

On June 25, 2002, OAH held a hearing. The hearing was conducted by Ella D. Johnson, an administrative law judge of OAH. The employer was represented by Mark S. Berry, President of D. E. General Contractors, Inc., as the employer's authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer called Berry as its only witness. The employer offered Exhibits 1 to 15 as documentary evidence.¹ All of the employer's exhibits were excluded from the record, pursuant to OAR 137-003-0570(10), because (1) the employer failed to provide discovery, (2) the employer did not have a good reason for failing to provide discovery,² and (3) refusal to admit the employer's documentary evidence did not prevent the administrative law judge from conducting a full and fair inquiry into the facts necessary for consideration of all issues properly before the administrative law judge in the case.³ The insurer was represented by David B. Hatton, an Assistant Attorney General, assigned to represent the insurer. The insurer called Joseph Rick as its only witness. The insurer offered Exhibits 101 to 119 as documentary evidence. All of the insurer's exhibits were admitted into the record.

On July 25, 2002, OAH issued a proposed order pursuant to ORS 183.460 and OAR 137-003-0645. The proposed order essentially recommended that the director affirm the billing because it concluded that the employer did not meet its burden of production. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed order within 30 days after the proposed order was served on the employer and insurer, pursuant to OAR 137-003-0650. On the same date, OAH mailed a copy of the proposed order to the employer and insurer.

¹ The proposed order erroneously referred to the employer's exhibits as numbered 101 to 119, the same numbers assigned to the insurer's exhibits. The index of the employer's exhibits indicates that they were numbered 1 to 15.

² The president of the employer testified at the hearing that he personally did not know about the order until the day before the hearing on June 25, 2002. However, the proposed order found that the vice president of the employer knew about the order by at least April 30, 2002, but the employer did not provide discovery thereafter.

³ The proposed order found that the evidence offered by the employer was unreliable because it was general payroll information and estimates of work activities but did not contain contemporaneous time sheets recording separate work activity for each employee.

The director did not receive any exceptions from the employer or the insurer.

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 facts, conclusions, and reasoning of the proposed order dated July 25, 2002 as the facts, conclusions, and reasoning of this final order.

Order

The final premium audit billing dated October 22, 2001 from the insurer to the employer is affirmed.

Notice of Right to Judicial Review

The party has the right to appeal the 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 February 23, 2004

/s/ Cory Streisinger
Cory Streisinger
Director
Department of Consumer and Business Services