

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

In the Matter of **R & R Tree and Landscape, Inc.**) **FINAL ORDER**
dba R & R Tree Service) Case No. INS 10-11-006

History of the Proceeding

The Director of the Oregon Department of Consumer and Business Services (director), by and through the Insurance Division, commenced the above entitled administrative proceeding, at the request of R & R Tree and Landscape, Inc. dba R & R Tree Service (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 three workers' compensation insurance final premium audit billings (billing) issued by SAIF Corporation (insurer) to the employer.

On 8/18/10, the employer received from the insurer a billing dated 8/13/10, for the audit period from 7/1/08 to 7/1/09 (first billing).¹

¹ The proposed order dated 3/30/12 did not find (1) when the employer received from the insurer any of the three billings, (2) when the director received from the employer a completed petition relative to the first billing, (3) when the director received from the employer a request for a hearing and completed petition relative to the second billing, and (4) when the director received from the employer a request for a hearing and a completed petition relative to the third billing. Determining when an employer received a billing, and when the director received a request for a hearing and petition, is 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). Relative to the first billing, the employer stated in its request for a hearing dated 9/23/10 and petition dated 11/18/10 that it received the first billing on 8/18/10. The request for a hearing was date stamped as being received by the director on 9/23/10, and the petition was date stamped as being received by the director on 11/19/10. Relative to the second billing, the employer stated in its request for a hearing dated 6/22/11 and petition dated 7/12/11 that it received the second billing on 5/9/11. The request for a hearing was date stamped as being received by the director on 6/22/11, and the petition was date stamped as being received by the director on 7/13/11. Relative to the third billing, the employer stated in its combination request for a hearing and petition dated 7/12/11 that the employer received the third billing on 5/9/11. The combination request for a hearing and petition was date stamped as being received by the director on 7/13/11. The director provided to OAH and the insurer a copy of the employer's requests for a hearing and petitions when the director referred the case to OAH on 11/30/10 relative to the first billing and on 7/19/11 relative to the second and third billings. Such documents automatically became part of the record of the case. See ORS 183.417(9). The employer and insurer both appeared at the hearing and did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that (1)

On 9/23/10, the director timely received from the employer a written request for a hearing to review the first billing.

On 9/29/10, the director mailed to the employer a letter and a petition form relative to the first billing.

On 11/19/10, the director timely received from the employer a completed petition relative to the first billing, and a request for an order staying all collection efforts by or on behalf of the insurer of any amount billed in the first billing as a result of the audit until this proceeding is concluded.

On 11/30/10, the director referred to the Office of Administrative Hearings (OAH) the employer's requests for a hearing and stay of collection relative to the first billing.

On 12/28/10, OAH issued an order granting the stay relative to the first billing.

On 1/20/11, OAH scheduled a hearing to be conducted on 5/10/11.

On 5/9/11, the employer received from the insurer two billings both dated 5/5/11. One billing was for the audit period from 7/1/09 to 7/1/10 (second billing). The other billing was for the audit period from 7/10/10 to 1/1/11 (third billing).²

On 6/22/11, the director timely received from the employer a written request for a hearing to review the second billing.

On 6/27/11, the director mailed to the employer a letter and a petition form relative to the second billing.

On 7/13/11, the director timely received from the employer, all in one document, (1) a written request for a hearing to review the third billing, (2) a completed petition relative to both the second and third billings, and (3) a request for an order staying all collection efforts by or on behalf of the insurer of any amount billed in

the employer received from the insurer the first billing on 8/18/10 and both the second and third billings on 5/9/11, (2) the director received from the employer a completed petition relative to the first billing on 11/19/10, (3) the director received from the employer a written request for a hearing on 6/22/11 and completed petition on 7/13/11 relative to the second billing, and (4) the director received from the employer a combination written request for a hearing and completed petition relative to the third billing on 7/13/11.

² See footnote 1 above.

the second and third billings as a result of the respective audits until this proceeding is concluded.

On 7/19/11, the director referred to OAH the employer's requests for a hearing and stay of collection relative to the second and third billings.

On 7/25/11, OAH issued an order granting the stay relative to the second and third billings.³

On 9/1/11, OAH rescheduled the hearing to be held on 12/16/11.

On 12/14/11, OAH rescheduled the hearing to be held on 3/16/12.

On 3/16/12, OAH held a hearing. The hearing was conducted by Alison Greene Webster, an administrative law judge of OAH. The employer appeared and was represented at the hearing by William H. Replogle, an attorney. The employer called Bobby Canini, Jannai Cornett, Robert Cornett, and Brittany Kenison as its witnesses. The employer offered Exhibits P1 to P16 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 A18 as its documentary evidence all of which were admitted into the record.⁴

On 3/30/12, OAH issued a proposed order and mailed it to the parties. The issue was whether the insurer correctly did not divide the compensation paid by the employer to certain persons between different applicable classifications for purposes of computing the employer's workers' compensation insurance premium for each audit period, but instead assigned all of the compensation to the highest rated classification, because the employer did not maintain verifiable payroll records, as required by OAR 836-0942-0060. The proposed order concluded that the employer

³ The order erroneously referred to the audit period relative to the first billing rather than to the audit periods relative to the second and third billings.

⁴ OAH added to the record the employer's hearing memorandum dated 3/2/12 which was filed with OAH on 3/5/12, and the insurer's hearing memorandum dated 3/6/12 which was filed with OAH on 3/7/12. It was unnecessary and redundant for OAH to add the documents to the record because they automatically became part of the record of the case. See ORS 183.417(9).

did not maintain verifiable payroll records and the insurer correctly allocated all of the compensation to the highest rated classification. The proposed order recommended that the director affirm all three billings.⁵

The director timely received (1) written exceptions to the proposed order from the employer on 4/23/12, (2) a written response to the employer's exceptions from the insurer on 5/3/12, and (3) a written reply to the insurer's response from the employer on 5/10/12.

The director considered the exceptions, response, and reply. The director is not persuaded by the exceptions and reply that the director must or should take any action different than that recommended in 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.⁶

Order

The billings are affirmed and the stays are 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

⁵ In a previous case, case number INS 09-04-002, between the same parties involving the same issue relative to a billing for a previous audit period, the director concluded that the employer did not maintain verifiable payroll records and the billing was correct. The employer appealed the director's decision to the Oregon Court of Appeals, appellate case number A145610. That case is pending.

⁶ See footnote 1.

a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

Dated July 11, 2012

/s/ Louis Savage
Louis Savage
Insurance Commissioner
Insurance Division
Department of Consumer and Business Services

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