

On August 14, 2009, the Insurance Commissioner entered a Notice of Request for Hearing for Imposition of Fines against PacifiCare of Washington, Inc. On request of PacifiCare of Washington, Inc., the undersigned transferred the matter to the Office of Administrative Hearings (OAH). The hearing was held before the OAH Administrative Law Judge Cindy L. Burdue, who entered her Initial Order Denying PacifiCare of Washington, Inc.'s Motion for Summary Judgment on January 25, 2010. On February 12, PacifiCare of Washington, Inc. filed its Petition for Review of Initial Order, requesting that the undersigned review the records of the OAH proceeding and enter a Final Order Granting Summary Judgment. Over opposition from the Insurance Commissioner, the undersigned used her discretion to grant PacifiCare of Washington, Inc.'s Petition for review of OAH Administrative Law Judge Burdue's Initial Order Denying PCW's Motion for Summary Judgment at this time for reasons of efficiency and judicial economy, to allow the parties to submit additional briefs, and to allow the parties to present oral argument in person on June 10, 2010. Finally, the undersigned held the record open for submission of additional briefs if desired. Throughout the proceeding before the undersigned, the Insurance Commissioner was represented by Andrea L. Philhower, Staff Attorney in his Legal Affairs division. PacifiCare of Washington, Inc. was represented by Jeffrey L. Gingold, Esq. of Lane Powell, P.C. in Seattle.

NATURE OF PROCEEDING

This case in chief commenced when the Insurance Commissioner (OIC) took action to impose monetary penalties against PacifiCare of Washington, Inc. (PCW) alleging that, briefly, after questioning from the OIC for some years, PCW finally admitted that it transferred some \$72,914,631 to its parent company PacifiCare Health Plan Administrators, Inc. and subsequently UnitedHealth Group, Inc., and also indirectly to its affiliate PacifiCare Life and Health Insurance Company. The OIC asserts that said transfers were illegal and therefore the subject fines should be imposed. PCW moved for summary judgment of the case, asserting that the OIC's action is time barred because the OIC notified PCW of the monetary penalty after the expiration of the two year statute of limitations. After hearing before an OAH Administrative Law Judge (ALJ) as requested by PCW, OAH ALJ Burdue entered an Initial Order denying PCW's Motion for Summary Judgment. PCW then petitioned the undersigned to review the hearing file, reverse the OAH ALJ's Initial Order and enter a Final Order granting PCW's Motion for Summary Judgment. The proceeding herein was held, therefore, for the undersigned to review the hearing file before OAH ALJ Burdue, to allow the parties to present oral argument and additional briefs to the undersigned prior to her decision and entry of a Final Order on PCW's Motion for Summary Judgment.

ISSUE PRESENTED

Whether the OIC's action for penalties against Respondent PCW is time barred because the OIC notified PCW of a monetary penalty after the expiration of the two year statute of limitations period allowed for imposition of punitive fines by a State agency?

ADOPTED BUT CLARIFIED, by replacing with:

Is the OIC's action for punitive fines against Respondent PCW time barred because the OIC failed to take some required action within the two year statute of limitations period allowed for imposition of punitive fines by a State agency or did the OIC take some sufficient action during that two year period that tolled the statute of limitations, and when does the two year statute of limitations commence?

FINAL FINDINGS OF FACT

Review: The proceeding and review herein were held in compliance with all applicable laws and regulations, and the undersigned duly appointed Review Judge has reviewed the entire record of the proceeding before Administrative Law Judge Burdue (ALJ Burdue), has reviewed all documents filed subsequent to entry of ALJ Burdue's Initial Order, has conducted the proceeding herein in compliance with all applicable laws and regulations, has considered all oral arguments of the parties and has reviewed and considered the Initial Order in detail. Having considered the evidence and arguments presented and the documents on file herein, the undersigned duly appointed Review Judge makes the following specific Final Findings of Facts. (For purposes of clarity, each Initial Finding of Fact which was included in the Initial Order herein retains its original finding number and is quoted *in italics* below. Additionally, directly after each Initial Finding of Fact the undersigned has indicated whether it is 1) adopted; 2) amended, with reasons therefore, and the Final Findings of Fact set forth in underlined print; or 3) deleted, with reasons therefore.

1. *The parties agree that the OIC has a two year statutory period in which to notify PCW of the imposition of a punitive penalty or fine pursuant to 4.16.100(2) and U.S. Oil & Refining Co. v. Dept. of Ecology, 96 Wn.2d 85, 633 P.2d 1329 (1981).*

DELETED, AS THIS RELATES TO A CONCLUSION OF LAW RATHER THAN A FINDING OF FACT.

2. *The gist of PCW's argument is that the OIC was required to file an administrative hearing request or "commence an action" against PCW for the imposition of fines and to toll the statute of limitations within the two year period.*

DELETED, AS THIS RELATES TO A CONCLUSION OF LAW RATHER THAN A FINDING OF FACT.

3. *The gist of the OIC position is that it may administratively impose fines, pursuant to applicable law, without the need to first demand an administrative adjudication or file a lawsuit or other judicial-type suit to "commence an action" for fines against PCW, and*

that PCW had an immediate right to demand an administrative hearing to contest the order for fines issued by the OIC.

DELETED, AS THIS RELATES TO A CONCLUSION OF LAW RATHER THAN A FINDING OF FACT.

4. *There is also a legal dispute between the parties over when the two year period legally commences, and whether action by the OIC during that two year period tolled the statutory period.*

DELETED, AS THIS RELATES TO A CONCLUSION OF LAW AND NOT A FINDING OF FACT.

5. *For purposes of this motion, the parties have stipulated to the essential facts and there are no disputed genuine issues of material fact, leaving only the legal issue to be determined: what action was the OIC required to take within the two year statutory period to properly impose punitive fines against PCW, and did OIC take such action timely?*

ADOPTED.

6. *For some years, the OIC had “suspected” that PCW was paying illegal franchise or royalty payments to its parent company. PCW “vigorously disputes that the acts in question were wrongful,” but for purposes of this motion does not assert that there is any genuine issue of material fact on the point which would be relevant to the legal issue under consideration. (Resp’s. Motion for SJ, page 7).*

ADOPTED.

7. *Relevant here, the OIC conducted two full financial examinations of Respondent PCW, pursuant to RCW 48.03.010: (1) For the period from 1997-2002. The OIC issued Order No. G06-4, dated February 13, 2006, as to the first financial examination; and (2) For the period from 2003 -2006; the OIC issued Order Number 08-111, formally adopting the second financial examination on August 13, 2008. (Respondent’s Motion for SJ, page 1-2; & Ex. R-5; and Decl. Jeffrey Gingold, Ex. R-3; Ex. R-4; Ex. R-6).*

ADOPTED BUT CLARIFIED, by replacing with:

The OIC conducted two full financial examinations of Respondent PCW: (1) The first financial examination covered the period from 1997 to 2002. The OIC formally adopted this first examination by Order entered February 13, 2006. [Ex. R-3, Financial Examination of PacifiCare of Washington, Inc. Dec. 31, 2002; Ex. R-5, OIC’s Findings, Conclusions and Order Adopting Report of Financial Examination entered Feb. 13, 2006.] (2) The second financial examination covered the period from 2003 to 2006. The

OIC formally adopted this second financial examination by Order entered August 13, 2008. [Ex. R-4, Financial Examination of PacifiCare of Washington, Inc. Dec. 31, 2006; Ex. R-6, OIC's Findings, Conclusions and Order Adopting Report of Financial Examination entered August 13, 2008.]

8. *Although illegal royalty payments were suspected by the OIC during both of these financial examinations, PCW denied these payments, until finally admitted to the OIC during a conference call on August 9, 2007. (Baker Decl., OIC Response to Summary Judgment Motion). Thus, the second financial examination report, issued after that August 9, 2007, date, dealt with these admitted illegal payments at "Instruction 4" of that report. (Ex. R-4, page 4). Final Order Number 08-111, adopting the examination report of the period from 2003-2006, specifies:*

Pursuant to RCW 48.31C.050(1)(a-c) and SSAP No. 70, paragraph 8, the Company is ordered to discontinue paying royalty fees either directly or indirectly and to seek reimbursement from the PHPA for all royalty fees paid. Instruction 4, Examination Report, page 4."

ADOPTED BUT CLARIFIED, AND REVISED ONLY TO CORRECT INITIAL FINDING NO. 9 to the extent it finds that PCW admits that the payments it made to its parent and affiliate companies were illegal. The hearing file shows that PCW denies, rather than admits, that the payments were illegal. Therefore replace with:

During both of these financial examinations, the OIC suspected that PCW had made illegal royalty payments but PCW denied that it had made them. On August 9, 2007, PCW finally admitted to the OIC that it had in fact made these payments to its parent company, PacifiCare Health Plan Administrators, Inc. ("PHPA") and subsequently UnitedHealth Group, Inc., and also indirectly to its affiliate PacifiCare Life and Health Insurance Company, identifying the payments first as "corporate charge back" fees and later as "management contract fees" and that then the royalty charges were recouped by being included in the inter-company billings from PHPA to PCW. PCW calculated the total payments made by it through these inter-company transactions from 1999 through 2006 was \$72,914,631. [Decl. of Carl Baker in support of OIC's Response to PCW's Motion for Summary Judgment Re: Statute of Limitations.] Thus, the second financial examination report issued after the August 9, 2007 date included information concerning the illegal payments as "Instruction 4." [Ex. R-4, page 4.] Additionally, Final Order No. 08-111, which adopted the financial examination report of the period from 2003 to 2006 specifies:

Pursuant to RCW 48.31C.050(1)(a-c) and SSAP No. 70, paragraph 8, the Company is ordered to discontinue paying royalty fees either directly or indirectly and to seek reimbursement from the PHPA for all royalty fees paid. Instruction 4, Examination Report, page 4.

9. *Under RCW 48.03, PCW had a specified statutory period after each of the above-referenced final orders were issued by the Insurance Commissioner ("Commissioner") in which to contest the findings and conclusions by demanding a hearing. PCW did not demand a hearing on either order. PCW did fulfill the instructions issued by the Commissioner in each order, which included recouping of the monies paid to the parent company as illegal franchise or royalty payments. (Respondent's Motion for SJ, page 2; Ex. R-5 and R-6).*

ADOPTED BUT CLARIFIED by replacing with:

Under RCW 48.03, PCW had a specified statutory period after each of the above-referenced final orders were issued by the OIC in which to contest the findings and conclusions by demanding a hearing. PCW did not demand a hearing on either order.

10. *RCW 48.03.040(5) states, regarding the Commissioner's final order accepting a financial examination report of the OIC, as follows:*

All orders entered under subsection (4) of this section must be accompanied by findings and conclusions resulting from the commissioner's consideration and review of the examination report, . . . Such an order is considered a final administrative decision and may be appealed under the Administrative Procedure Act, chapter 34.05 RCW, . . . [emphasis added.]

DELETED AS RELATING TO A CONCLUSION OF LAW AND NOT A FINDING OF FACT.

11. *The OIC argues that the date from which the two year statute of limitations should be measured is the end of the statutory appeals period after the Commissioner entered the final order. Final Order Number 08-111 was appealable by PCW until November 12, 2008. The OIC urges that it has two full years from that day, or until November 12, 2010, to pursue penalties against PCW for violations specified in that final order, under RCW 48.03.040(6)(c), specifically.*

DELETED AS RELATING TO A CONCLUSION OF LAW AND NOT A FINDING OF FACT.

12. *Neither of the final orders issued by the Commissioner, adopting the findings of the financial examinations referenced above, sought a monetary fine against PCW for illegal payments to its parent company in violation of RCW 48.31, the Washington Holding Company Act for Health Care Service Contractors and Health Maintenance Organizations.*

ADOPTED.

13. *On February 9, 2009, the OIC sent to PCW a “Consent Order Levying a Fine,” imposing a fine of \$400,000, along with a cover letter explaining to PCW the OIC’s findings as to the illegal action which warrants the \$400,000 fine; how the committee at OIC determined that amount of fine to be proper; and allowing PCW to resolve the matter on the basis of an agreed Consent Order Levying a Fine. (Ex. C-2, Consent Order Levying a Fine; and Ex. C-1, February 9, 2009, cover letter to PCW accompanying the Consent Order). The OIC clearly notified PCW it would enforce its assessment of the fine through “further administrative action” if PCW did not pay the fine by a set date.*

ADOPTED BUT REVISED AND SUPPLEMENTED FOR CLARIFICATION to include that part of Initial Conclusion of Law No. 6 concerning the punitive nature of the \$400,000 fine, which Initial Conclusion was primarily a finding of fact and not a conclusion of law, by replacing with:

On February 9, 2009, the OIC sent to PCW a “Consent Order Levying a Fine,” imposing a fine of \$400,000, along with a cover letter explaining to PCW the OIC’s findings as to the illegal action which warrants the \$400,000 fine; how the committee at OIC determined that amount of fine to be proper; and allowing PCW to resolve the matter expeditiously by executing the form of the basis of Consent Order Levying a Fine which the OIC had enclosed with this February 9 cover letter. (Ex. C-2, Consent Order Levying a Fine; Ex. C-1, February 9, 2009 cover letter to PCW accompanying the Consent Order.) The OIC clearly notified PCW it would enforce its assessment of the fine through “further administrative action” if PCW did not pay the fine by a set date. The OIC and PCW agree, and it is here found, that the imposition of \$400,000 in fines is punitive rather than remedial. In fact, the OIC specified that the penalty was imposed particularly in consideration of deceit by PCW over a lengthy period, including lying to the examiner during two consecutive examinations until August 9, 2007 when PCW finally confessed to the OIC that it had in fact been making the payments. [Ex. C-1 at pg. 2, para. 4, wherein in the OIC’s February 9, 2009 letter to PCW which accompanied the proposed Consent Order the OIC specifically stated that *one of the chief factors was the years of verbal and written misrepresentations by PacifiCare to this agency.*]

14. *PCW did not pay the monetary fines, and on August 14, 2009, the OIC sent to PCW a “Notice of Request for Hearing for Imposition of Fines.” (Ex. R-1) PCW argues that the date by which the OIC had to bring its “action” against Respondent for a monetary penalty or fine was August 9, 2009, two years from the August 9, 2007, “discovery” of the violations by PCW’s admissions of such violations. PCW further argues that the action for the monetary penalty was not filed or commenced by the OIC until August 14, 2009, when the OIC filed its “Notice of Request for Hearing for Imposition of Fines,” which is five days after the expiration of the statutory period ending August 9, 2009 (Ex. R-1).*

ADOPTED IN PART AND DELETED IN PART AS BEING RELATED TO A CONCLUSION OF LAW AND NOT A FINDING OF FACT, by replacing with:

PCW did not pay the monetary fines, and on August 14, 2009 the OIC sent to PCW a “Notice of Request for Hearing for Imposition of Fines.” [Ex. R-1.]

15. *The OIC argues that the date from which its right to assess monetary fines accrued is November 13, 2008, when the Order issued by the Commissioner in the 2003-2006 examination became “final” due to lack of an appeal by PCW. (Citing RCW 48.03.040(6)(c). Alternatively, the OIC argues that it is entitled to assess penalties based on an “equitable estoppel” theory, since PCW was not truthful or forthcoming for so long about the payment of royalties to its parent company.*

DELETED AS BEING RELATED TO A CONCLUSION OF LAW AND NOT A FINDING OF FACT.

CONCLUSIONS OF LAW

1. *The Office of Administrative Hearings and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW, and Chapter 34.12 RCW. The provisions of Chapter 48 RCW, the Insurance Code, are applicable here.*

ADOPTED, AND SUPPLEMENTED TO PROVIDE UPDATE by replacing with:

By discretionary grant of authority from the OIC pursuant to RCW 48.04.010, 48.44.020, and Chapters 34.05 and Chapter 34.12 RCW, the Administrative Law Judge from the Office of Administrative Hearings had jurisdiction over the parties and subject matter herein, and authority to enter the Initial Order. Pursuant to RCW 48.04.010, RCW 48.44.020, and Chapters 34.05 and 34.12 RCW, and delegation of authority from the Insurance Commissioner, the undersigned Review Judge has jurisdiction over the parties and subject matter herein to review the entire hearing file and to enter these Final Findings of Facts, Final Conclusions of Law and Final Order herein. Further, the provisions of Chapter 48 RCW, the Insurance Code, are applicable here.

2. *Summary judgment may be granted if the written record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. WAC 10-08-135. The evidence presented, and all reasonable inferences from the facts, must be viewed in the light most favorable to the nonmoving party. Herron v. King Broadcasting, 112 Wn.2d 762, 776 P.2d 98 (1989). Where reasonable minds could reach but one conclusion from the admissible facts and evidence, summary judgment should be granted. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).*

ADOPTED.

3. *The initial burden of showing the absence of material fact rests with the moving party. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Only if the*

moving party meets this initial showing will the inquiry shift to the non-moving party. Herron v. King Broadcasting, 112 Wn.2d 762, 776 P.2d 98 (1989). In that case, the non-moving party must "counter with specific factual allegations revealing a genuine issue of fact. . ." Int'l. Union of Bricklayers v. Jaska, 752 F.2d 1401, 1405 (9th Cir. 1985).

ADOPTED.

4. Pursuant to RCW 48.44.170, Chapter 48.04 RCW controls hearing rights and procedures under the Insurance Code. RCW 48.04 therefore must be considered and applied, as appropriate, in this case.

ADOPTED.

5. There is no dispute that the OIC can fine PCW for statutory violations. See, RCW 48.44.166. The parties agree that a two year statute of limitations applies to the imposition of penalties in this case, pursuant to RCW 4.16.100(2) and under *U.S. Oil and Refinery v. The Dept. of Ecology*, 192 Wn.2d 85, 633 P.2d 1329 (1981) (holding that the two year statute of limitations applies to the State when it seeks to impose punitive penalties rather than remedial measures).

ADOPTED BUT SUPPLEMENTED with the wording which was included in the Initial Order as Initial Findings of Fact 1, 2, 3, 4 and 10, but, per above, were deleted by the undersigned herein as being Conclusions of Law and not Findings of Facts, by replacing with:

The parties agree, and it is here concluded, that the OIC can fine PCW for statutory violations. See RCW 48.44.166. The parties also agree, and it is here concluded, that the OIC has a two year statutory period in which to notify PCW of the imposition of a punitive penalty or fine pursuant to 4.16.100(2) and *U.S. Oil & Refining Co. v. Dept. of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981). The parties further agree, and it is here concluded, that a two year statute of limitations applies to the imposition of penalties in this case, pursuant to RCW 4.16.100(2) and *U.S. Oil and Refinery v. The Dept. of Ecology*, 192 Wn.2d 85, 633 P.2d 1329 (1981) (holding that the two year statute of limitations applies to the State when it seeks to impose punitive penalties rather than remedial measures). However, the parties disagree as to when the two year statute of limitations legally commences and whether any action taken by the OIC during that two year period tolled the statutory period: More specifically, PCW argues that the OIC must have filed a hearing request or "commenced an action" against PCW for the imposition of these fines within the two year period in order to toll the statute of limitations. In opposition, the OIC argues that it may administratively impose fines pursuant to applicable law without the need to first demand an administrative adjudication or file a lawsuit or other judicial-type suit to "commence an action" for fines against PCW; the OIC also argues that PCW had an immediate right to demand an administrative hearing to contest the OIC's action in imposing these fines on PCW. RCW 48.03.040(5) states,

regarding the Commissioner's final order accepting a financial examination report of the OIC, as follows:

All orders entered under subsection (4) of this section must be accompanied by findings and conclusions resulting from the commissioner's consideration and review of the examination report, ... Such an order is considered a final administrative decision and may be appealed under the Administrative Procedure Act, chapter 34.05.RCW, ... [Emphasis added.]

Under RCW 48.03, PCW had a specified statutory period after each of the above-referenced Final Orders were issued in which to demand a hearing to contest the findings and conclusions contained in these Final Orders. PCW did not demand a hearing on either Final Order. The August 13, 2008 Final Exam Report included an order as follows: 5. Pursuant to RCW 48.31C.050(1)(a-c) ... the Company is ordered to discontinue paying royalty fees either directly or indirectly and to seek reimbursement from [PCW's parent/affiliated company] for all royalty fees paid. Instruction 4, Examination Report, page 4. [Ex. R-6 at pg. 3.]

6. *The OIC does not dispute that the imposition of \$400,000 in fines is punitive rather than remedial, and in fact, specifies that the penalty is imposed particularly in consideration of deceit by PCW over a lengthy period, including lying to the examiner during two consecutive examinations, until it confessed it had been paying improper royalties on August 9, 2007.*

ADOPTED, BUT CLARIFIED by replacing with:

The parties agree, and it is found in Finding of Fact No. 13 above and concluded here, that the imposition of \$400,000 in fines in this matter is punitive rather than remedial. In fact, the Consent Order specifies that the penalty is imposed particularly in consideration of deceit by PCW over a lengthy period, including lying to the examiner during two consecutive examinations, until August 9, 2007 when PCW confessed it had been paying the alleged improper payments to its parent company. [Ex. C-1, 2/9/09 letter from OIC to PCW.]

7. *The statutory limitations period runs either from the date of the illegal actions at issue, or the date these could or should have been discovered with reasonable diligence by the "plaintiff" (here, the OIC). See, U.S. Oil, Id. The OIC did not know until August 9, 2007, that PCW was paying royalties, despite the OIC's questions and suspicions since 2003. August 9, 2007, is the earliest date the OIC could have known of the illegal royalty payments. Thus, August 9, 2007, is the "discovery" date of the statutory violations at issue.*

ADOPTED.

8. *As is required in a summary judgment motion, viewing facts in the light most favorable to the non-moving party (the OIC), the violations could not have reasonably been discovered by the OIC prior to August 9, 2007. PCW failed to disclose the information needed for the OIC to determine impermissible royalty payments were being made by PCW, and actively hid the information from OIC. Therefore, since the OIC had no way to learn of the illegal payments without the cooperation of PCW, the “discovery” date of the violations is the applicable date here, not the dates on which the illegal payments were actually made by PCW to its parent company. Accord: See, U.S. Oil v. Dept. of Ecology, 98 Wn. 2nd [sic] 85, 633 P.2d 1329 (1981), wherein the court held that the government agency did not have the information or control necessary to learn of the violations as they occurred, but necessarily learned of the illegalities later.*

ADOPTED.

9. *The OIC had at least until August 9, 2009, to “commence its action” or administratively impose fines against PCW within the two year period starting August 9, 2007. The cited law supports an application of the “discovery” rule in this matter, which means that the “cause of action” for assessment of fines began on that date: August 9, 2007, and continued during a two year limitations period, to August 9, 2009.*

ADOPTED.

10. *The OIC argues that the action for fines commenced on November 13, 2008, when the Commissioner’s Final Order Number 08-111 was no longer appealable by PCW. The OIC argues that it has until November 13, 2010, two years from the end of the appeal period for that final order, to commence the action for fines. The OIC cites RCW 48.03.040 as authority for its argument that the cause of action for penalties against PCW accrued on November 13, 2008, in connection with the Final Order Number 08-111, which was final that date.*

ADOPTED.

11. *RCW 48.03 et seq., does not support a conclusion that a final administrative order, which makes no reference to a monetary penalty for the violations specified therein, could be the starting point in time for the OIC to assess monetary penalties, allowing the OIC a further two year period in which to do so. RCW 48.03.040(6)(c) specifically cited by the OIC as authority that the Commissioner has two years after the entry of that final order on a financial examination to impose fines or take other legal or regulatory action, states,*

“If the commissioner determines that regulatory action is appropriate as a result of any examination, he or she may initiate any proceedings or actions as provided by law.”

ADOPTED.

12. *The parties did not cite, and I could not locate any regulation or statute which defines “regulatory” as to the Insurance Commissioner or insurance laws of Washington. Nonetheless, there is nothing in the statute which indicates that the cited provision was meant to, or does, extend the time during which the OIC may impose punitive fines on an insurer beyond the two years from when the illegal actions of the insurer were discovered or should have been discovered. Moreover, having no definition of “regulatory,” I am not confident that punitive fines are considered “regulatory.”*

DELETED as this issue can be answered. REPLACE with:

“Regulatory action” as set forth in RCW 48.03.040(6)(c) above includes the OIC’s imposition of punitive fines on PCW. However, contrary to the argument of the OIC, there is nothing in RCW 48.03.040(6)(c) which indicates that it was meant to, or does, extend the time during which the OIC may impose punitive fines on PCW beyond the two year statutory period identified above, commencing, as above, from the date when the illegal actions of the insurer were discovered or should have been discovered.

13. *In regard to financial examinations by the OIC, RCW 48.03.040(3) and (4) describe the process, and mandate the time periods for OIC to issue and serve its reports and final orders on the examined company. Within the statutory period mandated in the law after the examination and report, the Commissioner must:*
- (a) enter an order adopting the report, as filed or with modifications; or,*
 - (b) enter an order rejecting the report, with directions to reopen the examination for more information; or,*
 - (c) call for an investigatory hearing for purposes of obtaining further information.*

ADOPTED.

14. *If the examination report reveals that the company is operating in violation of any law, rule, or order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure that violation.” RCW 48.03.040(4)(a). As noted in the Findings, the Commissioner’s final order on the examination report is considered to be a final administrative order and “may be appealed under the Administrative Procedures Act, chapter 34.05 RCW . . . RCW 48.03.040(5).*

ADOPTED.

15. *There is nothing apparent in the applicable law which prevents the Commissioner from assessing monetary fines in the final order.¹ PCW did not appeal the final order.*

¹ *As noted in the Findings, the OIC also issued to PCW a Commissioner’s Final Order which approved the first examination for the 1996 to 2003 period. Likewise, no penalty was assessed by the OIC for the various statutory infractions cited in that Order.*

However, since there was no indication in the Commissioner's Final Order that monetary fines were being or would later be assessed, there was no opportunity for PCW to appeal the imposition of fines, nor any reason for PCW to appeal the final order on the basis that it did not agree with the OIC's imposition of fines.

ADOPTED.

16. *Under chapter 48 RCW, neither entry of the Commissioner's final order which can be appealed, nor expiration of the examined company's appeal period for that order, logically appear to be a starting point for a two year statute of limitations period during which the OIC can assess monetary penalties not previously addressed in the final order by the OIC. The statutory period applicable here, during which the OIC can assess monetary fines, therefore cannot run from November 13, 2008, to November 13, 2010.*

ADOPTED.

17. *As stated above, the "discovery" of the illegal actions, on August 9, 2007, is the date from which the two year statute of limitations for imposition of punitive penalties must be measured.*

ADOPTED.

18. *Under U.S. Oil, Id., the pertinent action by a government agency, by which a cause of action for a penalty is "commenced," is notice of the penalty to the penalized party. Thus, I next examine the record for adequate administrative notice of the penalty prior to the expiration of the two year period ending August 9, 2009.*

ADOPTED.

19. *The OIC did not specifically notify PCW of its demand for an administrative hearing on the issue of the monetary penalties until August 14, 2009, in the "Notice of Request for Hearing on Imposition of Fines." (Ex. R-1). However, the OIC did send to PCW a letter and a "Consent Order Levying Fine," on February 9, 2009, six months before the statute of limitations expired on August 9, 2009. The Consent Order Levying Fine and the attached letter very clearly and specifically notified PCW that \$400,000 in fines "had been imposed" and that payment would be sought administratively if not paid voluntarily.*

ADOPTED.

20. *Based on U.S. Oil, the OIC commenced its action when it provided notice of the penalties sought to PCW. See, U.S. Oil, Id. Such notice occurred when OIC served PCW with the Consent Order Levying Fine, on February 9, 2009, demanding payment of \$400,000 as a penalty, along with a letter stating the penalty had been imposed by the OIC, and why.*

Either party could have taken subsequent legal action on that notice, simply by filing a hearing demand. RCW 48.04.010(1)(b). PCW now claims that this notice did not toll the statutory period, but its argument is not persuasive, nor is it supported by the law.

ADOPTED BUT CLARIFIED, by replacing with:

Contrary to PCW's claim that the OIC's February 9, 2009 letter and form of Consent Order did not toll the statutory period, it is here concluded that the OIC's February 9, 2009 letter and form of Consent Order Levying Fine did indeed provide notice of the penalties to PCW and constituted a legally sufficient "commencement of an action" by OIC for purposes of tolling the two year statute of limitations pursuant to the above cited statute and case law.

21. *RCW 48.04.010(1)(b) states that the Commissioner shall hold a hearing upon written demand by anyone aggrieved by an act, "threatened act," or by any report, promulgation or order of the Commissioner. Certainly, the Consent Order Levying Fine made it very clear that the OIC found statutory violations and deception by PCW, and set forth a very specific demand for payment of \$400,000 by PCW. The Consent Order and letter accompanying it make very clear to PCW that further administrative action would be taken to enforce payment if not made voluntarily by PCW. At the very least, the Consent Order and letter constitute "threatened" action by the OIC, from which PCW had administrative hearing rights immediately available.*

ADOPTED.

22. *When PCW failed to pay the fine, the OIC was forced to request an administrative hearing to enforce payment of its fine. The fact that it was the OIC which made the hearing demand does not diminish the fact that PCW had full rights to an administrative hearing on February 9, 2009, and had specific notice of the penalties sought by the OIC that day, in the amount of \$400,000.*

ADOPTED.

23. *PCW argues that the OIC did not provide adequate notice of the imposition of the fines by the Consent Order Levying Fine. PCW claims to view the Consent Order Levying Fine as merely an offer to settle the matter. However, a "matter" to settle does not exist without the Consent Order Levying Fine. This is the document issued by the OIC (along with the attached letter), to inform PCW of its demand for and intent to collect those monies.*

ADOPTED BUT SUPPLEMENTED FOR CLARITY by replacing with the following:

PCW argues that the OIC did not provide adequate notice of the imposition of the fines by the Consent Order Levying Fine. PCW claims to view the Consent Order Levying Fine as merely an offer to settle the matter. However, a “matter” to settle does not exist without the Consent Order Levying Fine. This is the document issued by the OIC (along with the attached letter), to inform PCW of its demand for and intent to collect those monies. Further, simply because the OIC waited for six months between the date it adopted the Final Examination Report (August 13, 2008) and the date on which the OIC sent its letter with accompanying proposed Consent Order Levying a Fine (February 9, 2009) does not mean that the OIC did not provide adequate notice to PCW that it intended to impose the \$400,000 fine on PCW for the alleged violations found in the August 13, 2008 Final Examination Report. The OIC may have used this time to 1) decide what disciplinary action, if any, to impose or 2) may have been – perhaps as a courtesy – allowing PCW time to conduct informal negotiations with the OIC; in either situation, this delay does not justify a finding that the OIC did not provide PCW with adequate notice of the imposition of the fines at issue in this case.

24. *The law does not require the OIC to request, file for, or provide notice of an adjudicative or administrative hearing or “action” before imposing a fine. RCW 48.44.166 allows OIC to impose a fine in lieu of revocation or suspension of license to conduct insurance business in Washington. RCW 48.44.160 states that the OIC can act, “subject to a hearing if one is requested,” to revoke, suspend, or refuse a new license or renewal of license by an insurer. PCW’s argument confuses the initiation of “adjudicative proceedings” with the agency’s right to issue an order levying a fine, which triggers a subsequent right to an adjudicative proceeding by the fined party, PCW, or to OIC for enforcement of its assessed fine.*

ADOPTED.

25. *The undisputed facts demonstrate that the OIC sent PCW its administrative order for penalty payment on February 9, 2009, by issuing the Consent Order Levying Fine and the accompanying letter which explained the process and informed PCW that the penalty had been imposed. The documents did not say a fine “would be” imposed, nor did OIC threaten to impose a fine if PCW did not do certain things. Instead, that February 9, 2009, letter states,*

“The OIC has determined that the appropriate penalty for these violations is a fine against PacifiCare of Washington in the amount of \$400,000. . . . Attached is a Consent Order imposing this fine.”

(Emphasis added).

ADOPTED.

26. *The OIC also explains that PCW “. . . may resolve this matter now without the need for further administrative action by . . . [signing the Consent Order] and paying the fine.”*

ADOPTED.

27. *PCW was therefore placed on administrative notice of a specific penalty imposed by the OIC in the Consent Order Levying Fine dated February 9, 2009. That action by the OIC carried a right to hearing on the issue, and therefore is the action by the OIC which tolls the statute of limitations for imposing a fine against PCW. See, U.S. Oil, Id.*

ADOPTED.

28. *Thus, because the OIC acted administratively, within the law, to impose a fine on PCW on February 9, 2009, 18 months after the statutory two year period began to run on August 9, 2007, with the discovery by OIC of PCW's violations, this matter may not, as a matter of law, be dismissed for lack of jurisdiction. Summary judgment on that issue must be denied.*

ADOPTED.

29. Further, as found above, upon receipt of the ALJ's Initial Order Denying Summary Judgment, PCW filed a Motion with the undersigned requesting that the undersigned review this Initial Order and enter a Final Order on Summary Judgment even though there has as yet been no hearing or Initial Order on the merits of the case. As detailed in February 19 and March 12, 2010 letters from the undersigned which are included in the hearing file [Ex. 1], and as stated during oral argument on review [Transcript, pg. 37 et seq], PCW had no right to have this Initial Order reviewed at this time as there has not yet been a hearing or Initial Order on the merits of the case: instead, the undersigned strictly used her discretion to review this Initial Order as an interim review (rather than waiting until after the case was heard on the merits and an Initial Order on the merits was entered). [Similarly, should PCW seek appeal of this Final Order on Summary Judgment in Superior Court at this time (rather than waiting for a hearing and Final Order on the merits of the case), it would appear still that PCW has no right to have an appeal of this Final Order Denying Summary Judgment heard in Superior Court at this time and that the presiding officer in Superior Court has the same discretion to grant an interim appeal now or require that there must first also be a Final Order on the merits of the case.]

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the Initial Order entered herein by the Administrative Law Judge with the Office of Administrative Hearings, which denies Respondent Pacificare of

Washington's Motion for Summary Judgment by concluding that the Office of Insurance Commissioner was not time barred from imposing the subject \$400,000 fine on Pacificare of Washington, Inc., is hereby UPHELD.

ENTERED this 18th day of January, 2011, pursuant to Title 48 RCW, Chapter 34.05 RCW and regulations applicable thereto.

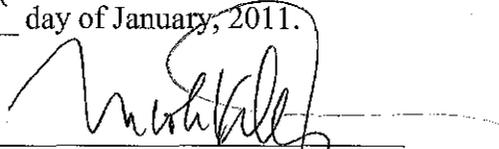


PATRICIA D. PETERSEN
Review Judge

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 through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Jeffrey L. Gingold, Esq., Mike Kreidler, Michael G. Watson, Carol Sureau, Esq., Andrea L. Philhower, Esq., and James T. Odiorne, CPA, JD.

DATED this 18th day of January, 2011.



NICOLE KELLY