

On January 9, 2002, the director referred the request to the Office of Administrative Hearings (OAH).

On January 14, 2002, OAH issued a notice scheduling a hearing to be held on March 26, 2002.

On February 22, 2002, OAH received from SAIF a motion to dismiss the case pursuant to OAR 836-043-0110(2) because (1) the billing decreased the amount of the premium due for the audit period as a result of the audit, or (2) the employer did not request a hearing to review the amount due, or both.³

On February 28, 2002, OAH issued a notice scheduling a telephone prehearing conference to be held on March 13, 2002 to discuss SAIF's motion.

On March 13, 2002, OAH issued a notice rescheduling the telephone prehearing conference to be held on April 10, 2002 to discuss SAIF's motion.

On April 10, 2002, OAH conducted the telephone prehearing conference to discuss SAIF's motion. OAH did not rule on the motion because it was considering transmitting to the director the question of whether OAR 836-043-0110(4)(a) disentitled an employer to a hearing to review a billing when the billing did not increase the premium due as a result of the audit for the audit period.

On April 11, 2002, SAIF requested, pursuant to OAR 137-003-0635(1) and (3), that OAH transmit the question to the director.

On April 16, 2002, OAH transmitted the following question to the director:

Whether the Insurance Division interprets its administrative rule, OAR 836-043-0110(4)(a), to limit the employer's ability to appeal its final premium audit billing to circumstances where the audit results only in an increase in the premium for the audit period at issue and whether this limitation is consistent with the language of ORS 737.505(4) and 737.318(2)(d)?

³ The billing reduced the amount of the premium due for the audit period as a result of the audit by \$219 from \$1,334.00 to \$1,115.00. See SAIF Exhibit A9 page 4. However, the employer requested a hearing to review SAIF's prospective deletion of class code 9154 and addition of class code 9186 effective December 1, 2001, which would result in increasing the employer's workers' compensation premium due for the policy period after the audit period. See letter dated November 17, 2001 from employer to Insurance Division requesting a hearing.

On June 26, 2002, the director transmitted an answer to the question to OAH. The answer was, in relevant part, that “[t]he Insurance Division does not interpret OAR 836-043-0110(4)(a) to limit an employer’s right to a hearing. This rule does not apply to the issue of whether an employer is entitled to a hearing. Instead, it applies to the issue of when an insurer must notify an employer of the employer’s right to hearing.”

On July 23, 2002, OAH issued an order denying the insurer’s motion, based on the director’s answer to the transmitted question.

On August 7, 2002, OAH issued a notice scheduling the hearing to be held on November 20, 2002.

On November 4, 2002, OAH issued a notice rescheduling the hearing to be held on January 7, 2003. On the same date, OAH also issued an order granting the employer’s request for a stay of collection of the premium due as stated in the billing.

On January 7, 2003, OAH held a hearing. The hearing was conducted by Ella D. Johnson, an administrative law judge of OAH. The employer participated in the hearing and was represented by Michael V. Fazzolari, as the employer’s authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer called Fazzolari as its only witness. The employer offered Exhibits R1 to R6 as its documentary evidence. All of the employer’s exhibits were admitted into the record. The insurer was represented by David B. Hatton, an Assistant Attorney General assigned to represent the insurer. The insurer called David Murritta and Timothy Hughes as its only witnesses. The insurer offered Exhibits A1 to A12 as its documentary evidence. All of the insurer’s exhibits were admitted into the record.

On March 20, 2003, OAH issued a proposed order pursuant to ORS 183.460 and OAR 137-003-0645. The proposed order recommended that the director affirm the billing because it concluded that classification code 9186 most accurately described the employer’s business operations. 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.

The director did not receive from the employer any written exceptions to the proposed order.

On April 22, 2003, the director received from the insurer written exceptions to the proposed order. The insurer had two exceptions. The first exception was that the proposed order directed the insurer to “contact NCI to request a recalculation of [the employer’s] experience rating consistent with its low loss rate within 10 days of the receipt of this order and upon receiving the adjusted experience rating, apply the new rating immediately to the inception of the reclassification.” The insurer essentially argued that this directive (1) did not relate to an issue that was identified and argued by either party at any time prior to the proposed order, and (2) was premature because it directed the insurer to take certain action before any exceptions were due and before any final order was issued. The second exception was that the proposed order concluded that “reclassification to [code] 9186 will not place an unjustified burden on the business [of the employer].” The insurer essentially argued that this statement was not relevant an issue that was identified and argued by the parties. The director agrees with both of the insurer’s exceptions.

A copy of the insurer’s exceptions was mailed to the employer. The director did not receive from the employer any response to the insurer’s exceptions.

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:

The director does not adopt the second sentence in the last paragraph of the “Opinion” section which reads “Moreover, in light of the adjustment which will occur in PPW’s experience rating which will decrease its premium for the current policy

period, I do not find the reclassification to Code 9186 will place an unjustified burden on the business.”

Order

The billing is affirmed.⁴

Notice of Right to Judicial Review

Each 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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⁴ Since the director is only affirming the billing, the director is not ordering the insurer to “contact NCCI to request a recalculation of [the employer’s] experience rating consistent with its low loss rate within 10 days of the receipt of this order and upon receiving the adjusted experience rating, apply the new rating immediately to the inception of the reclassification.”