STATE OF MICHIGAN

DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH

OFFICE OF FINANCIAL AND INSURANCE REGULATION

Before the Commissioner of Financial and Insurance Regulation

F. P. Rosback Company, Inc.,
Petitioner

v

Case No. 09-754-WC

Travelers Insurance Company,
Respondent

_____/

Issued and entered
this 12th day of January 2010
by Ken Ross
Commissioner

FINAL DECISION

I
BACKGROUND

This case concerns a dispute between a business and its workers compensation insurer. F. P. Rosback Company, Inc. appeals a decision by Travelers Insurance Company to classify certain individuals as "factory/shop" employees rather than as "clerical/office" employees during the period January 1, 2008 through December 31, 2008. The consequence of Travelers' decision is to significantly raise the Rosback Company's workers compensation insurance premium rates.

The appeal was filed by Rosback Company pursuant to section 2458 of the Michigan Insurance Code, MCL 500.2458, which provides in pertinent part:

> . . . Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his or her authorized representative, on his or her written request to review the manner in which the rating system has been applied in connection with the insurance afforded to him or her. If the rating organization or insurer fails to grant or reject the request

> within 30 days after it is made, the applicant may proceed in the same manner as if his or her application had been rejected. Any party affected by the action of the rating organization or insurer on request may, within 30 days after written notice of the action, appeal to the commissioner, who, after a hearing held upon not less than 10 days' written notice to the appellant and to the rating organization or insurer, may affirm or reverse the action. . . .

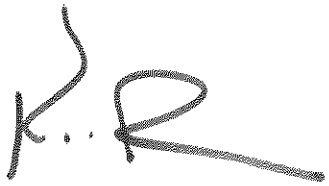
Following a hearing, the administrative law judge issued a Proposal for Decision (PFD) on November 20, 2009. Neither party filed exceptions to the PFD.

The administrative law judge concluded that two of the employees should be classified as "clerical/office" employees while one should be classified as a "factory/shop" employee.

The PFD is well-grounded in facts in the record and its legal conclusions correctly apply applicable law. The PFD is adopted and incorporated into this Final Decision.

II
ORDER

Therefore, it is ORDERED that, for the period in question, Petitioner is entitled to a premium adjustment in its favor of $3,363.00.



Ken Ross
Commissioner

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STATE OF MICHIGAN

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of	Docket No.	2009-1181
F.P. Rosback Company, Petitioner	Agency No.	09-754-WC
v	Agency:	Office of Financial and Insurance Regulation
Travelers Insurance, Respondent	Case Type:	Appeal Workers' Compensation
_____/		

Issued and entered
this 20th day of November, 2009
by Lauren G. Van Steel
Administrative Law Judge

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

Appearances: Larry Bowman appeared as a representative on behalf of F.P. Rosback Company, Petitioner. Scott A. Jensen appeared as a representative on behalf of Travelers Insurance, Respondent.

This contested case proceeding under the Insurance Code, 1956 PA 218, as amended, MCL 500.100 *et seq.* (hereafter "Insurance Code"), commenced in the State Office of Administrative Hearings and Rules with the issuance of a Notice of Hearing, dated July 16, 2009, scheduling hearing for August 19, 2009. The Notice of Hearing was issued based on an Order Referring Complaint for Hearing and Order to Respond, issued by Special Deputy Commissioner John R. Schoonmaker of the Office of Financial and Insurance Regulation on July 15, 2009.

The matter concerns Petitioner's appeal and request for hearing under Section 2458 of the Insurance Code, MCL 500.2458, filed on or about April 3, 2009, with the Office of Financial and Insurance Regulation regarding whether the ratings, classifications and premium billing decisions made by Respondent relating to Petitioner's workers' compensation policies comply with the requirements of the policy and law.

On August 14, 2009, Petitioner filed correspondence (motion), seeking a decision by default against Respondent, on the basis that Respondent had not filed a response to the Complaint. Petitioner's motion was not filed in sufficient time to allow Respondent to file a response to the motion prior to the hearing and was therefore not granted.

On August 19, 2009, the hearing was held as scheduled. Larry Bowman, President of F.P. Rosback Company, appeared and testified on behalf of F.P. Rosback Company, Petitioner. The following exhibit was offered by Petitioner and admitted as evidence into the record:

1. Petitioner's Exhibit No. 1 is a copy of a Collection Notice for $6,248.00, dated August 10, 2009.

Scott A. Jensen, Account Manager for Travelers Insurance, appeared and testified for Travelers Insurance, Respondent. No other witnesses were presented. Per the undersigned's order on the record, Respondent had until September 8, 2009, to submit its proposed Exhibit A. Respondent's filed its proposed Exhibit A on August 28, 2009. Petitioner had until September 18, 2009, to file any written objection to the proposed exhibit. No objection was filed by Petitioner and the record was then closed as of September 18, 2009. Respondent's Exhibit A is hereby admitted as evidence into

the record:

1. Respondent's Exhibit A is a copy of a premium break-down for each of the three employees in question, dated August 21, 2009.

ISSUES AND APPLICABLE LAW

The issue presented in this matter, as set forth on the Notice of Hearing, is whether the ratings, classifications and premium billing decisions made by Respondent relating to Petitioner's workers' compensation policies on three employees comply with the requirements of the policy and law. Section 2458 of the Insurance Code provides as follows:

> Sec. 2458. Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon payment of such reasonable charge as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of the insured, all pertinent information as to the rate. Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his or her authorized representative, on his or her written request to review the manner in which the rating system has been applied in connection with the insurance afforded to him or her. If the rating organization or insurer fails to grant or reject the request within 30 days after it is made, the applicant may proceed in the same manner as if his or her application had been rejected. *Any party affected by the action of the rating organization or insurer on request may, within 30 days after written notice of the action, appeal to the commissioner, who, after a hearing held upon not less than 10 days' written notice to the appellant and to the rating organization or insurer, may affirm or reverse the action.* A person who requests a hearing before the commissioner pursuant to this section may be represented at the hearing by an attorney. A person, other than an individual, that requests a hearing before the commissioner pursuant to this section may also be represented by an officer or employee of that person. An individual who requests a hearing before the commissioner pursuant to this section may also be

represented by a relative of the individual. MCL 500.2458. (Emphasis supplied).

FINDINGS OF FACT

Based on the entire record in this matter, including the witness testimony and admitted exhibits, the following findings of fact are established:

1. F.P. Rosback Company, Petitioner, is located in St. Joseph, Michigan. It is a printing manufacturing business with 19 employees. The company has been in business for 128 years.
2. Larry Bowman is President of Petitioner company. He credibly testified that he is personally involved in the operation on the company on a full-time basis. He is on the manufacturing floor of the company two or three times a day, throughout the 7:00 a.m. to 3:00 p.m. work day.
3. Petitioner has been insured through Travelers Insurance, Respondent, for several years for purposes of worker's compensation insurance on its employees.
4. Per Mr. Bowman, of Petitioner's 19 employees there are only six employees now involved in manufacturing: three shop employees and three assembly employees. The remaining employees are in administrative, engineering and assembly design work.
5. Petitioner's manufacturing building is approximately 40,000 square feet in size (with manufacturing on one side and assembly on the other side). There is an attached office building, approximately 6,000 square feet in size.

6. As of calendar year 2008, [redacted] had been Petitioner's employee for over 35 years; [redacted] had been Petitioner's employee for 30 years; and [redacted] had been Petitioner's employee for three to four years. The three employees, who worked on a full time basis for the time period in question, did not have specific job titles. Mr. Bowman was the immediate supervisor for these employees for the time period at issue.

7. Mr. Bowman credibly testified that until 2005, the three employees in question were designated as "factory supervision" or "shop" employees for purposes of workers' compensation insurance. Their jobs were changed when Petitioner down-sized because of the economy. Petitioner went from 60 manufacturing employees to three manufacturing employees on the factory floor (not the employees in question).

8. The three employees in question were not given anything in writing by Petitioner, but their jobs changed significantly after 2005.

9. This matter concerns the 2008 calendar year, being the audit term January 1, 2008 to December 31, 2008. Respondent determined that [redacted]s, [redacted] and [redacted] were not "clerical/office" employees, contrary to Petitioner's contention.

10. Per Mr. Bowman, [redacted]' job duties for calendar year 2008 comprised of his quoting prices on all of the parts to manufacture wind turbine parts for a particular contract. He did this work at a desk located within his own enclosed office space in Petitioner's 6,000 square-foot office building (which holds eight offices). [redacted] would go out on the

manufacturing/assembly floor for purposes of the lunchroom, the bathroom or to talk to his son, but there was nothing on the manufacturing floor that was necessary to his work. He was not ordered by Mr. Bowman as his supervisor to go out onto the manufacturing floor. Mr. Bowman saw [redacted] on a daily basis in his work; Mr. Bowman's office is in the same office building. (Prior to 2005, [redacted] had been a factory floor supervisor. He is now retired.)

11. Per Mr. Bowman, [redacted] job duties for the 2008 calendar year involved the designing of assembly prints and electrical panels for a particular contract. His main office was in a brick building attached to engineering, but most of the year he was in the engineering area on computers drawing up assembly prints. Engineering is located behind the 6,000 square-foot building in an office complex, separate from the manufacturing/assembly floor. Two other engineers worked with Mr. [redacted]. Mr. Bowman would see Mr. [redacted] on a daily basis. It would not be unusual for Mr. [redacted] to go to the manufacturing/assembly floor to bring a print to the assembly persons for three or four minutes. Normally, however, the prints were just put in a basket. Mr. [redacted] job duties did not change in calendar year 2008; he has always been designated as a "clerical/office" employee for purposes of workers' compensation insurance to Mr. Bowman's knowledge.

12. Per Mr. Bowman, [redacted] worked in calendar year 2008 in a separate office in the machine shop, which is part of the manufacturing/assembly floor in the 40,000 square-foot building. [redacted]

[redacted] did all the programming of equipment via computer. Also, if an employee needed a part check, he would do that.

13. [redacted] [redacted] used the enclosed office that was formerly the manufacturing supervisor's office. Per Mr. Bowman, [redacted]' job duties might include him going out onto the factory floor to check machines. There were three experienced employees on the machines, so there would not be much reason to have to check the machines, however. [redacted] has always been designated as a "clerical/office" employee to Mr. Bowman's knowledge.

14. For the 2006 and 2007 calendar years, Petitioner contested through its insurance agent when Respondent did not designate the three employees in question as "clerical/office" employees. The classification was changed back by Respondent.

15. Petitioner is seeking reimbursement for an alleged overpayment of premium payments for the three employees in question. Respondent has referred its request for payment to a collection agency. [Pet. Exh. 1]. A portion of the $6,248.00 amount being sought by the collection agency as of August 10, 2009, however, may pertain to matters other than that at issue in Petitioner's appeal here. The premium amounts at issue for the three employees in question, as shown in Respondent's Exhibit A, do not total $6,248.00.

16. Scott Jensen is the Account Manager of Premium Audit for Respondent Travelers Insurance. He personally conducted an audit of Petitioner's company for the past two years.

17. The workers' compensation insurance premiums are based on estimated payrolls. Audits are conducted soon after the end of the calendar year, and premiums are then adjusted.

18. In January 2007, an audit had been done by Respondent's outside vendor for calendar year 2006. In that audit, the vendor had obtained information from Sandy Bowman, Administrator for Petitioner and Mr. Bowman's sister, that the three employees in question were properly designated as factory or "shop" employees. Petitioner contested this and the classifications were changed back by Respondent's processing or billing unit to "clerical/office." The matter likely did not go through Respondent's underwriting at the time.

19. In January 2008, Mr. Jensen conducted the audit for calendar year 2007. After speaking with Sandy Bowman, Mr. Jensen understood that the three employees were on the factory floor 50% of the time and were properly designated as factory or "shop" employees for workers' compensation insurance. However, after speaking with Respondent's underwriter, Respondent agreed to do an exception. Mr. Jensen is not sure whether it was communicated to Petitioner that an exception was being granted.

20. On January 14, 2009, Mr. Jensen conducted an audit for calendar year 2008, the year at issue in this matter. For this audit, he again verbally reviewed job classifications with Sandy Bowman as Administrator for Petitioner. She indicated that the job duties of the three individuals had not changed from the prior year; Ms. Bowman had previously indicated that the three employees spent 50% of their time on the factory floor in a

supervisory capacity. Mr. Jensen did not obtain any more specific information about the employees' job duties. He did not speak with the three employees in question or anyone else. He was at Petitioner's location 45 minutes to an hour for the audit on January 14, 2009.

21. Mr. Jensen asserted that Respondent uses the state's workers' compensation classifications for determining who is a "clerical/office" employee. Each of the three employees in question do have physically separated offices. What is at issue, however, is the actual time spent throughout the day by the employees in their job duties. Just because someone has an enclosed office does not mean he is a "clerical/office" employee. According to Mr. Jensen, it is rare to see a company with top-heavy office/clerical employees, rather than manufacturing employees.

22. Mr. Jensen credibly testified that the parts inspection by [redacted] is not "clerical/office" by definition, no matter where it is done. Working with product is not a clerical function. Further, [redacted] goes out on the factory floor to check machines.

23. It is more likely than not that, based on their job duties, [redacted] and [redacted] should have been classified as "clerical/office" employees, but [redacted] should have been classified as a factory or "shop" employee for calendar year 2008.

24. Respondent should adjust the premium amounts due for calendar year 2008 for [redacted] and [redacted], based on the above factual finding on classification. The difference in premium amounts is set forth in Respondent's Exhibit A. For [redacted], the difference in

premium is $1,537.00. For [redacted], the difference in premium is $1,826.00. Petitioner is therefore entitled to a total adjustment in premiums of $3,363.00.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 *Callaghan's Michigan Pleadings and Practice* (2nd ed), §60.48. Petitioner has the burden of proof to show by a preponderance of the evidence that Respondent has not properly classified the employees in question for purposes of its workers' compensation insurance coverage. As the Michigan Supreme Court has stated, "[p]roof by a preponderance of the evidence requires that the fact finder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Blue Cross and Blue Shield of Michigan* v *Milliken*, 422 Mich 1; 367 NW2d 1 (1985). See also, *Martucci* v *Detroit Commissioner of Police*, 322 Mich 270; 33 NW2d 789 (1948).

Based on the above findings of fact, it is concluded that Petitioner has met its burden of proof as to two employees, [redacted] and [redacted]. In accordance with MCL 500.2411 and MCL 500.2458, Petitioner has shown that its appeal should be affirmed for these two employees and Respondent's classifications and premiums should be adjusted accordingly for calendar year 2008. However, Petitioner has not met its burden of proof as to the employee, [redacted], and Petitioner's appeal should be dismissed for that employee.

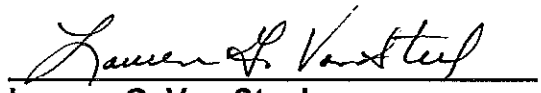
PROPOSED DECISION

The undersigned Administrative Law Judge proposes that the Commissioner adopt the above findings of fact and conclusions of law and order

Respondent to adjust its classifications and premiums for 2008 accordingly.

EXCEPTIONS

Any Exceptions to this Proposal for Decision should be filed in writing with the Office of Financial and Insurance Services, Division of Insurance, Attention: Dawn Kobus, P.O. Box 30220, Lansing, Michigan 48909, within twenty (20) days of issuance of this Proposal for Decision. An opposing party may file a response within ten (10) days after exceptions are filed.



Lauren G. Van Steel
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 30th day of November, 2009.

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