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2014 APR 11 P 2:03

BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:

**PREFERRED CHIROPRACTIC
DOCTOR, INC.,**

Respondent.

Docket No. 13-0134

**MOTION OF INSURANCE
COMMISSIONER MIKE
KREIDLER FOR
RECONSIDERATION OF
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
FINAL ORDER**

BACKGROUND AND BASIS

The Office of the Insurance Commissioner ("OIC") respectfully requests reconsideration of the Findings of Fact, Conclusions of Law, and Final Order in the above-captioned matter, entered on April 2, 2014 ("Final Order").

The OIC issued a Notice of Request for Hearing for Imposition of Fines, ("Notice") on May 17, 2013. The OIC requested that Preferred Chiropractic Doctor, Inc. ("PCD") be fined for operating a health discount plan in Washington without being licensed by the Commissioner, in violation of RCW 48.155.020(1). In Section B. of the Notice, titled "Penalties and Relief Requested," the OIC specified that RCW 48.155.130(2) provides that if such person willfully operates a health discount plan in violation of RCW 48.155.020(1), that person is subject to the provisions of RCW 48.15.020 and RCW 48.15.023, as if the unlicensed plan organization was an unauthorized insurer. The OIC thus requested a fine under RCW 48.15.023 as an alternative to a fine under RCW 48.155.020(1).

The OIC filed its Hearing Brief on September 9, 2013. In Section C., titled "Argument," the OIC specifically demonstrated that PCD knew of its violations of the law, but did not choose to cease selling discount cards. It is undisputed that PCD was unaware of the Washington requirement for a license until early fall of 2012. On September 12, 2013, PCD filed a Motion for Summary Judgment ("PCD Motion"), and OIC responded the same day. One specific challenge PCD posed to the OIC's request for a fine was that PCD did not act "willfully," as is required for a fine under RCW 48.15.023, by way of RCW 48.155.130(2). It certainly appears by the PCD Motion that PCD was quite sure the OIC was asking for a fine under RCW 48.15.023 as an alternative, even if Your Honor was not. PCD did not want to risk an even more devastating fine of \$25,000 per violation, so it wanted to eliminate a possible fine under RCW 48.15.020 and RCW 48.15.023 by showing it did not act "willfully."

The OIC's Response to PCD Motion for Summary Judgment ("OIC Response to Motion"), attached hereto, briefed the meaning of "willfully" in Washington case law, distinguished PCD's cited authorities, and concluded by arguing that "If a license is needed and one does not have one, there will have been a "willfull" violation unless the circumstances indicate that the action was a result of accident or mistake." If the OIC had no interest in arguing for fine authority under RCW 48.15, why would these two statutes have been repeatedly cited and argued for by the OIC in its Notice and Hearing Brief in the context of RCW 48.155, and extensively briefed and argued in the OIC Response to Motion?

It is for that reason that the OIC was puzzled by the Final Order. Both the OIC's Notice and Hearing Brief request relief under the provisions requiring that the

Respondent acted “willfully” by specifically citing request for relief under RCW 48.15.020 and RCW 48.15.023, contrary to the assertion in the Final Order’s Findings of Fact 25. But more strikingly, Conclusion of Law 6. states that the OIC “does not argue that they [RCW 48.15.020 and RCW 48.15.023] authorize imposition of a fine in this case.” The OIC did request a fine under both RCW 48.155, and thereby also under RCW 48.15. Otherwise, it would not have vigorously briefed and argued in response to the PCD’s Motion that PCD indeed acted “willfully” as defined in case law. There is no “willfull” requirement under RCW 48. 155.130(1)(b), so such argument would have been unnecessary if OIC sought *only* the \$100 per violation fine, as the Final Order suggests.

In Order Denying PCD’s Motion for Summary Judgment, there was no partial grant of summary judgment ruling that as a matter of law PCD had not acted “willfully” in selling the discount cards. Your Honor having denied PCD’s Motion, after having fully briefed and argued the issue of “willfull” actions under the law in response to the PCD Motion, the OIC believed that it had done all it could to take that PCD objection off the table for purposes of OIC requesting a fine under RCW 48.155.130(2), and by extension, RCW 48.15.023(5)(a)(ii) as an alternative to a fine under RCW 48.155.0130(1)(b).

No reference is made in the Final Order to the PCD Motion for Summary Judgment, the OIC Response thereto, or the Order Denying the Motion in its entirety. Yet, the Final Order concludes, without refutation of or even reference to the case law and arguments presented in the Response to PCD Motion, that PCD “did not willfully violate RCW 48.155.020(1).” OIC respectfully asks that Your Honor again review the OIC Response to PCD Motion for Summary Judgment and the briefing on the meaning of

“willfully” in Washington case law. In particular, please note the *Tarallo* case excerpt that explains that an action is “willfull” if the defendant intends those actions and they are not the product of accident or mistake. As the OIC argued in the Response to PCD’s Motion, PCD intended to operate a discount plan in Washington, and operated it on purpose, that is, intentionally. It did not sell discount plan cards by accident or by mistake.

CONCLUSION

Because the Final Order appears to have rejected the undisputed legal definition of “willfull” as laid out in the OIC responsive brief, and ignored the entreaties of the OIC to look to RCW 48.15.023 as an alternate source of a fine, the OIC respectfully requests that the Final Order be reconsidered.

DATED this ^{ca} 11 day of April, 2014.


Marcia G. Stickler
OIC Staff Attorney

In the Matter of

PREFERRED CHIROPRACTIC DOCTOR,
INC.,) No. 13-0134
)
) OIC RESPONSE TO PCD MOTION FOR
) SUMMARY JUDGMENT
)
)

Respondent.

This motion is supposed to be on the basis of law. All of the background is superfluous and should be kept for the hearing on the merits. But while this motion and its supporting materials are voluminous and rife with irrelevant facts and false assertions, the OIC will try to address the core issues as framed by the PCD Motion for Summary Judgment.

Issue: Did PCD “willfully” sell discount plan memberships without a license in violation of RCW 48.155.020(1)?

As pointed out in the OIC Hearing Brief, PCD did knowingly and willfully continue to sell discount plan memberships for months after it became aware of the need for a license. It also appears that PCD never terminated active discount cards, if at all, until April 25, 2013 at the earliest. However, PCD is also responsible for all illegal sales made after the act became law in 2009. PCD intentionally ran a discount plan organization in Washington and intentionally sold memberships. The PCD organization was not acting in Washington State by accident or mistake. PCD’s recurrent claim in its Motion that PCD was “acting inadvertently” as a discount plan organization is patently false on its face. In Washington alone, PCD sold 1,524 discount cards grossing \$58,680.00 in premium.

The two cases cited by the Respondent, *In re Estate of Kissinger* and *New York Life Insurance Company v. Jones*, both involved whether a killer can get insurance or inheritance benefits from his or her victim. The slayer statute prohibits receipt of such benefits where the killing is willful and unlawful. In *Kissinger*, the defendant had been found not guilty by reason of insanity, and claimed that therefore the killing was not unlawful. The Court concluded that there need not be a criminal conviction to satisfy the statute. It stated that “Willful” under the slayer statute means intentionally and designedly.” The *New York Life* case also concerned the slayer statute, and merely reiterated the holding in *Kissinger*, which concerned the same civil slayer statute.

These two cases are hardly dispositive. The definition of “willfully” has always depended on context, and is frequently conflated with the term “knowingly.” The Supreme Court has taken pains to observe that the word “willful” is a word of many meanings, and that its construction is often influenced by its context.” *Ratzlaf v. United States*, 510 U.S. 135, 141, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994). The Ninth Circuit underwent a detailed analysis of the difference between “knowingly” and “willfully” in *U.S. v. Tarallo*, 380 F.3d 1174; 2005 U.S.

App. LEXIS 12903 (9th Cir. Cal., June 29, 2005). The Court ruled that a defendant can commit securities fraud “willfully” in violation of law even if the defendant did not know at the time of the acts that the conduct violated the law. “Knowing” is not a required element of “willful” conduct. The Court elaborated:

The question is whether the securities fraud statutes’ use of the term “willfully” means that a defendant can be convicted of securities fraud only if he or she knows that the charged conduct is unlawful, or whether “willfully” simply means what the district court instructed it means: “knowingly” in the sense that the defendant intends those actions and that they are not the product of accident or mistake.”

In rejecting the defendant’s position, the Court cited numerous previous rejections of such a position by itself and other courts. In *United States v. Charnay*, 537 F.2d 341, 351-52 (9th Cir. 1976), the Court cited with approval the Second Circuit’s interpretation of a securities rule in *United States v. Peltz*, 433 F.2d 48, 54 (2d Cir. 1970). The Second Circuit explained there that “the language makes one point entirely clear. A person can willfully violate an SEC rule even if he does not know of its existence. This conclusion follows from the difference between the standard for violation of the statute or a rule or regulation, to wit, ‘willfully,’ and that for false or misleading statements, namely ‘willfully and knowingly.’ ” *Id.* at 54. The Ninth Circuit also addressed an argument very similar to Tarallo’s in *United States v. English*, 92 F.3d 909 (9th Cir. 1996). In *English*, the defendant was convicted of securities fraud under 15 U.S.C. §§ 77q(a) and 77x. “Section 77q(a) makes it illegal to use instruments of interstate commerce to defraud or deceive purchasers of securities. Section 77x, a general penalty provision covering § 77q(a) and other 15 U.S.C. § 77 offenses, provides that ‘any person who willfully violates’ § 77q(a) is subject to fines and incarceration. 15 U.S.C. § 77x (emphasis added).” *Id.* at 914. Section 77x is therefore substantively similar to the willfulness provision of § 78ff(a). In *English*, the Court rejected the defendant’s argument that § 77x’s willfulness requirement required that the government prove that the defendant knew that his conduct was illegal.

It is beyond dispute that in regulatory enforcement, there is no *mens rea* or requirement of evil intent. If a license is needed and one does not have one, there has been a “willful” violation unless the circumstances indicate accident or mistake.

Issue: Does the Commissioner have the authority to fine PCD for selling discount plan memberships without a license?

Under RCW 48.155.130(2), as cited in both the OIC’s Notice of Request for Hearing for Imposition of Fines and its Hearing Brief, any person who willfully operates a discount plan organization in violation of RCW 48.155.020(1) is subject to RCW 48.15.020 and RCW 48.15.023, as if they were unauthorized insurers. RCW 48.15.023 can subject a violator to a fine

of up to \$25,000 for each violation of transacting insurance, as defined in RCW 48.01.060, in Washington without authorization. There is no mention of “any license” in subsection (2). The “any license” language of subparagraph (1)(b) might be substituted by “a license, if any.” PCD’s position would make it riskier to get a license, let it lapse, and continue to sell discount plan memberships than to avoid licensure altogether. This makes no sense and would result in unlikely, absurd, or strained “consequences. *In re Parentage of J.M.K.*, 155 Wn.2d 374, 387, 119 P.3d 840 (2005); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2005). RCW 48.155.130(1)(b) clearly permits the Commissioner to impose a fine in lieu of any other actions, for violation of any provision of the chapter, including the section requiring licensure.

Issue: Is each sale a violation of the act, or is failure to obtain a license just one violation?

Both RCW 48.155.130 (1)(b) and RCW 48.15.023 permit the Commissioner to impose a fine “for each violation.” Both apply to PCD. PCD’s position that failure to obtain a license is one and only one violation of RCW 48.155.020, regardless of how many memberships it sells, makes no sense. If it were so, how conceivably could there be more than one violation? The words “for each violation” would be superfluous, a violation of the rule that all the language in a statute shall be given effect; no portion shall be rendered meaningless. *Judd v. American Tel and Tel. Co.*, 152 Wn.2d 195, 202, 95 P.3d 337 (2004). An “insurance transaction” is defined in the insurance code, to wit:

Insurance transaction” includes *any*: [emphasis added] (1) solicitation. (2) negotiations preliminary to execution.(3) execution of an insurance contract (4) transaction of matters subsequent to execution of the contract and arising out of it (5) insuring. RCW 48.01.060

Thus, given RCW 48.15.020 and RCW 48.15.023, any time a PCD discount plan membership was solicited, negotiated, sold, or used to obtain a discount at a chiropractor’s office pursuant to the membership, an unauthorized insurance transaction took place. Each time an unlicensed discount plan membership was sold, like any insurance transaction performed by an unauthorized insurer, a violation occurred. This is just common sense. By counting each illegal transaction rather than the one-time failure to get a license, enforcement penalties are proportional to the unlicensed activity that has occurred. To do otherwise would upset the entire scheme of the insurance code. Again, this would put an unlicensed entity in a better position vis-à-vis potential enforcement, than a licensed entity. This would be bad public policy as well as undercut the purpose of the insurance code as a consumer protection vehicle.

Pursuant to the foregoing, the Chief Hearings Examiner should deny PCD’s motion in its entirety.

Respectfully Submitted this _____ day of _____, 2013.

Marcia G. Stickler,
Staff Attorney - Legal Affairs

CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC RESPONSE TO PCD MOTION FOR SUMMARY JUDGMENT on the following individuals in the manner indicated:

Patricia Peterson, Chief Hearing Officer
P O Box 40255
Olympia, WA 98504-0255

(XXX) Via Hand Delivery

For Respondents:

Edward I. Clabaugh, Esq.
10217 SW Burton Drive, Suite 100
Vashon Island, Washington 98070

(XXX) Via U.S. Regular Mail

SIGNED this _____ day of _____, 2013, at Tumwater, Washington.

Christine Tribe

CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC MOTION FOR RECONSIDERATION on the following individuals in the manner indicated:

Patricia Peterson, Chief Hearing Officer
P O Box 40255
Olympia, WA 98504-0255

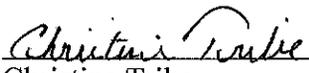
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For Respondents:

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10217 SW Burton Drive, Suite 100
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(XXX) Via U.S. Regular Mail

SIGNED this 11th day of April, 2014, at Tumwater, Washington.



Christine Tribe