

On 4/20/06, the director timely received from the employer the completed petition.

On 4/24/06, the director referred the request to the Office of Administrative Hearings (OAH).

On 5/4/06, OAH scheduled a hearing to be held on 8/3/06.

On 8/3/06, 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 Weisha Liu, as the employer's authorized representative pursuant to OAR 836-005-0112 and 137-003-0555. The employer did not call any witnesses or offer any documentary evidence.² The insurer appeared and was represented at the hearing by Shannon N. Rickard, an Assistant Attorney General assigned to represent the insurer. The insurer called DeAnne Hoyt as its witness. The insurer's exhibits A1 to A10 were admitted into the record.³

On 8/9/06, OAH issued a proposed order. The proposed order recommended that the director affirm the billing. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed order within 30 days after the proposed order was served on the employer and insurer.

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

On 8/18/06, the director timely received from the insurer written exceptions to the proposed order. The insurer objected to the proposed order's statement that "the employer's profit share plan fails to meet all three criteria listed in OAR 836-042-0055(2)(c)." The insurer objected because (1) the evidence admitted at the hearing supported the conclusion that the payments made pursuant to the

² According to the proposed order, the employer requested at the hearing that they be permitted to offer additional documents after the hearing. The insurer objected. OAH denied the employer's request pursuant to OAR 137-003-0610.

³ The employer initially requested a hearing to review three issues. According to the insurer's hearing memorandum dated 8/3/06, "two of the issues – the classification issue and the vacation pay issue – were resolved prior to hearing, leaving the profit sharing issue as the only remaining issue. Proposed Exhibit A8."

employer's profit sharing plan were anticipated by the employees that received the payments, and thus met the criteria specified in OAR 836-042-0055(2)(c)(A); and (2) the proposed order expressly stated that "the profit share payments to [the] employees were contingent upon the employees' performance in producing a net profit, and consequently, *they were anticipated as the term is used in OAR 836-042-0055(2)(c)(A).*" (Emphasis added). The insurer recommended that the director conclude that the employer's profit sharing plan failed to meet two of the three criteria listed in OAR 836-042-0055(2)(c). The director agrees with the insurer's exception.

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 this final order except as follows:

On page 3, first full paragraph, the first sentence is changed to state "Having reviewed the record, I find that the employer's profit sharing plan failed to meet the two criteria listed in OAR 836-042-0055(2)(c)(B) and (C) as follows." The remainder of the paragraph is deleted.

Order

The billing is affirmed.

Notice of Right to Judicial Review

A party has the right to appeal this final order 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 November 27, 2006

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

//
//
//