

**STATE OF OREGON**  
**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**  
**INSURANCE DIVISION**

In the Matter of **Portland Lodge, No. 142, BPOE**     )   **FINAL ORDER**  
**dba Portland Elks Lodge.**                                     )   Case No. INS 02-01-008

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, pursuant to Oregon Revised Statutes (ORS) 731.240, to review the directors' denial of a request for a hearing by Portland Lodge, No. 142, BPOE dba Portland Elks Lodge (employer) to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation (insurer) to the employer.

**History of the Proceeding**

On November 19, 2001, the employer received from the insurer a billing dated November 15, 2001 for the audit period from October 1, 2000 to September 30, 2001.

On January 14, 2002, the director received by fax from the employer a written request for a hearing. The director received the request within the 60-day time period required by ORS 731.318(3)(d) and 731.505(4), and Oregon Administrative Rules (OAR) 836-043-0170(1).

On January 16, 2002, the director mailed to the employer a petition form, pursuant to OAR 836-043-0170(2), for the employer to complete and return so that the director received it by March 15, 2002.

On March 20, 2002, the director mailed a letter to the employer informing it that the director denied its request for a hearing because the director had not received the petition by the due date.

On March 26, 2002, the director received by regular mail the petition. The petition was accompanied by a letter dated March 4, 2002 from the employer's attorney. The letter and petition were mailed in an envelope which was postmarked on March 22, 2002 in Portland, Oregon.

On March 26, 2002, after receiving the petition, the director telephoned the employer's attorney informing him that the petition was received late.

On March 27, 2002, the director received by mail from the employer's attorney a letter dated March 26, 2002. In the letter, the employer's attorney acknowledged the telephone call earlier that day; explained that the employer failed to timely mail the completed petition after obtaining the signature of the president of the employer; and requested 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 April 1, 2002, the director referred the request to the Office of Administrative Hearings (OAH).

On April 4, 2002, OAH issued a notice scheduling a hearing to be held on June 11, 2002.

On June 11, 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 did not participate in the hearing. Although not a party to the proceeding, the insurer participated in the hearing and was represented by David B. Hatton, an Assistant Attorney General assigned to represent the insurer<sup>1</sup> The insurer did not call any witnesses or offer any documentary evidence.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> On June 11, 2002, at about 8:30 AM when the hearing was scheduled to begin, the administrative law judge called for the employer's attorney so he could participate in the hearing by conference call. The administrative law judge spoke to the attorney's receptionist. The receptionist and attorney were waiting for the administrative law judge's call. However, the receptionist misunderstood who the administrative law judge was and why she was calling, and as a result transferred her to the employer's attorney's secretary's voice mail. The administrative law judge left a message for the employer's attorney to return the call. The employer's attorney did not return the call. On the same date at about 2:16 PM, the employer's attorney faxed a letter to the administrative law judge. In the letter, the attorney explained why he did not answer the telephone call, requested another hearing, and if another hearing was not held then "[t]he only testimony I would offer is that our lodge secretary forgot to mail our petition until after the due date. After preparing the petition, I gave it to her in an addressed, stamped envelope to mail the petition as soon as she had our president sign the petition. She got the signature and then forgot to put the petition in the mail. I did not follow up because I was out of town, and hence I could not get the president's signature myself. I first discovered the problem when we got the notice of denial from the director dated March 20, 2002." During the hearing, the administrative law judge designated OAH's hearing file as the record of the proceeding. Subsequently, the administrative law judge forwarded a copy of the employer's attorney's letter to the insurer. On June 12, 2002, the insurer faxed a letter to the administrative

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 timely file the petition was not for good cause, as used in OAR 836-003-0530(1)<sup>3</sup>, because the employer simply forgot to timely mail 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 and insurer.

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

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.

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

2. On page 3, the last two paragraphs 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,

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law judge opposing the employer's attorney's request for another hearing. On June 13, 2002, the administrative law judge made the two letters a part of the record and designated the employer's attorney's letter Exhibit 1, and the insurer's letter Exhibit 101, and closed the record.

<sup>3</sup> 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."

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 failed to timely file the petition because an employee of the employer, forgot to mail it until after the due date. 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 (4<sup>th</sup> 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](mailto:mitchel.d.curzon@state.or.us).

Dated February 24, 2004

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