

In the Matter of the Compensation of  
**BURL R. HAYES, Claimant**

WCB Case No. 03-04881, 02-01614

**ORDER ON REVIEW**

Malagon Moore et al, Claimant Attorneys

Michael G Bostwick, Defense Attorneys

Brian L Pocock, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

JCI-Sedgwick Claims Management Service (JCI), on behalf of an alleged noncomplying employer (GTS of Oregon, LLC) (GTS), requests, and GTS cross-requests, review of Administrative Law Judge (ALJ) Crumme's order that: (1) upheld the SAIF Corporation's denial of claimant's injury claim; and (2) affirmed an order finding GTS to be a noncomplying employer. On review, the issues are issue preclusion and coverage.<sup>1</sup> We reverse.

FINDINGS OF FACT

SAIF provided workers' compensation coverage for the employer, under a guaranty contract, beginning in January 2000.

On or about August 13, 2001, the employer's insurance agent received a copy of SAIF's notice of "Policy Expiration and Advance Termination," indicating that the employer's workers' compensation insurance policy would be terminated at midnight on September 30, 2001, if the employer did not pay delinquent premiums by then. Around that same time, the Workers' Compensation Division (WCD) also received a copy of SAIF's notice. No evidence establishes that SAIF mailed the August 13, 2001 notice to the employer.

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<sup>1</sup> In his respondent's brief, claimant contests that portion of the ALJ's order that declined to award an attorney fee under ORS 656.740(6)(c). JCI moves to strike claimant's brief, as untimely filed. Claimant moves for a waiver of rules regarding the timeliness of his brief. We need not address the parties' motions, based on the following reasoning.

ORS 656.740(6)(c) provides: "If a worker prevails at hearing or on appeal from a nonsubjectivity determination, the worker is entitled to reasonable attorney fees to be paid by the director from the Workers' Benefit Fund and reimbursed by the employer."

Claimant has not prevailed on a "nonsubjectivity determination." Consequently, even if we considered claimant's brief, he would not be entitled to an attorney fee award under the statute.

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On or about October 18, 2001, WCD received a copy of a second “cancellation” notice from SAIF. This second notice was the same as the first notice, except that it included a different “WCD number.” WCD processed SAIF’s termination of coverage for the employer on October 25, 2001.

Claimant suffered a compensable injury on November 13, 2001.

On November 14, 2001, SAIF received and processed a premium payment from the employer. (Ex. 14A). That day, SAIF “reinstated” the employer’s coverage.

On November 28, 2001, claimant requested a hearing, identifying the employer, stating that SAIF was the insurer, and seeking interim compensation.

On December 11, 2001, SAIF denied claimant’s claim, on the ground that it did not insure the employer on claimant’s date of injury. Claimant requested a hearing, contesting that denial. (WCB Case No. 03-0484).

Before the December 19, 2001 hearing regarding interim compensation, claimant wrote to the prior ALJ, stating his position that SAIF should be the only other party, even though other parties “wanted to be included because of the possible implications to them.” (Ex. 25AD-1). Then, on December 14, 2001, GTS’ then-attorney wrote to the prior ALJ confirming a telephone conversation that day, stating that the ALJ had advised that the only issue to be heard was interim compensation and the only parties were claimant and SAIF. Accordingly, the attorney informed the prior ALJ that he had advised GTS that it was not expected to be present at the hearing. (Ex. 25AE).

On December 19, 2001, a hearing convened regarding the interim compensation issue. (WCB No. 01-09259). The prior ALJ stated that the parties were claimant and SAIF and the sole issue was claimant’s entitlement to interim compensation.

On January 9, 2002, WCD issued a “Proposed and Final Order,” finding that the employer had not complied with the statute requiring it to maintain workers’ compensation coverage from October 1, 2002 to November 14, 2001. The order also assessed a civil penalty. (Ex. 26). On February 7, 2002, the employer requested a hearing regarding WCD’s “noncomplying employer” (NCE) order. (WCB Case No. 02-00777).

On April 23, 2002, the prior ALJ issued an order holding that SAIF did not owe claimant interim compensation, reasoning that SAIF had cancelled the employer's workers' compensation insurance on September 30, 2001 and it did not provide coverage on November 13, 2001, the date of claimant's injury. Under such circumstances, the prior ALJ found that any knowledge GTS had of claimant's injury would not be imputed to SAIF. In addition, the prior ALJ found that SAIF did not owe interim compensation, because its denial issued within 14 days of knowledge of the claim.

On June 5, 2003, another ALJ approved a stipulation between claimant, JCI, and WCD in WCB Case No. 02-00777. The stipulation provided that JCI accepted claimant's November 13, 2001 injury claim.

On March 8, 2002, the Assistant Presiding ALJ issued an order joining SAIF as a necessary party in WCB Case Nos. 03-04841 and 02-00777. The order also consolidated the two cases for hearing.

The employer and WCD settled the employer's challenge to WCD's NCE order, subject to a determination of whether SAIF provided coverage for the employer when claimant was injured. In other words, if SAIF was found to have provided coverage on the date of claimant's injury, the NCE order would be rescinded. Alternatively, if SAIF was found not to have provided coverage on the date of claimant's injury, the NCE order would be affirmed (subject to a reduction of the civil penalty assessment).

## CONCLUSIONS OF LAW AND OPINION

### Issue Preclusion

The ALJ held that the parties were precluded from contending that SAIF covered GTS on the date of claimant's injury, based on the prior ALJ's decision in WCB Case No. 01-09259 and the approved stipulation in WCB Case No. 02-00777. The ALJ reasoned that the parties actually litigated the coverage issue, and the issue was "necessarily determined," when the prior ALJ held that SAIF was not required to pay interim compensation (because the prior ALJ found that SAIF did not provide coverage on the date of claimant's injury). The ALJ also reasoned that the stipulation established that JCI's acceptance of claimant's claim was based on the fact that the employer was noncomplying at the time of claimant's injury. Under these circumstances, the ALJ further reasoned that "the insurer" could not deny the same condition that it had agreed to accept *via* an

approved settlement agreement. Having held that litigation of the coverage issue was precluded, the ALJ did not reach the parties' arguments concerning the merits.

Based on the following reasoning, we conclude that the coverage issue is not precluded.

The "collateral estoppel" SAIF seeks invokes the doctrine of issue preclusion. *See Steiner v. E.J. Bartells Co.*, 170 Or App 759, 762 (2000).

Issue preclusion "precludes future litigation on a subject issue only if the issue was 'actually litigated and determined' in a setting where 'its determination was essential to' the final decision reached." *Drews v. EBI Companies*, 310 Or 134, 139 (1990) (quoting *North Clackamas School Dist. v. White*, 305 Or 48, 53, *modified* 305 Or 468 (1988)). In *Washington Cty. Police Officers v. Washington Cty.*, 321 Or 430, 435 (1995), the Supreme Court explained that a decision in a prior proceeding may preclude relitigation of the issue in another proceeding if five requirements are met: "(1) The issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which [the Court] will give preclusive effect." (Citations omitted).

In this case, the employer was not a party in the prior litigation.<sup>2</sup> (WCB Case No. 01-09259). (Ex. 30A-1). Moreover, although an employer may generally be "in privity" for workers' compensation, an employer and its insurer are not "in privity," for estoppel purposes when there is a conflict of interests between them. *See Ferguson v. Birmingham Fire Ins.*, 254 Or 496, 509-510 (1969) ("The judgment should operate as an estoppel only where the interest of the insurer and insured in defending the original action are identical – not where there is a conflict of interests.") (quoted in *State Farm Fire & Casualty Co. v. Paget*, 123 Or App 558, 562 (1993) *rev den* 319 Or 36 (1994); *see Steiner*, 170 Or App at 763 (issue preclusion did not apply where the claimant's attorney, the party sought

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<sup>2</sup> It is unclear whether the employer received a copy of claimant's hearing request seeking "interim compensation" or received a copy of the notice of hearing involving that issue. However, GTS' then-attorney spoke with the ALJ on the telephone before the hearing and confirmed his understanding that GTS was not expected to be present at the hearing in a December 14, 2001 letter to the ALJ. That letter indicates that it was copied to claimant's attorney, SAIF, WCD, and GTS. (*See Ex. 25AE*).

to be precluded, was not a party in the underlying action, nor was he in privity with a party in that action).

In this case, SAIF had asserted its intention to terminate GTS' coverage before the "interim compensation" hearing. Thus, SAIF's interest was not "truly aligned" with the employer's interest at that hearing. Under such circumstances, SAIF could not have adequately represented the employer's interests at the hearing; the employer was not in privity with SAIF; and the coverage issue is not barred. *See McFadden v. McFadden*, 239 Or 76, 79 (1964) ("If the court is of the opinion that the first litigation did not afford proper protection to the rights of the person sought to be bound, then the court will hold that the parties have not been 'in privity.'"); *see e.g., Bloomfield v. Weakland*, 193 Or App 784, 795 (2004) (trial court did not err in rejecting defendant's defense that plaintiffs' claims were barred by claim preclusion, because the plaintiff in the prior action could not have adequately represented the interest the later plaintiffs' interests).

We also do not find that the employer had a full and fair opportunity to be heard on the coverage issue at the prior hearing. The employer was not a party to the prior proceeding. Moreover, because SAIF had taken the position that GTS' coverage was terminated, and no "NCE order" had issued (and neither JCI nor WCD were parties), the employer's interests were unrepresented and unprotected at the prior hearing.

For the foregoing reasons, the coverage issue is not precluded. *See McFadden*, at 80-81 ("\* \* \*we have found no authority to deny a person a right to be heard upon important substantive questions when it is found that his interest were not represented in the former action.").

Similarly, the approved settlement in WCB Case No. 02-00777 between claimant, JCI and WCD does not preclude litigation of the coverage issue. First, the agreement's "resolution" of the "NCE issue" was expressly *contingent* on prior resolution of the coverage question. (*See infra*, section entitled "Noncomplying Employer Order/WCB Case No. 02-01614"). In other words, the approved settlement was not a final decision on the merits. Moreover, because SAIF was not a party to the settlement, the parties were not the same. Under these circumstances, claimant's challenge to SAIF's denial (which is based on an asserted lack of coverage) is not precluded by the agreement between claimant, JCI, and WCD.

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Coverage/WCB Case No. 03-04841

On the merits, SAIF argues that it complied with ORS 656.427 and terminated GTS' workers' compensation insurance coverage on September 30, 2002--before claimant's November 13, 2001 injury. We disagree.

ORS 656.419(5) provides that "coverage of an employer under a guaranty contract continues until canceled or terminated as provided by ORS 656.423 or 656.427." ORS 656.423 provides the mechanism for cancellation of coverage by the employer. ORS 656.427 provides for termination of guaranty contracts by the insurer.

Pursuant to ORS 656.427, the insurer may terminate its liability by giving notice to the employer and to the Director of the Department of Consumer and Business Services (the Director). ORS 656.427(1)-(3). "A notice of termination shall state the effective date of termination." ORS 656.427(1).

Termination of a guaranty contract under ORS 656.427(2)(a) "is effective not less than 30 days after the date the notice *is mailed* to the employer." (Emphasis supplied).

Here, Exhibit 10 is SAIF's August 13, 2001 letter, stating that GTS' coverage would be cancelled effective midnight of Sept 30, 2001-- more than 30 days after the *date of the letter*. However, the statutory 30-day notice period under ORS 656.427(2)(a) begins to run on the date of *mailing* of the notice. There is no persuasive evidence establishing when Exhibit 10 was mailed--or even that it was mailed *to the employer*.<sup>3</sup> Accordingly, because the record does not establish

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<sup>3</sup> An assigned risk manager for SAIF testified that Exhibit 10, the employer's copy of the August 13, 2001 letter, "would have gone down to the mailroom and been mailed, probably on the 13<sup>th</sup>, the date of the letter." (Tr. 991-92). However, evidence of SAIF's general mailing procedure is not evidence that the particular letter was, in fact, mailed. *See Mark E. Landon*, 51 Van Natta 1512 (1999) (attorney's affidavit that he placed request for hearing in out-going mail basket and office receptionist's affidavit that she mailed everything in the mail bin that day, as part of her regular duties, insufficient to establish date of mailing).

In addition, although the employer's independent insurance agent testified that he received a copy of the letter, there is no evidence that the agent acted (or was authorized to act) on the employer's behalf. (*See* Tr. 56-57, 60-61). (In this regard, the agent testified, "The insureds deal directly with the carrier." (Tr. 60).) In any event, notice to the "independent insurance agent" did not constitute notice to the employer under ORS 656.427.

that SAIF provided statutory notice of its intent to terminate the employer's insurance coverage under ORS 656.427(2)(a) (*i.e.*, 30 days from the date of mailing of the notice), we conclude that coverage was not terminated. *See Lonny L. Pope*, 53 Van Natta 297, 298 (2002) (where there was no evidence that the insurer ever mailed notice to the employer, coverage not terminated under ORS 656.427).

Claimant's attorney is entitled to an assessed fee for services at hearing regarding SAIF's denial. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at hearing is \$3,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the denial issue (as represented by the hearing record), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.<sup>4</sup>

#### Noncomplying Employer Order/WCB Case No. 02-01614

GTS and WCD settled GTS' challenge to WCD's January 9, 2002 "Proposed and Final Order Declaring Noncompliance and Assessing a Civil Penalty" (NCE), subject to a determination of whether SAIF provided coverage for GTS during the disputed period.

The parties' agreed that: (1) If GTS was covered by SAIF, the NCE order will be rescinded; or (2) if GTS was not covered by SAIF, the NCE order will be affirmed, with a reduced penalty.

Accordingly, because we have determined that SAIF covered GTS when claimant was injured, the NCE order will be rescinded.

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Accordingly, because SAIF has not established when Exhibit 10 was mailed to the employer, we cannot determine when or whether the 30-day "pre-termination" statutory period began running. Because SAIF's notice of termination to the employer did not comply with ORS 656.427, SAIF was not authorized to terminate the employer's coverage.

Because we have determined that SAIF's coverage was not terminated, we do not address the parties' arguments about its November 14, 2001 "reinstatement" of coverage.

<sup>4</sup> Claimant's counsel is not entitled to an attorney fee for services on review, because claimant did not request review of the ALJ's order. Consequently, one of the statutory requirements for an attorney fee award for services on review has not been satisfied. *See* ORS 656.386(1). *Shoulders v. SAIF*, 300 Or 606, 611 (1986) ("Claimant must initiate the appeal.").

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Because GTS has prevailed against WCD's order on appeal, its counsel is entitled to a reasonable attorney fee for services at hearing and on review to be paid by SAIF. ORS 656.740(6)(b); *see also John W. Bones, Jr.*, 47 Van Natta 1498 (1995).

After considering the factors set forth in OAR 438-015-0010(4), we find that \$3,000 is a reasonable attorney fee for services at hearing and on review relating to the compliance issue. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record and GTS' appellate briefs), the complexity of the issue, and the value of the interest involved.

### ORDER

The ALJ's order dated April 27, 2004 is reversed. SAIF's denial is set aside and the claim is remanded to SAIF for processing according to law. The Workers' Compensation Division's NCE order is rescinded. For services at hearing regarding SAIF's coverage denial, claimant's counsel is awarded a \$3,500 attorney fee, to be paid by SAIF. For services at hearing and on review regarding the NCE Order, GTS' counsel is awarded a \$3,000 attorney fee, to be paid by SAIF.