

**BEFORE THE HEARING OFFICER PANEL
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Final Premium Audit Billing of) Case No. INS 01-10-013
)
)
WATERFORD CONSTRUCTION, INC.,) **PROPOSED**
an Oregon Corporation.) **ORDER OF DISMISSAL**

HISTORY OF THE CASE

On October 22, 2001, petitioning employer Waterford Construction, Inc. (Petitioner) timely filed a request for hearing with the Department of Consumer and Business Services, Insurance Division (the department or director) challenging the final premium audit billing issued by responding insurer, the SAIF Corporation (SAIF), for the periods of April 1, 2000 through March 31, 2001 (policy period). Although Petitioner's request for hearing was timely, its Petition was filed beyond the 60-day time period allowed as required by the department's rule, OAR 836-43-0170. The department subsequently denied Petitioner's request for hearing because its petition was untimely and Petitioner requested a "good cause" hearing. On January 16, 2002, the department referred this matter to the Hearing Officer Panel (the Panel) to conduct the good cause hearing.

On June 18, 2002, Administrative Law Judge (ALJ) Ella D. Johnson, who was assigned to hear this matter, conducted a telephone hearing to determine whether Petitioner's request for hearing should be dismissed for untimely filing of the petition. Attorney Charles N. Isaak (Isaak) represented Petitioner and Assistant Attorney General David Hatton represented SAIF. Isaak testified on behalf of Petitioner. The record closed following the good cause hearing.

ISSUE

Whether Petitioner's failure to timely file its petition was caused by circumstances beyond its reasonable control.

EVIDENTIARY RULING

At hearing, the file was designated as the record in this matter. Petitioner's counsel objected to the file's admission because he had not been provided with copies of the documents in the file and argued that he could not adequately prepare for the good cause hearing without them. I overruled Petitioner's objection because these were all documents

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either sent by or sent to Petitioner. I also orally reviewed each document in the file with Petitioner's counsel during the hearing.¹

FINDINGS OF FACT

- (1) On October 10, 2001, SAIF issued a final premium audit billing to Petitioner for the policy period of April 1, 2000 through March 31, 2001.
- (2) On October 22, 2001, Petitioner's attorney timely filed a request for hearing challenging SAIF's final premium audit billing. Instead of waiting the entire 60 days from the date he received the final premium audit billing, he filed the hearing request immediately after receiving the billing. (Isaak's testimony).
- (3) By letter dated November 6, 2001, the department directed Petitioner to complete a form entitled "Petition," and file it with the department within 60 days and no later than December 21, 2001. Isaak logged the due date into his tickler system. His assistant, who is his wife, drafted the wording of the tickler. (Isaak's testimony).
- (4) When the tickler came up for filing the Petition, Isaak thought that he had already filed the document due to the way the tickler was worded. It was not until SAIF attempted to cancel Petitioner's policy for non-payment that Isaak reviewed the file and discovered that he had failed to file the Petition by the deadline of December 21, 2001. (Isaak's testimony)
- (5) On January 8, 2002, Petitioner filed the required Petition. In the letter attached to the Petition, Isaak told the department that he "overlooked the December 21st deadline set forth in [the department's] letter dated November 6, 2001, a copy of which I did receive" and asked the department to waive the deadline for his client so it could proceed with its appeal.
- (6) By letter dated January 10, 2002, the department denied Petitioner's request pursuant to OAR 836-043-0170(9).
- (7) On January 15, 2002, Petitioner requested a hearing on the department's denial.
- (8) Waterford Construction, Inc. is owned by Charles D. Isaak, Isaak's son. Isaak is not an officer of the corporation nor does he hold any stock in the corporation. (Isaak's testimony).

¹ I note that Isaak testified that he had requested copies of the file from both the department and the Panel and his request was denied. He also requested an in-person good cause hearing and that request was also denied. Isaak objected to the entire proceeding arguing that it was contrary to proceedings in circuit court and did not comport with due process. However, inasmuch this is an administrative proceeding and the documents contained in the file were all documents Isaak either sent to the department or received from the department, I do not find that his failure to receive an additional copy of the file to violate due process.

CONCLUSIONS OF LAW

Petitioner's failure to timely file its petition was not caused by circumstances beyond its reasonable control.

OPINION

The issue is whether the circumstances causing Petitioner's failure to timely file the Petition constitute "good cause." As proponent of the fact or position, employer bears the burden of proving by a preponderance of the evidence that the circumstances concerning its failure to timely file the Petition constitutes "good cause." *See Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence).

OAR 836-43-0170 states in relevant part:

(9) The Director [of the Department of Consumer and Business Services] may dismiss the appeal of an employer if the Director determines that the Director lacks jurisdiction in the matter or if the director has not received a completed petition on or before the 60th day after the date on which the Director received the initial request from the employer for a hearing on the final premium billing.

Additionally, OAR 137-003-530, which governs proceedings before the Panel, states in relevant part:

(1) Unless otherwise provided by law, when a party or agency fails to file any document, except or a hearing request, within the time specified by agency rules or these rules of procedure, the late filing may be accepted if the agency or [ALJ] determines that there was good cause for failure to file the document within the required time.

OAR 137-003-530 does not define "good cause." However, OAR 137-003-0528(1)(a) states that an agency may accept a parties' untimely request for hearing, if a party's failure to timely file a request for hearing was caused by circumstances beyond the party's reasonable control. Therefore, under the procedural rules of the Panel, I conclude that the Petitioner must establish that the failure to timely file was caused by circumstances beyond its reasonable control.

SAIF suggested a different standard, arguing that Petitioner did not meet its burden of proving that it had "good cause" for failing to timely file the Petition based on a

long line of Oregon cases which hold that an attorney's negligence or mistake does not constitute good cause. The law concerning whether a claimant has "good cause" for a failure to timely file a request for hearing when the untimely filing is caused by the attorney or the attorney's employee is framed by *Sekermestrovich v. SAIF*, 280 Or 723 (1977) and *Brown v. EBI Companies*, 289 Or 455 (1980). Both of those cases involved workers' compensation claimants who failed to timely file their requests for hearing. In *Sekermestrovich*, the Court held that "good cause" under ORS 656.319(1)(b) was equated to the same type of "mistake, inadvertence, surprise or excusable neglect" that permitted relief from a default judgment under former ORS 18.160. The Court found that the failure by claimant's attorney to file a request for hearing was not "good cause" as a matter of law unless the attorney's failure was attributable to the claimant. 280 Or at 727. In *Brown*, the Court stated that, the failure to timely file a request for hearing, if caused by an employee who misplaced the crucial notice of denial and who was not responsible for handling and correctly processing such documents, was excusable neglect and constituted "good cause." 289 Or at 260. However, the Court held that because the failure in that case was caused by someone responsible for the handling and processing the notice, the failure to timely file the request for hearing did not constitute "good cause." *Id.*

At hearing, Isaak testified that he had overlooked the Petition filing deadline because the tickler for the filing was worded in a manner, which led him to believe that he had already filed the required document. He stated that his assistant, who is also his wife, drafted the tickler, and that he had never practiced in the premium audit area. He also argued that this was an honest mistake and that the system should allow his client to proceed with the appeal.² Petitioner presented no evidence concerning whether or not Isaak's wife was responsible for properly handling and drafting the ticklers concerning filing deadlines or whether or not there were other circumstances beyond Isaak's reasonable control which prevented the timely filing of the Petition. Under either the "good cause" standard of OAR 137-003-530 and 137-003-0528(1)(a) or the standard suggested by SAIF, I find that Petitioner did not have "good cause" for failure to timely file the Petition.

Consequently, on this record, I find that Petitioner failed to meet its burden of proving by a preponderance of the evidence that the untimely filing was caused by circumstances beyond its reasonable control or constituted excusable neglect. Accordingly, I conclude that Petitioner's request for hearing should be dismissed for failure to timely file the Petition.

²Petitioner also sought to challenge the department's petition requirement as inconsistent with ORS 737.318. Petitioner argued that the statute does not contain any exceptions that would permit the department to deny an employer's right to a hearing. However, ORS 731.244 gives the director of the department broad authority to promulgate administrative rules necessary to effectuate the Insurance Code (the Code). I find that OAR 836-43-0170 is a rule properly promulgated by the director to effectuate the portions of the Code governing premium audit hearings. Consequently, I do not find Petitioner's arguments in this regard to be persuasive.

ORDER

SAIF's final premium audit billings for the periods of August 1, 1999 through July 31, 2000 and August 1, 2000 through July 31, 2001 are correct and payable.

IT IS SO ORDERED.

Dated this 21st day of August 2002 in Salem, Oregon.

/s/ Ella D. Johnson
Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: 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 Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to:

Department of Consumer and Business Services
Insurance Division
c/o Mitch Curzon, Chief Enforcement Officer
350 Winter Street NE
Salem, OR 97301-3883