

MIKE KREIDLER  
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON

Phone: (360) 725-7000



FILED

**DECLARATION OF MAILING**

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery of a true copy of this document to Ms. Philhower, Mr. Gingold  
DATED this 19th day of Feb 2010  
at Tumwater, Washington.

OFFICE OF  
**INSURANCE COMMISSIONER**  
HEARINGS UNIT

Fax: (360) 664-2782

2010 FEB 19 P 3:14

Hearings Unit, DIC  
Patricia D. Petersen  
Chief Hearing Officer

Signed: \_\_\_\_\_

Patricia D. Petersen  
Chief Hearing Officer  
(360) 725-7105

Josie Bayon  
Legal Assistant  
(360) 725-7002  
[JosieB@oic.wa.gov](mailto:JosieB@oic.wa.gov)

February 19, 2010

Andrea Philhower, Staff Attorney  
Office of the Insurance Commissioner  
PO Box 40255  
Olympia, WA 98504-0255

Jeffrey Gingold  
Lane Powell  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101

RE: **PacifiCare of Washington, Inc.**  
**Matter no. 09-0010**

Dear Ms. Philhower and Mr. Gingold:

I am in receipt of 1) Judge Cindy Burdue's February 10, 2010 letter to the parties and me regarding the course of the above proceedings after her Initial Order Denying [PacifiCare's] Motion for Summary Judgment (hereinafter "Initial Order"); and 2) Ms. Philhower's letter dated February 18, 2010 in response to Judge Burdue.

Although I would not communicate with Judge Burdue at this or any stage of this proceeding, it appears to me that in her letter Judge Burdue is advising the parties that at this time you can take either of two courses: 1) with the Initial Order being now filed (leaving the need for review by the undersigned until after there is an Initial Order on the merits), the parties can go forward with the case on the merits i.e. the "full hearing on the penalty issue" to which she refers. Alternatively, 2) the parties can have the Initial Order reviewed by the undersigned now (which review would include the entire hearing file to date, PacifiCare's petition for Review of Initial Order and supporting documents, any written pleadings and documents the OIC may wish to submit, and oral argument of the parties before the undersigned). At the time that a Final Order on Summary Judgment is



February 19, 2010

Page 2

entered – because PacifiCare initially requested that the case be heard by an ALJ from OAH, the case would then be referred back to Judge Burdue to conduct the hearing on the merits and enter an Initial Order on the merits (i.e. Initial Findings of Facts, Conclusions of Law and Order).

By “interlocutory appeal,” I believe Judge Burdue opines that PacifiCare has no right to have the Initial Order reviewed by the undersigned now as it has requested in its Petition for Review (and a Final Order on Summary Judgment entered now) before the hearing on the merits commences; if this is what Judge Burdue means, if there is a difference in preference in course of action between the parties, then I suggest that this issue should be revisited before a course of action is decided upon.

There would be pros and cons to taking either course. However, although I make no comment on the merits of the Motion for Summary Judgment and have not even read the documents, the parties may want to consider that should they just go forward now on the hearing on the merits, upon review of the entire case and entry of a Final Order on the merits it might be that the Initial Order Denying Summary Judgment would be reversed and the parties would have gone through the hearing on the merits for no reason.

Finally, if it is relevant and a different reading of Judge Burdue’s letter (rather than the above interpretation) is the correct one, I add that the “Review Rights” section in the Initial Order runs contrary to WAC 284-02(2)(c)(i) which provides that:

*The insurance commissioner may delegate the authority to hear and determine the matter and enter the final order under RCW 48.02.100 and 34.05.461 to a presiding officer; or may use the services of an administrative law judge in accordance with chapter 34.12 RCW and the Administrative Procedure Act (chapter 34.05 RCW). The initial order of an administrative law judge will not become a final order without the commissioner’s review (RCW 34.05.464). [Emphasis added.]*

Unfortunately, this Review Rights section of the Initial Order should not have been included in the Initial Order as it is not in compliance with the rules governing OIC hearings or OIC/OAH Protocol. Specifically, the wording of this section implies that the Initial Order becomes a Final Order unless a party files an appeal within 20 days, which is clearly in violation of WAC 284-02(2)(c). Therefore, should Judge Burdue in her letter actually be referring to an “interlocutory appeal” as an appeal to Superior Court (as Ms. Philhower appears to believe) then please keep in mind that no appeal to Superior Court will be ripe until the Initial Order is reviewed and a Final Order on Summary Judgment is entered. At the point that a Final Order on Summary Judgment is entered – just as with the above scenario where PacifiCare may want to have the undersigned review the Initial Order now and enter a Final Order on Summary Judgment now -- there may be an issue of whether PacifiCare has a right to have the Final Order on Summary

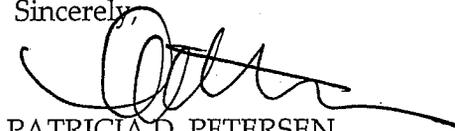
February 19, 2010

Page 3

Judgment appealed to the Superior Court now or whether (absent agreement of the parties) PacifiCare must wait to appeal to Superior Court until after a Final Order on the merits is entered.

I hope that this information is helpful to you, and trust that your current communications with Judge Burdue will guide you to a fair and expeditious resolution of this situation. Please let me know if I can be of more assistance to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patricia D. Petersen', written over a horizontal line.

PATRICIA D. PETERSEN

Chief Hearing Officer