

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of the Petition of) **PROPOSED ORDER**
)
ALL-IN-HALL CORPORATION) Case No.: INS 05-04-016
)

HISTORY OF THE CASE

On December 9, 2004, insurer SAIF Corporation (SAIF) sent a Final Premium Audit Billing (Audit) to All-in-Hall Corporation (Petitioner) for the period of August 19, 2003 through July 8, 2004. Petitioner's letter, requesting a hearing, was received by the Insurance Division of the Department of Business and Consumer Services (Division) on February 16, 2005. Its request was referred to the Office of Administrative Hearings (OAH) on May 2, 2005.

Telephone pre-hearing conferences were held by Administrative Law Judge Lawrence S. Smith of OAH on September 7, 2005, and October 26, 2005. Pursuant to OAR 137-003-0555, Petitioner was represented by its president, Russell Hall, who testified and called one witness, Tom Ware. Assistant Attorney General David B. Hatton represented SAIF, with two witnesses, Teresa Smith and Kathy Sim of SAIF. The hearing and record closed on October 26, 2005.

ISSUE

Whether Petitioner filed a timely request for hearing in regards to the Audit mailed by SAIF on December 9, 2004.

EVIDENTIARY RULINGS

Exhibits 1 through 10 were admitted without objection.

FINDINGS OF FACT

(1) Petitioner is an Oregon corporation that provides tree services. Its president is a professional arborist. (Test. of Ware and Hall.)

(2) SAIF provided workers' compensation coverage to Petitioner for the period of August 19, 2003 through July 8, 2004. On December 9, 2004, SAIF mailed a Final Premium Audit Billing (Audit) for this time period to Petitioner's bookkeeper at that

time, who was Petitioner's agent and whose address was Petitioner's address of record with SAIF. The Audit clearly states that Petitioner had 60 days to appeal. On the second page, the Audit states that appeals by corporations must be filed by an attorney, officer, or employee. The Audit was not returned to SAIF as undeliverable. Petitioner's bookkeeper received the Audit soon after it was mailed. (Ex. 1; Test. of Smith.)

(3) In late December 2004, a new agent/bookkeeper (Ware) started handling Petitioner's paperwork and received all the paperwork from the prior agent/bookkeeper by mid-January 2005. On January 12, 2005, Ware called SAIF, asking for copies of missing tax reports and for information regarding the Audit. SAIF faxed the missing tax reports to him the next day, but not the Audit. (Ex. 10 at 2.) He called SAIF on January 14, 2005, disputing the amount in the Audit and was told he should have the information on how to appeal in the Audit and how to file for a stay. (Ex. 10 at 1 and 2.) He called SAIF again on January 20, 2005, asking again about appealing the Audit and staying the collection of the amount due. SAIF promised to mail him the Audit. (Ex. 10 at 1.) He did not receive it. (Test. of Ware.) SAIF changed Petitioner's address of record on January 25, 2005, to Ware's address. (Ex. 1 at 1.)

(4) On January 31, 2005, Ware on behalf of Petitioner sent a letter of appeal to SAIF, requesting stay of collections on the amount owed under the Audit. (Ex. 9.) The letter was postmarked on February 2, 2005, and received by SAIF on February 4, 2005. (Test. of Sim.)

(5) On February 14, 2005, SAIF faxed appeal rights to Ware. (Ex. 10.) That day, he mailed and emailed a letter to the director of the Division, requesting a hearing. (Ex. 6.) The Division of DCBS received his letter on February 16, 2005. (Ex. 2; Test. of Ware.)

CONCLUSION OF LAW

Petitioner did not file a timely request for hearing in regards to the Audit mailed December 9, 2004.

OPINION

On August 12, 2005, SAIF requested dismissal of Petitioner's Petition because Petitioner did not file its petition within 60 days after receiving the Audit, as required by ORS 737.505(4).¹ The Audit was mailed to Petitioner's former agent/bookkeeper. There is no evidence that it was returned as undeliverable, and Petitioner does not dispute that

¹ ORS 737.505(4) states:

Insured entitled to rate information; remedies of aggrieved persons.

* * * *

(4) Appeals to the director pursuant to ORS 737.318 with regard to a final premium audit billing must be made within 60 days after receipt of the billing.

the former agent/bookkeeper probably received it when mailed. He is presumed to have received it by December 13, 2004, pursuant to OAR 836-043-0170(6).² He received it, but did not forward it to Petitioner after a new agent/bookkeeper (Ware) started in late December 2004. At that point, Petitioner had 60 days to appeal, or until February 11, 2005. Petitioner's request was not received by the Insurance Division until February 16, 2005. The rule does not allow for filing a request for hearing by email, so the email filing on February 14 is not accepted. Even if it were, it would still be too late.

Petitioner alleges that its delay was due to good cause because it changed agents/bookkeepers during this time and SAIF was trying to avoid the main issue, which it alleges is unfair billing. The Court of Appeals has specifically held that ORS 737.505(4) does not allow for good cause to extend the time limit. *Kilham Stationery v. NCCI*, 109 Or App 545 (1991). Petitioner also argues that SAIF did not provide the correct information on how to appeal, but the address for an appeal is clearly stated on the second page of the Billing, which was mailed to Petitioner's agent at the time. Petitioner's request for hearing was not filed within the 60-day time limit.

Ware's January 31, 2005 letter to SAIF was clear notice that Petitioner wanted to appeal the Audit, but it was not mailed to the Insurance Division as required by ORS 737.505(4), so it did not meet the specific requirements in the law. SAIF could have done much more to help Ware file a legally adequate appeal by faxing the Audit to him on January 15 when it faxed the tax reports or telling him how to appeal during their conversations in January, but SAIF was not required by law to do so.

SAIF also alleged that the agent/bookkeeper did not have the authority to request a hearing on behalf of Petitioner. There is no need to decide this allegation because the request filed by the agent/bookkeeper was not filed timely.

This Proposed Order does not preclude Petitioner from pursuing its claim that SAIF has improperly assigned labor to an incorrect and more costly classification during subsequent audit periods.

² OAR 836-043-0170(6) states:

For the purpose of determining the date of receipt of a final premium audit billing delivered to the employer by mail, if the date is unknown to the employer, the date of receipt is considered to be the third day after the date of mailing except as otherwise provided in this section. If the third day after the date of mailing is a Saturday or a legal holiday, including Sunday, the date of receipt is considered to be the next day that is not a Saturday or a legal holiday.

ORDER

Petitioner's request for hearing filed February 16, 2005, is dismissed as untimely filed pursuant to ORS 737.505(4). SAIF's Final Premium Audit Billing mailed to Petitioner on December 9, 2004, remains undisturbed and is correct and payable.

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

Dated this 10th day of November, 2005.

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
c/o Mitchel D. Curzon, Chief Enforcement Officer
Insurance Division
350 Winter Street NE
Salem, OR 97301-3883