

Filed
6-17-14
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STATE OF WASHINGTON
BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:

Docket No. 13-0293

Seattle Children's Hospital Appeal of OIC's
Approvals of HBE Plan Filings.

SEATTLE CHILDREN'S
HOSPITAL'S RESPONSE TO
PREMERA'S MOTION TO VACATE
CHIEF PRESIDING OFFICER
PETERSEN'S ORDERS, AND
BRIDGESPAN'S JOINDER

I. INTRODUCTION

Intervenors Premera and BridgeSpan have moved under CR 60(b)(11) to vacate the orders entered by Chief Presiding Officer Petersen based on the appearance of fairness doctrine. The OIC staff has orally requested a "do over" of these rulings. Seattle Children's position is that this relief is unnecessary because, under the Civil Rules,¹ each of the orders was interlocutory in nature, and therefore subject to revision up until entry of a final decision.²

¹ See WAC 10-08-135 (authorizing use of summary judgment proceedings); WAC 284-02-0700 (OIC adoption of WAC 10-08 by reference); *Granton v. Washington State Lottery Comm'n*, 143 Wn. App. 225, 230-31, 177 P.3d 745 (2008) (applying CR 56 case law to review of administrative summary judgment proceeding governed by WAC 10-08-135); *Kettle Range Conservation Grp. v. Washington Dep't of Natural Res.*, 120 Wn. App. 434, 456, 85 P.3d 894 (2003) ("case law has established that agencies may employ summary proceedings"); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 76, 11 P.3d 726 (2000) (approving use of summary judgment review in state agency proceeding).

² *Jordan v. Berkey*, 26 Wn. App. 242, 244, 611 P.2d 1382 (1980) ("Although adherence to a pretrial order is generally helpful to the promotion of the orderly conduct of a trial, it must be remembered that the order is interlocutory in character and will be modified or abandoned according to the demands of justice").

ORIGINAL

Intervenors' motion also fails to address any of the earlier orders specifically or to show why a different result is warranted. These omissions are material: in the main, the earlier orders involved (1) denial of the Intervenors' and OIC Staff's motions to dismiss or for summary judgment based on an alleged absence of standing and subject matter jurisdiction;³ and (2) a ruling on Seattle Children's motion for summary judgment, which held that the Essential Community Provider ("ECP") and Essential Health Benefit ("EHB") requirements of the Affordable Care Act ("ACA") apply here, but otherwise held there are disputed issues of material fact with respect to whether the Commissioner's decisions comported with these requirements.⁴

Critically, in earlier briefing, neither Intervenors nor the OIC Staff disputed the proposition that the ACA's ECP/EHB requirements apply to this case.⁵ Beyond that undisputed point, the orders identified issues of fact for hearing, including whether Seattle Children's appeal presents a justiciable controversy, whether the hospital demonstrated injury sufficient to allow this appeal to proceed, and whether the OIC Staff was aware of or followed the pertinent ACA requirements, or was aware of or considered the consequences of omitting SCH from the Intervenors' provider networks. These rulings do not preclude any party from seeking relief, whether it be an order to vacate the Commissioner's approvals of the BridgeSpan and Premera/LifeWise QHP approvals, or dismissal of Seattle Children's appeal. Accordingly, the Intervenors' motion is superfluous and should be denied.

³ Order on Insurance Commissioner's Motion to Dismiss (Feb. 20, 2014); Order on Intervenors' Joint Motion for Summary Judgment (Feb. 20, 2014).

⁴ Order on Seattle Children's Hospital's Motion for Partial Summary Judgment (March 14, 2014).

⁵ See Intervenors' Joint Opp. to SCH's MSJ at 7-8; OIC's Opp. to SCH's MSJ at 1-2.

II. FACTUAL BACKGROUND

Judge Petersen entered the following rulings in this action:

Date	Order	Description
December 19, 2013	Final Order on Petitions to Intervene	Granting Premera, BridgeSpan, and Coordinated Care leave to intervene, subject to conditions and limitations, and to modification.
January 14, 2014	Order Confirming Motions Schedule	Setting deadlines for filing of dispositive motions prior to February 3, 2014 hearing date.
February 20, 2014	Order on Insurance Commissioner's Motion to Dismiss	Denying the OIC staff's motion to dismiss.
February 20, 2014	Order on Intervenors' Motion for Summary Judgment	Denying the Intervenors' motion for summary judgment.
March 14, 2014	Order on Seattle Children's Hospital's Motion for Summary Judgment	Denying SCH's motion for summary judgment, with the exception of its holding that "the OIC was affirmatively required to consider and comply with the federal Affordable Care Act... as well as applicable state law and regulations."
April 16, 2014	Order on Prehearing Conference	Ordering SCH and OIC to each file a statement of the issues; setting a deadline for any statement of the issues from Intervenors; and setting a date for a further prehearing conference.
May 5, 2014	Order Authorizing Coordinated Care Corporation's Withdrawal as Intervenor	Ordering that Coordinated Care Corporation is withdrawn as an Intervenor (following stipulation of the parties).
May 5, 2014	Letter "clarifying the issues to be addressed at the hearing" ⁶	Identifying the issues to be addressed at the hearing, "incorporate[ing] all parties' submissions and concerns."
May 8, 2014	Notice of Hearing	Setting hearing date for June 9, 2014.

⁶ This letter ruling, stamped as filed May 5, 2014, does not appear to be posted on the OIC website where other pleadings have been posted publically. See <http://oic.wa.gov/laws-rules/administrative-hearings/judicial-proceedings/s-t/> (last accessed June 17, 2014).

The new hearing officer issued an Order on Pre-Hearing Conference, dated June 12, 2014, regarding several topics addressed in the June 11, 2014 pre-hearing conference, including issues addressed by earlier orders in this action.

III. ANALYSIS

SCH acknowledges that, because of the interlocutory nature of the orders issued to date, they remain subject to review and reconsideration upon the request of a party. Premera's motion and Regence's joinder asks the new hearing officer to abandon entirely all of the orders identified above, even though they failed to reference many of them in their pleadings, and identify no issues or concerns as to most of them. To the extent that the Hearings Unit engages in any further review of the topics addressed in any of the existing orders, SCH's analysis here addresses each of the orders separately.

Order on Petitions to Intervene. Neither the OIC nor the Intervenors identified any objection to this order, or reason for it to be vacated, or even mentioned its existence. The June 12, 2014 Order on Pre-Hearing Conference has addressed this topic.

Order Confirming Motions Schedule. No party has identified any issue with this order, and the dates and events it addressed have passed. No action is needed.

Order on Insurance Commissioner's Motion to Dismiss. As the new hearing officer noted in the June 11, 2014 pre-hearing conference, the effect of an order denying a motion for summary judgment is that the matter proceeds to hearing. *See generally, e.g., Rodin v. O'Beirn*, 3 Wn. App. 327, 332, 474 P.2d 903 (1970) ("no matter what the basis may be for refusing summary judgment, the order of denial is interlocutory and not a final judgment for the claim still remains pending for trial") (quoting *Hontz v. White*, 56 Wn.2d 538, 348 P.2d 420 (1960); K. Tegland, 4 Washington Practice (6th ed. 2013) at 426 ("[t]he denial of a summary judgment motion does not constitute a determination on the merits"). The new hearing officer has issued

his Order on Pre-Hearing Conference, and SCH understands that no further action is necessary or warranted on this motion at this time.

Order on Intervenors' Motion for Summary Judgment. As with the previous order, it is SCH's position that no further action is necessary or warranted at this time. In this regard, it should also be noted that, whereas the OIC Staff and Intervenors based their motions on judicial jurisdictional concepts such as justiciability and standing, this appeal is based solely on RCW 48.04.010(1), which states that the Commissioner "shall hold a hearing ... upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if such failure is deemed an act under any provision of this code...."

Further, if concepts of judicial jurisdiction apply to this proceeding, it is useful to note our Supreme Court's position on issues of the sort presented here,

Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer.

Vovos v. Grant, 87 Wn. 2d 697, 701, 555 P.2d 1343 (1976) (quoting *Washington Natural Gas Company v. Public Utility Dist. No. 1*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969)). And, to the extent the Intervenors intend to argue as part of their requested "re-do" that standing does not exist because the Hearings Unit cannot afford any relief, the United States Supreme Court has said,

For a plaintiff who is injured or threatened with injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 169 (2000). A ruling on the issues raised by SCH will serve to prevent further recurrence of the inconsistent and ultimately erroneous actions that led to this appeal in the first place.⁷

Order on SCH's Motion for Summary Judgment. As to that portion of this order that denies SCH's motion for summary judgment, it is SCH's position that no further action is necessary or warranted at this time.

Order on Prehearing Conference (dated April 16, 2014). No party has identified any issue with this order, and the dates and events it addressed have passed. No action is needed.

Order Authorizing Coordinated Care Corporation's Withdrawal as Intervenor. No party has identified any issue with this order. No action is needed.

Letter "clarifying the issues to be addressed at the hearing." The June 12, 2014 Order on Pre-Hearing Conference has noted that the topics to be addressed at the August 6, 2014 pre-hearing conference include "clarification of issues to be tried." The June 12, 2014 Order also authorized the parties to file pre-hearing memoranda by August 11, 2014. No further action is needed at this time in relation to this letter ruling.

Notice of Hearing. The June 12, 2014 Order has already re-set the hearing date. No further action is needed.

IV. CONCLUSION

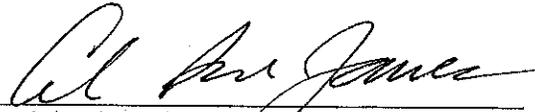
From the beginning, the OIC Staff and Intervenors attempted to avoid addressing the issues presented on the merits. Having failed initially, they now attempt to seize the unfortunate circumstances involving Ms. Petersen as a means to the same end. The Hearings Unit should

⁷ *E.g.*, in July and August, 2014, the Commissioner rejected the Coordinated Care and Molina applications in substantial part because they failed to include Seattle Children's in their networks. At the same time, he approved the BridgeSpan and Premera/LifeWise plans despite the same deficiency. When Coordinated Care appealed, the OIC Staff took the position that the company's network was inadequate without Seattle Children's, and even sought reconsideration after Ms. Petersen ruled to the contrary. After reconsideration was denied, however, the OIC Staff changed position and, in lockstep with the Intervenors, embraced the Coordinated Care ruling.

reject this ploy and, for the reasons stated, allow this matter to proceed to hearing under the criteria established in the June 12, 2014 Order on Pre-Hearing Conference.

DATED this 17th day of June, 2014.

BENNETT BIGELOW & LEEDOM, P.S.

By 

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this document on all parties or their counsel of record on the date below by the method of delivery specified below on today's date addressed to the following:

Presiding Officer

Hon. George A. Finkle (ret.)
gfinkle@jdrllc.com
forbes@jdrllc.com

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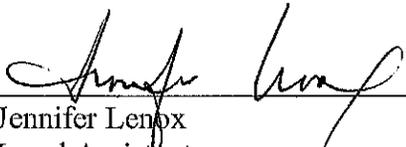
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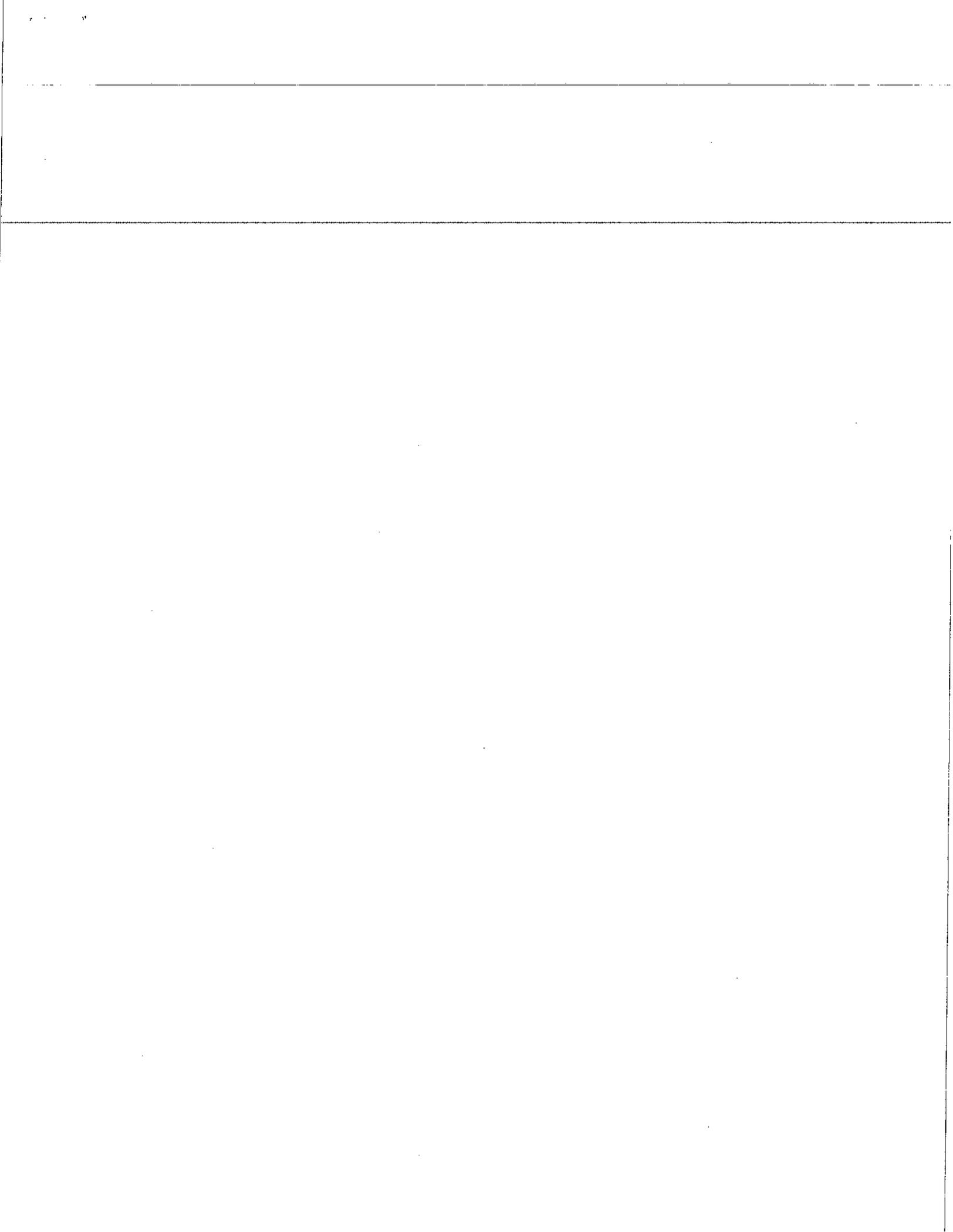
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 17th day of June, 2014.



Jennifer Lenox
Legal Assistant

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Jennifer K. Lenox

From: Jennifer K. Lenox
Sent: Tuesday, June 17, 2014 1:30 PM
To: 'gfinkle@jdrllc.com'; 'forbes@jdrllc.com'; 'KellyC@oic.wa.gov'; 'charlesb@oic.wa.gov'; 'Paytong@lanepowell.com'; 'parker@carneylaw.com'; Mike Madden; Carol Sue Janes
Cc: Gerri E. Downs; Jennifer K. Lenox
Subject: (13-0293 – SCH / OIC) Attaching for service and filing: 6-17-14 SCH Response to Premera's Motion to Vacate Chief Presiding Officer Petersen's Orders, and BridgeSpan's Joinder
Attachments: SCH's Response to Premera's Motion to Vacate Orders, and BridgeSpan's Joinder (6-17-14) (M1051418).pdf
Follow Up Flag: Copied to WORLDOX (BB&L - Client Files\0766\00018\EMAIL\M1051421.MSG)

Re: SCH Appeal of OIC's Approvals of HBE Plan Filings
Docket No. 13-0293

Dear Judge Finkle: (copy Ms. Cairns and All Counsel)

Please find attached for filing and service today: Seattle Children's Hospital's Response to Premera's Motion to Vacate Chief Presiding Officer Petersen's Order, and BridgeSpan's Joinder.

The original will be mailed today to Ms. Cairns for the file, and paper copies will be mailed to All Counsel.

Please let us know if anyone has difficulty accessing the attached. Thank you.

JENNIFER LENOX

Legal Assistant to Carol Sue Janes, Amy DeLisa, and Robert Stevens, COO

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