

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

In the Matter of **Rick Barrett,**
dba Rick Barrett Drywall

) **FINAL ORDER**
) **ON**
) **RECONSIDERATION**
) Case No. 08-11-007

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of Employer Rick Barrett dba Rick Barrett Drywall (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 the employer.

History of the Proceeding

On 9/1/08, the employer received from the insurer a billing dated 8/4/08 for the audit period from 10/12/06 to 8/31/07.¹

On 9/25/08, the director received from the employer a letter dated 9/24/08 requesting a hearing to review the billing.

On 9/26/08, the director mailed to the employer a petition form.

¹ The proposed order dated 4/3/09 and the revised proposed order dated 7/13/09 did not find when the employer received the billing or when the director received the employer's request for a hearing. Determining when an employer received a billing, and when the director received 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. Natl. Council on Comp. Ins.*, 113 Or App 26, *rev den* 314 Or 391 (1992). The employer stated in its petition dated 10/30/08, and confirmed it in an e-mail dated 11/6/08, that the employer received the billing on 9/1/08. The director received the employer's request for a hearing on 9/25/08 and stamped the date received on the face of the letter. The director provided to OAH and the insurer a copy of the employer's request for a hearing and petition when the director referred the case to OAH on 11/7/08. The employer and insurer did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that the employer received the billing on 9/1/08 and the director received the employer's request for a hearing on 9/25/08.

On 10/31/08, the director received from the employer the petition dated 10/30/08, which included 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. The petition was completed except that it included only part of the billing.

On 11/4/08, the director received from the employer a letter dated 11/3/08 enclosing the remainder of the billing.

On 11/7/08, the director referred the requests for a hearing and a stay of collection to the Office of Administrative Hearings (OAH).

On 11/17/08, OAH issued an order granting the stay of collection.

On 11/19/08, OAH scheduled a hearing to be conducted on 3/10/09.

On 3/10/09, OAH conducted a hearing. The hearing was conducted by Susan E. Teppola, an administrative law judge of OAH. The employer appeared and was represented at the hearing by James W. Hendry, an attorney. The employer called Raymundo Lescas Rodriguez as its witness. The employer offered Exhibits A to F 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 Edwin Grove as its witness. The insurer offered Exhibits A1 to A21 as its documentary evidence all of which were admitted into the record.

On 4/3/09, OAH issued a proposed order and mailed it to the parties.^{2 & 3}

The proposed order recommended that the director disaffirm the entire billing.

² OAH mailed the proposed order to the employer's attorney at the wrong address. So, on 4/21/09, the director mailed the proposed order to the employer's attorney at the correct address, and extended the due date for the parties to file with the director written exceptions to the proposed order from 5/4/09 to 5/21/09.

³ The proposed order indicated that OAH added to the record four documents. The documents are: (1) the employer's petition dated 10/30/08 and received by the director on 10/31/08, (2) OAH's notice of hearing dated 11/19/08, (3) the insurer's hearing memorandum dated 3/4/09, and (4) the employer's hearing memorandum dated 3/6/08. It was unnecessary and redundant for OAH to add the documents to the record because they automatically become part of the record of a case. ORS 183.417(9).

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.

On 5/13/09, the director received from the insurer written exceptions to the proposed order.

On 5/27/09, the director received from the employer a written response to the insurer's exceptions.

On 6/11/09, the director requested OAH to review the exceptions and issue a revised proposed order.⁴

On 7/13/09, OAH issued a revised proposed order and mailed it to the parties.^{5 & 6} There were three issues.

The first issue was whether the billing correctly included payments made by the employer to R & K Drywall, as a subject worker, for providing drywall services at multiple locations during the audit period in calculating the premium for workers' compensation insurance provided by the insurer to the employer during the audit period.

The revised proposed order concluded that the billing incorrectly included the payments to R & K Drywall, as a subject worker, because R & K Drywall was not a worker as defined in ORS 656.005(30), and therefore not a subject worker, because,

⁴ The director also requested OAH to correct nine grammatical or spelling errors in the proposed order, which OAH did in the revised proposed order.

⁵ OAH mailed the revised proposed order to the employer's attorney at the wrong address. So, on 7/15/09, the director mailed the revised proposed order to the employer's attorney at the correct address, and extended the due date for the parties to file with the director written exceptions to the revised proposed order from 8/12/09 to 8/14/09.

⁶ The revised proposed order indicated that OAH added to the record two more documents. The documents are: (1) the insurer's exceptions to the proposed order dated 5/12/09 and received by the director on 5/13/09, and (2) the employer's response to the insurer's exceptions dated 5/27/09 and received by the director by fax on 5/27/09 and by mail on 5/28/09. It was unnecessary and redundant for OAH to add the documents to the record because they automatically become part of the record of a case. ORS 183.417(9).

after applying the judicially created “right to control” and “nature of the work” tests⁷, R & K Drywall was not subject to the direction and control of the employer.

The second issue was whether the billing correctly included the payments to R & K Drywall, pursuant to ORS 656.029(1) and the workers’ compensation insurance policy issued by the insurer to the employer effective during the audit period, in calculating the premium for workers’ compensation insurance provided by the insurer to the employer during the audit period.

The revised proposed order found that the employer contracted with R & K Drywall to provide drywall services at multiple locations during the audit period, the drywall services were a normal and customary part of the employer’s business, R & K Drywall employed individuals to perform labor under the contracts, and R & K Drywall did not provide, before labor commenced, workers compensation insurance covering the individuals. The order concluded that “R & K Drywall was responsible for providing [workers’ compensation] insurance for all individuals [employed by R & K Drywall who performed labor during the audit period under the contracts between the employer and R & K Drywall except] those [individuals if any who] were exempt under ORS 656.027,” and therefore the billing was “correct in its determination that [employer] was required to provide workers’ compensation

⁷ 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.

[insurance] to R & K Drywall[‘s] employees who were not exempt under ORS 656.02[7].”⁸

The third issue was whether the billing correctly included payments made by the employer to other identified and unidentified persons for remodeling a residence owned by the proprietor of the employer during the audit period in calculating the premium for workers’ compensation insurance provided by the insurer to the employer during the audit period.

The revised proposed order concluded that the billing incorrectly included the payments to the persons who remodeled the employer’s residence because the persons were not subject workers as defined in ORS 656.005(28) further because they were exempt under the householder exemption in ORS 656.027(2).

The revised proposed order continued to recommend that the director disaffirm the entire billing.⁹

The revised proposed order informed the employer and insurer that they may 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.

On 8/11/09, the director received from the insurer written exceptions to the revised proposed order.

On 8/28/09, the director received from the employer a written response to the insurer’s exceptions.

On 6/22/10, the director received from the insurer a request that the director reconsider the final order. The insurer argued that the final order incorrectly interpreted ORS 656.029(1) in a manner inconsistent with the director’s prior

⁸ The record does not contain any evidence of, and the revised proposed order did not find, whether any of the individuals employed by R & K Drywall were exempt pursuant to ORS 656.027, or of the payments paid to R & K Drywall how much was earned by R & K Drywall and how much was earned by the individuals as compensation.

⁹ The revised proposed order continued to recommend that the entire billing be disaffirmed although the order concluded, in conclusion of law b., that the billing correctly determined that the employer was required to provide workers’ compensation insurance to R & K Drywall’s employees who were not exempt under ORS 656.027.

decisions, and such interpretation would lead to an absurd result not intended by the state legislature.

The director granted the request to reconsider the final order.

Therefore, the director now makes the following final decision on reconsideration 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 the revised proposed order as the findings of fact, conclusions of law, and reasoning of this final order, except as noted previously herein and as follows:

On page 9, first paragraph, third sentence, is deleted.¹⁰

On page 9, first paragraph, sixth sentence, is corrected to read “It [meaning R & K Drywall] worked ~~to~~ for Rick Barrett Drywall, but not exclusively.”

On page 4, conclusion of law b. is changed to read that the billing is “Correct in its determination that, pursuant to ORS 656.029(1), Rick Barrett Drywall was required to provide worker’ compensation to R & K Drywall employees who were not exempt under ORS 656.029 payments of \$109,827 made to R& K Drywall between 11/3/06 and 9/1/07 are includable in calculating the premium for workers’ compensation insurance provided by the insurer to the employer during the audit period, and....”

On page 4, conclusion of law c. is changed to read that the billing is “Not correct in its determination that ~~tile work, landscaping, gardening, and carpentry performed~~ payments and cash withdrawals for miscellaneous labor and recorded as individual expense for remodeling of a personal residence at 9743 Tenino Court in Portland, Oregon ~~was not exempt from~~ are includable in calculating the premium

¹⁰ See insurer’s exceptions to the revised proposed order dated 8/10/09, pages 9-10. The insurer objected to the inclusion in the proposed order to a particular finding of fact and a related statement in the opinion. The revised proposed order removed the finding of fact, but not the related statement in the opinion.

for workers' compensation insurance provided by the insurer to the employer during the audit period."

On page 10, the reference to "ORS 656.027(2)(3)" is corrected to "ORS 656.027(2)-(3)."

Order

The billing is reversed in part and affirmed in part. The billing is reversed to the extent that it included in the calculation of the premium for workers' compensation insurance provided by the insurer to the employer during the audit period payments and cash withdrawals for miscellaneous labor and recorded as individual expense for remodeling of a personal residence. In all other respects, the billing is affirmed.

The stay of collection 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 August 30, 2010

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

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