

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

In the Matter of **Real Property Management**) **FINAL ORDER**
Portland, Inc.) Case No. INS 13-03-002

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 Real Property Management Portland, Inc. (employer) to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation (insurer) to the employer.¹

Presumably on 10/29/12, the employer received from the insurer a billing dated 10/25/12, for the audit period from 2/1/11 to 2/1/12.²

¹ See Oregon Revised Statutes (ORS) 737.318(3)(d), ORS 737.505(4), and Oregon Administrative Rules (OAR) 836-043-0101 *et seq.*

² ORS 737.318(3)(d) and 737.505(4) give an employer the right to a hearing to review a workers' compensation insurance final premium audit billing issued by an insurer to the employer. ORS 737.318(3)(d), ORS 737.505(4), OAR 836-043-0110(5), and OAR 836-043-0170. Thus, determining whether and if so then when an employer received a billing, either actually or constructively, is critical to determining whether the employer is entitled to a hearing. However, the proposed order dated 8/7/13 did not find when the employer received the billing from the insurer but only stated that the "date employer actually received the billing is unclear." The billing was dated 10/25/12, and presumably the insurer mailed the billing to the employer on the same date. The employer stated in its letter dated 12/19/12 that it received the billing "some time later," and stated in its petition dated 2/22/13 that it received the billing on 10/25/12 which is the date of the billing. The employer did not appear at or present any evidence the hearing on 7/30/13. Thus, the date that the employer actually received the billing is unknown. However, OAR 836-043-0170(1) states "[f]or the purpose of determining the date of receipt of a final premium audit billing sent to the insured by mail when the receipt date is unknown to the insured, the date of receipt shall be presumed to be three days after the postmark date, or three days after the date of mailing, if the postmark is illegible or unavailable." As indicated above, presumably the insurer mailed the billing to the employer on 10/25/12. Three days after 10/25/12 was Sunday, 10/28/12. The next business day that the Insurance Division was open after 10/28/12 was Monday, 10/29/12. OAR 836-043-0170(3) states "[f]or the purposes of computing time periods specified in sections (1) and (2) of this rule, ORS 174.120 and 174.125 shall govern." ORS 174.120(2) states "[t]he time within which an act is to be done ... is computed by excluding the first day and including the last unless the last day falls upon any legal holiday or on Saturday, in which case the last day is also excluded. ORS 187.010(1)(a) defines a legal holiday as including Sunday. ORS 187.010(3) states that "[a]ny act authorized, required or permitted to be performed on a holiday as designated in this section may

On 12/26/12, the director received from the employer a letter dated 12/19/12 requesting a hearing to review the billing.³

On 12/26/12, the director mailed to the employer a letter dated 12/26/12 and a petition form to complete and return by 2/25/13.

On 2/25/13, the director received from the employer a completed petition dated 2/22/13.⁴ The petition also requested the director to prohibit or stay the insurer

be performed on the next succeeding business day; and no liability or loss of rights of any kind shall result from such delay." Based on the above, the director presumes that the employer received the billing on 10/29/12.

³ ORS 737.318(3)(d) and 737.505(4) give an employer the right to a hearing to review a workers' compensation insurance final premium audit billing issued by an insurer to the employer. If the employer wants a hearing, the employer must, *inter alia*, send to the director a written request for a hearing. The director must receive the request by the 60th day after the employer received the billing. ORS 737.318(3)(d), ORS 737.505(4), OAR 836-043-0110(5), OAR 836-043-0170(1), *Pease v. Natl. Council on Comp. Ins.*, 113 Or App 26, *rev den* 314 Or 391 (1992). Thus, determining whether and if so then when the director received a request for a hearing is critical to determining whether the employer is entitled to a hearing. However, the proposed order did not find when the director received the request for a hearing from the employer but only stated that the "[e]mployer appealed the billing on December 19, 2012...." On 12/21/12 @ 2:13 PM, a Friday, the employer mailed by US Postal Service Priority Mail ExpressTM a letter dated 12/19/13. The letter was addressed to Insurance Division. The letter requested a hearing. On 12/22/12 @ 9:40 AM, a Saturday, the US Postal Service attempted to deliver the letter to the Insurance Division but the Insurance Division was closed. Subsequently, either on 12/24/13, a Monday, or on 12/26/13, a Wednesday, since 12/25/13, a Tuesday, was the legal holiday of Christmas, the US Postal Service delivered the letter to the "mail room" of the Department of Consumer and Business Services (DCBS). The Insurance Division is one division of DCBS and receives all of its mail through the mail room. On 12/26/12, the mail room delivered the letter to the Insurance Division. The Insurance Division stamped the date of 12/16/12 on the face of the letter. Thus, the director received the request for a hearing on 12/26/12. The director included a copy of the letter dated 12/19/12 with the referral memo dated 3/6/13 when the director referred this case to OAH on 3/6/13.

⁴ If the employer wants a hearing, the employer must also send to the director a completed petition, on a form prescribed by the director, providing additional information including a copy of the entire billing. The director must receive the completed petition by the 60th day after the date that the director received the request for a hearing. OAR 836-043-0110(5) and OAR 836-043-0170(2). Thus, determining whether and if so then when the director received a completed petition is critical to determining whether the employer is entitled to a hearing. However, the proposed order did not find when the director received the completed petition from the employer but only stated that "[t]he date the [Insurance] Division received employer's Petition is unknown." On 2/25/13 @ 1:06 PM, the employer sent an e-mail to the director attaching the petition dated 2/22/13 but not a copy of the billing. On 2/25/13 @ 1:25 PM, the director sent an e-mail to the employer requesting the employer send a copy of the billing that day. On 2/25/13 @ 1:56 PM, the employer sent an e-mail to the director attaching a copy of the billing. Thus, the director received the completed petition on 2/25/13. The director included a copy of the e-mail dated 2/25/13 @ 1:56 PM with the referral memo dated 3/6/13 when the director referred this case to OAH on 3/6/13.

from collecting from the employer during this proceeding the disputed amount of the additional amount owed for the audit period as a result of the audit.⁵

Also on 2/25/13, the director referred this case to the small business ombudsman to help resolve this case without a hearing.⁶

On 3/6/13, the director referred this case to the Office of Administrative Hearings (OAH) to schedule, and if necessary conduct a hearing and issue a proposed order, and notified the parties.⁷

On 3/7/13, OAH issued an order granting the employer's request for a stay of collection and notified the parties.

On 3/18/13, OAH issued a notice of telephone prehearing scheduling a telephone prehearing conference to be conducted on 4/29/13 and notified the parties.

On 4/2/13, the insurer spoke to the employer about which parts of the billing the employer believed were incorrect.

On 4/29/13, OAH conducted the telephone prehearing conference. The insurer did, but the employer did not, participate in the conference.

Also on 4/29/13, OAH issued a notice of hearing to be conducted on 7/30/13 and notified the parties.

On 5/2/13, the insurer requested the employer to send certain relevant documents to the insurer by 5/20/13.

On 6/12/13, the insurer requested OAH to direct the employer to send the documents to the insurer because the employer had not responded to the insurer's request dated 5/2/13.

On 6/19/13, OAH mailed a letter to the employer requesting the employer send the documents to the insurer by 6/26/13.

⁵ See ORS 737.505(5) and OAR 836-043-0170(5). The petition stated that the billing charged the employer \$12,630.63 as the premium for the audit period but did not state how much of that amount the employer disputed it owed. Actually, the billing charged the employer \$11,158.56 as the premium for the audit period as a result of the audit, but credited \$887.22 as the amount previously billed and presumably paid, and thus charged only the net additional amount of \$10,271.34.

⁶ See ORS 656.709, and <http://www.oregon.gov/DCBS/SBO/Pages/index.aspx>.

⁷ See ORS 183.635(3)(g), OAR 836-005-0112, and OAR 137-003-0501 *et seq.*

On 7/3/13, the insurer again requested OAH to direct the employer to send the documents to the insurer because the employer had not responded to the insurer's request dated 5/2/13 and OAH's request dated 6/19/13.

On 7/10/13, OAH issued an order directing the employer to send the documents to the insurer by 7/16/13.

On 7/22/13, the insurer requested OAH to amend the order granting the stay of collection by staying only the disputed amount which the insurer calculated as \$5,497.62, based on the insurer's conversation with the employer on 4/2/13.

On 7/30/13, OAH conducted a hearing. The hearing was conducted by Rick Barber, an administrative law judge of OAH. The issues discussed during the hearing were whether the billing was correct and whether the order granting the stay of collection should be amended. The employer did not appear, was not represented, and did not offer any evidence, at the hearing.⁸ 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 to testify about whether the billing was correct but called DeAnne Hoyt to testify about whether the order granting the stay of collection should be amended. The insurer offered exhibits A1 to A7 as its documentary evidence all of which were admitted into the record.

Also on 7/30/13, OAH issued an amended order granting the employer's request for a stay of collection staying the insurer from collecting only the disputed amount of \$5,497.62 but not the remaining undisputed amount of \$4,773.72.

On 8/7/13, OAH issued a proposed order and notified the parties. The issue to be decided was whether the billing was correct because the insurer correctly refused to allocate the payroll of certain employees to multiple classifications.⁹ & ¹⁰ The

⁸ Although the employer's letter dated 12/19/12 requesting a hearing and petition dated 2/22/13 are included in the record of this case, see ORS 183.417(4) and (9)(a), the letter and petition only asserted that the billing was incorrect but did not provide any evidence to support the assertion.

⁹ All insurers that are licensed in Oregon to transact workers' compensation insurance are required to members of a licensed rating organization. See ORS 737.560(2). The National Council on

proposed order concluded that the billing was correct. The proposed order reasoned that the employer had the responsibility or burden of proving, by a preponderance of the evidence, that the insurer's billing was incorrect¹¹, but the employer did not meet its responsibility because it did not provide any evidence that it maintained verifiable payroll records which would have permitted the insurer to allocate the payroll to multiple classifications. 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 9/6/13.

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.¹²

Order

The billing is affirmed and the stay is terminated.

Compensation Insurance, Inc. (NCCI) is the only workers' compensation rating organization that is licensed in Oregon. See ORS 737.355. NCCI must file with the director its rates, rating systems, and policy forms. See ORS 737.320(3). Insurers that are members of NCCI must use the policy forms filed by NCCI, see ORS 737.265, and must also use the rates and rating systems filed by NCCI unless the insurer files its own rates and rating systems, see ORS 737.205. NCCI publishes the *Basic Manual of Workers' Compensation Insurance (Basic Manual)*, and the *Scopes® of Basic Manual Classification, (Scopes® Manual)*. The *Basic Manual* describes the workers' compensation classifications and the rules used to apply those classifications to employers. The *Basic Manual* has been filed with and approved by the director as part of NCCI's rating system. The *Scopes® Manual* is a guide for understanding and assigning classifications to employers. It includes the description of each classification as contained in the *Basic Manual*, and a narrative explanation of the intent of the classification. The *Scopes® Manual* has not been filed with or approved by the director. In the unlikely event that there is a conflict between the *Basic Manual* and *Scopes® Manual*, the *Basic Manual* takes precedence because the former has, but the latter has not, been filed with and approved by the director.

¹⁰ See OAR 836-042-0060.

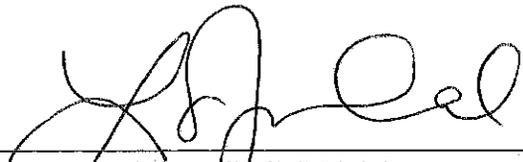
¹¹ See ORS 183.450(2), *Salem Decorating v. Natl. Council on Comp. Ins.*, 116 Or App 166, 170, 840 P2nd 739 (1992), *rev den*, 315 Or 643 (1993); *Gallant v. Board of Medical Examiners*, 159 App 175, 180, 974 P2nd 814 (1999).

¹² See footnotes 1 - 3.

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 OCT 03 2013



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

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STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of **Real Property Management**) **CERTIFICATE of**
Portland, Inc.) **SERVICE of**
) **FINAL ORDER**
) Case No. INS 13-03-002

I certify that I sent the final order to the following person(s) on the date and by the means indicated below:

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✓ US First Class Mail

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Dated OCT 03 2013



Mitchel D. Curzon
Chief Enforcement Officer

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