears the burden of proving each individual was free from its right to direct and control their work.

The “right to control” test includes four factors: (1) direct evidence of the right to, or exercise of, control; (2) the furnishing of tools and equipment; (3) the method of payment; and (4) the right to fire. *SAIF v. DCBS*, 250 Or App at 364, citing *Clements*, 240 Or App at 234. The evidence on this issue is sparse, at best, and does not weigh in the employer’s favor. As an initial matter, the employer must present evidence sufficient to support a finding that both Mr. Kruse and Ms. Juarez were free from its direction and control. At the hearing, Mr. Crofut testified that he believed Mr. Kruse and Ms. Juarez were both operating their respective businesses as independent contractors. Nonetheless, the fact that the parties may have believed and operated on the premise that their relationship was that of an independent contractor does not control the outcome of the required analysis under the applicable laws. *Woody v. Waibel*, 276 Or App 189 , (1976).

Here, Mr. Crofut testified that both Mr. Kruse and Ms. Juarez performed work on their own schedules, determined how the work would be performed, and were free to accept work from others. Ms. Noel testified similarly that Ms. Juarez was contracted to perform janitorial and landscaping for a flat fee of \$500 per month and did so on her own schedule each month. While this evidence may tend to show that the employer did not exercise direction or control over Mr. Kruse and/or Ms. Juarez, it says little of the employer’s *right* to direct and control the work of these two individuals.

Where evidence of direction and control is inconclusive, the courts look to the relative “nature of the work.” *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 619 (2002), citing *Woody*, 276 Or at 198. Under that test, the courts look at the significant factors relevant to the nature of the work test including indicators of how integrated and coordinated a particular individual’s activity was in the employer’s overall production pattern. *Rubalcaba*, 333 Or 614 at 619. In this case, the employer is a licensed general contractor performing, *inter alia*, residential remodeling and carpentry work. As discussed above, the employer failed to establish that it does not engage in any residential remodeling or that its work during the audit period was limited exclusively to roofing. Rather, the elusive nature of the employer’s time keeping records raises more questions than answers. As set forth above, on this record, SAIF correctly concluded that the appropriate exposure classification code applicable to the bulk of the employer’s work was 5645- Carpentry. Accordingly, an examination of the employer’s scope of work is necessary to determine whether services performed by Mr. Kruse and Ms. Juarez was an integral part of the employer’s operations. According to the employer, Mr. Kruse provided services as a residential/commercial painter. While perhaps not an essential element of roofing, painting is often an integral part of construction and remodeling projects. The nature of the employer’s work, as well as the work Mr. Kruse performed, establishes the necessary relationship to support SAIF’s determination that Mr. Kruse was an employee during the period in issue, rather than an independent contractor.

Next, the determination turns to whether Mr. Kruse qualifies as a non-subject worker under the statutory scheme. *S-W Floor*, 318 Or at 630-631. ORS 656.027 identifies non-subject workers and provides, in relevant part:

All workers are subject to this chapter except those nonsubject workers described in the following subsections:

* * * * *

(2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker.

* * * * *

(7)(a) Sole proprietors, except those described in paragraph (b) of this subsection. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

(b) Sole proprietors actively licensed under ORS 671.525 or 701.021. When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the sole proprietor must qualify as an independent contractor. Any sole proprietor licensed under ORS 671.525 or 701.021 and involved in activities subject thereto is conclusively presumed to be an independent contractor.

(8) Except as provided in subsection (23) of this section, partners who are not engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or

appurtenances thereto. When labor or services are performed under contract, the partnership must qualify as an independent contractor.

(9) Except as provided in subsection (25) of this section, members, including members who are managers, of limited liability companies, regardless of the nature of the work performed. However, members, including members who are managers, of limited liability companies with more than one member, while engaged in work performed in direct connection with the construction, alteration, repair, improvement, moving or demolition of an improvement on real property or appurtenances thereto, are subject workers. When labor or services are performed under contract, the limited liability company must qualify as an independent contractor.

At the hearing, the employer offered evidence indicating Mr. Kruse operated Kruse Painting, LLC⁸ under a valid CCB license from October 1989 until October 2015. During that time period, the evidence shows that Mr. Kruse did not carry workers' compensation insurance for himself or employees of Kruse Painting, LLC.⁹ Moreover, the record establishes that Kruse

⁸ According to the record, this entity changed names multiple times during the period of licensure and operated under the names, Kruse Painting Co, Kruse Painting, Eric Kruse Construction, and Kruse Painting, LLC. (See Ex. R9.) The employer's records refer only to Eric Kruse Painting. (See R3 at 2.)

⁹ In its closing arguments, SAIF asserts that the lack of workers' compensation insurance for employees of Kruse Painting, LLC necessitated coverage by the employee during the period in issue pursuant to Basic Manual Rule 2H (Subcontractors), which provides, in relevant part:

1. In those states where workers compensation laws provide that a contractor is responsible for the payment of compensation benefits to employees of its uninsured subcontractors, the contractor must furnish satisfactory evidence that the subcontractor has workers compensation insurance in force covering the work performed for the contractor. The following documents may be used to provide satisfactory evidence:

- Certificate of insurance for the subcontractor's workers compensation policy
- Certificate of exemption
- Copy of the subcontractor's workers compensation policy
- Copy of subcontractor's registration with Construction Contractors' Board (CCB)

2. For each subcontractor not providing such evidence of workers compensation insurance, additional premium must be charged on the contractor's policy for the uninsured subcontractor's employees.

SAIF Closing Argument at 12; *See also* Exhibits A44 at 13 and A45 at 6. Nonetheless, because the evidence at hearing failed to establish whether Eric Kruse Painting employed anyone other than Mr. Kruse during the period in issue, NCCI Rule 2H does not automatically apply. Although this proposed order determines that lack of evidence ultimately supports SAIF's allocation of payments to Mr. Kruse as subject wages, that determination is based on a totality of the circumstances as revealed in the record, rather than the default application of the NCCI rule advocated for by SAIF. Had the record established the existence of one or more non-covered employees of Eric Kruse Painting/Kruse Painting, LLC during the period in issue, I would agree that NCCI Rule 2H is applicable.

Painting, LLC remained unlicensed during the period in issue.¹⁰ The record fails to establish by a preponderance of the evidence that Mr. Kruse qualified as a non-subject worker under any of the provision of ORS 656.027.

At hearing, the employer presented testimony from Mr. Crofut who testified about several aspects of Mr. Kruse's business. Nonetheless, much of that testimony was not corroborated by other evidence and simply constituted speculation on the part of Mr. Crofut. While Mr. Crofut can be presumed to testify competently and accurately about the operations and staffing of his own business, based on the record before me the same cannot be said about the affairs of Eric Kruse Painting (or Kruse Painting, LLC). Mr. Crofut asserted that Mr. Kruse bid on painting jobs offered to him, owned and utilized his own equipment on painting jobs, and was paid only upon completion of each job. However, Mr. Crofut offered no foundation for his assertions. As such, Mr. Crofut's testimony amounts to nothing more than speculation and is therefore entitled to little weight.

Moreover, Mr. Crofut's testimony is inconsistent with the preponderant weight of the record. Mr. Crofut testified that Mr. Kruse painted the employer's offices as well as Mr. Crofut's home. Additionally, according to Mr. Crofut, the employer refers work to Mr. Kruse but does not employ him on any of its jobsites. Based on the employer's evidence, the record should reflect no more than two payments to Mr. Kruse: one for painting Mr. Crofut's personal residence; and one for painting the employer's offices. However, the record shows that the employer made several payments to Mr. Kruse during the 10-month period in issue, and the employer offered no evidence to reconcile this discrepancy. According to the record, the employer either enlisted Mr. Kruse's efforts on more than two jobs during the period in issue, or it was paying Mr. Kruse on a schedule other than stated in testimony, or both. This inconsistency weighs in favor of treating payments to Mr. Kruse during the period in issue as subject wages.

Assuming, in the alternative, that Mr. Kruse was operating as an independent contractor, the employer failed to establish that, during the period in issue, Mr. Kruse either did not employ others or that, if he did employ one or more persons, he carried workers' compensation insurance for those employees. SAIF's evidence indicates that, according to the Oregon CCB, Mr. Kruse did not carry workers' compensation insurance during at least a portion of the time he was licensed prior to 2019. It is reasonable to conclude, based on that evidence, that Mr. Kruse did not acquire workers' compensation insurance for himself or others during the approximately four-year lapse of his CCB license. Thus, even if Mr. Kruse qualified as a non-subject worker, payments allocated to Eric Kruse Painting would still be subject wages pursuant to Basic Manual Rule 2H.

In sum, because the employer failed to establish that Mr. Kruse was a non-subject worker as defined above, SAIF appropriately treated Mr. Kruse as a worker subject to workers' compensation law and correctly determined that the employer was required to provide workers'

¹⁰ The evidence in the record shows that Mr. Kruse did not renew the CCB license for Kruse Painting, LLC until October 2019, approximately five months after the final premium audit billing in issue. (See Ex. R10.)

compensation insurance for this individual during the period in issue.

Turning next to Ms. Juarez, a similar analysis reveals identical deficiencies in the employer's arguments. As addressed above, the employer failed to prove, by a preponderance of the evidence, that Ms. Juarez was free from its right to direct and control her work. Although Mr. Crofut's unrefuted testimony indicates that the employer did not actually direct or control how or when Ms. Juarez performed her duties, he failed to address whether the employer *could* engage in such direction and control if it chose to do so. It is therefore necessary to consider the nature of the work Ms. Juarez performed during the period in issue.

The record demonstrates that Ms. Juarez performed janitorial and landscaping services at the employer's offices, as well as landscaping at Mr. Crofut's personal residence, all of which were paid for by the employer. During the period in issue, the employer maintained an office building and a one-acre yard for storing vehicles and equipment. The employer employed office and administrative staff at that location. Janitorial and landscaping services can be integral to the efficient administrative operations of any business that maintains a permanent office and/or yard. Moreover, both janitorial and landscaping can be important aspects of a residential renovation project. Given these considerations, the nature of the work fails to support a finding that Ms. Juarez was an independent contractor during the period in issue.

At hearing, the employer offered little to support its assertions that Ms. Juarez should be treated as an independent contractor, rather than an employee. While the employer asserted that Ms. Juarez operated under a contract, the employer elected not to produce that contract to SAIF during the audit or at hearing. Moreover, the employer's evidence that Ms. Juarez also provided services to others during the period in issue, or otherwise met the requirements of an independent contractor, consisted solely of Mr. Crofut's unsupported speculation. In addition, Ms. Noel's testimony at hearing that Ms. Juarez invoiced the employer for her services and was paid a flat rate of \$500 per month conflict with other evidence in the record. For example, the employer made several payments to Ms. Juarez (including check 4926 in the amount of \$198 and check 4978 in the amount of \$265, purportedly covering February and March payments for yard maintenance) that totaled \$3,611, a number not cleanly divisible by 500. The evidence in the record supports the conclusion that, more likely than not, the employer paid Ms. Juarez for actual hours worked performing janitorial and/or landscaping services, rather than the alleged flat rate for monthly services.

The employer failed to establish that Ms. Juarez was a non-subject worker as defined above. As such, SAIF treated Ms. Juarez as a worker subject to workers' compensation law and correctly determined that the employer was required to provide workers' compensation insurance for payments made to her during the period in issue.

4. ERM and ARM calculations.

Finally, the employer argues that SAIF improperly calculated the premium rate "by compounding two adjustment factors[,] thus substantially increasing the rate for each classification of work performed, above the proper amount." Supplemental Objection at 2.

At hearing, the insurer's evidence showed that the experience rating and assigned risk modifiers, along with the classification rates applicable to the employer's industry and associated risk exposure, were determined prior to policy generation and that the ultimate calculation is automated. According to the record, SAIF employees do not manually apply the experience rating or assigned risk modifiers to the policy.

By contrast, the employer offered no evidence to demonstrate that SAIF's system for calculating total adjusted premiums, including the disputed modifiers, resulted in an incorrect premium. Rather, the employer asserts that, depending on how the modifiers are added to the overall equation, its own calculations failed to match those generated by SAIF. At best, the employer has demonstrated that changing the order of operations in the mathematical formula used to calculate premiums delivers divergent results. That is insufficient to demonstrate, by a preponderance of the evidence, that SAIF miscalculated the premiums or that the final premium audit is incorrect based on the application of the experience rating and assigned risk modifiers.

5. Conclusion.

The employer failed to prove, by a preponderance of the evidence, that SAIF erroneously determined the employer's payroll documents do not constitute verifiable time records; improperly reclassified the subject payroll to the highest rated exposure class available; failed to exclude loans and gifts, payments made to independent contractors, and reimbursements to employees for work related out-of-pocket expenses from total subject payroll; and/or incorrectly compounded the employer's experience rating and assigned risk modifications when calculating the adjusted premiums. As such, the employer failed to demonstrate that the premium audit billing, dated April 29, 2019, was incorrect.

ORDER

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

SAIF Corporation's Final Premium Audit Billing, dated April 29, 2019 is **AFFIRMED**.

/s/ 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

CERTIFICATE OF MAILING

On September 10, 2021, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2019-ABC-03059.

By: Electronic Mail

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