

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

In the Matter of **American Construction** ) **FINAL ORDER**  
**and Siding, Inc.** ) Case No. INS 08-06-006

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of American Construction and Siding, Inc. (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 Commerce and Industry Insurance Company (insurer) to the employer.

**History of the Proceeding**

On an unknown date, but sometime after 2/29/08,<sup>1</sup> the employer received from the insurer a billing, entitled an "audit advice summary," dated 2/28/08, for the audit period from 11/1/06 to 11/1/07. 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).

On 5/29/08, the director received from the employer a written request for a hearing dated 5/16/08 to review the billing.

On 5/30/08, 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

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<sup>1</sup> The employer stated in its request for a hearing dated 5/16/08, that it received the billing on 3/31/08. However, the employer stated in its petition dated 6/10/08, that it received the billing on 5/13/08. The employer did not appear at the hearing and thus did not provide any testimony or documentary evidence of the date that the employer received the billing or explain why the employer stated that it received the billing on two different dates. The insurer testified at the hearing on 10/28/08, that the insurer's normal practice is to mail billings by the next business day after the billing is prepared. The billing was prepared on 2/28/08 and the next business day was, Friday, 2/29/08.

director so that the director received it by 7/28/08. See OAR 836-043-0170(2)-(3) and (9).

On 6/11/08, the director received from the employer the completed petition dated 6/10/08, 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).

On 6/12/08, the director referred the requests to the Office of Administrative Hearings (OAH). The director referred the requests based on the representation of the employer in its request for a hearing dated 5/16/08 that it received the billing on 3/31/08 and that therefore the request was timely.<sup>2</sup>

On 6/16/08, OAH issued an order granting the stay.

On 6/19/08, OAH scheduled a hearing to be conducted on 10/28/08, and notified the parties.

On 10/28/08, OAH conducted a hearing. The hearing was conducted by John Mann, an administrative law judge of OAH. The employer did not appear and was not represented at the hearing. The insurer appeared and was represented at the

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<sup>2</sup> On 6/12/08, the director sent an e-mail to OAH saying in relevant part “Today, we will be referring to [OAH], a request for a hearing and petition from the above employer to contest a workers’ compensation final premium audit billing (aka audit advice) dated 2/28/08, issued by Commerce and Industry Insurance Company of the AIG Group.\*\*\*OAH needs to be aware of two issues.\*\*\*One issue is the date the employer received the billing.\*\*\*In the employer’s request for a hearing, which is on a petition form dated 5/16/08, and received by us on 5/29/08, the employer said that it received the billing on 3/31/08. However, in the real petition dated 6/10/08, the employer said that it received the billing on 5/13/08. I think the employer was more correct when it said in its request for a hearing that it received the billing dated 2/28/08 on 3/31/08, and in the petition the employer was confused when it received the billing, when it received some other document or communication from the insurer. If a hearing is held, the Administrative Law Judge (ALJ) will need to ask the employer to prove when it really received the billing and that the employer timely requested a hearing and filed a petition pursuant to ORS 737.318(3)(d), ORS 737.505(4), and OAR 836-043-0170(1).\*\*\*The other issue is a stay.\*\*\*The insurer has referred the amount due in the billing to a collection company which is demanding payment. The insurer has issued a notice of cancellation dated 5/13/08 with the **cancellation** to be effective on **6/20/08**.\*\*\*The employer is requesting a stay of the insurer’s collection and cancellation efforts.\*\*\*Please expedite issuing the stay.” [\*\*\* represent omitted paragraph separators in original] [emphasis in original].

hearing by Matt Raines as the insurer's authorized representative.<sup>3</sup> The insurer called Matt Raines as its witness. The insurer offered Exhibits 1 to 27 as its documentary evidence all of which were admitted into the record.

On 12/18/08, OAH issued a proposed order. The proposed order found that the insurer prepared the billing on 2/28/08, the insurer mailed to the employer the billing on 2/29/08, the employer received the billing three calendar days later on 3/3/08 applying OAR 836-043-0170(6), the 60<sup>th</sup> day after 3/3/08 was 4/29/08<sup>4</sup>, and the director received from the employer a written request for a hearing on 5/29/08. The proposed order concluded that the employer's request for a hearing was received more than 60 days after the employer received the billing from the insurer, and thus the employer was not entitled to a hearing. ORS 737.318(3)(d), ORS 737.505(4), OAR 836-043-0170(1); *Pease v. National Council on Compensation Insurance*, 113 Or App 26 (1992); *Marcott Timber & Trucking v. National Council on Compensation Insurance*, 115 Or App 165 (1992). The proposed order recommended that the director dismiss the employer's request for a hearing. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed order and the director must receive them within 30 days after the proposed order was mailed to the employer and insurer.

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<sup>3</sup> On 6/18/08, OAH sent an e-mail to the director asking if the insurer, which is a corporation, must be represented by an attorney licensed in Oregon. On the same date, the director sent an e-mail to OAH essentially saying that the insurer did not have to be represented by an attorney licensed in Oregon. The director explained, *inter alia*, that "[a] party[,] as defined in ORS 183.310(7), including an insurer that is a corporation (see OAR 137-003-0550(2)), in a proceeding under ORS 737.505 (see ORS 183.457(1)(d), OAR 137-003-0555(1)(a) and [OAR] 836-005-0112) may be represented by an 'authorized representative' as defined in ORS 183.457(5), OAR 137-003-0555(1)(b) and [OAR] 836-005-0112(4)(a), which does not include an attorney. However, the participation of such an 'authorized representative' is limited (see ORS 183.457(2)(c) & (3), OAR 137-003-0555(4) and [OAR] 836-005-0112(3) (Note: OAR 836-005-0112(3)[,] which is specific to these proceedings[,] may limit an 'authorized representative' more than ORS 183.457(2)(c) & (3), [and] OAR 137-003-0555(4))."

<sup>4</sup> According to the "Add or subtract to a date" calculator at [www.timeanddate.com](http://www.timeanddate.com), 60 calendar days after but not including 3/3/08 is Friday, 5/2/08, not Tuesday, 4/29/08. The number of days after but not including 3/3/08, to and including 4/29/08, is only 57 days. Based on this information, the director finds that the employer's request for a hearing was due by 5/2/08, not 4/29/08 as stated in the proposed order.

The director did not receive from the employer or insurer any exceptions to the 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 proposed order as the findings of fact, conclusions of law, and reasoning of this final order, except as follows:

On page 4 of the proposed order, in the first full paragraph, the date “4/29/08” is changed to “5/2/08.” See explanation in footnote 3 herein.

**Order**

The employer’s request for a hearing dated 5/16/08 is dismissed, and the order granting a stay of collection dated 6/16/08 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, which 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 11, 2009

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

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