

On January 10, 2002, the director mailed a letter to the employer informing it that the director denied its request for a hearing because the director received the petition late.

On January 15, 2002, the director received by fax a letter dated January 15, 2002, requesting a hearing, pursuant to ORS 731.240, to review the director's denial of the employer's request for a hearing to review the billing.

On January 16, 2002, the director referred the request to the Office of Administrative Hearings (OAH).

On February 5, 2002, OAH issued a notice scheduling a hearing to be held on February 13, 2002.

On May 2, 2002, OAH issued a notice rescheduling the hearing to be held on June 18, 2002.

On June 18, 2002, OAH held a telephone hearing solely to review the issue of whether the employer was entitled to a hearing to review the billing. The hearing was conducted by Ella D. Johnson, an administrative law judge of OAH. The employer participated in the hearing and was represented by Charles N. Isaak, an attorney. The employer called its attorney as its only witness. The employer did not offer any documentary evidence. Although not a party to the proceeding, the insurer was represented by David B. Hatton, an Assistant Attorney General assigned to represent the insurer.¹ The insurer did not call any witnesses and did not offer any documentary evidence.

On August 21, 2002, OAH issued a proposed order, pursuant to ORS 183.460 and OAR 137-003-0645. The proposed order recommended that the director dismiss the employer's request for a hearing to review the billing because the employer failed to timely file the petition as required by OAR 836.043-0170(9), and that such failure was not for good cause. The proposed order concluded that the failure to

¹ SAIF was not a party because it did not meet any of the definitions of a party in ORS 183.310(6), although it may have met the definition in ORS 183.310(6)(c) if it had requested to be a party since it had an interest in the outcome of the proceeding. Also, SAIF did not comply with the requirements of OAR 137-003-0535.

timely file the petition was not for good cause, as used in OAR 836-003-0530(1)², because the employer's attorney filed the petition late, and the attorney filed it late because he misread the written reminder to file the petition to mean that he had filed it rather than he needed to file it. The proposed order informed the employer that it could file with the director written exceptions to the proposed order within 30 days after the proposed order was served on the employer, pursuant to OAR 137-003-0650. On the same date, OAH mailed a copy of the proposed order to the employer.

On September 20, 2002, the director received from the employer written exceptions to the proposed order.³

The director considered the employer's exceptions but is not persuaded thereby that the director must or should grant the employer's request for a hearing to review the billing.

Therefore, the director now makes the following final decision in this proceeding pursuant to ORS 731.248 and 183.470, and OAR 137-003-0655 and 137-003-0665.

Findings of Fact, Conclusions of Law and Opinion

The director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and opinion of proposed order as the facts, conclusions, and reasoning of this final order, except as follows.

On page three, the legal citation to *Cook v. Employment Division* is corrected from 47 Or 437 (1982) to 47 Or App 437 (1980).

² The proposed order interpreted "good cause" to mean "beyond the reasonable control of the party," citing OAR 836-003-0528, since OAR 137-003-0530 did not define "good cause." SAIF argued that "good cause" should be interpreted to mean the same as that phrase has been interpreted to mean in cases such as *Sekermestrovich v. SAIF*, 280 Or 723 (1977) and *Brown v. EBI Companies*, 289 OR 455 (1980). The proposed order concluded that under either standard, the employer did not fail to timely file the petition for good cause. The director adopts the proposed order's conclusion about this issue, but does not decide which standard applies.

³ The employer mailed a copy of the employer's exceptions to the insurer. On October 10, 2002, the director received from the insurer its response to the employer's exceptions. On October 15, 2002, the director received from the insurer a corrected response to the employer's exceptions. The insurer sent a copy of its response and corrected response to the employer. Since the insurer was not a party, the director did not consider the insurer's response.

On page 3, the last two paragraphs; and all of page 4, are replaced with the following:

OAR 137-003-0530 previously allowed a late filed document to be accepted if the reason for the late filing was beyond the reasonable control of the party. However, the rule was amended by replacing the “beyond the reasonable control of the party” test with a “good cause” test. Although, the rule does not define “good cause,” Oregon appellate courts have interpreted “good cause” to mean “mistake, inadvertence, surprise or excusable neglect.” *Brown v. EBI Companies*, 289 Or 455 (1980); *Sekermestrovich v. SAIF*, 280 Or 723 (1977); *SAIF v. Avery*, 167 Or App 327 (2000); *Hempel v. SAIF*, 100 Or App 68, 70 (1990).

The director concludes that “good cause,” as used in OAR 137-003-0530, means the same as that phrase has been interpreted to mean in the above cited cases. In this case, the employer’s attorney failed to timely file the petition because the attorney misread the written reminder to file the petition to mean that he had filed it rather than he needed to file it.. Based on the above cited law and facts, the director concludes that the employer’s reason for filing the petition late was not for good cause.

Order

The employer’s request for a hearing to review the billing is dismissed pursuant to OAR 836-043-0170(9).

Notice of Right to Judicial Review

The party has the right to appeal this final order to the Oregon Court of Appeals pursuant to ORS 183.480 and 183.482. If a party wants to appeal the order, the party must file a petition for judicial review with the Court of Appeals within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the day the party received the order. If the order was mailed to a party, then the date of service is the day the order was mailed to the party, not the day the party received the order. If a party does not file a petition within the 60-day time period, then the party will lose the right to appeal this order. If a party appeals the order, the party should also send a copy of the petition to the Insurance Division by delivering it to Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing it

to PO Box 14480, Salem, OR 97309-0405, or faxing it to 503-378-4351; or e-mailing it to mitchel.d.curzon@state.or.us.

Dated March 12, 2004

/s/ Joel Ario
Joel Ario
Insurance Administrator
Department of Consumer and Business Services

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