In the Matter of the Compensation of
BURL R. HAYES, Claimant
WCB Case No. 03-04881, 02-01614
ORDER ON RECONSIDERATION
Malagon Moore et al, Claimant Attorneys
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Reviewing Panel: Members Langer and Kasubhai.

On December 10, 2003, we withdrew our November 9, 2004 order, as corrected November 12, 2004, that set aside the SAIF Corporation's denial of claimant's injury claim and the Workers' Compensation Division's (WCD's) "noncomplying employer" order. We took this action to consider SAIF's assertion that we erred in concluding that it did not establish that it had mailed notice of policy expiration and coverage termination to GTS of Oregon (the alleged noncomplying employer) prior to claimant's injury. Having received the employer's and the assigned claim processing agent's responses,[1] we proceed with our reconsideration and replace our prior order with the following order.

FINDINGS OF FACT

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

On August 10, 2001, the Workers' Compensation Division (WCD) received a copy of SAIF's August 13, 2001 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. (Ex. 32-2). On or about August 15, 2001, the employer's insurance agent received a copy of that notice. (*See* Ex. 10).

According to SAIF's ordinary business (mailing) practices, the notice was sent to the employer the same time it was sent to the employer's agent. A copy was also sent by courier to WCD.[2]

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[1] Claimant waived his response.

[2] 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.

Pursuant to SAIF's mid-August 2001 mailing of notice of termination of the employer's workers' compensation insurance coverage to the employer and the Director's receipt of that notice, the employer's coverage was cancelled on September 30, 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). It also reinstated the employer's coverage, effective that day. (Exs. 17, 18).

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). 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).

The employer was not a party in the prior litigation.[3] (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

[3] 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).

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 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 later plaintiffs' interests).

The employer also did not have 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.

Coverage/WCB Case No. 03-04841

On the merits, SAIF argues that it complied with ORS 656.427[4] and terminated GTS' workers' compensation insurance coverage on September 30, 2002--before claimant's November 13, 2001 injury. On reconsideration, we agree.

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[4] ORS 656.427 (1995) provided, in part:

> "(1) An insurer that issues a guaranty contract or a surety bond to an employer under this chapter may terminate liability on its contract or bond, as the case may be, by giving the employer and the Director of the Department of Consumer and Business Services written notice of termination. A notice of termination shall state the effective date and hour of termination.
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> "(2) An insurer may terminate liability under this section as follows:
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> "(a) If the termination is for reasons other than those set forth in paragraph (b) of this subsection, it is effective at 12 midnight not less than 30 days after the date the notice is received by the director.
>
> "(b) If the termination is based on the insurer's decision not to offer insurance to employers within a specific premium category, it is effective not sooner than 90 days after the date the notice is mailed to the employer.
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> "(c) The termination of a surety bond is effective at 12 midnight not less than 30 days after the date the notice is received by the director.
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> "(3) Notice under this section shall be given by mail, addressed to the employer at the last-known address of the employer. If the employer is a partnership, notice may be given to any of the partners. If the employer is a limited liability company, notice may be given to any manager, or in a member managed limited liability company, to any of the members. If
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> the employer is a corporation, notice may be given to any agent or officer of the corporation under whom legal process may be served.
>
> "(4) Termination shall in no way limit liability that was incurred under the guaranty contract or surety bond prior to the effective date of the termination.
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> "* * * * *"

The statute was amended in 2003. Under ORS 656.427(2)(a) (2003), an insurer may terminate its liability effective "not less than 30 days after the date the notice is mailed *to the employer*." (Emphasis added). The amendment does not apply to this 2001 policy termination.

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(1), 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). "A notice of termination shall state the effective date and hour of termination." (*Id*). ORS 656.427(3) provides, "Notice under this section shall be given by mail, addressed to the employer at the last-known address of the employer."

Pursuant to ORS 656.427(2)(a) (1995), termination is effective at 12 midnight not less than 30 days *after the date the notice is received by the director*." (Emphasis added). *See also* OAR 436-050-0100(1) (WCD Admin. Order 01-054 eff. 7/1/01).[5]

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[5] The rule is set out in full, below. It provides, in pertinent part: "Liability of an insurer under a guaranty contract * * * is terminated by an insurer taking action pursuant to ORS 656.427." The rule has been amended, but the amendments do not apply here.

Under the former rule (WCD Admin. Order 01-054):

> "(1) An employer may cancel coverage with an insurer pursuant to ORS 656.423. An employer's cancellation of coverage with an insurer does not terminate a guaranty contract. Liability of an insurer under a guaranty contract under this chapter is terminated by an insurer taking action pursuant to ORS 656.427.
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> "(2) A guaranty contract terminated pursuant to ORS 656.427 may be reinstated provided that the insurer submits notice to the director stating that the termination notice is being rescinded with no lapse in coverage. Notice under this section shall be in writing and include the name of the insurer, legal name of the insured, insured's address, insured's telephone number, insurance policy number, and the insured employer's Federal Employer Indentification Number (FEIN).
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> "(3) Pursuant to ORS 656.427(5), an employer may give notice to the insurer seeking continued coverage. The notice must be given before the effective date of the insurer guaranty contract termination and must be in writing. The notice must at least include a statement that other coverage has not been obtained and that the employer intends to become insured under the plan as established in ORS 656.730. Further application by the employer is not required. Pursuant to ORS 656.427(5), the insurer so notified must then insure continuing coverage and may take the additional steps necessary to transfer the risk to the plan.

The employer argues that SAIF's cancellation of coverage was ineffective before claimant's injury, contending that neither it nor the Director were properly notified. Alternatively, the employer contends that SAIF reinstated coverage after termination. In all events, the employer contends that it was covered when claimant was injured on November 13, 2001. We address the employer's arguments in turn.

The employer first argues that there is no evidence that it received SAIF's August 13, 2001 notice of "Policy Expiration and Advance Termination."

Here, the notice in question was correctly addressed to the employer, dated August 13, 2001. The notice stated that GTS' coverage would be cancelled effective midnight of September 30, 2001-- more than 30 days after the date of the letter. (*See* Ex. 10).

SAIF contends that its notice to the employer was timely and effective to cancel the employer's coverage as of September 30, 2001, because it was, in fact, mailed more than 30 days before that date. In support, SAIF relies on the presumption that it followed its ordinary course of business and mailed the notice on or after August 13, 2001, when it was written. We find SAIF's argument persuasive, based on the following reasoning.

In *Bill D. Coleman*, 48 Van Natta 2154, 2156 (1996), we found the Oregon Evidence Code (OEC), helpful in dealing with a similar notice issue. Specifically, under OEC 311(m) and OEC 308, and the evidence presented, we found that the carrier's ordinary course of business included sending an injured worker a copy of the 801 claim form (front and back, including appeal rights) when the claim was accepted. Accordingly, after considering the claimant's testimony that he did not recall but it was "possible" that he had received the form, we concluded that the claimant did not carry his burden of proving that the carrier failed to follow its ordinary course of business (*i.e.*, failed to mail the form to him). Under those circumstances, we further concluded that the presumption that the ordinary course of business had been followed was not rebutted and the carrier had, in fact, mailed the form to claimant. *Coleman*, 48 Van Natta at 2157; *see* ORS 40.120; ORS 40.135.

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(4) When there are two or more effective guaranty contracts on file with the director covering the same period, the insurer filing the most recent contract shall have all responsibility for processing claims of the employer for the period its guaranty contract is in effect."

We find this case similar to *Coleman*, because there is persuasive evidence that SAIF's ordinary course of business included prompt mailing of coverage notices to employers generally and to this employer in particular. In this regard, an assigned risk manager for SAIF testified that the employer's copy of the notice letter "would have gone down to the mailroom and been mailed, probably on the 13th, the date of the letter." (Tr. 91-92).[6] In addition, the record indicates that the employer's insurance agent received a copy on August 15, 2001. (Tr. 60-61). Considering this evidence, and the copy of the letter, with its date and the employer's correct address, we find the record sufficient to raise the presumption that SAIF followed its ordinary course of business and mailed the notice of impending cancellation of coverage to the employer by mid-August 2001. Consequently, it is the employer's burden to rebut that presumption. *See Coleman*, 48 Van Natta at 2157.

The employer relies on an assertion that it did not *receive* SAIF's mid-August 2001 notice of impending cancellation of coverage. However, we find the employer's assertion insufficient to rebut the presumption that SAIF followed its ordinary course of business (regarding mailing) and timely mailed the employer's copy to the employer.

Consequently, we conclude that SAIF provided statutory notice to the employer and it was effective to cancel the employer's coverage as of September 30, 2001 (as provided in the notice), under ORS 656.427. *See Coleman*, 48 Van Natta at 2157 (where evidence was insufficient to rebut the presumption that the carrier had followed its ordinary course of business, the claimant failed to carry his burden of rebutting that presumption); *compare Lonnie L. Pope*, 53 Van Natta 297 (2002) (where there was no evidence that the insurer ever mailed notice to the employer, coverage not terminated under ORS 656.427).

The employer also argues that SAIF's notice to the Director was inadequate to terminate its coverage, because termination would only be effective not less that 30 days after notice was received by the Director. *See* ORS 656.427(2)(a) (1995). Because the initial August 13, 2001 notice apparently included an incorrect WCD number, and WCD did not "process" the termination until the number was corrected, the employer argues that the 30-day notice period did not run before claimant's injury. (*See* Exs. 32-2, 33-27).

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[6] The employer argues that the evidence does not establish that SAIF *had* an "ordinary course of business" regarding mailing in the first place. However, considering the witness' unrebutted testimony, we find this argument unpersuasive. (*See* Tr. 89).

However, the required 30-day "pre-cancellation" notice period runs "from the date the notice is received by the director" under the statute. Here, it is undisputed that the Director received a copy of SAIF's August 13, 2001 "Policy Expiration and Advance Termination Notice" on August 10, 2001, more than 30 days before the impending September 30, 2001 termination date.

We find SAIF's notice to WCD effective because it clearly referred to the policy SAIF had provided for the employer. Under these circumstances, WCD's apparent inability to promptly "process" SAIF's notice did not "invalidate" the notice. In this regard, we note that no applicable statute or rule required the notice to include a correct WCD number in order to be effective or to trigger the running of the 30-day notice period under ORS 656.427(2)(a) (1995).[7]

Under these circumstances, we conclude that SAIF's notice to the director was effective to cancel the employer's coverage as of September 30, 2001.[8] (Ex. 32-2).

Accordingly, because the employer was notified of the impending cancellation of its coverage and the Director was notified more than 30 days before the September 30, 2001 cancellation, we conclude that SAIF complied with the requirements for effective cancellation under *former* ORS 656.427. *Compare Wausau v. Hardy*, 155 Or App 231, 236-37 (1998) (workers' compensation coverage not terminated where notice of cancellation not provided to the Director, as required by ORS 656.427(1)).

Finally, the employer contends that SAIF's reinstatement of the employer's coverage was effective before claimant's injury, based on the "natural and ordinary meaning" of the word "reinstatement." In this regard, the employer relies on a dictionary defining "reinstatement" as "The action of restoring an insurance policy to its previous status or amount after it has been reduced by the payment of a claim or allowed to lapse."

We are not persuaded that this meaning accurately describes "reinstatement" of cancelled worker's compensation coverage under the Director's rules. Instead, we find that the term "reinstatement" in this context is a technical term, without

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[7] The employer does not contend that the notice was ineffective for failing to comply with the requirements set forth in OAR 436-050-0100(2) (WCD Admin. Order 01-054). (*See* n 5, *supra*).

[8] We do not consider the WCD employee's testimony regarding a hypothetical response to a telephone inquiry regarding the employer's coverage dispositive or relevant to the cancellation issue. (*See* Ex. 33-27). And there is no evidence that the employer changed its position based on a misrepresentation by WCD.

necessary implications of retroactivity. *See, e.g., Nationwide Mutual Insurance Co. v. Williams*, 55 Or App 442, *rev den* 292 Or 825 (1982) (summary judgment granted in favor of plaintiff insurance company, because policy reinstated after lapse for nonpayment of premium was a new contract, not a continuation of the earlier lapsed policy). For example, under the rule in effect on November 14, 2001, when the employer's coverage was "reinstated," "A guaranty contract terminated pursuant to ORS 656.427 may be reinstated provided that insurer submits notice to the director stating that the termination notice is being rescinded *with no lapse in coverage*." OAR 436-050-0100(2) (WCD Admin Order 01-054) (Emphasis added). Thus under the rule, reinstatement of coverage, "with no lapse in coverage," required notice to the director to that effect. Because there is no such notice in this case, we are not persuaded that reinstatement occurred without a lapse.

For all these reasons, we find that the employer's workers' compensation coverage was cancelled effective September 30, 2001 and reinstated *effective* November 14, 2001, the day after claimant's injury. (*See* Exs. 14, 17, 18, 19, 19B, 20, 23, 24, 25A, 26, 31). Under these circumstances, we uphold SAIF's denial of claimant's injury claim on "noncompliance" grounds. (*See* Ex. 26).

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 did not cover GTS when claimant was injured, the NCE order is affirmed, subject to the stipulated penalty.

In conclusion, on reconsideration, the ALJ's order dated April 27, 2004 is affirmed.

Accordingly, on reconsideration, we replace our November 9, 2004 order, as corrected November 12, 2004, with this order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 4, 2005