

insurer of any amount billed in the billing until this proceeding is concluded, pursuant to OAR 836-043-0170(5). Subsequently, OAH rescheduled the hearing several times.

OAH held a pre-hearing telephone conference on July 31, 2003, which was continued on August 12, 2003, which was continued and concluded on September 19, 2003.

OAH held a hearing on April 21, 2004, which was continued on July 19, 2004, which was continued and concluded on October 12, 2004 (collectively the hearing). The hearing was conducted by Ella D. Johnson, an administrative law judge of OAH. The employer appeared and was represented at the hearing by Scott H. Terrall, an attorney. The employer called Mike Wheelock, Mike Craddock, Tim Hughes, Teresa Smith, Glen Johnston, and Joe Rick as its witnesses. The employer offered Exhibits E1 to E27 as its documentary evidence. All of the employer's exhibits were admitted into the record. The insurer appeared and was represented at the hearing by David B. Hatton, an Assistant Attorney General assigned to represent the insurer. The insurer called Mark Hallock, Teresa Smith, and Mike Craddock as its witnesses. The insurer offered Exhibits A1 to A97 and A99 to A102 as its documentary evidence. The employer objected to the insurer's exhibits A13, A38, A58, A59, A84, A87, A90, A91, and A95 because the employer claimed that the exhibits were either not relevant or were hearsay or both. OAH overruled the objections. Thus, all of the insurer's exhibits were admitted into the record.

On January 5, 2005, OAH issued a proposed order recommending that the director affirm the billing. The proposed order addressed three issues. First, the proposed order concluded that the billing correctly reallocated the payroll for the employer's forest thinning activities, and contemporaneous slash piling and burning activities, during the audit period from classification code 0124 to 2702 because the former code does not, but the later code does, include forest thinning activities regardless of when the activities occur, and regardless of the size and value of the trees cut down, and includes slash piling and burning activities that occur during such thinning activities. Second, the proposed order concluded that although the

employer may request the director to investigate the insurer's alleged "bad faith" billing practices, and if warranted, assess a civil penalty against the insurer, OAH is not authorized to consider such issue in this proceeding. Third, the proposed order concluded that the employer requested a hearing to review a billing for only the audit period from October 1, 2001 to October 1, 2002, and thus the order granting a stay of collection applied to only that audit period and not to any subsequent audit period. 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 from the employer any exceptions to the proposed order.

On February 7, 2005, the director received from the insurer a written exception to the proposed order. Subsequently, the insurer amended its exception which is discussed below. A copy of the insurer's exception was mailed to the employer. The director did not receive from the employer any response to the insurer's exception.

On February 9, 2005, the director received from the insurer an amended exception to the proposed order. The insurer asserted that the proposed order erroneously found that as a result of the audit the insurer reallocated *all* of the payroll from classification code 0124 to classification code 2702 when there was evidence in the record of the hearing, Exhibit A 58 pages 1 and 4, which was part of the billing, showing that the insurer reallocated only *most* of the payroll to code 2702. The director agrees. A copy of the insurer's amended exception was mailed to the employer. The director did not receive from the employer any response to the insurer's amended exception.

The director considered the insurer's amended exception, although untimely, because they identified a error, although minor, of a finding of fact.

Therefore, the director now makes the following final decision in this proceeding.

Findings of Fact, Conclusions of Law and Opinion

The director adopts, and incorporates herein by this reference, the findings of fact, conclusions, and reasoning of proposed order as the findings of facts, conclusions, and reasoning of this final order, except as follows.

On page 3, paragraph number 7, fourth sentence, the finding of fact is changed to “The audit reallocated most of the payroll for slash piling and burning during the audit period to Code 2702.”

Order

The billing is affirmed and the stay is withdrawn.

Notice of Right to Judicial Review

Each party may be entitled to have the final order reviewed by the Oregon Court of Appeals pursuant to ORS 183.480 and 183.482. A party may institute a proceeding for judicial review by filing with the court a petition for judicial review 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 files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

Dated May 19, 2005

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

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