

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

In the Matter of the Premium Audit of)	Case No: INS 05-09-002
)	
JOHN M. SANFORD, INC.)	AMENDED
)	PROPOSED ORDER
an Oregon Corporation.)	

HISTORY OF THE CASE

John M. Sanford, Inc. (Sanford) timely appealed SAIF's final premium audit billing for the period October 1, 2003 through September 30, 2004 (audit period). On April 12, 2006, by first class mail, the Office of Administrative Hearings (OAH) sent Sanford a Notice of Hearing set for June 26, 2006. On June 26, 2006, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a contested case hearing in Salem Oregon. Sanford failed to appear. Assistant Attorney General Shannon N. Rickard represented responding insurer, SAIF Corporation (SAIF or insurer). The record closed upon adjournment on June 26, 2006. On July 13, 2006, I issued a Proposed Order upon Default.

Sanford timely filed exceptions and a Motion for a New Hearing, asserting that it had not received the Notice of Hearing dated April 12, 2006, notifying it of the time and place of the hearing set for June 26, 2006. SAIF timely responded.

On October 18, 2006, I conducted a telephone show cause hearing. Attorney Jeffrey A. Trautman represented petitioner. Assistant Attorney General Shannon N. Rickard represented SAIF. The record closed on November 1, 2006 following both parties' submission of written argument, including an Affidavit of Theresa Smith, SAIF Premium Audit Program Analyst.

EX PARTE CONTACT

I note for the record that I received an e-mail dated August 24, 2006 from Mitchel D. Curzon, Chief Enforcement Officer of the Oregon Insurance Division, concerning the exceptions in this case.

OAR 137-003-0625 provides in pertinent part:

- (1) For purposes of this rule, an ex parte communication is:
 - (a) An oral or written communication;

(b) By a party, a party's representative or legal adviser, any other person who has a direct or indirect interest in the outcome of the proceeding, any other person with personal knowledge of the facts relevant to the proceeding, or any officer, employee or agent of the agency;

(c) That relates to a legal or factual issue in the contested case proceeding;

(d) Made directly or indirectly to the administrative law judge;

(e) While the contested case proceeding is pending;

(f) That is made without notice and opportunity for the agency and all parties to participate in the communication.

(2) If an administrative law judge receives an ex parte communication during the pendency of the contested case proceeding, the administrative law judge shall place in the record:

(a) The name of each individual from whom the administrative law judge received an ex parte communication;

(b) A copy of any ex parte written communication received by the administrative law judge;

(c) A memorandum reflecting the substance of any ex parte oral communication made to the administrative law judge;

(d) A copy of any written response made by the administrative law judge to any ex parte oral or written communication; and

(e) A memorandum reflecting the substance of any oral response made by the administrative law judge to any ex parte oral or written communication.

(3) The administrative law judge shall advise the agency and all parties in the proceeding that an ex parte communication has been made a part of the record. The administrative law judge shall allow the agency and parties

an opportunity to respond to the ex parte communication.
Any responses shall be made part of the record.

On October 18, 2006, OAH faxed a copy of the e-mail to both parties and neither party has responded. I made no response to the *ex parte* communication. A copy of the e-mail is attached and marked as Appendix A.

ISSUE

Whether petitioner is entitled to a new hearing pursuant to OAR 137-003-0672.

FINDINGS OF FACT

1. Sanford failed to appear for a meeting scheduled for December 13, 2005 and failed to return several phone calls to SAIF. (Affidavit of Smith.) Sanford failed to respond to SAIF's discovery request dated December 20, 2005. Sanford failed to respond to an Order Compelling Discovery dated January 23, 2006. (*Id.*)
2. OAH sent Sanford four hearing notices and a Stay of Collection¹ at the address of record² where Sanford received the Proposed Order. (Exs. 1, 2, 3, 6 and 7.)
3. On March 1, 2006, an ALJ granted Sanford's request to postpone the upcoming hearing to allow it to obtain counsel. (Ex. 5.) Prior to hearing on June 26, 2006, Sanford provided no notice of counsel. (Ex. 6.)
4. On April 12, 2006, OAH sent Sanford a hearing notice by regular mail, notifying it of the hearing set for June 26, 2006 in Salem, Oregon. (Ex. 6.)

CONCLUSION OF LAW

Petitioner is not entitled to a new hearing pursuant to OAR 137-003-0672.

OPINION

Citing OAR 137-003-0670³ petitioner asserts that he is entitled to a new hearing because he did not receive the Notice of Hearing dated April 12, 2006, notifying it of the

¹ ORS 737.505(5) provides:

The director may, upon a showing of good cause, stay any workers' compensation insurer's collection effort on a final premium audit billing during the pendency of an appeal authorized by subsection (4) of this section.

² PO Box 1133, Dallas, OR 97338-1047.

³ OAR 137-003-0670 provides in pertinent part:

Default in Cases Involving a Notice of Proposed Action that Does Not Become Final Without a Hearing or Default

time and place of the hearing set for June 26, 2006. In contrast, SAIF asserts that petitioner's failure to appear is governed by OAR 137-003-0672 which contains no good cause exception. As explained below, I find SAIF's argument persuasive.

Contested cases presented to OAH are governed by the Attorney General's Model Rules of Procedure, OAR Chapter 137, Division 3. OAR 137-003-0672 provides in pertinent part:

Default in Cases Involving an Agency Order that May Become Final Without a Request for Hearing

(1) This rule applies when the agency has issued a contested case notice containing an order that was to become effective unless a party requested a hearing, and has designated the agency file as the record.

(3) After a party requests a hearing, the agency or the administrative law judge will dismiss the request for hearing, and the agency order is final as if the party never requested a hearing if:

(b) The agency or administrative law judge notifies the party of the time and place of the hearing and the party fails to appear at the hearing;

(Emphasis in the original.)

(1) This rule applies when the agency issues a notice of proposed action that does not become final in the absence of a request for hearing. The agency or, if authorized, the administrative law judge may issue a final order by default:

(c) Except as provided in section (2) of this rule, when the agency or administrative law judge notified the party of the time and place of the hearing and the party fails to appear at the hearing;

(2) If the party failed to appear at the hearing and, before issuing a final order by default, the agency or administrative law judge finds that the failure of the party to appear was caused by circumstances beyond the party's reasonable control, the agency or administrative law judge may not issue a final order by default under section (1)(c) of this rule. In this case, the administrative law judge shall schedule a new hearing.

(Emphasis in the original.)

Additionally, ORS 737.505(4) provides:

(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.

OAR 137-003-0672 applies where an agency order may become final without a request for hearing. The Attorney General's procedural rules were designed for one-party administrative cases rather than two-party cases such as premium audit disputes. Nevertheless, SAIF is properly analogized to the role of an agency. Furthermore, pursuant to ORS 737.505(4), SAIF's premium audit billing becomes final without a request for hearing. Consequently, OAR 137-003-0672 applies to the present case.

On June 26, 2006, Sanford failed to appear at hearing. In its request for a new hearing, Sanford contends that it was not notified of the time and place of the hearing. I find Sanford's contention unpersuasive. To begin, OAR 137-003-0520(9)⁴ creates a rebuttable presumption that documents sent through the U.S. mail were received. However, Sanford offered neither documentary evidence nor sworn testimony to support its contention that it did not receive the hearing notice. Furthermore, Sanford appealed the Proposed Order that it received at the same address of record where the hearing notice was sent. Moreover, I find Sanford's contention not credible in light of its pattern of nonresponsive behavior concerning the premium audit. Based upon the record, I conclude that Sanford has failed to overcome the presumption that it received the hearing notice dated April 12, 2006. Inasmuch as Sanford failed to appear at hearing on June 25, 2006, it is not entitled to a new hearing.

⁴ OAR 137-003-0520(9) provides:

Documents sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary.

ORDER

SAIF's final premium audit billing for the audit period of October 1, 2003 through September 30, 2004 is correct and payable.

IT IS SO ORDERED.

Catherine P. Coburn

Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: November 29, 2006

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
Oregon Insurance Division
350 Winter Street NE Room 440
Salem, OR 97301-3883

CERTIFICATE OF SERVICE

On the 29th day of November 2006, I mailed the foregoing AMENDED PROPOSED ORDER in Reference No. **0509002**.

BY FIRST CLASS MAIL:

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