

amount billed in the billing as a result of the audit until this proceeding is concluded.²

On 1/6/09, the director referred the request to the Office of Administrative Hearings (OAH).

On 1/14/09, OAH issued an order granting the stay.

On 1/16/09, OAH scheduled a hearing to be conducted on 5/12/09.

On 5/12/09, 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 Earl Croucher, as the employer's authorized representative pursuant to OAR 836-005-0112 and OAR 137-003-0555. The employer did not call any witnesses. The employer did not offer any documentary evidence. 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 and Steve Northrop as its witnesses. The insurer offered Exhibits A1 to A13, and P1 to P2, as its documentary evidence all of which were admitted into the record.

On 6/19/09, OAH issued a proposed order and mailed it to the parties. The issue was whether the insurer correctly assigned classification code 8044 to all of the employer's payroll for four office workers rather than assigning code 8044 to part of the payroll and code 8810 to the remaining part of the payroll. The employer's four office workers performed both sales and clerical work for the employer. The sales work was classified under code 8044, while clerical work was classified under code 8810. The employer was entitled to have code 8044 assigned to the sales work and code 8810 assigned to the clerical work if the employer kept verifiable payroll records as described in OAR 836-042-0060(4) showing how much time each employee performed each type of work. Although the employer kept some records,

² The proposed order incorrectly stated that the director received from the employer the petition on 12/29/08. The petition was dated 12/29/09 and was personally delivered to the Insurance Division on 1/2/09.

the employer did not present them at the hearing.³ In the absence of verifiable payroll records, the insurer was required by OAR 836-042-0060(3) to assign all of the payroll to code 8044. The proposed order recommended that the director affirm the billing because (1) the employer did not meet its burden of proving by a preponderance of the evidence that the billing was incorrect, see ORS 183.450(2); *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166, 170, 840 P2d 739 (1992), *rev den*, 315 Or 643 (1993); *Gallant v. Board of Medical Examiners*, 159 Or App 175, 180, 974 P2d 814 (1999), and (2) the insurer provided *prima facie* evidence that the billing was correct, see ORS 183.415(6), OAR 137-003-0670(3)(a). 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.

The director did not receive from the parties 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 noted herein.

Order

The billing is 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

³ The proposed order explained that the insurer brought the records to the hearing and made them available to the employer to offer as evidence but, even after being advised of the consequences of not offering any records as evidence, the employer declined because “Croucher [the president of the employer] candidly admitted that he could not vouch for the accuracy of the time records in light of the possible alternation of the documents by a dishonest employee, his office manager, who is currently under investigation for theft.”

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 9/3/09

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

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