

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

In the Matter of **SAFE, Inc.**

) **FINAL ORDER**
) Case No. INS 03-06-003

The Director of the Oregon Department of Consumer and Business Services (director), by and through the Insurance Division, commenced the above entitled administrative proceeding, at the request of SAFE, Inc. (employer), to review a decision by the Oregon Workers' Compensation Rating System Review and Advisory Committee (ORAC), pursuant to Oregon Revised Statutes (ORS) 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 *et seq.*

History of the Proceeding

Sometime prior to 4/22/03, the employer requested ORAC to amend its Basic Manual of Workers' Compensation and Employers Liability Insurance (Basic Manual) rule 2-E-1, by exempting officers of non-profit corporations. The rule establishes a minimum average payroll of \$300 per week for each officer of a business for purposes of calculating the workers' compensation insurance premium for the officer. The employer paid certain members of its board of directors about \$20 per week for performing other tasks for the employer. The employer believed that the rule was unfair when, as in this case, the officer's actual payroll was a fraction of the minimum average payroll.

On 4/22/03, ORAC convened a meeting and discussed the employer's request.

On 5/16/03, the employer received from ORAC a letter dated 5/7/03. In the letter, ORAC informed the employer that ORAC had decided not to amend the rule. In the letter, ORAC also informed the employer that it could appeal ORAC's decision to the director by requesting a hearing within 30 days of receiving the letter.

On 5/30/03, the director received from the employer a written request for a hearing. The director received the request within the 30-day time period required by ORS 737.505(3).

On 8/4/03, the director referred the request to the Office of Administrative Hearings (OAH).

On 8/8/03, OAH issued a notice scheduling a hearing to be held on 12/3/03.

On 9/23/03, OAH issued an amended notice continuing to schedule the hearing to be held on 12/3/03.¹

On 12/3/03, OAH held a hearing. The hearing was conducted by Catherine P. Coburn, an administrative law judge of OAH. The employer did not appear and was not represented at in the hearing. ORAC appeared and was represented at the hearing by Timothy J. Hughes, the Recording Secretary for ORAC, as its authorized representative. ORAC did not expressly call any witnesses, although OAH allowed ORAC's authorized representative to introduce ORAC's exhibits as permitted by OAR 137-003-0555(1)(d) and (4), and to explain what transpired at ORAC's meeting and discussion on 4/22/03. ORAC offered Exhibits A to D as its documentary evidence. All of ORAC's exhibits were admitted into the record.

On 12/9/03, OAH issued a proposed order pursuant to ORS 183.460 and OAR 137-003-0645. The proposed order recommended that the director affirm ORAC's decision because it determined that the rule applies to the employer, but the employer failed to appear at the hearing and thus failed to meet its burden of proof that the rule should not apply. The proposed order informed the employer and ORAC 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 ORAC.

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

On 1/9/04, one day after the due date, the director received from the employer written exceptions to the proposed order. The employer mailed a copy of its exceptions to ORAC. The director did not receive from ORAC any response to the exceptions.

¹ The notice issued on 8/8/03 incorrectly characterized this case as a workers' compensation premium audit type of case initiated by the employer requesting a hearing to review a final premium audit billing issued by the insurer pursuant to ORS 737.318(3)(d) and 737.505(4). The amended notice issued on 9/23/03 correctly characterized this case as a workers' compensation classification type of case initiated by the employer requesting a hearing to review a decision by ORAC pursuant to ORS 737.505(2)-(3).

The director considered the employer's exceptions and determined that the exceptions did not have any merit.

The director also determined that the employer's reason for not appearing at the hearing on 12/3/03 was not beyond the employer's control. The employer argued that it should be excused for not appearing, and should be granted another hearing, because OAH did not correct the employer's mistaken belief that the hearing was to be held on 12/5/03. The director disagrees. OAH had informed the employer on 8/8/03 and 9/23/03 in writing of the correct hearing date of 12/3/03. The document sent by the employer to OAH on 11/22/03 which contained the erroneous hearing date, as well as OAH's response on 11/26/03 which did not refer to the hearing date, both focused on the issue to be decided at the hearing, not on the date of the hearing. Finally, and most importantly, the employer created the error, not OAH, and the employer had as much or more of an opportunity to identify and correct its error as did OAH.

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.

On page 2, under the section entitled Evidentiary Rulings, the first sentence is deleted because (1) pursuant to OAR 137-003-0670(3)(c), the agency, *i.e.* the director, did not designate and did not authorize OAH to designate "the agency file" in this matter as the record, and (2) pursuant to OAR 137-003-0670(3)(d), this case involved more than one party of which one appeared, *i.e.* ORAC, and a hearing was conducted and a record thereof created in lieu of any agency file. In this case, the record shall consist only of the items described in ORS 183.415(11) and (12), and not any other item that may also be in any paper or electronic file of the director relating to this case.

On page 2, under the section entitled Opinion, in the last sentence, the phrase "the final premium audit" is replaced with "ORAC's decision." Thus, the sentence shall read "Accordingly, the employer carries the burden of proving by a preponderance of

the evidence that ORAC's decision is incorrect." The sentence is changed because, as indicated in footnote 1 herein above, this case is a workers' compensation classification type of case initiated by the employer requesting a hearing to review a decision by ORAC.

Order

ORAC's decision is affirmed.

Notice of Right to Judicial Review

Each party may have the right to appeal this order to the Oregon Court of Appeals pursuant to ORS 183.480 and 183.482. A party may appeal the order by filing a written petition for judicial review with the Court of Appeals in accordance with the current Oregon Rules of Appellate Procedure. The Court of Appeals must receive the petition within 60 days from the date the 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 the 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 the 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 April 9, 2004

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

//
//
//