



## EVIDENTIARY RULINGS

SAIF's Exhibits A1 through A20 and Petitioner's Exhibits P1 through P30 were admitted without objection.

### FINDINGS OF FACT

(1) Petitioner has been in the business of providing employees to its clients since March 2002. About 60 per cent of its employees are on short-term assignments and the remainder on long-term assignments. The National Council of Compensation Insurance, Inc. (NCCI) referred it to the assigned risk pool and to SAIF for its workers' compensation coverage. (Test. of LaFurge.)

(2) On February 22, 2002, SAIF sent a letter to Petitioner with its workers' compensation policy. With the policy was a pamphlet called the "Tool Box" that listed various services provided by SAIF. (Ex. A4.) Two of the 17 pages in the Tool Box were a form titled, "Employer Option for Reimbursement of Medical Expenses on Nondisabling Claims." This form explained how employers may keep their experience rating down by paying nondisabling claims of medical bills of up to \$500. The form also advised Petitioner that it had 30 days to elect this option for the next policy year. (Ex. A2 at 16.) The letter with the policy and Tool Box was mailed to Petitioner's correct business address and not returned to SAIF as undeliverable. (Test. of Hoyt.)

(3) On February 11, 2003, SAIF mailed a notice of Policy Expiration and Advance Termination Notice to Petitioner. With this notice was the Employer Option form described above. (Ex. A5.) The notice and form were mailed to Petitioner's correct address and not returned to SAIF as undeliverable. (Test. of Hoyt.)

(4) On February 9, 2004, SAIF mailed a notice of Policy Expiration and Advance Termination Notice to Petitioner. With this notice was a different version of the Employer Option form described above, but with the same basic information. (Ex. A6 at 5 and 6.) Petitioner received this form, but did not review the Employer Option form. (Test. of LaFurge.)

(5) By February 2004, Petitioner's president had bought out his partner. When discussing renewal of Petitioner's workers' compensation policy with SAIF, Petitioner's president complained that Petitioner's ERM was too high. A SAIF representative asked him why Petitioner did not pursue the option of paying small, nondisabling claims. Petitioner's president stated that he had not heard of such an option before and signed up for it on February 27, 2004. He back-dated his application to March 1, 2002, when Petitioner first became insured, and submitted a check to cover the nondisabling claims against it since then that involved up to \$500 in medical costs. (Test. of LaFurge.) SAIF did not accept the check and did not allow back dating of Petitioner's request prior to February 27, 2004, but it did allow Petitioner to pay for two nondisabling claims against it since April 1, 2004, the effective date of the election. (Ex. A18; Test. of Scroggin.)

(6) Petitioner's president had prior experience as a staffing business manager, but no prior workers' compensation experience. (Test. of LaFurge.)

### CONCLUSIONS OF LAW

1. Department has jurisdiction to consider Petitioner's allegation that SAIF failed to provide notice of its right to participate in the claims reimbursement program.

2. SAIF gave Petitioner notice of its right to participate in the claims reimbursement program.

3. The ERM in SAIF's Final Premium Audit Billing is correct.

### OPINION

#### 1. Jurisdiction

Petitioner appealed the Audit in order to require SAIF to retroactively accept its application to be part of the medical claims reimbursement program, starting in 2002. One of the Audit's results was application of an ERM that was higher because Petitioner had not been part of the medical claims reimbursement program in prior years. SAIF argues that questions about the ERM must be addressed to NCCI, which set the ERM in this Audit many months before, which makes Petitioner's appeal untimely. Petitioner is not appealing the ERM calculation, but SAIF's alleged failure to inform Petitioner about the option of the medical claims reimbursement program. SAIF argues that Petitioner's claim regarding lack of notice of the program cannot be addressed in a premium audit hearing, but must be addressed in a direct application to the Director for a civil penalty pursuant to ORS 656.262(5) and OAR 436-060-0055(7). Petitioner is not seeking a civil penalty against SAIF. Such a penalty would not benefit Petitioner, and is used by the Insurance Division to prompt compliance to its rules. Instead, Petitioner is seeking recalculation of its ERM by allowing it to pay nondisabling claims of up to \$500 since coverage began.

ORS 737.505 provides that any appeals of premium audits are pursuant to ORS 737.318, which provides in relevant part:

(3) The premium audit system shall include provisions for:

\* \* \* \* \*

(d) An appeal process pursuant to ORS 737.505 for employers to question the results of a premium audit.

In *PGE v. Bureau of Labor and Industries (BOLI)*, 317 Or 606 (1993), the Supreme Court set out a scheme for statutory interpretation to determine the intent of the legislature. The first step in determining its intent is examination of the text and context of the statute, including other provisions of the same statute and related statutes and

legal rules of statutory and judicially developed rules of construction that bear directly on how to read the text, such as “words of common usage typically should be given their plain, natural, and ordinary meaning.” *PGE* at 611. If the legislative intent is not clear after this first step, legislative history is reviewed in order to determine the legislature’s intent. *PGE* at 611-612. If the intent is still unclear, the general maxims of statutory construction are applied to resolve any remaining uncertainty. *PGE* at 612.

Under ORS 737.318, the standard “to question the results of a premium audit” is broad in that it allows Petitioner to question any result of a premium audit. It is a clear expression of a legislative intent to allow Petitioner to question any result of the Audit in its appeal. The jurisdictional issue is therefore whether Petitioner’s claim that SAIF failed to notify it of medical claim reimbursement program was a result of the Audit. The Audit failed to apply an ERM that was based Petitioner participating in the medical claims reimbursement program in prior years. A plain reading of this section allows for an appeal of an ERM that was not based upon Petitioner participating in the medical claims reimbursement program. If such an appeal were not allowed, Petitioner would have no avenue for redress because a penalty against SAIF would provide no relief to Petitioner. Moreover, the availability of a possible penalty against SAIF does not preclude another option, which is Petitioner’s appeal. The Final Orders cited by SAIF address the issue of penalty and not SAIF’s alleged failure to allow the employer to participate in the program. Specifically, the conclusion in *Rose’s Maintenance Co., Inc.*, INS Case No. 89-05-010 (Final Order, March 12, 1991), addressed whether there was grounds to invalidate an audit. Petitioner does not seek invalidation, but modification so that it would reflect participation in the medical claims reimbursement program, something SAIF was able to calculate when asked by Petitioner. The Insurance clearly has the authority to modify an audit to remove an employer’s payments to an independent contractor, so it has the authority to modify the Audit for other reasons. The conclusion in *Backlund Logging Company*, INS Case No. 02-12-009 (Final Order, January 5, 2005), addressed whether the insurance division had the authority to investigate whether the insurer acted in bad faith. Petitioner has not alleged that SAIF acted in bad faith, only that it failed to notify it of the program.

If Petitioner is not allowed to question whether SAIF provided the required notice, it would not be allowed to question a premium audit. Therefore, ORS 737.318 provides jurisdiction to consider Petitioner’s appeal.

## **2. Notice of claims reimbursement program**

Insurers are required to notify employers of the option of paying nondisability claims in amounts up to \$500. See OAR 436-060-0055, which provides in relevant part:

Payment of Medical Services on Nondisabling Claims; Employer/Insurer Responsibility

Pursuant to ORS 656.262(5) the costs of medical services for nondisabling claims, in amounts not to exceed \$500 per claim, must first be paid by the insurer and the insurer may be reimbursed by the employer if the employer

so chooses. Such choice does not relieve the employers of their claim reporting requirements or the insurers of their responsibility to determine entitlement to benefits and process the claims accurately and timely. Also, when paid by the employer, such costs cannot in any way be used to affect the employer's experience rating modification or otherwise be charged against the employer. To enable the director to ensure these conditions are met, insurers and employers must comply with the following process and procedures:

\* \* \* \* \*

(2) Prior to the commencement of each policy year, the insurer must send a notice to the insured or prospective insured, advising of the employer's right to reimburse medical service costs up to \$500 on accepted, nondisabling claims. The notice must advise the employer:

- (a) Of the procedure for making such payments as outlined in section (3) of this rule;
- (b) Of the general impact on the employer if the employer chooses to make such payments;
- (c) That the employer is choosing not to participate if the employer does not respond in writing within 30 days of receipt of the insurer's notice;
- (d) That the employer's written election to participate in the reimbursement program remains in effect, without further notice from the insurer, until the employer advises otherwise in writing or is no longer insured by the insurer; and
- (e) That the employer may participate later in the policy period upon written request to the insurer, however, the earliest reimbursement period shall be the first completed period, established pursuant to subsection (3)(a) of this rule, following receipt of the employer's request.

Petitioner claimed it received no such notice from SAIF prior to the policy years it has had insurance from SAIF. Therefore, SAIF should accept its payment of these nondisabling claims and not count the claims against it, thereby reducing its ERM. SAIF claims that it provided such notice.

In Oregon, it is presumed that "A letter duly directed and mailed was received in the regular course of the mail." ORS 40.135(1)(q). SAIF has established through direct and consistent testimony and from its exhibits that the Toolbox, including the notice, was properly mailed to Petitioner prior to each policy year and was not returned as undeliverable. Petitioner presumably received the notices. Petitioner's president testified that he never saw such notices, but his denial was not specific enough to rebut the presumption. He did not specifically testify that he never received any part of the mailings SAIF sent to Petitioner. Such a claim would be hard to believe because the mailing contained Petitioner's insurance policy and the president would be looking for that. He probably did receive the notice of his policy and the Toolbox with it, but did not read the Toolbox because it was 17 pages among many other pages and he did not review it until prompted by a SAIF representative in February 2004. Based on the record, Petitioner received notice of the option of paying medical services for nondisabling claims up to \$500 prior to each policy year.

Petitioner claimed that SAIF “must also advise the employer [Petitioner] that it is choosing to not participate in the reimbursement program. OAR 436-060-0055(2)(c).” (Employer’s Hearing Memorandum at 1.) SAIF’s notice advised Petitioner that if it did not notify SAIF within 30 days, it would not be included in the program. OAR 436-060-0055(2)(c) does not require SAIF to notify Petitioner again after the 30 days to tell Petitioner that it was not being included in the program.

### **3. Premium Audit**

Petitioner received notice of the program prior to each policy year and failed to take advantage of the program until April 1, 2004. The Final Premium Audit Billing, with an ERM based on all claims, was correctly determined by SAIF.

### **ORDER**

SAIF’s Final Premium Audit Billing issued on November 23, 2004, to Anytime Labor, Inc., for April 1, 2004 through September 30, 2004, is affirmed.

Dated this 9<sup>th</sup> day of December, 2005

/s/ Lawrence S. Smith  
Lawrence S. Smith  
Administrative Law Judge  
Office of Administrative Hearings

### **NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW**

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this proposed order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to:

Department of Consumer and Business Services  
Mitchel D. Curzon  
Chief Enforcement Officer  
Insurance Division  
PO Box 14480  
Salem OR 97309-0405