STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
NORTHWEST TURF, LLC	)	OAH Case No. 2020-ABC-03941
	)	Agency Case No.: INS-WCA 20-6-02

Procedural History

The Director of the Oregon Department of Consumer and Business Services (Director), by and through Division of Financial Regulation, (the Division), commenced the above entitled administrative proceeding to review a workers' compensation insurance final premium audit billing issued by Hartford Underwriters Insurance Company (Hartford) to Northwest Turf, LLC, (Employer) pursuant to Oregon Revised Statutes (ORS) 737.256(1), ORS 737.505(3), and Oregon Administrative Rules (OAR) 836-043-0200 *et. seq.*

On July 30, 2020, the Division referred Employer's hearing request contesting the billing to the Office of Administrative Hearings (OAH). The issue before OAH was whether Hartford's Final Premium Audit, dated June 11, 2020, was correct. By Proposed Order dated January 28, 2021, Senior Administrative Law Judge (ALJ) Alison Greene Webster modified Hartford's June 11, 2020 Final Premium Audit Billing for the period of April 10, 2019, to November 15, 2019. Northwest Turf, LLC is not liable to Hartford for the Short Rate Cancellation fees totaling $12,176.

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 the Proposed Order as the findings of fact, conclusions of law, and reasoning of this Final Order.

Order

Hartford's Final Premium Audit issued June 11, 2020, is MODIFIED.

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 Division.

Dated May 19, 2021

TK Keen
Administrator, Division of Financial Regulation
Department of Consumer and Business Services

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER & BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	**PROPOSED ORDER**
	)	
NORTHWEST TURF, LLC	)	OAH Case No. 2020-ABC-03941
	)	Agency Case No. INS-WCA 20-6-02
	)	
	)	

HISTORY OF THE CASE

On June 11, 2020, Hartford Underwriters Insurance Company (Hartford or the insurer) issued a Statement of Premium Adjustment – Final Premium Audit Billing to Northwest Turf, LLC (employer) for the audit period of April 10, 2019 to November 15, 2019. The employer received the billing on June 29, 2020. On June 30, 2020, the employer requested a hearing challenging the cancellation fees included in the billing.

On July 30, 2020, the Department of Consumer & Business Services Division of Financial Regulation (Department) referred the employer's hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Alison Greene Webster to preside at hearing.

On October 29, 2020, ALJ Samantha Fair convened a prehearing conference on ALJ Webster's behalf in this matter. The employer's office manager, Kristen Kearney, participated in the prehearing on the employer's behalf. David Soja participated on behalf of Hartford. During the prehearing, ALJ Fair reviewed the hearing procedures, jurisdiction, the burden of proof, and the issues to be determined at hearing. In addition, ALJ Fair set the matter for a telephone hearing on January 26, 2021 at 9:00 a.m.

ALJ Webster convened the hearing as scheduled at 9:00 a.m. on January 26, 2021, by telephone. Tyler Meno, the employer's President, represented the employer. No one appeared or participated for Hartford. The following witnesses testfied on behalf of the employer: Mr. Meno and Ms. Kearney. The record closed at the conclusion of the hearing.

ISSUE

Whether the employer is liable to Hartford for the short rate cancellation fees on policy no. 76WEGAB4O1F in the amount of $12,176.

EVIDENTIARY RULINGS

The employer's Exhibits R1 through R8 were admitted into the record at hearing.

In addition, the ALJ marked and admitted into the record as Exhibit A1 the "Minimum Retained Premium Endorsement" for policy no. 76WEGAB4O1F dated February 28, 2019.[1]

FINDINGS OF FACT

1. Northwest Turf LLC is an artificial turf installation company located in Bend, Oregon, that does business in Oregon, California, and Washington, among other states. The employer's business is seasonal. The vast majority of the employer's turf installation work is done in the spring and summer months, *i.e.*, between April and September each year. (Test. of Meno; Ex. R7.)

2. On or about April 10, 2018, the employer, working with its then payroll processing company, Automatic Data Processing (ADP), purchased workers' compensation insurance from the Hartford, policy no. 76WEGAB4O1F. (Test. of Meno; Ex. A4.) The "pay-by-pay" or pay as you go policy ran for one year,[2] and then automatically renewed for another year on April 10, 2019. (Test. of Meno.)

3. On February 28, 2019, Hartford issued to the employer a Minimum Retained Premium Endorsement for policy no. 76WEGAB4O1F, effective April 10, 2019. The endorsement changed subparagraphs 1 and 2 of Section E, Final Premium of Part Five – Premium of the policy. As pertinent here, the endorsement changed the policy as follows:

> Sub-paragraphs 1. and 2. are deleted and replaced by the following:
>
> * * * * *
>
> 2. a. If you cancel for any reason, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate cancellation table and procedure.
>
> 2. b. If you cancel due to retiring from business or when all work covered by this policy has been completed, final premium will not be less than the minimum premium.

[1] The employer provided a copy of this endorsement to the Department as part of its Petition requesting a hearing to contest the final premium audit billing. The Department provided this document to the OAH in referring the matter to OAH for hearing. The ALJ takes official notice of this endorsement to include it in the evidentiary record at hearing. OAR 137-003-0615.

[2] With this "pay-by-pay" or pay as you go workers' compensation policy, the employer (through ADP) made premium payments to the insurer each time the employer ran payroll, based upon the workers' pay, instead of paying a lump sum estimated premium amount at the time it purchased the policy. (Test. of Meno.)

(Ex. A1.)

5. In the fall of 2019, after completing its seasonal work, the employer shopped for and purchased new workers' compensation insurance coverage. The new carrier notified Hartford to terminate policy no. 76WEGAB4O1F. (Test. of Meno.)

6. Hartford cancelled policy no. 76WEGAB4O1F effective November 15, 2019. (Exs. R1, R2, R5.) The Hartford did not provide the employer with confirmation of cancellation, nor did it provide the employer with notice of its short rate cancellation table and procedure for calculating the final premium. (Test. of Meno and Kearney.)

7. On May 29, 2020, the Hartford audited policy no. 76WEGABO1F. (Ex. R2.) The auditor conducted the audit remotely, did not review the audit with an underwriter, and did not interview or speak with an officer or representative of the employer about the audit. (Ex. R2; test. of Meno and Kearney.)

8. On June 11, 2020, the Hartford issued a Statement of Premium Adjustment – Final Premium Audit Billing (billing) for policy no. 76WEGABO1F. The billing included short rate cancellation fees totaling $12,176.[3] Specifically, the billing included, as part of its "Other Premium Taxes and Surcharges" for California, a line item for "Cancellation Short-Rate" in the amount of $12,165 and, as part of its "Other Premium Taxes and Surcharges" for Oregon, a line item for "Cancellation Short-Rate" in the amount of $11. (Ex. R1.)

9. The employer timely contested the short rate cancellation fees included in the billing (the amount of $12,176), asserting that it did not receive notice of the amount of the cancellation fees or notice of the procedures for assessing such fees, and did not agree in writing to pay such fees upon cancellation of the policy. (Test. of Meno; Exs. R4 and R5.) The employer has satisfied the remainder of the billing. (Test. of Kearney; Ex. R8.)

10. On September 3, 2020, the OAH, through Presiding ALJ Monica A. Whitaker, issued

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[3] In a July 1, 2020 email exchange with the Oregon Small Business Ombudsman for Workers' Compensation, a customer service representative for Hartford explained the insurer's short rate fee calculation:

> The short rate fee is calculated by taking the number of days the policy was in effect and applying the appropriate factor from our Short Rate Cancellation Table to the earned premium. In this case the policy was in effect for 219 days (4/10/19 – 11/15/19) and the factor from the table is 1.15. Per the attached Final Audit the earned premium prior to applying the short rate fee for the state of CA was $81,100 and the state of OR was $75.
>
> $81,100 + $75 = $81,175.
> $81,175 x 1.15 = $93,351.
> Short Rate Fee = $12,176 ($12,165 for CA and $11 for OR).

(Ex. R5.)

an Order Granting Stay of Collection, finding good cause to stay collection pursuant to ORS 737.505(5) and ordering that all collection efforts of the disputed amount of $12,176 be stayed during the pendency of the contested case.[4] (Ex. R8 at 1.)

CONCLUSION OF LAW

The employer is not liable to Hartford for short rate cancellation fees in the amount of $12,176 on policy no. 76WEGAB4O1F.

OPINION

Jurisdiction over this matter is based on ORS 737.318 and ORS 737.505. Pursuant to ORS 737.318, the Department is required to maintain a premium audit system for workers' compensation insurance in Oregon, including an appeal process under ORS 737.505 for employers to question a premium audit billing. ORS 737.318(3)(d).

In this case, an Oregon employer, Northwest Turf LLC, challenges the validity of the short rate cancellation fees included in the Hartford's final premium audit billing for policy no. 76WEGAB4O1F. As the party seeking redress and proponent of position that the short rate cancellation fees are invalid, the employer bears the burden of proof. *Salem Decorating v. NCCI*, 116 Or App 166, 170 (1992); ORS 183.450(2); *Dixon v. Board of Nursing*, 291 OR App 207 (2018) (the standard of proof that generally applies in administrative hearings is the preponderance of the evidence standard).

The employer contends that it did not receive notice of the amount of cancellation fees prior to cancellation of the policy and that it did not agree in writing to pay such fees upon cancellation of the policy. The employer further contends that, had it known it would be subject to cancellation fees for terminating the policy, then it would have completed the policy term. Given the seasonal nature of its business and the pay as you go premium payment plan, the employer would not have had any significant payroll, and therefore no significant workers' compensation premiums to pay, in the last six months of the policy period.

The resolution of this case turns not on whether the employer had prior notice of the cancellation fee, but rather whether, under the record presented in this case, the minimum retained premium/short rate cancellation provisions of Hartford policy no. 76WEGABO1F are valid and enforceable. Because this case involves an insurance policy delivered or issued for delivery to Northwest Turf LLC, an Oregon-based business, it is subject to Oregon insurance law. ORS 742.001.

ORS 742.023 addresses the contents of insurance policies in general, and provides in pertinent part as follows:

[4] On January 6, 2021, in contravention of the Order Granting Stay of Collection, the Hartford issued the employer a Final Audit Bill FINAL BILLING in the amount of $12,176, demanding payment by January 29, 2021 and threatening to refer the matter to a collection agency. (Ex. R8 at 5.)

(1) Every policy shall specify:

(a) The names of the parties to the contract.
(b) The subject of the insurance.
(c) The hazards or perils insured against.
(d) The time when the insurance thereunder takes effect and the period during which the insurance is to continue.
(e) The premium.
(f) The conditions and provisions pertaining to the insurance.

(2) *If under the policy the exact amount of premium is determinable only at stated intervals or termination of the contract, a statement of the basis and rates upon which the premium is to be determined and paid shall be included.*

(Emphasis added.) ORS 742.016 provides that the policy constitutes the entire contract and that every contract shall be construed according to the terms and conditions of the policy.

ORS 742.038 addresses validity and construction of noncomplying policy forms, and provides as follows:

(1) A policy in violation of the Insurance Code, but otherwise binding on the insurer, shall be held valid, but shall be construed as provided in the Insurance Code.

(2) Any insurance policy issued and otherwise valid which contains any condition, omission or provision not in compliance with the Insurance Code, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy been in full compliance with the Insurance Code.

In other words, the statute requires courts to construe policy provisions that do not comply with Oregon's insurance law in accordance with Oregon law. *See, e.g., Fleming v. United Services Automobile Assn.*, 329 Or 449 (1999) (ORS 742.038(2) requires court to construe an otherwise valid insurance policy in full compliance with the Insurance Code; under the circumstances, construing the policy as though it did not contain the invalid clause was the most appropriate way to bring the policy into compliance with the Insurance Code).

In this case, the hearing record does not include a copy of the Hartford policy no. 76WEGAB4O1F.[5] The only policy terms in evidence are set out in Exhibit A1, the Minimum Retained Premium Endorsement, issued February 28, 2019, addressing the short rate cancellation penalty. The endorsement states "If you cancel for any reason, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate

[5] As noted previously, no one from the Hartford appeared or participated in the hearing. The evidentiary record is based upon documents submitted by the employer and the testimony of Mr. Meno and Ms. Kearney.

table and procedure." Exhibit A1.

Because of the pay-by-pay nature of the Hartford policy, the exact amount of the employer's premium is determinable only at stated intervals or termination of the contract. Therefore, Oregon law requires that this policy include "a statement of the basis and rates upon which the premium is to be determined." ORS 742.023(2). Based on the evidence in the record, the Hartford policy does not meet the statutory requirement with regard to the minimum retained premium/short rate cancellation provision. Subparagraph 2.a. of the Minimum Retained Premium Endorsement references "our short rate cancellation table and procedure," but there is nothing to indicate that the rate table and procedure were included in the policy. In fact, the evidence establishes the contrary, *i.e.*, that the short rate cancellation table and penalty calculation procedure were *not* part of the policy and were *not* provided to the employer with the endorsement on the policy. Consequently, the policy's short rate cancellation provision is invalid under ORS 742.023(2). Because the policy's short rate cancellation provision does not comply with Oregon law, it is appropriate to construe the policy as if it did not contain this cancellation penalty provision.

To summarize, the short rate cancellation provision in policy no. 76WEGABO1F does not comply with Oregon insurance law and is, therefore, invalid. Because the policy provision is invalid, there is no lawful basis to bill the employer for the short rate cancellation premium penalty. Accordingly, the employer is not liable to the Hartford for that part of the Final Premium Audit Billing constituting short rate cancellation fees, $12,176.[6]

ORDER

I propose the Department issue the following order:

The Hartford's June 11, 2020 Final Premium Audit Billing for the period of April 10, 2019 to November 15, 2019 is MODIFIED. Northwest Turf, LLC is not liable to the insurer for the Short Rate Cancellation fees totaling $12,176.

Alison Greene Webster
Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this Proposed Order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the **Division of Financial Regulation** within 30 days

[6] Because the short rate cancellation provision is invalid, the employer is not liable for any portion of the cancellation fee, regardless of the amount payroll attributed to Oregon or to California subject workers.

following the date of service of this Proposed Order. You may send exceptions via email to gail.m.gage@oregon.gov, or via mail to:

Gail M. Gage
Compliance Specialist 3
Division of Financial Regulation
PO Box 14480
Salem, OR 97309-0405

CERTIFICATE OF MAILING

On January 28, 2021, I mailed the foregoing Proposed Order issued on this date in OAH Case No. 2020-ABC-03941**.**

By: Electronic Mail

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