

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

In the Matter of **A Sharp Painter, LLC**) **FINAL ORDER**
) Case No. INS 03-09-012

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 A Sharp Painter, LLC (employer).

History of the Proceeding

On 7/15/03, the employer received from the insurer a billing dated 7/11/03 for the audit period from 4/1/02 to 3/31/03.

On 9/12/04, the director timely received from the employer a written request for a hearing.

On 9/16/03, the director mailed to the employer a petition form.

On 11/3/03, the director timely received from the employer the petition.

On 11/4/03, the director referred the request to the Office of Administrative Hearings (OAH).

On 11/6/03, OAH scheduled a hearing to be held on 3/2/04.

On 3/2/04, 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 the hearing. 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 John Hegner as its witness. The insurer offered Exhibits A1 to A25 as its documentary evidence. All of the insurer's exhibits were admitted into the record.

On 3/15/04, OAH issued a proposed order. The proposed order recommended that the director affirm the billing.

On 4/16/04, the director received from the employer written exceptions to the proposed order.

On 4/23/04, the director received from the insurer written exceptions to the proposed order and a response to the employer's exceptions.

On 9/15/04, the director requested OAH to revise the proposed order as it considered appropriate to address the exceptions file by the parties.

On 10/19/04, OAH issued a revised proposed order. The proposed order continued to recommend that the director affirm the billing because it concluded that the employer did not meet its burden of proving by a preponderance of the evidence that the billing was incorrect, ORS 183.450(2); *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166, 170, 840 P2d 739 (1992), *rev den*, 315 Or 643 (1993), but the insurer did meet its burden of proving by a prima facie case that the billing was correct, ORS 183.450(2), 183.415(6). The proposed order found that the insurer was required by OAR 836-042-0055(2)(c) to include in its calculation of the premium owed by the employer during the audit period the employer's payments to its employees pursuant to its "Incentive Plan." The insurer was required to include the payments because the payments were not profit sharing payments because, although they were anticipated, OAR 836-042-0055(2)(c)(A), they were not distributed in accordance from net realized profits or in accordance with the employer's a written plan, OAR 836-042-0055(2)(c)(B) & (C).

The director reviewed the record in this proceeding and found that it proves a prima facie case. The director found that the revised proposed order addressed the parties' exceptions. The director believes that the insurer's exceptions have merit, but employer's exceptions do not persuade the director to make a decision different than the decision that was recommended in the proposed order.

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 of law, and opinion of proposed order as the facts, conclusions, and reasoning of this final order

Order

The billing is affirmed.

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 January 7, 2005

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

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