

STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of **RJ Enterprises LLC of Oregon**) **FINAL ORDER**
dba homemeatmarket.com) Case Nos.:
) INS 08-02-001
) INS 08-06-005

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of employer, RJ Enterprises LLC of Oregon dba homemeatmarket.com (employer), pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d), 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 RJ Enterprises LLC of Oregon dba homemeatmarket.com (employer).

History of the Proceeding

On 11/19/07, the employer received from the insurer a billing dated 11/14/07 for the audit period from 1/13/06 to 1/31/07 (first billing).¹

On 12/14/07, the director received by fax from the employer a written request for a hearing dated 12/14/07 regarding the first billing.²

¹ The proposed order dated 8/8/08, revised proposed order dated 10/15/08, or second revised proposed order dated 11/7/08, collectively referred to as the proposed orders, did not find when the employer received the first billing. The date when an employer receives a billing, and the director receives the employer's request for a hearing and completed petition, are critical to determining whether the employer is entitled to a hearing. ORS 737.505(4), OAR 836-043-0110, OAR 836-043-0170. See *Pease v. National Council on Compensation Insurance*, 113 Or App 26, 830 P2d 605, *rev den* 314 Or 391 (1992). The employer stated in its initial petition dated 2/1/08 that it received the first billing on 11/19/07. The director provided a copy of the initial petition to OAH and the insurer when the director referred the case to OAH on 2/13/08. The employer and insurer did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that the employer received the first billing on 11/19/07.

² The proposed orders also did not find when the director received the employer's request for a hearing regarding the first billing. On 12/14/07, the director received by fax from the employer a letter dated 12/14/07 requesting a hearing regarding the first billing. The director provided a copy of the letter to OAH and the insurer when the director referred the case to OAH on 2/13/08. The employer and insurer did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that the director received the employer's request for a hearing regarding the first billing on 12/14/07.

On 12/17/07, the director sent to the employer a petition form regarding the first billing to complete and return by 2/12/08.

On 2/7/08, the director received by fax from the employer the completed petition dated 2/1/08 regarding the first billing,³ and a request for a stay of collection pursuant to ORS 737.505(5) and OAR 836-043-0170(5).⁴

On 2/13/08, the director assigned case number INS 08-02-001 to the request for a hearing regarding the first billing, and referred the request to the Office of Administrative Hearings (OAH).

On 2/20/08, OAH scheduled a hearing to be conducted on 6/24/08.

Also on 2/20/08, OAH issued an order staying collection.⁵

On 3/24/08, OAH received by mail from the employer a motion dated 3/11/08 requesting a stay of collection.⁶

On 3/31/08, OAH issued an order denying the employer's motion dated 3/11/08.⁷

³ The proposed orders did not find when the director received the employer's completed petition regarding the first billing. On 2/5/08, the director received by mail from the employer a petition. However, the petition did not include the premium audit result page of the billing. On 2/7/08, the director received by fax from the employer a revised petition which included, *inter alia*, the premium audit result page. Therefore, the director finds that the director received the employer's completed petition on 2/7/08.

⁴ The employer requested a stay of the insurer's collection efforts of all premium billed to date by the insurer for workers' compensation insurance provided or to be provided by the insurer to the employer until this proceeding is concluded. The employer wanted a stay not only for the additional premium due for the audit period from 1/13/06 to 1/31/07 as billed in the first billing, but also for the estimated premium due for the then current period from 2/1/07 to 1/31/08, which had not yet been audited.

⁵ The order stayed the insurer's collection efforts of only the additional premium due for the audit period from 1/13/06 to 1/31/07 as billed in the first billing.

⁶ The employer requested a stay of the insurer's collection efforts of all premium billed or to be billed by the insurer for workers' compensation insurance provided or to be provided by the insurer to the employer until this proceeding is concluded. On 3/25/08, OAH received from the insurer a letter dated 3/20/08 objecting to the employer's motion "to extend that stay [dated 2/20/08] to collection efforts on amounts due on the policy periods subsequent to the audited premium under dispute." The insurer argued that ORS 737.505(5) authorized the director to stay collection efforts "on a final premium audit billing" but not "on subsequent premiums because no 'final premium audit billing' has been issued in the 2007-2008 and 2008-2009 policy periods [and] those periods have not been audited." The insurer commented that "granting a stay on collection efforts on the subsequent policy periods forces [the insurer] to insure risk for these periods at no charge." The employer argued that "[t]he accuracy of the subsequent billings is solely premised on the audit's conclusions, and the ultimate disposition of this case." The employer commented that the insurer "is attempting to secure free financing from [the employer] on amounts it has not yet established are due and owing." The director agrees with the insurer. See footnote 12 herein.

On 5/15/08, the employer received from the insurer a billing dated 5/12/08 for the audit period from 2/1/07 to 1/31/08 (second billing).⁸

On 5/21/08, the director received by fax from the employer a written request for a hearing to review the second billing.⁹

On 5/28/08, the director mailed to the employer a petition form regarding the second billing to complete and return by 7/21/08.

On 6/9/08, the director received by fax from the employer the completed petition dated 6/9/08 regarding the second billing¹⁰, and a request for a stay of collection.¹¹

On 6/11/08, the director assigned case number INS 08-06-005 to the request for a hearing regarding the second billing, and referred the request to OAH.

On 6/12/08, OAH received by mail from the employer a motion to consolidate both cases, numbers INS 08-02-001 and INS 08-06-005.

⁷ The order denied the employer's motion because "the Administrative Law Judge (ALJ) finds that ORS 737.505(5) does not allow a stay of collection on all billings but only on a final premium audit billing."

⁸ The proposed orders did not find when the employer received the second billing. The employer stated in its petition dated 6/9/08 that it received the billing on 5/12/08. The billing was dated 5/12/08. The insurer mailed the billing to the employer on 5/12/08 at the earliest. The insurer is located in Salem, Oregon, which is in northwestern Oregon. The employer is located in Wood Village, Oregon which is in northwestern Oregon, in the Portland metropolitan area. It is unlikely that the employer received the billing on the same date as it was mailed because of the distance between Salem and Wood Village. It is likely that the employer did not know when it received the billing but merely stated on the petition the date of the billing rather the date the employer received the billing. Pursuant to OAR 836-043-0170(6), "...if the date is unknown to the employer, the date of receipt is considered to be the third day after the date of mailing...." Three days after Monday, 5/12/08, was Thursday, 5/15/08. The employer and insurer did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that the employer received the second billing on 5/15/08.

⁹ The proposed orders also did not find when the director received the employer's request for a hearing regarding the second billing. On 5/21/08, the director received by fax from the employer a letter dated 5/21/08 requesting a hearing. The director provided a copy of the letter to OAH and the insurer when the director referred the case to OAH on 6/11/08. Therefore, the director finds that the director received the employer's request for a hearing on 5/21/08.

¹⁰ The proposed orders did not find when the director received the employer's completed petition regarding the second billing. On 6/9/08, the director received by mail from the employer a petition. The director provided a copy of the petition to OAH and the insurer when the director referred the case to OAH on 6/11/08. Therefore, the director finds that the director received the employer's completed petition on 6/9/08.

¹¹ The employer requested a stay of the insurer's collection efforts of all premium billed to date by the insurer for workers' compensation insurance provided or to be provided by the insurer to the employer until this proceeding is concluded. The employer wanted a stay not only for the additional premium due for the audit period from 2/1/07 to 1/31/08 as billed in the second billing, but also for the estimated premium due for the then current period from 2/1/08 to 1/31/09, which had not yet been audited.

Also on 6/12/08, OAH issued an order consolidating both cases and staying collection.¹²

¹² The order stayed the insurer's collection efforts of all premium billed or to be billed by the insurer for workers' compensation insurance provided or to be provided to the employer until this proceeding is concluded. The order did not explain why OAH reversed its previous denial dated 3/31/08 of the employer's multiple requests for such a stay other than to say that "[t]he ALJ now finds that Petitioner has shown good cause for issuance of a stay of collection." The director disagrees that the employer was entitled to a stay of the insurer's collection of premium beyond the additional premium billed in the first and second billings. ORS 737.505(5) provides that "the director may, upon a showing of good cause, stay a 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." (Emphasis added). ORS 737.505(4) provides that "[a]ppeals 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." (Emphasis added). ORS 737.318(2) provides that the director "shall prescribe by rule a premium audit program system for workers' compensation insurance." ORS 737.318(3) provides, *inter alia*, that the "premium audit program system shall include provisions for ... (d) An appeal process pursuant to ORS 737.505 for employers to *question the results of a premium audit.*" (Emphasis added). OAR 836-043-0170(5) provides that "[a]n employer may apply to the Director to *stay the collection effort of an insurer on a final premium audit billing* during the pendency of an appeal as provided in this section. The application must allege and show good cause as required in ORS 737.505 by stating the employer's contentions of error for which the Director would be authorized to provide relief if the contentions were proved at the hearing. The Director shall grant the stay after receipt of the petition from the employer if the Director determines that the Director has jurisdiction over the matter and that the application alleges and shows good cause." (Emphasis added). OAR 836-043-0170(7) describes a billing as "the first document issued by the insurer to the employer after its audit of the employer that contains all of the elements specified in this section. ... The elements are as follows: (a) The results of the audit; (b) The amount of the difference between the estimated standard premium reported by the employer for the entire policy period and the final standard premium calculated after the policy period is over as determined pursuant to the audit; and (c) The notification required in ORS 737.318 and OAR 836-043-0110." OAR 836-043-0170(7) provides that "[f]ailure by the insurer to include any of the elements renders the billing incomplete as a final premium audit billing for purposes of ORS 737.318 and 737.505 and renders the debt uncollectible until all elements are included." These laws give an employer the right to request a hearing to contest the results of a workers' compensation insurer's audit of the employer's operations during a specified past period, called an audit period, to determine the actual premium for the insurance provided during the audit period. If an audit results in the employer owing additional premium for the audit period, then the insurer may collect the additional premium only after the insurer issues and the employer receives a billing, and the employer may request the director to stay the insurer's efforts to collect the additional premium for the audit period only after the director has timely received from the employer a written request for a hearing a completed petition and the director has determined that the director has jurisdiction to decide the case. Although the results of an audit can affect an employer in subsequent policy periods, as in this case, ORS 737.318(3) entitles an employer to a hearing to contest only the results of an audit. The results of an audit are the determination by the insurer of the amount of the actual premium for the insurance provided during the audit period, as well as classifications, amount of payroll, and other factors, used to determine the actual premium. Accordingly, ORS 737.505(5) entitles an employer to a stay of an insurer's collection of only additional premium due for a *past audited*, not for a *future unaudited*, period. In this case, the employer requested a stay of the insurer's demand for increased estimated premium for all future, unaudited, policy periods until this proceeding is concluded. The employer requested more than the law allows. Therefore, OAH should not have granted the employer's request for a stay beyond the additional premium billed in the first and second billings.

OAH conducted a hearing on 6/24/08, which was continued on 6/30/08. The hearing was conducted by Rohini Lata, an administrative law judge of OAH. The employer appeared and was represented at the hearing by Matthew Wand, an attorney. The employer called Bruce Russell and Joshua Kollar as its witnesses. The employer offered Exhibits P1 to P11 as its documentary evidence, all of which were admitted into the record. The insurer appeared and was represented at the hearing by Ethan R. Hasenstein, an Assistant Attorney General assigned to represent the insurer. The insurer called Teresa Smith, Ed Dolfay and Ed Grove as its witnesses. The insurer offered Exhibits A1 to A30 as its documentary evidence, all of which were admitted into the record.¹³

On 8/8/08, OAH issued a proposed order and mailed it to the parties. The order recommended that the director affirm both the first and second billings.

On 8/13/08, the director received by mail from the insurer written exceptions to the proposed order.

On 9/4/08, the director received by fax from the employer written exceptions to the proposed order.

On 9/24/08, the director requested OAH to review the exceptions and issue a revised proposed order.

On 10/17/08, OAH issued a revised proposed order dated 10/15/08, and mailed it to the parties. The order continued to recommend that the director affirm both the first and second billings.

¹³ OAH closed the record following the end of the continued hearing on 6/30/08. However, in the revised proposed order dated 10/15/08, OAH unilaterally added to the record as evidence, by taking official notice, the Oregon Employment Department's 2006 Wage Guide for driver/sales workers statewide, and marked it as Exhibit ALJ1. On 10/24/08, the employer objected to the addition of the exhibit. In an e-mail dated 11/19/08 from the insurer to Insurance Division and the employer, the insurer stated, *inter alia*, "[the insurer] feels that [the] ALJ was correct to sustain [the employer's] objection to the inclusion of the wage charts without any request to do so from either party or without affording the parties adequate opportunity to respond to her inclusion of these documents in the evidentiary record." In the second revised proposed order dated 11/7/08, OAH withdrew the exhibit.

On 11/7/08, OAH issued a second revised proposed order¹⁴ and mailed it to the parties.¹⁵ The order continued to recommend that the director affirm both the first and second billings. The order addressed three issues.

The first issue was whether the insurer correctly included, in the calculation of the premium due for workers' compensation insurance provided to the employer during the audit periods, compensation paid by the employer to persons who leased and drove the employer's trucks and provisionally purchased and resold the employer's meat products to others. The order concluded that the insurer correctly included the compensation in calculating the premium because the drivers/salesmen were "workers" as defined in ORS 656.005(30) after applying the judicially created "right to control" and "nature of the work" tests.¹⁶

The second issue was whether the insurer correctly changed the classification code from 8291 to 8031 rather than to 8021 to the work performed by the drivers/salesmen. The order concluded that the insurer correctly changed the classification code because (1) code 8291 did not apply to the employer because it applies to a business operating cold storage warehouses for others and do not own the

¹⁴ OAH issued the second revised proposed order before any exceptions to the revised proposed order were due. The director did not request OAH to, and OAH did not notify the director that it was going to, issue the second revised proposed order.

¹⁵ OAH did not mail the second revised proposed order to the employer's attorney at his current address although the attorney had notified OAH of his current address. So on 11/18/08, the director sent an e-mail to the attorney, with a copy to the insurer's attorney, attaching a copy of the second revised proposed order.

¹⁶ In *Woody v. Waibel*, 276 Or 189 (1976), the Oregon Supreme Court established a "right to control" test and a "nature of the work" test to determine whether a person is a "worker" under Oregon's workers' compensation law. In *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002), the court noted that the "[f]actors relevant to the right to control test have included, for example, whether the employer retains the right to control the details of the method of performance, the extent of the employer's control over work schedules, whether the employer has power to discharge the person without liability for breach of contract, and payment of wages. [*S-W Floor Cover Shop v. Nat'l. Council on Comp. Ins.*, 318 Or 614, 622, 872 P.2d 1 \(1994\)](#)." *Id.* at 618 n 1. The court also noted that "[f]actors relevant to the 'nature of the work' test have included considerations such as whether the work done is an integral part of the employer's regular business and whether the individual, in relation to the employer's business, is in a business or profession of his or her own. See [*Woody v. Waibel*, 276 Or 189, 197-98, 554 P.2d 492 \(1976\)](#)." *Id.* at 619 n 2. The court explained "when an employer has the right to control a claimant's performance *in some respects but not others*, 'it is essential that we consider the factors which make up the 'nature of work' test' in deciding whether the control that employer retains makes the relationship one of master and servant. *Woody*, 276 Or at 196-97." *Id.* at 627 (emphasis added).

stored products whereas the employer owned the stored products and sold them through the drivers/salesmen as workers for the employer, (2) code 8021 did not apply to the employer because it applies to a business engaged in the wholesale distribution of primarily meat, fish and poultry whereas the employer was a business engaged in the retail sale of frozen, pre-cut, pre-packaged, meat and fish by selling such products through the drivers/salesmen as workers for the employer, and (3) code 8031 applied because it applies to a business engaged in the retail sale of primarily meat, fish and poultry like the employer through the drivers/salesmen as workers for the employer.

The third issue was whether the insurer correctly assigned classification code 7380 to all of the work performed by a person who primarily managed the employer's office and occasionally drove a truck making deliveries for the employer. The order concluded that the insurer correctly assigned code 7380 to all of the manager/driver's work because (1) code 7380 applied to the manager/driver's work as a driver,¹⁷ (2) code 7380 was the highest rated applicable classification, but (3) the employer did not keep verifiable time records pursuant to ORS 737.310(10)¹⁸ and OAR 836-042-0060(1) and (3)¹⁹ of when the manager/driver performed work as an office manager and when he performed work as a driver, which would have allowed the insurer to allocate the compensation paid to the manager/driver between code 7380 and another lower rated applicable classification code.

On 11/10/08, the director received by fax from the employer written exceptions to the (first) revised proposed order.

¹⁷ Presumably, another standard exception classification code applied to the manager's/drivers work as an office manager such as code 8810.

¹⁸ ORS 737.310(10) provides that [the director], by rule, shall prescribe the conditions under which a division of payroll between different manual classifications is permitted for purposes of computing workers' compensation premiums. Pursuant to this statute, the director adopted OAR 836-042-0050 to 836-042-0060.

¹⁹ OAR 836-042-0060(1) provides that "[w]hen there is an interchange of labor [as defined in OAR 836-042-0055(1)(d)], the payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, provided verifiable payroll records maintained by the employer disclose a specific allocation for each such individual employee...." OAR 836-042-0060(3) provides that "[w]hen verifiable payroll records are required with respect to a single employee and the employer does not maintain them as required by this rule, the entire payroll of the employee shall be assigned to the highest rated classification...."

On 11/24/08, the director received by mail from the insurer a written response to the employer's exceptions to the (first) revised proposed order.

On 12/15/08, the director received by fax from the employer written exceptions to the second revised proposed order. The director did not receive from the insurer any exceptions to the second revised proposed order, or a reply to the employer's exceptions to the second revised proposed order.

The director considered the exceptions. The director is not persuaded by the exceptions that the director must or should take any action different than that recommended in the second revised proposed order.

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

Order

The first and second billings are affirmed and the stay is terminated.

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 7/9/2009

/s/ Teresa D. Miller
Teresa D. Miller
Acting Administrator
Insurance Division
Department of Consumer and Business Services