

was likely mailed from New Jersey to Appellant no later than February 29, 2008. (Test. of Raines.)

2. On May 29, 2008, the Division received a petition form filled out by Appellant's President, Feodor Ivanov. On the form, Mr. Ivanov wrote that the Appellant received the billing on March 31, 2008. (Ex. 2.)

2. May 30, 2008, the Division mailed a letter to Appellant and instructed Appellant to complete and return an enclosed petition form no later than July 28, 2008. (Ex. 3.) The Division received Appellant's completed petition form on June 11, 2008. On the completed petition form, Appellant wrote that it received the billing on May 13, 2008. (Ex. 4.)

CONCLUSIONS OF LAW

1. Appellant did not file a timely request for hearing.
2. A default order is appropriate.

OPINION

OAR 137-003-0670(3) provides that, in the event a party fails to appear after being notified of the date, time and place of the hearing, an ALJ may issue an order adverse to the party upon default "only upon a prima facie case made on the record." The ALJ "must find that the record contains evidence that persuades the [ALJ] of the existence of facts necessary to support the order." The Appellant was properly notified of the date, time and place of the hearing in this case. The Appellant failed to appear. The evidence in the record established that the Appellant's request for hearing was untimely. Thus, a default order is appropriate.

The Appellant requested a hearing to challenge the results of a final premium audit billing pursuant to ORS 735.318 and ORS 735.505(4). The Division has adopted an administrative rule to set forth the procedures to govern such requests. OAR 836-043-0170 provides, in relevant part:

(1) This rule establishes the procedure for an employer to appeal a final premium audit billing to the Director under ORS 737.505. *An employer must first submit a written request to the Director for a hearing to review the results of a final premium audit billing. The request must be received by the Director not later than the 60th day after the employer received the billing.* A request that is received by the Director not later than the 60th day after the employer received the billing satisfies the requirement under ORS 737.505 that an appeal be made within 60 days after receipt of the billing. The time period includes Saturdays and legal holidays, including Sundays. ORS 174.120 and 174.125 govern the computation of the time period.

(2) *After submitting the written request for a hearing under section (1) of this rule, an employer must submit a petition to the Director, on a petition form provided by the Director, that states the reasons that the employer believes the*

insurer billed the employer incorrectly and describes the actions the employer wishes the Director to take in order to correct the matter.

(3) *An employer is entitled to a hearing only when the Director has received the completed petition* and has determined that the Director has jurisdiction over the matter.

* * * * *

(6) For the purpose of determining the date of receipt of a final premium audit billing delivered to the employer by mail, if the date is unknown to the employer, the date of receipt is considered to be the third day after the date of mailing except as otherwise provided in this section. If the third day after the date of mailing is a Saturday or a legal holiday, including Sunday, the date of receipt is considered to be the next day that is not a Saturday or a legal holiday.

Thus, to be entitled to a hearing, the Appellant had to file a request for hearing no later than 60 days after the date that it received the final premium audit billing. In this case, the insurer mailed the Appellant a final premium audit billing. Although the billing itself is undated, it was accompanied by a document labeled Audit Advice Summary that was dated February 28, 2008. There is no direct evidence of the actual mailing date, however the insurer provided testimony that its normal practice is to mail such documents within one day after they are prepared. Thus, it is likely in this case that the billing was mailed no later than February 29, 2008.

Appellant provided conflicting information regarding the date that it received the billing. In its request for hearing, the Appellant wrote that it received the billing on March 31, 2008, more than a month after the date it was prepared. In its Petition, the Appellant wrote that it received the final billing on May 13, 2008, more than two and a half months after it was prepared. If the Appellant received the billing on March 31, 2008, it would have had to file its request for hearing no later than May 30, 2008. If, however, the Appellant received the billing on May 13, 2008, then its request could have been filed as late as July 12, 2008. Thus, the Appellant's request is timely if either of the dates is accurate. If, however, the Appellant received the billing on an earlier date, the request may not be timely. There are at least three possibilities: 1) the Appellant received the billing on March 31, 2008; 2) the Appellant received the billing on May 13, 2008; or 3) the Appellant received the billing on some other unknown date. Because the Appellant did not appear at the hearing and the record contains no evidence to resolve the discrepancy in the dates.

The Appellant is the only party that could know the date on which it received the billing. As the party asserting the date of receipt, the Appellant had the burden of proving that date by a preponderance of the evidence. See ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard, the standard in an administrative hearing is by a preponderance of the evidence); *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166 (1992), *rev den*

315 Or 643 (1993) (in premium audit cases, burden of proof is on the employer). In this case, because it failed to appear for the hearing, the Appellant failed to provide reliable evidence to establish the actual date of receipt.

The Appellant provided conflicting dates, both more than a month after the billing was mailed. In the absence of any evidence to explain the contradiction, the record contains no reliable evidence that the date of receipt was known to the employer. Therefore, I must apply the provision of OAR 836-043-0170 and consider the date of receipt to be March 3, 2008, three days after the billing was mailed by the insurer. Using that date, the Appellant had to request a hearing no later than April 29, 2008. The Appellant's request, filed May 29, 2008, was therefore untimely. Because the Appellant did not file a timely hearing request, it did not have the right to a hearing and there is no authority to issue a ruling on the merits of the case. The Appellant's hearing request is therefore dismissed as untimely.

ORDER

I propose that the Insurance Division issue the following order:

The request for hearing filed by American Construction and Siding, Inc. is untimely and is therefore dismissed.

/s/ John Mann
John Mann
Senior Administrative Law Judge
Office of Administrative Hearings

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:

Mitchel D. Curzon
Chief Enforcement Officer
Oregon Insurance Division
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF SERVICE

On the 18th day of December 2008, I mailed the foregoing Proposed Order on Default in Reference No. **0806006**.

BY FIRST CLASS MAIL:

Feodor "Fred" Ivanov, President
American Construction and Siding Inc
10645 Monitor McKee Rd NE
Woodburn, OR 97071-9034

Matt Raines, Technical Services Supervisor
Commerce and Industry Insurance Co
2 Rincon Center, 121 Spear St 3rd Floor
San Francisco, CA 94105-1583

/s/ Charles J Ramsey
Charles J Ramsey
Hearing Coordinator