In the Matter of the Compensation of
MARK L. EBENSTEINER, Claimant
WCB Case No. 03-02908
ORDER ON RECONSIDERATION
Guinn & Munns, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

On June 21, 2005, we withdrew our May 25, 2005 Order on Review that affirmed an Administrative Law Judge's (ALJ's) order that determined that the SAIF Corporation (ALLPEO, Inc.) provided workers' compensation coverage on the date of claimant's injury. We took this action to address SAIF's motion for reconsideration. Having received claimant's response, we proceed with our reconsideration.

SAIF makes several contentions in support of its argument that we incorrectly analyzed the coverage issue. Having reviewed this matter once more, we remain persuaded that the reasoning in our prior order was sound. We write, however, to address SAIF's contention that ALLPEO, the leasing company, terminated its coverage of its leased employees effective March 3, 2002, which was prior to claimant's June 17, 2002 injury. Therefore, according to SAIF, it could not be responsible for an injury occurring when it did not provide coverage.

In our previous order, we reasoned that SAIF, as insurer of the leasing company, ALLPEO, was responsible under ORS 656.850(3) for claimant's June 17, 2002 injury because the "client," KH&P (KHP), did not have "an active guaranty contract on file with the director" during the term of the lease arrangement with ALLPEO. SAIF does not challenge that conclusion on reconsideration, but instead focuses on the subsequent portion of ORS 656.850(3) that provides that, if a client such as KHP allows its guaranty contract to terminate and continues to employ subject workers or has leased workers, the client shall be considered a noncomplying employer, unless a worker leasing company, such as ALLPEO, has complied with ORS 656.850(5). That subsection allows a leasing company to provide workers' compensation coverage for leased workers on notification to the director and to terminate its obligation to provide workers' compensation coverage for workers provided to a "client" upon notification to the client and the director.

SAIF argues that it terminated coverage under ORS 656.850(5) and that, therefore, it was not responsible for claimants' injury, which occurred after that termination. We are not inclined to address SAIF's argument that it raises for the first time on reconsideration. *See Vogel v. Liberty Northwest Ins. Corp.*, 132 Or App 7, 13 (1994) (Board has discretion not to address issues raised for the first time on reconsideration); *see also Stevenson v. Blue Cross*, 108 Or App 247, 252 (1991) (Board may refuse to consider issues on review that were not previously presented at hearing). Nevertheless, even if we consider it, we disagree with SAIF's analysis.

In order for a client such as KHP to allow a guaranty contract to terminate under ORS 656.850(3), it must have had an "active guaranty contract on file with the director" during the term of the lease arrangement with ALLPEO. We have previously determined that this requirement was never satisfied. Therefore, the portion of ORS 656.850(3) SAIF cites never became operative. Accordingly, under the other portion of ORS 656.850(3), the worker leasing company, ALLPEO, was responsible for claimant's injury because it was required to provide coverage for leased workers in the absence of an active guaranty contract on file with the director shifting coverage to KHP.[1] [2]

SAIF again argues that our interpretation of ORS 656.850(3) would nullify the effect of statutes concerning guaranty contracts, such as ORS 656.427(4) (providing that termination of a guaranty contract shall not limit liability incurred under the contract) and ORS 656.447(2) (providing that suspension or revocation of a guaranty contract shall not affect the liability on a guaranty contract in force prior to the suspension or revocation). We continue to conclude that the specific provisions of ORS 656.850(3) control over the more general provisions of statutes relating to guaranty contracts.

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[1] To the extent that SAIF is arguing that ALLPEO had an independent right under ORS 656.850(5) to terminate its obligation to provide coverage of leased workers, we reject that argument. While ALLPEO may have been authorized by that subsection to terminate its coverage if the "client," KHP, had "an active guaranty contract on file with the director" pursuant to ORS 656.850(3), this record does not establish that KHP ever had such a contract on file during the term of its lease agreement with ALLPEO. Under such circumstances, ALLPEO was required to provide coverage under ORS 656.850(3).

[2] In our prior order, we stated that KHP's insurer, Paula, likely cancelled coverage under its guaranty contract in the spring of 2002. SAIF contests that portion of our order. However, even if that statement was incorrect, we also found that the Director cancelled all of Paula's guaranty contracts on July 24, 2002, prior to the date (August 20, 2002) it had a guaranty contract "on file." Thus, Paula never had an effective guaranty contract on file prior to its cancellation. Accordingly, whether or not there was an earlier date of cancellation is irrelevant to our determination that SAIF is responsible for claimant's injury.

In reaching this conclusion, we observe that ORS 656.850(3) is located in a specific statutory section devoted to "Worker Leasing Companies." Those particular statutory provisions contrast with the aforementioned statutory provisions dealing with guaranty contracts in general.

Moreover, the general guaranty contract statutes cited by SAIF, as well other guaranty contract provisions, such as ORS 656.419(3) (workers' compensation coverage is effective when the insurer receives and accepts the employer's application and required fees or premium) and ORS 656.419(5) (coverage of an employer under a guaranty contract continues until cancelled or terminated as provided in ORS 656.423 or 656.427), all contemplate a valid guaranty contract. Cancellation or termination provisions contemplate a valid or effective guaranty contract because there would be no need to terminate an invalid or ineffective guaranty contract.

Accordingly, there is no conflict between ORS 656.850(3) and the general guaranty contract provisions contained in the above statutes. Moreover, to the extent that there may be a conflict, we once again give greater effect to the specific statutory provisions relating to worker leasing companies such as the leasing company (ALLPEO) we are concerned with in this case. To do otherwise would cause us to omit what the legislature inserted in ORS 656.850(3). *See* ORS 174.010 (in construing a statute, we are "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted"). That is, a "client" must have a guaranty contract "on file" with the director before a worker leasing company is relieved of the responsibility for providing workers' compensation coverage. Because the "client" here (KHP) did not have such a contract "on file" during the term of its lease arrangement with the leasing company, ALLPEO, we continue to find that SAIF was responsible for claimant's injury.

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our March 25, 2005 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 September 16, 2005