

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

In the Matter of **James G. McCarthy**
dba JMC Ranch

) **FINAL ORDER**
) Case No. INS 03-11-007

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, pursuant to Oregon Revised Statutes (ORS) 731.318(3)(d) and 731.505(4), and Oregon Administrative Rules (OAR) 836-043-0101 *et seq*, to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation (insurer) to James G. McCarthy dba JMC Ranch (employer).

History of the Proceeding

On or about September 25, 2003, the employer received from the insurer a revised billing dated September 25, 2003, for the audit period from April 1, 2002 to March 31, 2003.¹

On November 5, 2003, the director received from the employer a written request for a hearing.

On November 17, 2003, the director mailed to the employer a petition form.

On December 26, 2003, the director received from the employer the petition.

On December 29, 2003, the director referred the request and petition to the Office of Administrative Hearings (OAH).

On December 31, 2003, OAH received from the insurer a motion to dismiss the employer's request. The insurer argued that ORS 737.318(3)(d) and 737.505(4) as interpreted in *Pease v. National Council on Comp. Ins.*, 113 Or App 26, 830 P2d 605 (1992), and OAR 836-043-0170(1) and (6)-(7), require an employer to file a request for a hearing with the director within 60 days of receiving a billing. The insurer alleged that the employer received the initial billing on or about August 15, 2003 but requested a hearing more than 60 days later on November 5, 2003.

¹ The revised billing was a revision of an initial billing dated August 12, 2003.

On February 9, 2004, OAH scheduled a pre-hearing telephone conference to be held on March 3, 2004 to hear the insurer's motion and to determine when the employer received the initial billing.

On March 3, 2004, OAH held the conference. The conference was conducted by Ella D. Johnson, an administrative law judge of OAH. The employer appeared and was represented by James G. McCarthy (McCarthy) as the employer's authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer called himself as his only witness. The employer did not offer any documentary evidence. The insurer appeared and was represented by David B. Hatton, an Assistant Attorney General assigned to represent the insurer. The insurer called Teresa Smith as its only witness. The insurer did not offer any documentary evidence. OAH made its hearing file a part of the record, and designated it as Exhibit 1, without objection by either party.

On March 31, 2004, OAH issued a proposed order. The proposed order found, *inter alia*, that (1) the insurer mailed the initial billing to the employer on August 13, 2003, (2) the employer received the initial billing sometime thereafter but did not remember when he received it, (3) applying OAR 836-043-0170(6), the employer received the initial billing by August 16, 2003, and (4) the employer filed a request for a hearing with the director on November 5, 2003 which was 81 days later. The proposed order concluded that the employer did not timely request a hearing. The proposed order recommended that the director dismiss the employer's request. 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. On the same date, OAH mailed a copy of the proposed order to the employer and insurer.

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.

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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.

Order

The employer's request for a hearing is denied.

Notice of Right to Judicial Review

Each party may have 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 October 5, 2004

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

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