



On 11/4/11, the director received by mail from the employer a completed petition dated 11/3/11. The petition indicated that the employer was disputing not only the results of the audit of the first period, and also the results of an audit conducted on an unknown date by the insurer of the employer's operations during of the subsequent period from 3/19/11 to 3/19/12 (second period). The petition enclosed certain documents relating to both periods.<sup>5 & 6</sup> The petition also requested an order staying any effort by or on behalf of the insurer to collect the additional amount due for both periods until this proceeding is concluded.<sup>7</sup>

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<sup>3</sup> The request did not identify or enclose the document that prompted the employer to request a hearing.

<sup>4</sup> The documents that were admitted into the record were (1) a "Premium Adjustment Notice" dated 10/14/11 stamped date received on 10/21/11 (Exhibit R42-2 & R42-4), (2) an "Exposure Comparison" dated 10/14/11 (Exhibit R42-3), and (3) an "Earned Premium" dated 10/18/11 stamped date received on 10/21/11 (Exhibit R42-1). However, none of these documents, individually or collectively, constituted a final premium audit billing, as described in *former* OAR 836-043-0110(5) and *former* OAR 836-043-0170(7), because at a minimum none of them were entitled "Final Premium Audit Billing" and none of them contained the notice required by OAR 836-043-0110(5).

<sup>5</sup> The documents were (1) a "Premium Adjustment Notice" dated 10/14/11 stamped date received on 10/21/11 (Exhibit R42-2 & R42-4), (2) an "Exposure Comparison" dated 10/14/11 (Exhibit R42-3), (3) an "Earned Premium" dated 10/18/11 stamped date received on 10/21/11 (Exhibit R42-1), and (4) an "Endorsement" dated 10/14/11 and stamped date received 10/19/11 (no exhibit number). However, none of these documents, individually or collectively, constituted a final premium audit billing, as described in *former* OAR 836-043-0110(5) and *former* OAR 836-043-0170(7), because at a minimum none of them were entitled "Final Premium Audit Billing" and none of them contained the notice required by OAR 836-043-0110(5).

<sup>6</sup> Usually, an employer receives from its insurer a billing, then files with the director a request for a hearing, and then files with the director a petition attaching the initial or revised billing to be reviewed. This case is unique in terms of the sequence of when the employer filed the request, petition, and billing relative to each period. In this case, relative to the first period, the employer filed a request for a hearing on 10/10/11, filed a petition dated 11/3/11 on 11/4/11, and a revised billing dated 2/7/12 on 2/14/12. (See also the revised billing dated 2/7/12 marked and admitted as evidence as Exhibit R44.) In this case, relative to the second period, the employer filed both a request for a hearing and a petition dated 11/3/11 on 11/4/11, and a filed a revised billing dated 5/25/12 on 6/5/12. (See also the revised billing dated 5/25/12 marked and admitted as evidence as Exhibit R45.) Although the insurer probably issued and the employer received an initial billing, and maybe even other revised billings, before the employer filed the request for a hearing relative to each period, and although portions of such billings may have been admitted into the record at the hearing (see footnotes 2 to 4), the entire initial billings were not admitted into the record during the hearing.

<sup>7</sup> On 11/7/11 @ 11:50 AM, the director received from the insurer an e-mail attaching a copy of a document entitled "Final Premium Audit Billing" dated 10/18/11 reporting the results of the audit of the first period. The document indicated that it replaced the most recent billing but did not identify the most recent billing. On 11/7/11 @ 1:11 PM, the director sent to the employer an e-mail attaching the document and asking if the employer had previously received it. On 11/7/11 @ 3:33 PM, the director received from the employer an e-mail saying that the employer "can't recall ever having

On 11/8/11 @ 9:28 AM, the director sent to the employer an e-mail asking if the director could retain this case to give the employer and insurer time to resolve their dispute without a hearing, rather than refer this case to the Office of Administrative Hearings (OAH) to schedule and conduct a hearing. On 11/8/11 @ 9:42 AM, the director received from the employer an e-mail permitting the director to retain this case.

On 2/6/12 @ 11:03 AM, the director received from the employer an e-mail saying that the employer and insurer were at an impasse in trying to resolve their dispute and asking the director to refer this case to OAH.

On 2/8/12, the director referred this case to OAH and notified the parties.<sup>8</sup>

On 2/14/12, the director received from the employer by mail a letter dated 2/13/12 enclosing an amended petition dated 2/13/12. The amended petition enclosed a document entitled "Final Premium Audit Billing" dated 2/7/12 reporting the results of the audit of the first period.<sup>9</sup> The petition again requested an order staying any effort by or on behalf of the insurer to collect the additional amount due for the first period until this proceeding is concluded.

Also on 2/14/12, the director forwarded to OAH the employer's amended petition.

Also on 2/14/12, OAH issued an order granting the employer's request for a stay of collection for both the first and second periods and notified the parties.

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received" the document. On 11/8/11 @ 7:59 AM, the director received from the insurer an e-mail saying "we sent this revised bill [dated 10/18/11] to both the insured [*i.e.* employer] and the [employer's insurance] agent. ... In the [petition dated 11/3/11, it stated that] "[t]he employer received the billings on or about October 19 and October 21, 2011" and "Page 10 of the [petition] shows one page of the revised audit, dated 10/18/11." "Page 10" referred to was the "Earned Premium" dated 10/18/11 stamped date received on 10/21/11 (Exhibit R42-1). Although "Page 10" was admitted into the record as Exhibit R42-1, the entire billing dated 10/18/11 was not provided to OAH, and thus not offered or admitted into the record, not considered by OAH in making the proposed decision, and was not referred to in the proposed order dated 3/6/13. Therefore, the billing dated 10/18/11 was not considered by the director in making the final decision.

<sup>8</sup> As of 2/8/12, this case related to only the first period because as of that date although the director had received from the employer a written request for a hearing relative to both the first and second periods the director had received a completed petition relative to only the first period.

<sup>9</sup> The document indicated that it replaced the most recent billing but did not identify the most recent billing.

On 2/17/12, OAH issued an amended order continuing to grant a stay of collection but limiting the period of the stay to the first period, and notified the parties.

On 4/18/12, OAH issued a notice scheduling a hearing to be conducted on 9/18/12 and notified the parties.

On 6/5/12, the director and OAH received from the employer by mail a letter dated 6/4/12 enclosing a supplemental petition dated 6/4/12. The supplemental petition enclosed a document entitled "Final Premium Audit Billing" dated 5/25/12 reporting the results of the audit of the second period.<sup>10</sup> The supplemental petition again requested an order staying any effort by or on behalf of the insurer to collect the additional amount due for the second period until this proceeding is concluded. The supplemental petition requested that the review of the results of the audits of both periods be consolidated.<sup>11</sup>

On 6/13/12, OAH issued an amended order continuing to grant a stay of collection but expanding the period of the stay to include the first and second periods, and notified the parties.

On 9/18/12, OAH conducted a hearing. The hearing was conducted by Richard Barber, an administrative law judge of OAH. The employer appeared and was represented at the hearing by William H. Replogle, an attorney. The employer called Rick Lofton, Seth Pietsch, and Terrilynn Roshay, and as its witnesses. The employer offered Exhibits R1 to R53 as its documentary evidence all of which were admitted into the record. The insurer appeared and was represented at the hearing by Patrick C. Wylie, an attorney. The insurer did not call any witnesses. The insurer offered Exhibits T1 to T93 as its documentary evidence all of which were admitted into the record.

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<sup>10</sup> The document indicated that it replaced the most recent billing but did not identify the most recent billing.

<sup>11</sup> As of 6/5/12, this case related to both the first and second periods because as of that date the director had received from the employer a written request for a hearing as well as a completed petition relative to both the first and second periods.

On 3/6/13, OAH issued a proposed order and mailed it to the parties. The issues to be decided was whether the billings correctly included the compensation paid by the employer to certain persons during the audit period for performing power washing services for the employer, and whether the billings correctly allocated to certain classifications the compensation paid to certain persons because the employer did not keep verifiable payroll records. The proposed order concluded that the billings were correct except in a few instances as noted therein. The proposed order recommended that the director affirm the billing as modified therein. 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 by 4/5/13.

On 3/15/13, OAH received from the employer a letter dated 3/14/13 objecting to the inclusion in the record of Exhibit R54.

Also on 3/15/13 @ 3:46 PM, OAH sent to the director an e-mail attaching the employer's letter to the director.

On 3/18/13 @ 7:31 AM, the director sent to OAH an e-mail asking OAH if it intended to respond to the employer's letter.

Also on 3/18/13 @ 9:44 AM, the director received from OAH an e-mail saying that OAH intended to respond to the employer's letter.

Also on 3/18/13, OAH sent to the parties a letter dated 3/18/13 saying, *inter alia*, that "[m]y assumption then, as it is now, is that the amounts mentioned in Exhibit [R]54 were the amounts that Travelers was *claiming* were due in the policy years. Nothing in my [proposed] order should be construed otherwise, and I certainly did not believe that Oswego Roofing was agreeing that those amounts were owed. My decision in the case was not premised on any belief that the parties agreed that those amounts were owed – only that they agree Travelers was claiming those amounts." (Emphasis in original).

On 4/4/13, the director timely received from the employer written exceptions to the proposed order.

On 4/5/13, the director timely received from the insurer written exceptions to the proposed order.

On 4/9/13, the director referred the parties' exceptions to OAH.

On 5/20/13, the director received from OAH a response to the parties' exceptions adhering to the proposed order.

Also on 5/20/13, the director asked the parties if they had any comments to OAH's response.

On 5/20/13 @ 3:47 PM, the director received from the insurer an e-mail saying that the insurer did not have any additional comments.

On 5/28/13 @ 3:16 PM, the director received from the employer an e-mail saying that the employer did not have any additional comments.<sup>12</sup>

The director has considered the employer's and insurer's exceptions. The director is not persuaded by the exceptions 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.

#### **Order**

The billings are affirmed as modified, 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 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

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<sup>12</sup> Between 6/18/13 and 7/22/13, the director communicated with both the employer and insurer about some "threshold issues." The director decided that these issues were addressed and resolved in the proposed order, and a final decision should be based on the record as it existed.

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 DEC 03 2013

  
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Laura N. Cali, FCAS, MAAA  
Insurance Commissioner and Chief Actuary

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