

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

In the Matter of TCSH, LLC) **FINAL ORDER**
dba Pacific Personnel Services of the Northwest) **ON**
) **RECONSIDERATION**
) Case No. INS 05-06-009

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 TCSH, LLC dba Pacific Personnel Services of the Northwest (employer).

History of the Proceeding

On 4/11/05, the employer received from the insurer a billing dated 4/3/05 for the audit period from 1/1/04 to 12/31/04. 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 5/3/05, the director timely received from the employer a written request for a hearing.

On 5/4/05, the director mailed to the employer a letter and a petition form. The letter informed the employer that it must complete the form 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 5/18/05, the director timely received from the employer the completed petition.

On 5/20/05, the director received from the employer a request for a stay of collection efforts by or on behalf of the insurer of any amount billed in the billing until this proceeding is concluded.

On 6/9/05, the director referred the request to the Office of Administrative Hearings (OAH).

On 6/13/05, OAH scheduled a hearing to be held on 9/27/05.

On 6/13/05, 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. See OAR 836-043-0170(5).

On 9/20/05, OAH rescheduled the hearing to be held on 9/28/05.

On 9/28/05, 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 Trina Hoggard, as the employer's authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer called Trina Hoggard and Shannon Hoggard as its witnesses. The employer offered Exhibits P1 to P3 as its documentary evidence of which Exhibits P1 to P2 were admitted into the record.¹ 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 Katherine L. Sims as its witness. The insurer offered Exhibits A1 to A6 as its documentary evidence, all of which were admitted into the record.

On 10/27/05, OAH issued a proposed order. The proposed order recommended that the director affirm the billing because if the employer orally received and relied on erroneous information from the insurer about which classifications applied to the employer, such reliance was unreasonable when the insurer had previously given the employer correct information in writing. The proposed order informed the employer and insurer that they could file with the director written exceptions to the

¹ The proposed order omitted that the employer offered exhibits P 1 to P3 and that P1 and P2 were admitted. See the audio recording of the hearing.

proposed order within 30 days after the proposed order was served on the employer and insurer.

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

On 12/28/05, director issued a final order.

On 1/10/06, the insurer requested the director reconsider the final order. The final order determined that “the insurer in this case, although created by state law, is not acting as an agency of the state government but as an insurer” and thus the state case law about equitable estoppel applicable to state agencies cited in the proposed order was not relevant. The insurer argued that it was not necessary to make that determination in order to decide whether to affirm or reverse the billing.

The director considered the request.

Therefore, the director now makes the following final decision on reconsideration 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 on reconsideration, except as follows.

On page 2, first paragraph of the proposed order, the reference to code 9910 is changed to code 8810 as the code for office clerical classification. See Exhibit A-3 page 26.

On page 3, the first full paragraph of the proposed order is deleted and rewritten to consider whether the insurer is subject to equitable estoppel without consideration as to the insurer’s status as a governmental agency, or otherwise. The new paragraph shall read as follows:

“The insurer may be estopped to assert a claim inconsistent with a previous position it has taken. *SAIF Corp. v. Jensen*, 283 Or App 439, 52 P3d 1118 (2002); *see also Bruer’s Contract Cutting v. NCCI*, 116 Or App 485, 841 P2d 690 (1992).

‘[I]t is well established, however, that there can be no estoppel unless there was not only reliance, but a right of reliance, and that reliance is not justified where a party

has knowledge to the contrary of the fact or representation allegedly relied upon * * *.' *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 35, 514 P2d 888 (1973). *See also Meier v. Reiger*, 152 Or App 312, 954 P2d 786, *rev den* 327 Or 431 (1998) (justifiable reliance does not exist when party seeking estoppel has knowledge of contrary facts); *Bash v. Fir Grove Cemeteries Co.*, 282 Or 677, 581 P2d 751 (1978) (estoppel may be established only where there was a right of reliance upon the act of the party sought to be estopped and such reliance was reasonable)."

Order

The billing is affirmed and the stay is withdrawn.

Notice of Right to Judicial Review

An aggrieved party may have the right to appeal this final order on reconsideration to 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 February 21, 2006

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

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