

**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 02-01-008
))
)	PROPOSED
PORTLAND LODGE, No. 142 BPOE,)	ORDER OF DISMISSAL
An Oregon Non-Profit Corporation.))
))

HISTORY OF THE CASE

On January 14, 2002, petitioning employer Portland Elks Lodge No. 142 (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 in question. Although Petitioner's request for hearing was timely, its Petition was filed beyond the 60-day time period 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 April 1, 2002, the department referred this matter to the Hearing Officer Panel (the Panel) to conduct the good cause hearing.

On June 11, 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 Lee Davis Kell (Kell) was to represent Petitioner but failed to appear in response to the voice mail message left on his telephone. Assistant Attorney General David Hatton represented SAIF. The record closed on June 13, 2002, following receipt of SAIF's response to Kell's letter.

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. In addition, I have marked Kell's June 11, 2002 letter as exhibit 1 and SAIF's June 13, 2002 letter in response as exhibit 101. SAIF objected to Petitioner's offer of the testimony of the lodge

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secretary because it would be unsworn and not subject to cross-examination. I overrule SAIF's objection and admitted exhibits 1 and 101 into the record.

FINDINGS OF FACT

- (1) Petitioner's request for hearing was timely filed on January 14, 2002.
- (2) On January 16, 2002, the department sent Petitioner a petition form and directed that the Petition be completed and returned to the department within 60 days and no later than March 15, 2002.
- (3) Petitioner's lodge secretary forgot to mail the Petition to the department until after the due date. (Ex. 1.).
- (4) As of March 20, 2002, the department had not received the Petition and denied Petitioner's request for hearing pursuant to OAR 836-043-170(9).
- (5) Petitioner requested a good cause hearing.
- (6) On June 11, 2002, I conducted a telephone hearing in this matter. When I called Kell's telephone number, I received his voice mail and left a message that I was conducting a telephone hearing on Petitioner's good cause hearing request and directed Kell to contact me.
- (7) By fax on June 11, 2002, Kell explained that the error was caused by a receptionist in his office that misunderstood who I was and had sent me to his voice mail to keep the line clear for the good cause hearing. (Ex. 1.).
- (8) Petitioner's counsel stipulated that the only witness he intended to call was the lodge's secretary who would testify that the Petition was not mailed timely because the lodge secretary forgot to mail it until after the due date. (*Id.*)

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 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.

Petitioner’s June 11, 2002 letter establishes that the reason that the Petitioner was not timely submitted to the department was due to the lodge’s secretary’s failure to remember to mail the Petition until after the due date. I find based on the file and this testimony 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. Accordingly, I conclude that Petitioner’s request for hearing should be dismissed for failure to timely file the Petition.

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ORDER

SAIF's final premium audit billings for the periods in question 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