

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

In the Matter of **A Sharp Painter, LLC**

) **FINAL ORDER**
) Case No. INS 04-09-010

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 to A Sharp Painter, LLC (employer).

History of the Proceeding

On 8/11/04, the employer received from the insurer a billing dated 8/3/04 for the audit period from 4/1/03 to 3/31/04. The billing informed the employer that it may request a hearing by sending to the director a written request for a hearing so that the director receives the request within 60 days after the employer received the billing. See ORS 737.318(3)(d), ORS 737.505(4), and OAR 836-043-0170(1).

On 9/21/04, the director timely received from the employer a written request for a hearing and request for stay of collection.

On 9/24/04, the director mailed to the employer a letter and a petition form. The letter informed the employer that it must complete the petition and return it to the director so that director receives it within 60 days after the director received the request for a hearing, otherwise the director will dismiss the employer's request for a hearing. See OAR 836-043-0170(2)-(3) & (9).

On 11/22/04, the director timely received from the employer the completed petition.

On 12/2/04, the director referred the request to the Office of Administrative Hearings (OAH).

On 12/13/04, OAH issued an order granting a stay of all collection efforts by or on behalf of the insurer of any amount billed in the billing until this proceeding is concluded, pursuant to OAR 836-043-0170(5).

On 12/14/04, OAH scheduled a hearing to be held on 3/30/05.

On 3/30/05, OAH held a hearing. The hearing was conducted by Catherine P. Coburn, an administrative law judge of OAH. The employer appeared and was represented at the hearing by Randal D. Thomas, as the employer's authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer called Randal D. Thomas as its only witness¹. The employer offered Exhibits P1 to P16 as its documentary evidence. The employer's exhibits P1 to P11 and P13 to P16 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 John Hegner and Dee Ann Hoyt as its witnesses. The insurer offered Exhibits A1 to A31 as its documentary evidence. All of the insurer's exhibits were admitted into the record.

On 4/28/05, OAH issued a proposed order. The proposed order recommended that the director affirm the billing. OAR 836-042-0055(2)(c) requires an insurer, in the course of calculating the workers' compensation insurance premium owed by an employer insured by the insurer, to exclude from payroll a profit sharing payment made by the employer to a worker. A payment is a profit sharing payment if it is anticipated, distributed from net realized profits, *and* distributed in accordance with a written plan. During the audit period, the employer had two successive written plans both called an "Incentive Plan." The first plan was effective from March 2001 to December 2003.² The second plan was effective since January 2004.

¹ Although the proposed order did not say that the employer called any witnesses, the proposed order cited Randall's testimony in support of certain findings of fact thus indicating that Randall testified at the hearing as a witness.

² The first plan was also involved in a previous billing dispute between the employer and insurer. In that case, the director affirmed the billing because the employer defaulted, and the insurer presented sufficient evidence and argument that the employer's incentive plan did not meet all of the requirements of OAR 836-042-0055(2)(c). See *In the Matter of A Sharp Painter, LLC*, Case No. INS 03-09-012, final order dated 1/7/05.

The employer made payments to its employees during the audit period as a result of the plans. The employer argued that the payments were, and the insurer argued that they were not, profit sharing payments. The proposed order concluded that the payments were not profit sharing payments because they were not made from net realized profits or in accordance with the written plans. Thus, the payments did not meet all of the requirements of OAR 836-042-0055(2)(c).

The director did not receive from the employer or the insurer any exceptions to 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, and reasoning of proposed order as the findings of facts, conclusions, and reasoning of this final order.

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 August 3, 2005

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