

stay during the pendency of this proceeding any effort by the insurer to collect the amount billed in the billing.³

On 8/13/12, the director referred the employer's request for a hearing to the Office of Administrative Hearings (OAH) to schedule, and if necessary conduct a hearing and issue a proposed order.⁴

On 8/15/12, OAH issued an order granting the employer's request for a stay.

On 9/26/12, OAH conducted a telephone prehearing conference with both parties, during which OAH and the parties agreed to provide exhibits and witness lists by 1/8/13, and conduct the hearing on 1/22/13. OAH also encouraged the employer to provide to the insurer as soon as possible any documents supporting the employer's position to possibly either eliminate the need for a hearing or narrow the issues at a hearing.⁵

On 10/1/12, OAH issued a notice of hearing scheduling the hearing to be conducted on 1/22/13.

On 12/26/12, after the insurer did not receive from the employer any documents supporting the employer's position, the insurer sent to the employer a letter dated 12/26/12 requesting the employer to send to the insurer by 1/2/13 certain relevant documents.⁶

On 1/9/13, OAH received from the insurer a letter dated 1/8/13 enclosing its exhibits and witness list.⁷

On 1/10/13, after the insurer did not receive from the employer any response to the insurer's letter dated 12/26/12, OAH received from the insurer a letter dated 1/9/13 requesting OAH issue an order compelling the employer to produce the documents.⁸

³ See ORS 737.505(5) and OAR 836-043-0170(5).

⁴ See ORS 183.635(3)(g) and OAR 137-003-0501 *et seq.*

⁵ See OAH's e-mail dated 9/26/12 to the parties confirming the agreements during the prehearing conference.

⁶ See OAR 137-003-0568(1).

⁷ OAH did not receive from the employer its exhibits and witness list.

⁸ See OAR 137-003-0568(2)-(5).

On 1/15/13, OAH issued an order compelling the employer to produce the documents by 1/22/13.⁹ & ¹⁰

On 1/18/13 at 4:01 PM, OAH received by fax from the employer a letter dated 1/18/13 saying that the employer received OAH's order dated 1/15/13 on the morning of 1/18/13, the employer had "been diligent in gathering as much information as possible but due to circumstances outside our control have not been able to fully comply," and as a result was "requesting a two week extension of time to produce the documents." The letter did not explain what information had been gathered, what the circumstances were, or why the circumstances were beyond the employer's control. Also, the letter did not request the hearing be rescheduled.¹¹

On 1/22/13, OAH conducted a hearing.¹² The hearing was conducted by Alison Greene Webster, an administrative law judge of OAH. The employer did not appear at the hearing, was not represented at the hearing, and did not offer at the hearing any documentary evidence.¹³ The insurer appeared and was represented at the hearing by Holly O'Dell, an Assistant Attorney General assigned to represent the insurer. The insurer did not call any witnesses. The insurer offered Exhibits 1 to 8 as its documentary evidence all of which were admitted into the record.¹⁴

On 1/24/13, OAH issued a proposed order and mailed it to the parties.¹⁵ The proposed order concluded that the employer did not meet its responsibility or burden of proving, by a preponderance of the evidence, that the insurer's billing was

⁹ See OAR 137-003-0520(11). The order said that the documents were due by 1/18/13. However, the documents were not actually due until 1/22/13 because 1/18/13, a Friday, was a mandated state office furlough day, and the following 1/21/13, a Monday, was a state office holiday, and next day that OAH was open was 1/22/13, a Tuesday, the day of the hearing.

¹⁰ The employer did not produce any of the documents requested by the insurer in its letter dated 12/26/12 or ordered by OAH in its order dated 1/15/13.

¹¹ Since OAH was closed on Friday 1/18/13 and Monday 1/21/12, OAH was not aware of the employer's request for an extension of time to produce the requested documents until at least Tuesday, 1/22/13, the day of the hearing.

¹² See OAR 137-003-0670(3)(c).

¹³ See ORS 183.417(4) and (9)(a). The employer's request for a hearing dated 7/24/12 and petition dated 8/1/12 were included in the record.

¹⁴ See OAR 137-003-0670(3)(a).

¹⁵ See OAR 137-003-0670(3)(c).

incorrect.¹⁶ The proposed order recommended that the director affirm the billing. The proposed order informed the parties that they may file with the director written exceptions to the order by 2/25/13.¹⁷

The director did not receive from the parties any exceptions to the proposed order.

On 1/28/13 at 3:11 PM, OAH received by fax from the employer a letter dated 1/27/13 requesting the proposed order dated 1/24/13 be vacated and the hearing be rescheduled. The employer explained that it did not appear at the hearing because it “was confused as to the timeline of the hearing and production of documents,” “assumed ... that the production of the documents and the date of the hearing could not be so close together,” was not aware that 1/18/13 was a mandated state office furlough day, and “assumed the extension for the hearing would be automatically granted along with the extension requested for the production of documents.”¹⁸ The employer said that it “is ready to proceed and provide all documents within its custody on or before February 2, 2013.”

On 1/30/13, the director received from OAH its hearing file, including the employer’s letter dated 1/27/13.

On 2/1/13, the director received from the insurer a letter dated 1/31/13 saying that the insurer intended to respond by about 2/19/13 to the employer’s letter dated 1/27/13.¹⁹

¹⁶ See ORS 183.450(2), *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166, 170, 840 P2nd 739 (1992), *rev den*, 315 Or 643 (1993); *Gallant v. Board of Medical Examiners*, 159 App 175, 180, 974 P2nd 814 (1999).

¹⁷ See ORS 183.460 and OAR 137-003-0645(5).

¹⁸ The employer did not request, in its letter dated 1/18/13 or at any other time prior to 1/28/13, that the hearing be rescheduled.

¹⁹ The insurer’s letter dated 1/31/13 was addressed to the Workers’ Compensation Division (WCD) of the Department of Consumer and Business Services (DCBS), instead of the Insurance Division of DCBS. WCD received the letter on 2/1/13. WCD forwarded the letter to the Insurance Division. The Insurance Division received the letter on 2/5/13. During the interim, on 2/4/13, the Insurance Division asked the insurer if it intended to respond to the employer’s letter dated 1/27/13. The insurer said yes and that it had sent a letter dated 1/31/13 requesting a two week extension from 2/4/13, thus to about 2/19/13, to respond to the employer’s letter dated 1/27/13, and provided a copy of the insurer’s letter dated 1/31/13.

On 2/21/13, the director received from the insurer a letter dated 2/21/13 responding to the employer's letter dated 1/27/13 and arguing that the employer did not have good cause for failing to appear at the hearing on 1/22/13.²⁰

On 2/28/13, the director received from the employer a copy of an e-mail dated 2/26/13 addressed to the insurer's attorney, saying, *inter alia*, that the employer failed to appear at the hearing due to a "misunderstanding on [the employer's] part, a clerical error you might say."

On 3/1/13, the director sent an e-mail to the employer responding to the employer's e-mail dated 2/26/13 and finding that the employer did not have good cause for failing to appear at the hearing.

The director did not receive from the parties any further response to the director's e-mail dated 3/1/13.

Therefore, the director now makes the following final decision in this proceeding.

Findings of Fact, Conclusions of Law and Opinion

The director finds that employer did not have good cause for failing to appear at the hearing.

The director finds that the record of this proceeding proves a *prima facie* case.²¹

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 billing is affirmed and the stay is terminated.

²⁰ See OAR 137-005-0670(2). On 2/19/13, the director received from the insurer a letter dated 2/19/13 responding to the employer's letter dated 1/27/13 but citing to OAR 137-003-0075 and arguing that the employer's failure to appear at the hearing was caused by circumstances beyond the employer's reasonable control, rather than citing to OAR 137-003-0670(2) and arguing the employer did not have good cause for failing to appear at the hearing. On 2/20/13, the director informed the insurer that OAR 137-003-0075 did not, but OAR 137-003-0670(2) did, apply. On 2/21/13, the director received from the insurer an amended letter dated 2/21/13 responding to the employer's letter dated 1/27/13 and arguing that the employer did not have good cause for failing to appear at the hearing on 1/22/13.

²¹ See ORS 183.417(4) and OAR 137-003-0670(3)(a).

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 March 14, 2013

/s/ Louis Savage
Louis Savage
Insurance Commissioner

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