

In the Matter of the Compensation of
MARK L. EBENSTEINER, Claimant

WCB Case No. 03-02908

ORDER ON REVIEW

Guinn & Munns, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

The SAIF Corporation, on behalf of the employer, ALLPEO, Inc. (ALLPEO), requests review of those portions of Administrative Law Judge (ALJ) Otto's order that: (1) determined that it provided workers' compensation coverage on the date of claimant's injury; and (2) set aside its responsibility denials of claimant's injury claim for thoracic and cervical spine conditions. On review, the issue is coverage.

We adopt and affirm the ALJ's order with the following supplementation.

Applying ORS 656.850(3),¹ the ALJ found that as insurer of a worker leasing company (ALLPEO, Inc.), SAIF was responsible for claimant's June 17, 2002 injury because ALLPEO's client, KH&P (KHP), did not have "an active guaranty contract on file with the director" during the term of its lease agreement with ALLPEO. Thus, the ALJ found that, when claimant was injured, coverage under the statute reverted back to SAIF, as the leasing company's insurer.

On review, SAIF challenges the ALJ's finding that KHP did not have an active guaranty contract on file during the term of the leasing agreement. Appearing in this proceeding pursuant to ORS 656.726(4)(h), the Workers' Compensation Division (WCD) supports SAIF's position that it is not responsible for claimant's injury. Before addressing those parties' arguments, we first briefly recount the procedural and factual background of the claim.

¹ That statute provides in relevant part:

"When a worker leasing company provides workers to a client, the worker leasing company shall satisfy the requirements of ORS 656.017 and 656.407 and provide workers' compensation coverage for those workers and any subject workers employed by the client unless during the term of the lease arrangement the client has an active guaranty contract on file with the director that extends coverage to subject workers employed by the client and any workers leased by the client * * *."

KHP, a parent company of wholly owned subsidiaries, KoldKist Beverage Ice and Culligan Bottled Water, leases its workers from worker leasing companies such as ALLPEO. KHP, as the client company, assumed all direction and control of the workers, while the worker leasing company performed all the business paperwork, including taxes, payroll, health insurance and unemployment compensation. Pursuant to ORS 656.850(3), the worker leasing company also provides workers' compensation insurance coverage to all leased employees of a client company such as KHP, unless the client desires a different carrier and follows the appropriate statutory procedure for instituting such coverage. This procedure requires the client company to have an "active guaranty contract on file" during the term of the lease agreement.

In this case, a worker leasing company, PEO, leased workers to KHP, the "client," in 2001 and provided workers' compensation insurance coverage for those workers through SAIF. Although PEO provided insurance coverage, KHP was responsible for payment of the premiums. In November 2001, KHP decided to find less expensive coverage.

On January 1, 2002, KHP contracted with Paula Insurance Company (Paula) to provide workers' compensation insurance coverage. KHP also leased all its employees from another worker leasing company, ALLPEO. The contract between Paula and KHP ran from January 1, 2002 to January 1, 2003. On January 1, 2002, KHP stopped paying premiums to PEO, the prior leasing company, and started paying those premiums to Paula.

On two occasions in the spring of 2002, Paula asked the WCD to cancel its coverage of KHP due to KHP's failure to pay premiums. The WCD declined because it was unable to locate the guaranty contract. When Paula subsequently went bankrupt, all of Paula's insurance policies, including the policy with KHP, were cancelled on June 24, 2002.

Claimant, a delivery truck driver for a subsidiary of KHP, sustained a cervical and thoracic injury on June 17, 2002. On August 20, 2002, the WCD finally obtained a copy of Paula's guaranty contract showing it was to provide insurance from January 1, 2002 to January 1, 2003.² The Director, however, had already cancelled all of Paula's guaranty contracts on July 24, 2002.

² The guaranty contract that Paula submitted to WCD was apparently sent in February 2002. (Tr. 53). It is not clear why WCD did not obtain the guaranty contract until August 2002.

The WCD initially referred the claim to SAIF for processing, but subsequently directed claim processing to Pinnacle Risk Management (Pinnacle), which was assigned responsibility for Paula's claims by the Oregon Insurance Guaranty Association (OIGA). Pinnacle denied coverage on January 6, 2003 and subsequently executed a Disputed Claim Settlement (DCS), in which claimant agreed to withdraw his request for hearing against Pinnacle in exchange for a sum of money. (Ex. 35). That DCS became final.

In March and May 2003, SAIF denied responsibility for the claim on the ground that Paula had provided coverage for the injury. Claimant requested a hearing contesting SAIF's denials.

In setting aside SAIF's denials, the ALJ reasoned that, because the WCD did not receive Paula's guaranty contract until August 20, 2002, almost a month after the Director had cancelled all of Paula's guaranty contracts on July 24, 2002, KHP, the client company, never had an active guaranty contract on file during the term of the lease agreement between it and ALLPEO. Therefore, according to the ALJ, coverage reverted back under ORS 656.850(3) to the leasing company (ALLPEO) and its insurer, SAIF.

In asserting that the ALJ's reasoning was incorrect, SAIF and WCD make several arguments. Before addressing them, we first review the requirements of ORS 656.850(3).

That statute provides that, when a worker leasing company provides workers to a "client," it shall provide workers' compensation coverage for those workers and any subject workers employed by the client, "unless during the term of the lease arrangement the client has an active guaranty contract on file with the Director" that extends coverage to the client's subject workers and any leased workers.

Here there is no dispute that a leasing company, ALLPEO, provided workers to KHP, the "client." ALLPEO's insurer, SAIF, would be responsible for insurance coverage during 2002, a period which included claimant's date of injury, *unless* KHP during the term of the lease had an "active guaranty contract on file with the director." Accordingly, the crux of this dispute centers on the phrase "unless during the term of the lease agreement the client has an active guaranty contract on file with the director." ORS 656.850(3).

SAIF concedes that KHP's guaranty contract was not "on file" until the WCD obtained it on August 24, 2002, after WCD had cancelled it on July 24, 2002. (Appellant's Brief p. 11).³ SAIF nevertheless argues that KHP satisfied the requirements of ORS 656.805(3) because at one point during the term of the 2002 lease agreement between KHP and PEO (August 24, 2002) an effective guaranty contract was on file with the WCD.⁴ It asserts that the guaranty contract was "active," despite the July 24, 2002 cancellation of all of Paula's guaranty contracts, because, under ORS 656.419, the insurance contract bound Paula to be liable for compensable injuries for the period of time beginning when the coverage was effective and ending when the insurance was terminated. SAIF observes that, under ORS 656.419(3), workers' compensation coverage is effective when a subject employer applies for coverage, together with any required fees, or when premiums are received and accepted by an insurer. SAIF further notes that an insurer is not required to file a guaranty contract under ORS 656.419(2) until 30 days after coverage is effective. Thus, according to SAIF, regardless of the date that the guaranty contract was "on file," Paula's coverage was effective to cover injuries such as claimant's during the period of the insurance contract.

Notwithstanding SAIF's argument that the statutes dealing with guaranty contracts control this dispute, the requirements of ORS 656.850(3) are clear.⁵ For SAIF to be relieved of responsibility for claimant's injury, KHP must have had an "active" guaranty contract on "on file" during the term of the lease agreement. As

³ The WCD, however, does not accept the ALJ's finding that it did not have Paula's guaranty contract "on file" when claimant was injured. It argues that the evidence supports a finding that Paula mailed the guaranty contract in February 2002. (WCD's Brief p. 4). WCD's rules do not define what is meant by "on file." OAR 436-050-0060(1)(c) only states that the guaranty contract must be "submitted in a form and format prescribed by the director." Given the statutory requirement in ORS 656.850(3) that the guaranty contract be "on file," we reject the WCD's argument that mailing the guaranty contract satisfies the requirement that the contract be "on file." In reaching this conclusion, we observe that, had the legislature intended mailing to be sufficient, it would likely have used the word "filed," rather than the phrase "on file."

⁴ The phrase "active guaranty contract" is not statutorily defined. However, one of the definitions of word "active" is "having practical operation or results: EFFECTIVE." *Webster's Third New Int'l Dictionary* 22 (unabridged ed 1993).

⁵ In resolving this dispute, we are mindful that the special provisions in ORS 656.850(3) control over the more general provisions contained in the statutes dealing with guaranty contracts. *See Smith v. Multnomah County Board of Commissioners*, 318 Or 302, 309 (1994) (where there is a conflict between two statutes, both of which would otherwise have equal force and effect, the special provisions control over the general provisions). Moreover, if we adopted SAIF's position, ORS 656.850(3) would have little, if any, effect.

previously noted, SAIF concedes that the guaranty contract was not “on file” until after the contract had been cancelled on July 24, 2002. Even assuming that SAIF is correct that the guaranty file need only be “on file” at some point during the 2002 leasing agreement between KHP and ALLPEO, the fact remains that, by the time the guaranty contract was “on file” (August 24, 2002), it had already been cancelled.⁶ Accordingly, we agree with the ALJ that there was no “active” guaranty contract “on file” during the term of the leasing agreement so as to relieve SAIF of responsibility for claimant’s June 17, 2002 injury.

Citing *King v. Department of Insurance and Finance*, 126 Or App 1, *rev den* 319 Or 149 (1994), SAIF and the WCD argue, however, that the later filing of guaranty contracts creates effective coverage for earlier periods. For the following reasons, we do not find *King* controlling.

In *King*, the only issue was whether the ALJ (then referee) erred in denying the employer attorney fees. The employer argued that, because a proposed order of noncompliance was rescinded as a direct result of its attorney’s efforts, it was entitled to attorney fees under ORS 656.740(5). The court held that the employer was not entitled to attorney fees. It reasoned that it was undisputed that, at the time the proposed order was issued, the employer had not caused a guaranty contract to be filed with the Department of Insurance and Finance (DIF). As a result, the court determined that the employer was a noncomplying employer, and the proposed order was correct until the guaranty contract was filed with DIF. Once the guaranty contract was filed, the court stated that the employer became a complying employer and DIF rescinded its proposed order. According to the court, DIF did not rescind the proposed order because it was incorrectly issued, but because the employer finally complied with the law. Because the employer did not establish that the proposed order was incorrect, the court held that the ALJ did not err in denying attorney fees. 126 Or App at 6.

Unlike *King*, the issue in this case is coverage under ORS 656.850(3), not attorney fees under ORS 656.740(5). As is apparent from the above summary of the *King* decision, that case did not concern the statute at issue in this case. Specifically, the court did not address the issue presented here: the effectiveness of a guaranty contract under ORS 656.850(3) that was not “on file” with WCD until after it had been cancelled. Under these circumstances, we do not find *King* helpful in resolving this dispute.

⁶ Paula’s coverage of KHP under the guaranty contract was likely cancelled in the Spring of 2002 when it notified WCD that it wished to cancel its coverage of KHP. See *Burl R. Hayes*, 57 Van Natta 838 (2005).

SAIF also argues that we should defer to WCD's interpretation of ORS 656.850(3) and its related administrative rule OAR 436-050-0400(2).⁷ It argues that WCD's interpretation of an "inexact term," such as the phrase "active guaranty contract," should be given deference under *Don't Waste Oregon Comm. v. Energy Facility Siting Council*, 320 Or 132, 142, (1994) (where the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which the court can assert that the rule has been interpreted "erroneously"). See *Springfield Education Assn. v. School Dist.*, 290 Or 217, 224 (1980) (discussing "inexact" statutory terms).

Here, WCD's representative testified that once a copy of Paula's guaranty contract was received in August 2002, he was satisfied that Paula's successor, Pinnacle, was responsible for the claim. (Tr. 50). SAIF further notes that WCD was a primary proponent of the legislation that resulted in enactment of ORS 656.850, which reinforces the authoritativeness of its interpretation of the statute and related rules.

The Director's exercise of authority is not without limits, however, because the determination of "active guaranty contract on file" must be consistent with the legislature's intended meaning. See *Patti E. Bolles*, 49 Van Natta 1943, 1944 (1997). ORS 656.850(3) unambiguously requires an active guaranty contract on file during the term of the lease agreement. Here, by the time the guaranty contract was "on file," it had been cancelled. Consequently, no guaranty contract was ever "active" at the same time it was "on file." Thus, WCD's interpretation notwithstanding, we conclude that the requirements of ORS 656.850(3) were not satisfied. SAIF remained responsible for coverage of workers' compensation injuries during the term of the lease agreement between KHP and ALLPEO.

⁷ That rule provides:

"Every worker-leasing company providing leased workers to a client shall also provide workers' compensation insurance coverage for any subject workers of the client, unless the client has an active guaranty contract on file with the director or is certified under ORS 656.430 as a self-insured employer. In the latter circumstance, the client's guaranty contract insurer or self-insured employer will be deemed to provide insurance coverage for all leased workers and subject workers of the client."

WCD also argues that there is a strong policy argument favoring its interpretation of the guaranty contract and the related statutes and rules. It observes that, when an employer contracts with an insurer to provide coverage, it is forced to rely on the insurer to follow through with filing of the guaranty contract. According to WCD, if an insurer is allowed to collect premiums and subsequently not be held responsible for the costs of claim as incurred during the term of the contract, it would encourage insurers not to comply with the statutory requirement of filing guaranty contracts with WCD.

We are constrained to follow the intent of the legislature as manifested in the language of the relevant statute. Thus, any public policy matters should be directed to the legislature. In this case, the language of ORS 656.850(3) requires that a guaranty contract filed with the Director be both “active” (*i.e.* effective) and “on file.” Because the guaranty contract was cancelled prior to it being “on file,” it was not simultaneously “active” and “on file” during the term of the lease agreement between KHP and ALLPEO. Accordingly, we affirm.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 on review is \$1,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ’s order dated October 18, 2004 is affirmed. For services on review, claimant’s attorney is awarded an assessed fee of \$1,500, to be paid by SAIF.

Entered at Salem, Oregon on May 25, 2005