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OIC HEARINGS UNIT
PATRICIA D. PETERSEN
CHIEF PRESIDING OFFICER

STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of

PREFERRED CHIROPRACTIC DOCTOR,
INC.

Respondent,

NO. 13-0134

RESPONSE OF PREFERRED
CHIROPRACTIC DOCTOR, INC. TO
ORDER TO RECONSIDER FINDINGS
OF FACT, CONCLUSIONS OF LAW,
AND FINAL ORDER

The OIC failed to obtain a civil penalty under RCW 48.155.130(1)(b) which, according to all of its pleadings and all of its oral statements at the Hearing, was the only section under which it sought a penalty. Although it mentioned RCW 48.155.130(2) in various pleadings, it was only for the purpose of mentioning it. Having mentioned it, the OIC then plainly discarded it and emphatically stated that it was seeking the minimum \$100 per violation fine under RCW 48.155.130(1)(b) and was not seeking any penalty under RCW 48.155.130(2). Chief Hearing Officer Petersen, in her thorough and reasoned analysis in which she granted the Final Order and in her equally thorough and reasoned analysis in which she granted OIC's Motion for Reconsideration, carefully and fully describes the efforts of the OIC to obtain the minimum penalty under RCW 48.155.130(1)(b) and its declination to pursue any remedy under RCW 48.155.130(2). Now, however, having failed to obtain any penalty under RCW 48.155.130(1)(b), the OIC wants a second bite at the apple. It now claims, against the

RESPONSE OF PREFERRED CHIROPRACTIC DOCTOR,
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CONCLUSIONS OF LAW, AND FINAL ORDER Page 1

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1 overwhelming weight of its own pleadings and presentation at the Hearing, that it wanted the
2 Chief Hearing Officer to consider RCW 48.15.023 (which comes into play if RCW
3 48.155.130(2) has been violated) as an alternate source of a fine.¹

4 The OIC does not cite any errors of fact in its Motion for Reconsideration. Rather, the
5 OIC claims that the Final Order “rejected the undisputed legal definition of ‘willfull’ (sic) as
6 laid out in the OIC responsive brief, and ignored the entreaties of the OIC to look to RCW
7 48.15.023 as an alternate source of a fine.” The “responsive brief” referenced by the OIC is its
8 responsive brief to Preferred Chiropractic Doctor’s (PCD) motion for summary judgment.
9 That motion was denied by the Chief Hearing Officer and is of no force or effect. The OIC
10 tries to make much of the fact that it was denied. Apparently the OIC believes the motion for
11 summary judgment was denied on the basis that PCD could not demonstrate that it did not act
12 “willfully.” However, the OIC is simply wrong. The motion was denied, as clearly stated by
13 the Chief Presiding Officer, because PCD had failed to show there was no genuine issue as to
14 any material fact and that it was entitled to a judgment as a matter of law. Therefore, the
15 parties proceeded to the full evidentiary hearing. The motion for summary judgment was over
16 and done with. The pleadings filed by the parties with respect to it have no continuing effect
17 beyond the motion. The matter turned to a new phase – the full evidentiary hearing. The
18 OIC’s sole basis for reconsideration is its request that the Chief Presiding Officer “... review
19 the OIC Response to PCD Motion for Summary Judgment and the briefing on the meaning of
20 ‘willfully’ in Washington case law.”² However, the responsive brief of the OIC to PCD’s
21 motion for summary judgment was not entered into evidence at the Hearing or referenced in
22 any way. It was not considered. Since it was not considered at the Hearing, no grounds exist
23

24 ¹ Motion of Insurance Commissioner Mike Kreidler for Reconsideration of Findings of Fact, Conclusions of
Law, and Final Order, “Conclusion” – p.3

25 ² Motion of Insurance Commissioner Mike Kreidler for Reconsideration of Findings of Fact, Conclusions of
Law, and Final Order, pp 2-3

1 to reconsider any matter raised by it. Neither in its Hearing Brief nor at the Hearing did the
2 OIC provide or argue for any definition of “willful.” Neither in its Notice of Request for
3 Hearing for Imposition of Fines, nor in its Hearing Brief nor at the Hearing did the OIC claim
4 that it sought any penalty under RCW 48.15.023. The OIC sought only the minimum fine
5 under RCW 48.155.130(1)(b). The Final Order and the Grant of the Motion for
6 Reconsideration provide all of the details. PCDS will not burden the Chief Hearing Officer
7 with a replay of those details except to note, as the Chief Hearing Officer did so thoroughly
8 and well, the final oral argument of the OIC. In the OIC’s final statement at the Hearing, it
9 clearly and obviously intentionally determined to make clear to the Chief Hearing Officer and
10 to PCD that it was taking RCW 48.155.130(2) out of play. The OIC said

11 1. “...the willful thing [directly referring to RCW 48.155.130(2) since “willful” is
12 only included in that portion of RCW 48.155] isn’t really germane to the specific penalty I’m
13 requesting” (emphasis added). That statement serves as the OIC’s direct request that it is only
14 asking the Chief Hearing Officer to consider RCW 48.155.130(1)(b).

15 2. The OIC continues that it thinks RCW 48.155.130(2) would apply but for
16 purposes of the fine it is asking for “...willfulness isn’t really part of that ...” (emphasis
17 added). Since the OIC states willfulness is not part of it, RCW 48.155.130(2) cannot apply
18 since willfulness is a requirement of that section.

19 3. The OIC also stated, “Believe me, if the Commissioner had believed this was
20 knowing and intentional ...” referring to the fact that it would have sought a fine under RCW
21 48.155.130(2). The Commissioner did not seek any fine under RCW 48.155.130(2). The only
22 conclusion that can be drawn is exactly what the Commissioner sought – a fine based only on
23 RCW 48.155.130(1)(b).

1 The conclusion is that the issue of “willful” never was raised by the OIC because it
2 was not required for the imposition of a fine under the section under which it sought a fine -
3 RCW 48.155.130(1)(b).

4 However, PCD raised the issue and provided exhaustive evidence that it had not acted
5 willfully. The record is replete with evidence that was carefully and thoroughly analyzed by
6 the Chief Hearing Officer. Based on her careful, thorough and exhaustive review of that
7 evidence, the Chief Hearing Officer found in Finding of Fact #25 that “...PCD did not
8 willfully violate RCW 48.155.020(1).” That is, PCD did not willfully fail to obtain a license
9 from the commissioner to operate as a discount plan organization.

10 If the OIC had told PCD to stop selling discount plans and PCD had continued to sell
11 them, that would have been a willful violation. See, e.g., *Diamond State Port Corporation v.*
12 *Ferguson and Unemployment Insurance Appeal Board*, 2003 Del. Super. LEXIS 14;
13 *Unemployment Ins. Rep. (CCH) P8264 (2003)*, a copy of which is attached. However, the
14 record is replete with contacts between PCD’s lawyer and the OIC and PCD and the OIC.
15 PCD informed the OIC that it was selling discount plans in unintentional violation of the
16 statute. In response the OIC encouraged OIC to register under the statute. It did not advise
17 PCD to stop operations or to stop selling discount plans. For many months this continued. The
18 OIC did not request that PCD stop operations until after it had filed for a license and the OIC
19 had denied it. At that point the OIC notified PCD that it was thereafter prohibited from
20 conducting any health care discount plan activities and operations. PCD immediately stopped
21 its operations and stopped selling discount plans.

22 Additionally, RCW 48.155.130(2) provides that a person that **willfully** operates as a
23 discount plan organization in violation of RCW 48.155.020(1) commits **insurance fraud** and
24 is subject to RCW 48.15.020 and 48.15.023. RCW 48.15.020 provides **criminal** penalties.
25 The standard to find a “willful” violation is higher in a criminal matter than in a civil matter.

1 See, e.g., *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 60 (2007); *Bryan v. United States*, 524
2 U.S. 184, 191 (1998). As said in *Bryan*,

3
4 “The word ‘willfully’ is sometimes said to be ‘a word of many meanings’ whose
5 construction is often dependent on the context in which it appears. [citation] Most
6 obviously it differentiates between deliberate and unwitting conduct, but in the
7 criminal law it also typically refers to a culpable state of mind. As we explained in
8 *United States v. Murdock*, 290 U.S. 389 (etc.) (1933), a variety of phrases have been
9 used to describe that concept. As a general matter, when used in the criminal context, a
10 ‘willful’ act is one undertaken with a ‘bad purpose.’ *Id.*

11 Nothing in the record shows that PCD undertook any of its discount plan operations
12 or its sale of discount plans with any “bad purpose.” Quite to the contrary, the record shows
13 that PCD benefited consumers in the State of Washington by providing them with valuable
14 chiropractic services at a discount. The annual fee charged for each discount plan was more
15 than recovered in savings upon the first visit to a member chiropractor.

16 Since the Chief Presiding Officer found no willful violation for the section of the
17 statute that imposes only civil penalties, it would not be possible to find a willful violation of
18 a statute that imposes criminal penalties since that would require a “bad purpose” which, from
19 the record, was totally lacking.

20 And perhaps even more importantly, the record shows that the OIC did not seek any
21 fine or other penalty based on the provisions of RCW 48.155.130(2).

22 All of this raises the question as to why the OIC now comes back and seeks to add
23 additional burdens in time, expense and legal fees onto this small respondent. The OIC knows
24 that the respondent does not even have a net worth of \$150,000. For that reason it denied PCD
25 a license as a DPO. The OIC has known from the beginning that PCD did not intentionally
violate the statute but began trying to find ways to comply with it once it became aware of it.
In fact, on May 30, 2013, the attorney for the OIC specifically agreed with Edward Clabaugh,
the attorney for PCD, that PCD had not “willfully violated” any law. *Decl. Clabaugh.*

1 It seems totally unfair for the Insurance Commissioner to bring a whole new theory of
2 his case after already having had a full hearing and putting PCD to the expensive and time-
3 consuming task of responding to it and presenting its case. There is no new evidence that the
4 Commissioner is advancing. There are no claimed new facts. The Commissioner just wants
5 reconsideration because he lost. He could have advanced this new theory - that RCW
6 48.15.023 should be looked to as an alternate source of a fine - at the first hearing and in the
7 interests of judicial economy should have done so. This is unfair and smacks of bullying. It
8 smacks of the large bureaucratic agency seeking to grind this small company into the ground.

9 Moreover, the fact the Insurance Commissioner is bringing this unfounded request for
10 reconsideration after having had a full hearing looks very much like bad faith. In connection
11 with bad faith, the Chief Hearing Officer should have the same authority to assess sanctions
12 against a party that acts in bad faith as Superior Court Judges have under RCW 2.28.010,
13 RCW 2.28.150 and C.R. 11.

14 In her Order granting the OIC's request for reconsideration, the Chief Hearing Officer
15 stated that the parties could raise other issues relevant to a fair reconsideration of the Final
16 Order. The OIC raises new issues in its request for rehearing. Although PCD is very satisfied
17 with the Final Order in this matter, there is another issue. That issue is whether the Insurance
18 Commissioner has the authority and power to issue any sanctions under the Washington
19 Health Care Discount Plan Organization Act.

20 In summary, RCW Title 48 constitutes the Insurance Code. It is not the Health Care
21 Discount Plan Organization Code. A clear distinction exists between the Insurance Code
22 provisions in RCW Chapters 48.01 through 48.150 and Chapters 48.160 through 48.175
23 which deal with insurance and insurance-related issues and RCW Chapter 48.155 which is the
24 Health Care Discount Plan Organization Act. The activities governed by the Health Care
25 Discount Plan Organization Act are not insurance. Since they are not insurance, the legislature

1 did not have the constitutional authority to place their governance under an agency it created
2 for the governance of insurance. The legislature did not have the constitutional authority to
3 place them under the purview of the Insurance Commissioner to whom they only gave power
4 over matters involving insurance.

5 In summary, RCW 48.01.010 states "Title 48 RCW constitutes the insurance code."
6 (emphasis added here and below)

7 RCW 48.01.020 states the Scope of the code is "All insurance and insurance
8 transactions in this state, or affecting subjects located wholly or in part or to be performed
9 within this state, and all persons having to do therewith are governed by this code."

10 RCW 48.01.040 Defines "Insurance" as "... a contract whereby one undertakes to
11 indemnify another or pay a specified amount upon determinable contingencies."

12 RCW 48.01.050 defines "Insurer" as "... every person engaged in the business of
13 making contracts of insurance ..."

14 RCW 48.01.053 defines "Issuer" to mean "... insurer, fraternal benefit society, certified
15 health plan, health maintenance organization, and health care service contractor."

16 RCW 48.01.060 defines "Insurance transaction" as follows: " 'Insurance transaction'
17 includes any:

- 18 (1) Solicitation.
- 19 (2) Negotiations preliminary to execution.
- 20 (3) Execution of an insurance contract.
- 21 (4) Transaction of matters subsequent to execution of the contract and arising
22 out of it.
- 23 (5) Insuring."
- 24
- 25

1 RCW 48.01.080 provides for penalties for violation of the code as follows: "Except
2 as otherwise provided in this code, any person violating any provision of this code is guilty of
3 a gross misdemeanor and will, upon conviction, be fined not less than ten dollars nor more
4 than one thousand dollars, or imprisoned for not more than three hundred sixty-four days, or
5 both, in addition to any other penalty or forfeiture provided herein or otherwise by law."
6

7 RCW 48.02.060 provides the General Powers and Duties of the Insurance
8 Commissioner:

9 (1) The commissioner has the authority expressly conferred upon him or her by
or reasonably implied from the provisions of this code.

10 (2) The commissioner must execute his or her duties and must enforce the
11 provisions of this code.

12 ... (sections omitted)

13 These provisions definitively state the scope of the Insurance Code and the insurance
14 transactions that are encompassed by it. The Code does not provide any authority concerning
15 non-insurance transactions.

16 The Health Care Discount Plan Organization Act, contained within the Insurance
17 Code, is an entirely different matter. None of its provisions concern insurance. There is no
18 reference to insurance except in one penalty section, RCW 48.155.130(2) that states that a
19 person who willfully operates as a discount plan organization in violation of RCW
20 48.155.020(1) commits insurance fraud and is subject to RCW 48.15.020 and 48.15.023, as if
21 the unlicensed discount plan organization were an unauthorized insurer. The key point,
22 however, is that discount plans are not insurance. They are not defined as insurance. They do
23 not pretend to be insurance.
24
25

1 The Health Care Discount Plan Organization Act provides the purpose of the chapter,
2 Chapter 48.155, the definition of "discount plan," the definition of a "discount plan
3 organization," the definition of a "member" and the application of the Chapter as stated
4 below.

5 RCW 48.155.003 provides " The purposes of this chapter [Chapter 48.155, Health
6 Care Discount Plan Organization Act] are to promote the public interest by establishing
7 standards for discount plan organizations, to protect consumers from unfair or deceptive
8 marketing, sales, or enrollment practices, and to facilitate consumer understanding of the role
9 and function of discount plan organizations in providing discounts on charges for health care
services."

10 RCW 48.155.010(4)(a) provides the definition of "Discount plan." " 'Discount plan'
11 means a business arrangement or contract in which a person or organization, in exchange for
12 fees, dues, charges, or other consideration, provides or purports to provide discounts to its
members on charges by providers for health care services."

13 RCW 48.155.010(5)(a) provides the definition of a "Discount plan organization." "
14 'Discount plan organization' means a person that, in exchange for fees, dues, charges, or other
15 consideration, provides or purports to provide access to discounts to its members on charges
16 by providers for health care services. "Discount plan organization" also means a person or
17 organization that contracts with providers, provider networks, or other discount plan
organizations to offer discounts on health care services to its members. This term also
includes all persons that determine the charge to or other consideration paid by members."

18 RCW 48.155.010(13) provides the definition of "Member." " 'Member' means any
19 individual who pays fees, dues, charges, or other consideration for the right to receive the
20 benefits of a discount plan, but does not include any individual who enrolls in a patient access
21 program."

22 RCW 48.155.015(1) provides that "(t)his chapter applies to all discount plans and all
23 discount plan organizations doing business in or from this state or that affect subjects located
24 wholly or in part or to be performed within this state, and all persons having to do with this
25 business."

Discount plans are not insurance.

1 The issue then becomes, did the legislature err in placing their governance in the
2 Insurance Code under the authority of the Insurance Commissioner. Is the delegation of
3 authority over a non-insurance matter to the Insurance Commissioner unconstitutional? Both
4 state and federal courts throughout the United States give great deference to the power of
5 legislatures to delegate authority to agencies. However, that is not the issue here. PCD does
6 not contend that the legislature could not delegate authority over discount plans to some state
7 agency. The issue is whether the legislature had power to delegate discount plan organizations
8 to the Insurance Commissioner's Office.

9 *Peninsula Neighborhood Ass'n v. DOT*, 142 Wn.2d 328 (2000) is instructive. In that
10 case the Peninsula Neighborhood Association appealed a declaratory and summary judgment
11 finding the Public-Private Transportation Initiatives Act (PPI Act), RCW Ch. 47.46,
12 constitutional and enforceable and an agreement between the DOT and a private company for
13 the development of a new Tacoma Narrows Bridge valid and enforceable. The court affirmed
14 the constitutionality of the PPI Act but held the agreement between the DOT and the private
15 company was unenforceable because the agreement provided for tolls of the existing bridge
16 which violated RCW 47.56.271. The agreement between DOT and the private company was
17 thus held to exceed the statutory authority of the DOT.

18 In the same vein, the Insurance Commissioner does not have the statutory authority to
19 govern Discount Plan Organizations. They are not insurance. The legislature could have
20 delegated that authority to some other agency. But as the existing Insurance Code stands, it
21 cannot encompass discount plans. The entire Health Care Discount Plan Organization Act is
22 inconsistent with the provisions of the Insurance Code.

23 Because of the bad faith of the Insurance Commissioner in requesting this frivolous
24 rehearing, PCD respectfully requests that it be awarded its reasonable attorney's fees, costs

1 and expenses incurred in connection with the rehearing according to proof thereof to be
2 provided hereafter.

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4 Respectfully submitted this 7th day of May, 2014

5 LAW OFFICES OF EDWARD L. CLABAUGH

6 By: /s/Edward L. Clabaugh

7 Edward L. Clabaugh, WSBA #30676
8 Attorney for Respondent
9 Preferred Chiropractor Doctor, Inc.

1 **CERTIFICATE**

2 I certify that I served a copy of the foregoing RESPONSE OF PREFERRED
3 CHIROPRACTIC DOCTOR, INC. TO ORDER TO RECONSIDER FINDINGS OF
4 FACT, CONCLUSIONS OF LAW, AND FINAL ORDER including the DECLARATION
OF EDWARD L. CLABAUGH and *Diamond State Port Co. v. Ferguson* in the manner
indicated:

5 Honorable Patricia D. Petersen
6 Chief Presiding Officer
7 P.O. Box 40255
8 Olympia, WA 98504-0255

9 By email as authorized by the Chief Presiding Officer's paralegal today

10 **For the OIC:**

11 Marcia G. Stickler, Esq.,
12 P.O. Box 40255
13 Olympia WA 98504-0255

14 By U.S. Regular Mail

15 Dated: May 7, 2014

16 /s/ Edward L. Clabaugh

17 Edward L. Clabaugh
18 Attorney for Preferred Chiropractic Doctor, Inc.

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OIC HEARINGS UNIT
PATRICIA B. PETERSEN
CHIEF PRESIDING OFFICER

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STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of

NO. 13-0134

PREFERRED CHIROPRACTIC DOCTOR,
INC.

DECLARATION OF EDWARD L.
CLABAUGH IN SUPPORT OF THE
RESPONSE OF PREFERRED
CHIROPRACTIC TO RECONSIDER
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ORDER

Respondent,

I, Edward L. Clabaugh, declare as follows:

1. I am over the age of 18. I have personal knowledge of the facts stated herein and if called as a witness I could testify competently thereto.
2. I am the attorney for Preferred Chiropractic Doctor, Inc.
3. On May 30, 2013 I had a telephone conversation with Marcia Stickler, staff attorney for the OIC. During the course of that conversation, I told Ms. Stickler that PCD certainly had not willfully violated any law. Ms. Stickler agreed with me that PCD had not willfully violated any law but said that her "higher ups" were pushing for the \$154,400 penalty that was demanded in their Notice of Request for Hearing for Imposition of Fines for violation of RCW 48.155.020(1).

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Executed at Vashon, Washington, this 6th day of May, 2014.

/s/Edward L. Clabaugh
Edward L. Clabaugh