STATE OF ARIZONA
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DEPT. OF INSURANCE
BY Kathy

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

In the Matter of: D & E ROOFING, L.L.C., Petitioner.	))))))	Docket No. 98A-167-INS **ORDER**

On December 30, 1998, the Office of Administrative Hearings, through Administrative Law Judge Casey J. Newcomb, issued a Recommended Decision of the Administrative Law Judge ("Recommended Decision"), a copy of which is attached and incorporated by this reference. The Director of the Department of Insurance has reviewed the Recommended Decision and enters the following Order:

1. The recommended Findings of Fact and Conclusions of Law are adopted.
2. The Petitioner's appeal is denied and the Board's decision shall be upheld.

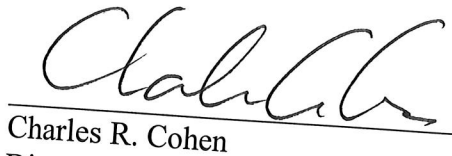
NOTIFICATION OF RIGHTS

Pursuant to A.R.S. § 41-1092.09, the aggrieved party may request a rehearing with respect to this Order by filing a written motion with the Director of the Department of Insurance within 30 days of the date of this Order, setting forth the basis for relief under A.A.C. R20-6-114(B).

The final decision of the Director may be appealed to the Superior Court of Maricopa County for judicial review pursuant to A.R.S. §§ 12-904 and 20-166. A party filing an appeal must

notify the Office of Administrative Hearings of the appeal within ten days after filing the complaint commencing the appeal, pursuant to A.R.S. § 12-904(B).

DATED this 5th of January, 1999



Charles R. Cohen
Director of Insurance

A copy of the foregoing mailed
this 5 day of January, 1999

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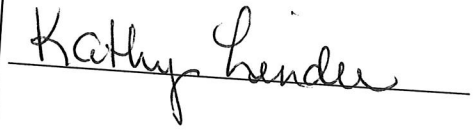

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	Docket No. 98A-167-INS
D & E ROOFING, L.L.C., Petitioner.	**RECOMMENDED DECISION OF THE ADMINISTRATIVE LAW JUDGE**

On December 4, 1998, a hearing was held on the Petitioner's Appeal of a decision by the Arizona Workers Compensation Appeals Board (the "Board"). Attorney Deborah Mittelman represented the Arizona State Compensation Fund (the "State Fund"). Attorney Curtis Ensign represented the Petitioner. The record was kept open until December 23, 1998 to allow the parties sufficient time to submit post hearing memoranda. Evidence and testimony were presented. Based upon a review of the entire record, the following Findings of Fact, Conclusions of Law and Recommended Decision are made.

FINDINGS OF FACT

1. Thomas Edwards is the owner of D&E Roofing, L.L.C. (the "Petitioner"). The Petitioner has approximately 20 full time employees. Approximately 65% of these employees are insured with the State Fund. The remaining employees chose to reject the State Fund coverage. These remaining employees are insured under an alternative insurance plan offered by the Petitioner.

2. In September of 1997, the Petitioner purchased a workers' compensation policy for insurance from the State Fund. At the inception of this policy, the Petitioner timely provided several rejection forms to the State Fund for the employees who had chosen not to be covered by the State Fund. The State Fund subsequently issued endorsements to the policy indicating that these employees were not covered under the State Fund policy.

3. Patti Beck is the State Fund's Supervising Underwriter. Ms. Beck testified that the State Fund also sent a letter to the Petitioner confirming the rejection forms.

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4. Within a few months, the State Fund performed a routine audit and assessed a retroactive premium. The retroactive premium covered the time period September 25, 1997 to December 31, 1997. On or about March 3, 1998, the audit was completed. The audit found that the Petitioner had additional employees during the audit period who were entitled to coverage under the State Fund policy. Consequently, the audit revealed that the Petitioner had failed to pay an appropriate premium for these additional employees.

5. In early March of 1998, the Petitioner attempted to clarify why the audit revealed these additional employees. The Petitioner informed the State Fund that a part-time employee had inadvertently failed to send to the State Fund the rejection forms for these additional employees ("Rejecting Employees") who had actually rejected coverage under the State Fund. Mr. Edwards testified that these Rejecting Employees were already covered by the Petitioner's alternative insurance policy. Mr. Edwards testified that he requested that the State Fund adjust the retroactive premium to reflect the actual number of employees covered by the State Fund policy. In other words, the Petitioner did not want to pay a premium to the State Fund for employees who were already covered by the Petitioner's alternative insurance plan.

6. On or about March 13, 1998, the State Fund sent a letter to the Petitioner denying its request to exclude the Rejecting Employees from the adjusted retroactive premium. See State Fund's Exhibit 1. The State Fund pointed out that the rejection form states the following:

> Note: This notice is of no effect unless it is filled out in duplicate and served upon the employer. The employer shall, in all cases, within five days of receipt of the notice, file the original with the State Compensation Fund.

Id. The State Fund also stated that the Rejecting Employees would continue to be included in all premiums until the State Fund received the proper rejection forms. Id. The State Fund further stated that the rejections would be effective on the date received but would not be retroactive. Id.

7. The Petitioner requested a hearing with the Arizona Workers' Compensation Appeals Board (the "Board"). On or about September 1, 1998, a hearing was held before the

Board. See State Fund's Exhibit 2. On or about September 8, 1998, the Board denied the Petitioner's appeal. Id. The Board found that the Petitioner had failed to timely file the Rejecting Employees' rejection forms within the statutory five day requirement in A.R.S. §23-906. Id. On or about October 6, 1998, the Petitioner filed a Notice of Appeal with the Department of Insurance.

8. At the hearing in this matter, the Petitioner admitted that some of the rejection forms were not submitted to the State Fund within the statutory five day period. However, the Petitioner argued that this failure to timely submit the rejection forms was not intentional. Rather, the delay was due to a flawed office procedure that has since been corrected.

9. The Petitioner further argued that the language of A.R.S. §23-906(B) & (C) shows that the five day requirement is not a requirement for the employee to reject the State Fund coverage. Rather, the Petitioner argued that the five day requirement pertains only to the employer's duty to file the rejection notice with the State Fund. The Petitioner argued that the employer does not have the power (simply by withholding the rejection form) to invalidate an employee's rejection of the State Fund coverage. Furthermore, the Petitioner argued that the State Fund is not prejudiced by the late rejection forms because the State Fund was not responsible for covering claims made by the Rejecting Employees.

10. The Petitioner also argued that it is unfair that the Petitioner has had to pay premiums to the State Fund and to the alternative insurance carrier for similar coverage on the same employees. The Petitioner argued that the State has received a windfall because it received the Petitioner's premium (that included coverage for the Rejected Employees) when it was not exposed to the risk of paying a claim by the Rejected Employees.

11. The State Fund argued that the Petitioner's "honest mistake" argument is irrelevant. The State Fund argued that the language in A.R.S. §23-906 clearly requires that the employer "shall file" the rejection forms with its insurance carrier within five days. The State Fund argued that the word "shall" indicates mandatory intent.

12. The State Fund argued that the employer's ability to possibly invalidate the employee's election to reject State Fund coverage is not relevant to this case. In other

words, the State Fund argued that the issue before this tribunal is not the contractual relationship between the employer and the employee. Rather, the issue before this tribunal is the statutory duty that an employer owes to its insurer.

13. The State Fund argued that insurance is purchased to guard against future risk and liability. The State Fund argued that the audit revealed that the Petitioner had not paid the proper premium for the risk and liability incurred during the audit period because there were additional employees entitled to State Fund coverage who had not been properly reported to the State Fund. The State Fund argued that to reduce the premium for the audit period (because no covered accidents actually occurred) would completely eviscerate the fundamental principles of insurance coverage.

14. The State Fund further argued that there is a valid and rational purpose for requiring an employer to submit the rejection forms within the five day requirement of A.R.S. §23-906. The State Fund argued that the State Fund's Claims Department must have a complete list of the employees that are covered by the State Fund. Otherwise, the State Fund may expend valuable time and resources on an injured claimant who (unbeknownst to the State Fund) had actually rejected the State Fund coverage.

15. The State Fund argued that there is a second valid and rational purpose for requiring an employer to submit the rejection forms to its insurance carrier within the five day statutory period. The State Fund argued that:

> Allowing the employers to hold on to rejection forms and to present them to the carrier at random times, and then argue that they do not owe a premium for past coverage, leads to potential mischief and a breakdown of the clear rights and responsibilities of all parties to the workers' compensation scheme.

See Memorandum of State Compensation Fund, page 6. The State Fund argued that a dishonest employer could withhold the rejection forms for the duration of the premium period. The dishonest employer could then produce the rejection forms and request a reduction in the premium amount for the rejecting employees. However, if a claim ever arose during the premium period, then the dishonest employer could utilize the State Fund policy. In essence, the employer could unfairly pass on its liability to the State Fund.

CONCLUSIONS OF LAW

1. The Petitioner has the burden of proof, and the standard of proof on all issues is by a preponderance of the evidence. Culpepper v. State, 187 Ariz. 431, 930 P.2d 508 (App. 1996). A "preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not." Morris K. Udall, *Arizona Law of Evidence*, §5 (1960). It "is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary*, 1182 (6th ed. 1990).

2. A.R.S. §23-906(C) states in part:

> C. The notice shall be filed with the employer prior to injuries sustained by the employee, and within five days the employer shall file with his insurance carrier the notice so served by the employee.

A.R.S. §23-906(C).

3. The ordinary meaning of the word "shall", in the context of a statute, is to impose a mandatory duty, and the use of the word "shall" indicates mandatory intent. Matter of Appeal in Navajo County Juvenile Action No. JV-94000086, 898 P.2d 517, 182 Ariz. 568 (App. 1995). Where the language of the statute is plain and unambiguous, the court must follow the text as written. Canon School District No. 50 v. W.E.S. Construction Co., Inc., 869 P.2d 500, 177 Ariz. 526 (1994).

4. Although the Petitioner has raised some very interesting arguments, the undersigned Administrative Law Judge simply cannot ignore the clear and mandatory language of A.R.S. §23-906(C) which states that "within five days the employer shall file with the his insurance carrier the [rejection] notice so served by the employee." A.R.S. §23-906(C)(emphasis added). Accordingly, the undersigned Administrative Law Judge recommends that the Petitioner's appeal be denied.

RECOMMENDED DECISION

Based upon the foregoing, the undersigned Administrative Law Judge recommends that the Petitioner's appeal be denied and that the Board's decision be upheld.

Done this day, December 30, 1998.

Casey J. Newcomb
Administrative Law Judge

Original transmitted by mail this 31 day of December, 1998, to:

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Department of Insurance
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Phoenix, AZ 85018

By Ann Crawford Thomison