



OFFICE OF
INSURANCE COMMISSIONER

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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:

KENNETH T. JEPSON,

Licensee.

)
) **No. 10-0126**
)
)
)
) **ORDER ON MOTION FOR**
) **RECONSIDERATION**
)

TO: Kenneth T. Jepson
(New mailing address)
1625 S 341st Place
Federal Way, WA 98003

(Old mailing address)
3415 Pacific Avenue
Tacoma, Washington 98418

AND TO: Mike Kreidler, Insurance Commissioner
Michael G. Watson, Chief Deputy Insurance Commissioner
Carol Sureau, Esq. Deputy Commissioner, Legal Affairs
Charles D. Brown, Esq., Senior Staff Attorney, Legal Affairs
John F. Hamje, Deputy Commissioner, Consumer Protection
PO Box 40255
Olympia, WA 98504-0255

Pursuant to Motion for Reconsideration filed by the Office of the Insurance Commissioner (OIC) on February 11, 2011, the undersigned has considered the arguments of the OIC, the entire record of the proceeding before the Office of Administrative Hearings (OAH) and the record of activity by the undersigned prior to transferring the matter to OAH at the request of Mr. Jepson (Licensee), which activity is also documented in the hearing file, and finds as follows:

On September 29, 2010, Administrative Law Judge Terry A. Schuh of the Office of Administrative Hearings (OAH) served a Notice of Prehearing Conference on the Licensee advising him that the prehearing teleconference would be held at 11:00 AM on October 12, 2010. Although mailed to the Licensee's still current legal mailing address, this Notice of Prehearing Conference was never received by the Licensee (possibly because it arrived during the short period where the Licensee was changing his residences from Tacoma to Auburn and his mailing address from Tacoma to Federal Way). The Licensee failed to appear at OAH's Prehearing Conference on October 12. The reason the Licensee failed to appear at OAH's Prehearing conference is presumably because he never knew about the OAH's prehearing conference.

On October 18, 2010, the OAH entered an Initial Order dismissing the Licensee's appeal based solely on the Licensee's failure to appear at the abovereferenced October 12 prehearing conference. As above, the Licensee never received notice of the prehearing conference, and therefore the reason the Licensee failed to appear at OAH's Prehearing Conference is presumably because he did not know about it and there is no evidence that the OAH tried to telephone him when he failed to appear on October 12. Additionally, by the time the OAH entered its Initial Order it actually knew that the Licensee had never received notice of the prehearing conference because by that time its Notice of Prehearing Conference had been returned to the sender, OAH, in a condition which was unopened and marked by the U.S. Post Office as not deliverable and unable to be forwarded, which was stamped received by the OAH on October 18, and is included in OAH's hearing file.

On February 7, 2011, the undersigned entered and served her Final Order Denying Default Judgment ("Final Order") reversing the Initial Order and ruling that this case is not dismissed, for the reasons cited therein. Just as with the OAH's Notice of Prehearing Conference, this Final Order was never received by Mr. Jepson. This Final Order was mailed to the Licensee's by then incorrect mailing address. Just as with the Notice of Prehearing Conference, the Final Order was returned to the sender, OIC, unopened and marked by the U.S. Post Office as not deliverable and unable to be forwarded, and is included in the undersigned's hearing file. Therefore the reason the Licensee failed to participate in the review of the OAH's Initial Order (which he is invited, but not required, to do) is presumably because through no fault of his own he never knew about the OAH's Initial Order.

On February 11, 2011, the OIC filed its Motion for Reconsideration of Final Order Denying Default Judgment, requesting that the undersigned reconsider her Final Order and instead uphold the OAH's Initial Order dismissing this case based on the Licensee's failure to appear at the OAH's first prehearing conference. Just as with the OAH's Notice of Prehearing Conference and just as with the undersigned's Final Order, the OIC's Motion for Reconsideration was never received by the Licensee. Just as with the undersigned's Final Order, the OIC's Motion for Reconsideration was mailed to the Licensee's by then incorrect address and was returned to the sender, OIC. The reason the Licensee failed to participate in the review of the OIC's Motion for Reconsideration (which he is invited, but not required, to do) is presumably because through no fault of his own he did not know about the OIC's Motion for Reconsideration.

In support of its Motion for Reconsideration, the OIC contends, briefly, that Mr. Jepson was properly served with the Notice of Prehearing Conference before the OAH; that said Notice included the advice that failure of a party to attend might result in default pursuant to RCW 34.05.440. While on the date OAH mailed the Notice of Prehearing Conference it was still Mr. Jepson's current legal address, Mr. Jepson was changing his residence from Tacoma to Auburn and his mailing address from Tacoma to Federal Way and he never received that Notice. Also, as stated in the undersigned's Final Order, there is no evidence in the OAH hearing file (and the prehearing conference was not taped, as required) that the OAH tried to contact Mr. Jepson on October 12 when he failed to appear at the prehearing conference. Further, the OAH failed to mail its Initial Order to Mr. Jepson at his by then incorrect mailing address: the Initial Order recommended dismissal of the case based on Mr. Jepson's failure to appear at the OAH prehearing conference when the OAH was aware at time of entry of its Initial Order (because by then it had actually received the returned Notice of Prehearing Conference) that Mr. Jepson had changed his mailing address and had never received the OAH's Notice of Prehearing Conference.

In addition to the above use of the incorrect mailing address on the part of both OAH and OIC, the OIC cites Graves v. the Employment Security Department, 144 Wn. App. 302, 182 P.3d 1004 (2008), as authority for entering a default order and dismissing the case where a party fails to appear. However, the Graves decision concerned whether or not an agency's final default judgment entered by the Administrative Law Judge ("ALJ") should be upheld or set aside (not, as is the situation herein, whether an ALJ's initial or recommended default judgment should be upheld in an agency's final order). Further, all as opposed to the situation herein, in Graves the court of appeals specifically noted 1) that the Employment Security Department mailed two notices of hearing to Graves which clearly informed him of the scheduled date and time of the hearing; 2) that Graves did not argue that he did not timely receive the notices (but only that he mismarked the date on his calendar); 3) that the proceeding at which Graves failed to appear was the actual hearing (and not a first prehearing conference before the ALJ as is the situation here). Further, the Graves court refused to set aside the default judgment entered by the ALJ *especially since claimant [Graves] continually refused to meet reporting and job interview requirements, and in view of claimant's failure to provide Department of Employment Security with requested information.* This is also not the situation herein; in fact, the undersigned noted in her Final Order that Mr. Jepson had actively participated in the scheduling of the first prehearing conference before the undersigned in which it was the opposing party who failed to appear and had also actively participated in the rescheduling and conduct of the first prehearing conference before the undersigned when it did occur.

RCW 34.05.440 by its wording, and also as the Graves court notes, is discretionary. RCW 34.05.440(2) states:

(2) If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, ... the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.

Based upon the above, and the other bases cited by the undersigned in her Final Order Denying Default Judgment - including most particularly the facts that 1) Mr. Jepson is pro se; and 2) that

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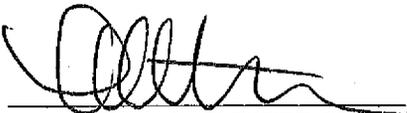
he did receive and respond to the undersigned's Notice of Receipt of Hearing served to his then legal address on August 4, 2010 and then actively participated in the scheduling, rescheduling and his appearance at both prehearing conferences before the undersigned in August and early September 2010 - it is reasonable that the OIC's Motion for Reconsideration should be denied and that the Final Order entered by the undersigned on February 7, 2011 remain as written.

This being the decision of the undersigned,

IT IS HEREBY ORDERED that the Office of Insurance Commissioner's Motion for Reconsideration of Final Order Denying Default Judgment is **DENIED** and the Final Order Denying Default Judgment entered by the undersigned on February 7, 2011 shall remain as written.

IT IS FURTHER ORDERED that Mr. Jepson shall have the right to pursue his appeal forthwith. As he selected Option 2 (choosing to pursue an Initial Order from OAH prior to review and entry of a Final Order by the undersigned) at the time he filed his Demand for Hearing, the hearing file is being transferred back to OAH to commence the proceeding on the merits of Mr. Jepson's appeal.

ENTERED AT TUMWATER, WASHINGTON, this 22nd day of February, 2011, pursuant to Title 34 RCW, Title 48 RCW and regulations applicable thereto.

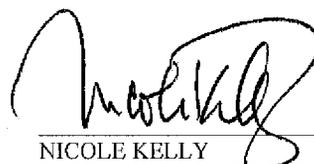

PATRICIA D. PETERSEN
PRESIDING OFFICER

The parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General in the United States mail. For further information or to obtain copies of the applicable statutes, the parties may contact the administrative assistant to the undersigned.

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: Kenneth T. Jepson, Mike Kreidler, Michael G. Watson, John F. Hamje, Carol Sureau, Esq., and Charles D. Brown, Esq.

DATED this 22nd day of February, 2011.


NICOLE KELLY