STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of **John M. Sanford, Inc.**	) **AMENDED**) **FINAL ORDER**) and) **ORDER**) **DENYING PETITION**) **FOR REHEARING**) Case No. INS 05-09-002

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of John M. Sanford, Inc. (employer), pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d) and ORS 737.505(4), and Oregon Administrative Rules (OAR) 836-043-0101 *et seq*, to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation (insurer) to the employer.

History of the Proceeding

On 5/31/05, the employer received from the insurer a billing dated 5/22/05 for the audit period from 10/1/03 to 9/30/04.[1] The billing informed the employer that it may request a hearing by sending to the director a written request for a hearing so that the director receives the request within 60 days after the employer received the billing. See ORS 737.318(3)(d), ORS 737.505(4), and OAR 836-043-0170(1).

[1] The proposed order on default and the amended proposed order did not find when the employer received the billing but merely concluded that the employer timely requested a hearing. The employer stated in its letter dated 7/13/05 that it received the billing on 5/31/05. Later, the employer stated in the petition dated 8/2/05 that it received the billing on 7/7/05. Enclosed with the petition was, *inter alia*, a copy of the billing which had been faxed either to or by the employer on 6/17/05, which is after 5/31/05 but before 7/7/05, and a "Statement of Account Summary Page" dated 7/7/05 from the insurer summarizing account activity in June 2005. Thus, the employer received the billing on or before 6/17/05. The director finds that the employer received the billing on 5/31/05, and more than likely the employer mistakenly inserted in the petition the date of the "Statement of Account Summary Page" rather than the date the employer received the billing.

On 7/21/05, the director timely received from the employer a written request for a hearing to review the billing.[2]

On 7/22/05, the director mailed to the employer a letter and a petition form. The letter informed the employer that it must complete the form and return it to the director so that the director receives it within 60 days after the director received the request for hearing, otherwise the director will dismiss the employer's request for a hearing. See OAR 836-043-0170(2)-(3) & (9).

On 9/19/05, the director timely received from the employer the completed petition, and a request for an order staying all collection efforts by or on behalf of the insurer of any amount billed in the billing as a result of the audit until this proceeding is concluded. See OAR 836-043-0170(5).

On 9/27/05, the director referred the case to the Office of Administrative Hearings (OAH).

On 10/3/05, OAH issued a notice scheduling a hearing to be held on 1/17/06, issued an order granting a stay, and mailed the notice and order to the parties.[3]

On 1/10/06, OAH received from the insurer a request that OAH issue an order to compel the employer to produce certain documents that the insurer had previously requested the employer to produce in this proceeding.

Also on 1/10/06, the employer requested OAH to reschedule the hearing.

Also on 1/10/06, OAH issued a notice rescheduling the hearing to be held on 3/2/06 and mailed it to the parties.[4]

On 1/23/06, OAH issued an order to the employer compelling discovery and mailed it to the parties.

On 3/1/06, the employer requested OAH to reschedule the hearing.

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[2] The employer's request was a letter dated 7/13/05. The employer's address on the letter was "John M. Sanford, Inc., PO Box 1133, Dallas, OR 97338." According to the United States Postal Service on 7/22/05, the complete zip code for this post office box was "97338-1047." All communications sent by the director and the Office of Administrative Hearings (OAH) to the employer were sent to PO Box 1133, Dallas, OR 97338-1047.

[3] The employer received this first notice of hearing. See the letter from the employer to OAH dated 1/10/06 requesting the first hearing be rescheduled.

[4] The employer received this second notice of hearing. See the letter from the employer to OAH dated 3/1/06 requesting the second hearing be rescheduled.

On 4/12/06, OAH issued a notice rescheduling the hearing to be held on 6/26/06 and mailed it to the parties.[5]

On 6/26/06, OAH held a hearing. The hearing was conducted by Catherine P. Coburn, an administrative law judge (ALJ) of OAH. The employer did not appear and was not represented at the hearing. The insurer appeared and was represented at the hearing by Shannon N. Rickard, an Assistant Attorney General assigned to represent the insurer. The insurer called Marcus Watson and Theresa Smith as its witnesses. The insurer offered Exhibits A1 to A18 as its documentary evidence all of which were admitted into the record.[6]

On 7/13/06, OAH issued a proposed order on default and mailed it to the parties.[7] The proposed order recommended that the director affirm the billing because the employer did not meet its burden of proving by a preponderance of the evidence that the billing was incorrect, ORS 183.450(2); *Salem Decorating v. National. Council on Comp. Ins.*, 116 Or App 166, 170, 840 P2d 739 (1992), *rev den*, 315 Or 643 (1993); but the insurer met its burden of proving by a *prima facie* case, ORS 183.450(2), ORS 183.415(6), OAR 137-003-0670(3)(a), that the insurer correctly included payments made to workers for mileage reimbursement and correctly assigned classification code 2702, and thus the billing was correct. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed order within 30 days after the proposed order was served on the employer and insurer.[8]

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[5] This was the last notice of hearing. The employer claimed it never received this notice and the failure to receive it caused the employer to not appear at the hearing.

[6] The proposed order erroneously omitted that the insurer also offered exhibit 18 and that it was admitted into the record.

[7] The employer received this proposed order. See the employer's affidavit dated 8/11/06. The order was mailed to the employer but not to an attorney representing the employer because prior to 8/14/06 OAH did not know that the employer was not represented by an attorney. On 8/14/06, OAH received from an attorney a letter dated 8/11/06 indicating that the attorney represented the employer. See the employer's first attorney's letter dated 8/11/06.

[8] Pursuant to ORS 174.125, if the normal due date falls on a date that the director is not open for business, then the actual due date is the next date that the director is open for business. The normal due date for receiving exceptions was 8/12/06, a Saturday, when the director was not open for business. The next date that the director was open for business was 8/14/06, a Monday. Thus, the actual due date was 8/14/06.

On 7/21/06, the director timely received from the insurer written exceptions to the proposed order. The insurer argued that the proposed order incorrectly found that the employer paid its loggers a daily rate "plus a flat mileage rate" when the "undisputed evidence in this case shows that … Sanford paid its loggers a daily rate and then subtracted the mileage payment from that pay and classified that [subtracted] portion of pay as mileage reimbursement, rather than payroll." The director agrees with the insurer because during the hearing, Marcus Watson testified that the "the mileage wasn't being ran through the payroll but [the employer] was actually excluding it from the day rate" and the employer "paid them [the workers] $200 a day excluding the mileage." There was no contrary evidence admitted during the hearing.

On 8/14/06, OAH received[9] from the employer a motion for a new hearing pursuant to OAR 137-003-00670(2). The employer argued that the employer did not appear at the hearing on 6/26/06 for good cause[10] as explained in an affidavit dated 8/11/06 of the president of the employer. In the affidavit, the employer's president stated that "I did not appear at the hearing because I was unaware that the hearing was scheduled to take place. At no point in time did I receive any notice or correspondence from the Office of Administrative Hearings regarding this matter since my e-mail correspondence with [a clerical employee of OAH] on March 21, 2006."

Also on 8/14/06, the director timely received from the employer written exceptions to the proposed order. Relative to not appearing at the hearing, the employer argued that the employer had demonstrated in its motion for a new

[9] In accordance with OAR 137-003-0520(2)(c), the employer should have sent the request for a new hearing to the director because the employer sent the request on or about 8/11/06 which was after OAH issued the proposed order on 7/13/06.

[10] OAR 137-003-0670(2) permits the director to issue a final order by default when, *inter alia*, "the administrative law judge notified the party of the time and place of the hearing and the party fails to appear at the hearing" unless "the [director] or administrative law judge finds that the failure of the party to appear was caused by circumstances beyond the party's reasonable control" in which case "the [director] … may not issue a final order by default" and "the administrative law judge shall schedule a new hearing." Thus, a party is entitled to new hearing if the party's failure to appear at a hearing was caused by circumstances beyond the party's reasonable control, rather than for good cause.

hearing that the employer did not appear at the hearing for both good cause and due to circumstances beyond the reasonable control of the employer. Relative to the billing, the employer asserted that it "does not pay its employees for commuting to work, but rather reimburses mileage to its employees for travel associated with their work activities," that it "does not inflate the amount of miles reimbursed," or that it "did not improperly classify its employees as Class Code 2725 when they should have been Class Code 2702 classified." The employer claimed that it would demonstrate these assertions at a new hearing.

On 8/18/06, OAH received[11] from the employer a memorandum to support the employer's motion for a new hearing. The employer argued that the phrase "beyond the party's reasonable control" means the same as "good cause," citing *Lolley v. SAIF Corp.*, 141 Or App 281 (1996); and *Ewing-Swearingen v. Employment Division*, 131 Or app 331 (1995). The employer also argued that the employer had good cause for failing to appear at the hearing because the employer's president stated that he did not receive the last notice of hearing, citing *In re Adams*, 102 Or App 329 (1990).[12]

On 8/18/06, OAH requested the director to refer the case back to OAH which the director did on 8/21/06.

On 8/23/06, the director received from the insurer a response to the employer's exceptions to the proposed order. The insurer argued that the director should not

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[11] In accordance with OAR 137-003-0520(2)(c), the employer should have sent the request for a new hearing to the director because the employer sent the request on or about 8/17/06 which was after OAH issued the proposed order on 7/13/06.

[12] As indicated above, the standard in this case is whether a party's failure to appear at a hearing was caused by circumstances beyond the party's reasonable control, not for good cause. The first two cases cited by the employer, *Lolley* and *Ewing-Swearingen*, are not applicable to this case because they involved administrative rules which defined "good cause" as "beyond the party's reasonable control," whereas in this case there is no such rule. Similarly, the third case cited by the employer, *Adams*, is not applicable to this case because it involved a statute that contained the phrase "good cause" but did not define it as or equate it to "beyond the party's reasonable control." Even if *Adams* involved the standard "beyond the party's reasonable control," *Adams* would still not apply to this case because in *Adams* the hearing referee found the claimant's testimony of not receiving a notice of hearing credible whereas in this case the ALJ found the employer's president's statement in an affidavit of not receiving a notice of hearing to be not credible.

consider the employer's exceptions because the exceptions may have been filed late and were without merit.

Also on 8/23/06, OAH scheduled a telephone conference to be held on 10/18/06.

On 8/24/06, an employee of the Insurance Division, on behalf of the director, sent an e-mail to the insurer's attorney, with a copy to an employee of the insurer, the employer's first attorney, and to a clerical employee of OAH. The e-mail informed the recipients that (1) on 8/14/06 the director timely received from the employer written exceptions to the proposed order, (2) on 8/18/06 the director received from OAH a request to refer the case back to OAH, and (3) on 8/21/06 that the director referred the case back to OAH, and (4) the director would send to OAH a copy of the insurer's response to the employer's exceptions.[13]

Also on 8/24/06, OAH received from the insurer a response to the employer's motion for a new hearing. The insurer argued that OAH should not grant the employer's motion for a new hearing because the employer's president's statement that he did not receive the last notice of hearing was not credible for the reasons explained in an affidavit dated 8/23/06 of an employee of the insurer.[14]

On 10/18/06, OAH conducted a telephone conference about the employer's request for a new hearing. The employer participated and was represented by Jeffrey A. Trautman, an attorney. The insurer participated and was represented by Shannon N. Rickard, an assistant attorney general assigned to the insurer.

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[13] In the amended proposed order, the ALJ characterized the e-mail as an *ex parte* communication. The director believes that the e-mail was not an *ex parte* communication. OAR 137-003-0625(1) describes an *ex parte* communication in relevant part as a "written communication …[t]hat is made without notice and opportunity for … all parties to participate in the communication." The e-mail expressly indicated and was in fact sent to both parties in this case.

[14] The insurer argued that the employer's president's statement was not credible for three reasons. The first reason was that the president exhibited a "pattern of non-responsiveness" by not attending a meeting with the insurer, not returning telephone calls from the insurer, and not responding to or complying with an order issued by OAH to comply with a discovery request from the insurer in this proceeding. The second reason was the president gave at different times different reasons for requesting the hearing be rescheduled from 3/2/06. The third reason was the president may have known prior to the hearing date about the hearing because on 6/15/06 a clerical employee of OAH told an employee of the insurer that the clerical employee of OAH had, on unspecified dates, called and left two voice mail messages for the president, and sent an e-mail to the president "asking if the president had retained an attorney for the June 26, 2006 hearing, but that [OAH] had not received any response."

On 10/30/06, OAH received from the insurer a letter stating that the insurer received the employer's supplemental memorandum, but would not file a response, but instead would rely on the insurer's previous arguments in response to the employer's motion for a new hearing and at the telephone conference.

On 10/31/06, OAH received from the employer a supplemental memorandum to support the employer's motion for a new hearing.

On 11/29/06, OAH issued an amended proposed order[15] and mailed it to the parties. The amended proposed order concluded that the employer was not entitled to a new hearing because the employer did not overcome the presumption in OAR 137-003-0520(9) that the employer received the last notice of hearing.[16] The amended proposed order found that the employer did not overcome the presumption because (1) the employer had not offered any documentary evidence or sworn testimony that the employer did not receive the last notice of hearing,[17] (2) the employer received the proposed order which was mailed by OAH to the same address of the employer as the last notice of hearing, (3) and the ALJ found that the employer's president's statement that he did not receive the last notice of hearing was not credible "in light of its pattern of nonresponsive behavior concerning the premium audit." The amended proposed order informed the employer and the insurer that they could file with the director written exceptions to the amended

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[15] Notwithstanding its name, the amended proposed order did not amend the proposed order but only supplemented it since it did not address the issue of whether the billing was correct but only addressed the issue of whether the employer was entitled to a new hearing.

[16] The amended proposed order applied OAR 137-003-0672 to this case but did not explain how the rule applied. The director believes that OAR 137-003-0672 does not apply to this case. OAR 137-003-0672 "applies when the *agency* has issued a contested case notice *containing an order* that was to become effective unless a party requested a hearing, and *has designated the agency file* as the record." OAR 137-003-0672(1) (emphasis added). OAR 137-003-0672 does not apply to this case at least because the "agency" is the director, not the insurer, ORS 737.318(1)(3)(d); and the director did not issue a notice *containing an order that was to become effective on default* or *designating the director's file as the record*. Also, the director could not issue such a notice because there is no statute authorizing the director to do so or rule exempting the director from OAR 137-003-0501 *et seq*. See OAR 137-003-0501(1)(b). Furthermore, OAR 137-003-0672 does not provide a defaulting party with an opportunity for a new hearing under any circumstances. See OAR 137-003-0672(3)(b).

[17] The amended proposed order did not explain why it treated the employer's affidavit differently than the insurer's affidavit. Both affidavits were notarized and submitted with pleadings. The only difference was the employer's affidavit indicated that the affiant was deposed whereas the insurer's affidavit indicated that the affiant was sworn and deposed.

proposed order within 30 days after the amended proposed order was served on the employer and insurer.

On 12/29/06, the director timely received from the employer exceptions to the amended proposed order. The employer argued that (1) the employer offered sworn testimony that the employer did not receive the last hearing notice when the employer's president stated in an affidavit that he did not receive the notice, (2) the employer did not demonstrate a pattern of unresponsive behavior but instead maintained contact with the insurer and OAH at every critical moment and made a conscious effort to request extensions of time or rescheduling of hearings so the employer could attend or be represented at the hearing, and (3) the employer had demonstrated in its motion for a new hearing that the employer did not appear at the hearing for good cause and due to circumstances beyond the reasonable control of the employer.

The director believes, regardless of whether the employer's statement in the affidavit was sworn testimony or the employer was responsive at selected times, the employer is not entitled to a new hearing pursuant to OAR 137-003-0670(3) because the employer's failure to appear at the hearing was not caused by circumstances beyond its reasonable control because (1) OAR 137-003-0520(9) provides that "[d]ocuments sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary," (2) OAH sent the last notice of hearing dated 4/12/06 to the employer at PO Box 1133, Dallas, OR 97338-1047 through the U.S. Postal Service by regular mail, and (3) notwithstanding the employer's statement to the contrary, the director infers that (a) the employer received the last notice of hearing from the fact that the employer received various documents related to the audit, billing or this proceeding that were mailed to the employer at the same address as the last notice; and (b) the employer failed to appear at the hearing after knowing or having the opportunity of knowing when the hearing was scheduled to be held from the fact that the employer at various times failed to appear at a meeting with the insurer, failed to respond to telephone calls from the insurer and OAH, and failed to respond to a discovery

request from the insurer and discovery order from OAH, after having received the pertinent communications.

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

On 7/10/07, director issued a final order denying the request for a new hearing, affirming the billing, and withdrawing the stay of collection.

On 9/10/07, the director timely received from the employer a petition for a rehearing and stay of the final order pursuant to ORS 183.482, OAR 137-003-0675, and OAR 137-003-0690.

Therefore, the director now makes the following amended 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, and reasoning of the proposed order relative to the billing, and the amended proposed order relative to the employer failing to appear at the hearing that was held and to the employer requesting a new hearing, as the findings of facts, conclusions, and reasoning of this final order, except as noted herein.

Order

The employer's request for a new hearing is denied.

The billing is affirmed and the stay of collection is withdrawn.

The employer's petition for rehearing and stay of the final order is denied.

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 October 31, 2007

/s/ Carl N. Lundberg
Carl N. Lundberg
Acting Administrator
Insurance Division
Department of Consumer and Business Services

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