

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

In the Matter of **Robert Gipner** ) **FINAL ORDER**  
**dba Pro Landscaping Construction** ) Case No. INS 06-12-001

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of Robert Gipner dba Pro Landscaping Construction (employer), pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d) and ORS 737.505(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 the employer.

**History of the Proceeding**

On or about 9/22/06, the employer received from the insurer a billing dated 9/19/06 for the audit period from 6/1/05 to 12/31/05.<sup>1</sup> 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).

---

<sup>1</sup> The proposed and revised proposed orders did not find when the employer received the billing. Whether and when an employer receives a billing is critical to determining whether an employer is entitled to a hearing. ORS 737.505(4), OAR 836-043-0110, OAR 836-043-0170; *Pease v. National Council on Compensation Insurance*, 113 Or App 26, 830 P2d 605, *rev den* 314 Or 391 (1992). The employer's attorney stated in his letter dated 11/8/06 that the billing was dated 10/5/06 and that the employer received on or about 10/9/06. Later in a letter dated 11/20/06, the employer's attorney stated "I have been advised by SAIF that the final premium audit billing is actually dated September 19, 2006, not October 5, 2006. Under the circumstances, my client would have received the billing on or about September 22, 2006, not October 9, 2006, as set forth in my previous letter [dated 11/8/06]." Accordingly, the employer's attorney stated in the employer's petition dated 12/8/06 that the employer received the billing on or about 9/22/06. The insurer did not introduce any evidence to the contrary. The insurer and administrative law judge did not object to the date. See ORS 183.450(1) and OAR 137-003-0050(3). Therefore, the director finds that the employer received the billing on 9/22/06.

On 11/9/06, the director timely received from the employer a written request for a hearing to review the billing.

On 11/13/06, 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 the 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 12/11/06, the director timely received from the employer the completed petition, and a request for an order staying all collection efforts by or on behalf of the insurer of any amount billed in the billing as a result of the audit until this proceeding is concluded. See OAR 836-043-0170(5).

Also on 12/11/06, the director referred the requests to the Office of Administrative Hearings (OAH).

On 12/21/06, OAH scheduled a hearing to be conducted on 3/27/07.

Also on 12/21/06, OAH issued an order granting the stay.

On 3/27/07, OAH conducted a hearing. The hearing was conducted by Rick Barber, an administrative law judge of OAH. The employer appeared and was represented at the hearing by William Repogle, an attorney. The employer called Robert Gipner (Gipner) as its witness. The employer offered Exhibits P1 to P18 as its documentary evidence all of which were admitted into the record. 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 Mary Fisher and Theresa Smith as its witnesses. The insurer offered Exhibits A1 to A14 as its documentary evidence all of which were admitted into the record.

On 5/16/07, OAH issued a proposed order. The proposed order concluded that the billing was incorrect and recommended that the director modify the billing, as described below. 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.

On 6/14/07, the director timely received from the insurer written exceptions to the proposed order.

On 7/2/07, the director requested OAH to review the exceptions and issue a revised proposed order. See OAR 137-003-0650(3).

On 7/6/07, the director timely received from the employer a written response to the insurer's exceptions.

On 7/9/07, the director forwarded to OAH the employer's response to the insurer's exceptions.

On 8/16/07, OAH issued a revised proposed order. The revised proposed order continued to conclude that the billing was incorrect because the employer presented sufficient and reliable evidence, notwithstanding the insurer's assertions to the contrary, that (1) the insurer used, but should not have used, a purported "50/50 rule" to calculate an estimate of the total amount of compensation paid to workers for the employer during the audit period, and (2) the estimated compensation included, but should have excluded, compensation paid to Gipner and possibly also to Gary Gipner and "Overstreet Landscape" who were not required to be covered under the workers' compensation policy issued to the employer. The revised proposed order continued to recommend that the director modify the billing by including compensation paid to only one employee, identified as Matthew or Michael O'Connell (O'Connell), and excluding compensation paid to all other persons, during the audit period. The revised 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.

On 9/13/07, the director timely received from the insurer written exceptions to the revised proposed order.

On 9/26/07, the director received from the employer a written response to the insurer's exceptions.

The director considered the insurer's exceptions and employer's response.

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 of law, and reasoning of revised proposed order as the findings of fact, conclusions of law, and reasoning of this final order.

### **Order**

The billing is modified by including only O'Connell's compensation during the audit period, and the stay is withdrawn.

### **Notice of Right to Judicial Review**

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition 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 date the party received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date 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 March 27, 2008

/s/ Scott J. Kipper  
Scott J. Kipper  
Administrator  
Insurance Division  
Department of Consumer and Business Services

//  
//  
//