

STATE OF OREGON  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
INSURANCE DIVISION

In the Matter of **Atherly Contracting LLC** ) **FINAL ORDER**  
 ) Case No. INS 14-07-005

**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 Atherly Contracting LLC (employer) to contest a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation (insurer) to the employer.<sup>1</sup>

On 6/20/14, the employer received from the insurer a revised billing dated 6/16/14 for the audit period from 4/1/12 to 3/31/13.<sup>2</sup>

On 7/3/14, the director timely received from the employer a written request for a hearing to contest the billing.

On 7/7/14, the director mailed to the employer a letter, and a petition form to be completed and returned to the director by 9/2/14.

On 7/25/14, the director timely received from the employer a completed petition dated 7/24/15, and a request for an order staying all collection efforts by or on behalf

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

<sup>2</sup> An employer is entitled 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. 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 60<sup>th</sup> day after the employer received the billing. 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 4/13/15 did not find when the employer received the billing from the insurer. The billing was dated 6/16/14. The employer stated in its request for a hearing dated 7/3/14 and in its petition dated 7/24/14 that it received the billing on 6/20/14. 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 7/29/14. The employer and insurer both appeared at the hearing but did not introduce any evidence at the hearing to the contrary. Therefore, the director finds that the employer received the billing on 6/20/14.

of the insurer of any amount billed in the billing as a result of the audit until this proceeding is concluded.<sup>3</sup>

On 7/29/14, the director referred the employer's requests to the Office of Administrative Hearings (OAH).<sup>4</sup> On the same date, the director sent by e-mail to the parties a copy of the referral and all attached documents including a written notice of the rights of parties and procedures and the Code of Conduct for Non-Attorney Representatives at Administrative Hearings.<sup>5 & 6</sup>

On 8/12/14, OAH issued an order granting a stay.

On 10/8/14, OAH conducted a telephone prehearing conference in which the employer did not, but the insurer did, participate.

On 10/22/14, OAH scheduled a hearing to be conducted on 11/17/14.

On 10/30/14, OAH conducted another telephone prehearing conference in which both the employer and insurer participated.

On 10/31/14, OAH rescheduled the hearing to be conducted on 1/8/15.

OAH conducted a hearing on 1/8/15, 1/21/15 and 3/2/15. The hearing was conducted by Samantha A. Fair, an administrative law judge of OAH. The employer appeared and was represented at the hearing by Matthew F. Denley, an attorney. The employer called Darst Atherly and Hunter Caputo as its witnesses. The employer offered Exhibits R1 to R12. Exhibits R1 to R9, and R11 pages 4 to 8, were admitted into the record. Exhibits R10, R11 pages 1 to 3, and R12 were excluded. The insurer appeared and was represented at the hearing by Holly O'Dell, an attorney. The insurer called Eric Williams as its witness. The insurer offered Exhibits A1 to A27. Exhibits A1 to A27 were admitted into the record. The insurer also offered and then withdrew two alternate versions of R12.

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<sup>3</sup> See ORS 737.505(5) and OAR 836-043-0170(5).

<sup>4</sup> See ORS 183.635(1) and OAR 137-003-0515.

<sup>5</sup> See ORS 183.413(2), OAR 137-003-0510(1), and OAR 137-003-0555(6).

<sup>6</sup> Initially, the employer was not represented by an attorney. Sometime between 10/8/14 and 10/30/14, the employer became represented by Matthew F. Denley, an attorney. Mr. Denley represented the employer at and after the second prehearing conference on 10/30/14. On 11/6/14, OAH received from Mr. Denley a letter dated 11/5/14 saying that he represented the employer.

On 4/13/15, OAH issued a proposed order recommending that the director affirm the billing. The order concluded that the insurer correctly allocated to classification code 2702, rather than to code 0124, all compensation paid by the employer to its employees who worked at five specified areas during the audit period because the employees actually cut down standing trees of various small diameters e.g. pre-commercial thinning or whip felling, and in four of the five areas<sup>7</sup> the work was performed pursuant to a contract that required cutting standing trees in the areas, and in one of the five areas, that was logged about 20 years earlier,<sup>8</sup> the work was performed pursuant to a contract that required cutting standing trees eight inches or more in diameter at breast height.<sup>9</sup> The order also concluded that the insurer correctly included in the calculation of the premium all compensation paid by the employer to its employees during the audit period as reimbursement for using their own chain saws while performing work for the employer except 20 percent of such compensation paid to employees while performing work assigned to code 2702.<sup>10</sup> The order also concluded that the insurer correctly included in the calculation of the premium all compensation paid by the employer to its employees during the audit period as reimbursement for work related travel expenses except \$75 per day per employee because the employer did not receive or keep receipts for actual expenses.<sup>11</sup> 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 any exceptions by 12/4/14.<sup>12</sup>

The director did not receive from the employer or insurer any exceptions to the proposed order.

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

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<sup>7</sup> The four areas were referred to as Sled Plow, Skyliner, Fuzzy Hunter, and Clyde.

<sup>8</sup> The fifth area was referred to as Idaho Creek.

<sup>9</sup> The classification codes are listed and described in the National Council on Compensation Insurance, Inc.'s (NCCI) *Basic Manual of Workers' Compensation Insurance (Basic Manual)* and *Scopes® of Basic Manual Classification (Scopes® Manual)*.

<sup>10</sup> See *Basic Manual*, rule 2-B-1 and description of code 2702.

<sup>11</sup> See *Basic Manual*, rule 2-B-2-h.

<sup>12</sup> See ORS 183.460 and OAR 137-003-0645(5).

**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 corrected proposed order as the findings of fact, conclusions of law, and reasoning of this final order, except as added in footnote 2 herein.

**Order**

The billing is affirmed and the stay is terminated.

**Notice of Right to Judicial Review**

Each party has the right to judicial review of this order. 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.<sup>13 & 14</sup>

Dated           **JUN 03 2015**          

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

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<sup>13</sup> See ORS 183.480 and ORS 183.482.

<sup>14</sup> If a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

**STATE OF OREGON  
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In the Matter of **Atherly Contracting LLC** ) **CERTIFICATE of**  
 ) **SERVICE of**  
 ) **FINAL ORDER**  
 ) Case No. INS 14-07-005

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

Darst Atherly  
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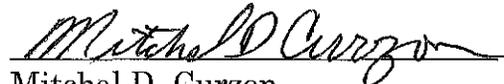
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Dated           **JUN 03 2015**          

  
Mitchel D. Curzon  
Chief Enforcement Officer

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