

FILED

2015 FEB 25 P 2:54

STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER

RENT-A-CENTER, INC.  
RENT-A-CENTER WEST, INC.

and

BENEFIT MARKETING SOLUTIONS, LLC and  
BENEFIT SERVICES ASSOCIATION,

No. 14-0081  
No. 14-0082

REPLY TO OIC'S OPPOSITION TO  
MOTION FOR RECONSIDERATION

**A. The Respondents were not provided with notice or a meaningful opportunity to litigate the issue of the waivers.**

The OIC correctly cites to *McDaniel v. DSHS*, 51 Wn. App. 893 (1988) for the standard for notice that an administrative agency must provide to identify the issues to be adjudicated, but completely misapplies the *McDaniel* holding. In *McDaniel*, the court stated:

The APA requires that parties be put on notice of the issues to be litigated. Generally, an administrative law judge's decision on an issue will not be upheld on review if the issue was not raised in the amended complaint, in the briefs, or in oral argument, and no evidence was presented concerning the issue. This rule follows the APA requirement that the parties be put sufficiently on notice of the issues to be litigated in the case. Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself. However, where there is sufficient notice **and** the issue is fully litigated, even though absent from the pleadings, the administrative law judge's decision will be upheld. (Internal citations omitted; emphasis added).

The OIC argues in its response to the motion for reconsideration that the Second Amended Notice of Hearing satisfied the notice requirement, but does not cite to any specific

1 language that provided the Respondents with any notice that the waivers were at issue in this  
2 hearing. The Second Amended Notice of Hearing specifically identifies the “accidental death  
3 and dismemberment coverage and a non-vehicle service contract product” as the conduct that  
4 violates the Insurance Code. The Second Amended Notice of Hearing is silent on the waivers  
5 because the issue was not in dispute. The failure to provide any notice that the OIC was  
6 seeking relief related to the waivers was not limited to the Second Amended Notice of  
7 Hearing.

8 In its Motion for Partial Summary Judgment, the OIC moved for a determination of  
9 liability only on the AD&D coverage and non-vehicle service contract stating that, if its  
10 motion was granted, “the sole issue at hearing will be the amount of any fine.” In Bobby  
11 Frye’s email to Rent-A-Center on February 15, 2014 (Final ROI – Ex. 6, Page 1), Frye states  
12 that after reviewing RAC’s response (contending that the waivers are not insurance), the OIC  
13 has determined that the AD&D is insurance and the Paid-Out Account benefit is a service  
14 contract. The OIC never provided any notice to the Respondents that it would pursue relief  
15 related to the waivers and is now seeking to take advantage of the Hearing Officer’s erroneous  
16 ruling. To the contrary, the OIC agreed with the Respondents’ position that the waivers were  
17 not insurance and were no longer the subject and/or focus of the OIC’s investigation.

18 The OIC further argues that there was evidence presented at the hearing that the  
19 waivers were insurance. As its only support, the OIC relies on the brochure that was offered  
20 into evidence as Respondents’ Exhibit 1 for arguments related to the AD&D and Paid-Out  
21 Account benefit. But, even if correct, documentary evidence alone is not a proper basis for  
22 the Hearing Officer to rule on the waivers without notice. In *International Association of*  
23 *Firefighters v. The Public Employment Relations Commission*, 38 Wn. App. 572 (1984), the  
24 court stated:

25 Evidence without a supporting allegation cannot serve as the basis of a  
26 determination of an unfair labor practice. It offends elemental concepts of

1 procedural due process to grant enforcement to a finding neither charged in the  
2 complaint nor litigated at the hearing.

3 Even assuming, there may have been peripheral evidence related to the waivers (that  
4 was admitted and used for entirely different purposes), the OIC does not even attempt to  
5 argue that the issue was litigated at the hearing. At opening statements, OIC counsel  
6 specifically mentioned the AD&D and Paid-Out Account benefit and was noticeably silent on  
7 the waivers. When Bobby Frye testified he stated:

8 Specifically, the ones that we were concerned about that we felt that would  
9 [need to] meet the laws of the State of Washington were the Paid-Out Account  
10 Services protection...[and] the AD&D product[.] (Hearing transcript  
11 beginning at 36:58).

12 Bobby Frye was silent on the waivers, as was the OIC's other witness Jim Thomkins.  
13 They were silent on these issues because they were not litigated during the hearing. At  
14 closing argument, neither party mentioned the waivers.

15 Further, equitable and judicial estopped prevent the OIC from taking a position that  
16 conflicts with the arguments it advanced, the investigation it conducted, the witnesses it  
17 presented, and the position it took throughout this administrative proceeding. *See Lybert v.*  
18 *Grant County*, 141 Wn.2d 29 (2000); *Arkinson v. Ethan Allen*, 160 Wn.2d 535 (2007). At  
19 every turn, the OIC has stated or implied that the waivers are no longer at issue. The OIC  
20 should be equitably and judicially estopped from contradicting its previous positions.

21 The OIC argues that "an agency adjudicative proceeding is not a court of law subject  
22 to court rules and procedures," but the Respondents are entitled to procedural due process.  
23 Procedural due process requires that the Respondents be notified of the issues to be litigated  
24 and be given an opportunity to litigate those issues at the hearing. This Hearing Officer  
25 should reconsider its determination that the waivers are insurance because Respondents were  
26 not afforded procedural due process.

1 **B. The OIC failed to submit any legal authority that waivers are insurance.**

2 Challenged to produce any authority for its newly-adopted position that waivers are  
3 insurance the OIC did not cite to a single case. Instead, the OIC relies on unadmitted  
4 evidence, speculation, and conjecture to argue that RAC must get paid by BMS/BSA if a  
5 member qualifies for the waiver benefit. This argument is both untrue and unpersuasive.

6 Despite its failure to cite to any case law, the OIC seeks to distinguish the cases cited  
7 by the Respondents because BMS/BSA are not the lessors of the products to which the  
8 waivers pertain. This is a distinction without a difference. The applicable and relevant  
9 portion of the authority cited is that there can be elements of loss shifting and distribution of  
10 risk which are present in all waivers without turning a waiver into insurance.

11 Further, there was no evidence submitted at the hearing or otherwise that established  
12 the relationship between BMS and RAC so as to indicate which party assumes the risk  
13 pursuant to the waivers. Had there been an opportunity to present evidence on the waivers,  
14 the evidence would have established that the waivers are a direct obligation between RAC and  
15 the member. The fact that there may be a risk – for example, the possibility a member could  
16 become unemployed – that RAC assumes for RAC Benefits Plus members does not equate to  
17 there being a contract of indemnity between BMS/BSA and the member that would meet the  
18 definition of insurance. Simply because RAC Benefits Plus members are provided the benefit  
19 does not mean that the benefit is paid for or otherwise provided by BMS/BSA. The OIC  
20 failed to meet its burden to produce any evidence related to the financial responsibilities  
21 related to the waivers and as a matter of law without this evidence cannot demonstrate there is  
22 a contract of indemnity.

23 The Hearing Officer should reconsider his holding that the waivers are insurance  
24 because it is contradicted by applicable authorities and not supported by the evidence in the  
25 record.  
26

1 **C. The OIC continues to conflate specific duration with indefinite duration.**

2 The OIC argues that the duration for the Paid-Out Account benefit was “as specific as  
3 they could be given the business model of RAC.” That is not the standard. Specific has a  
4 plain meaning that is applicable regardless of the type of business that the OIC is attempting  
5 to regulate. The statutory definition of specific does not change at the whim of the  
6 enforcement division of the OIC depending on the company they are seeking to impose fines  
7 upon. For a duration to be specific, it must be identified at the time of contract and not  
8 terminable at will by the parties. Without specification, the contract duration becomes  
9 indefinite and lasts until it is terminated by the parties or the terms of the agreement. Here,  
10 the Paid-Out Account benefit is a contract of indefinite duration that either party can  
11 terminate at any time without penalty.

12 **D. The OIC produced no evidence that RAC solicited insurance by asking or**  
13 **urging consumers to apply for insurance.**

14 The OIC response provided a Wikipedia definition of a brochure to argue that RAC  
15 solicited insurance by distributing a brochure to its customers. Even accepting Wikipedia as a  
16 legitimate source and accepting its definition of brochure, the OIC’s argument fails.  
17 Assuming arguendo that the RAC Benefits Plus brochures are “advertising” or intended “to  
18 inform about products,” this assumption gets the OIC no closer to proving that RAC is urging  
19 or asking someone to apply for a particular kind of insurance from a particular insurer as  
20 required by RCW 48.17.010(14). The OIC ignores the statutory definition requiring “urging”  
21 and “asking” and states that RAC is soliciting insurance because the purpose of the brochure  
22 is to encourage the purchase of the membership. The purpose of the brochure is irrelevant to  
23 what specific actions RAC took. The Hearing Officer should reconsider his decision that RAC  
24 solicited insurance because the evidence from Bobby Frye that RAC handed him a brochure,  
25  
26

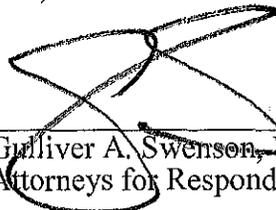
1 and that no RAC employee asked or urged him to apply for the program, does not meet the  
2 statutory definition of RCW 48.17.010(14).

3 **CONCLUSION**

4 The OIC's opposition is devoid of legitimate and supportable legal reasons opposing  
5 the Respondents' motion for reconsideration. The Hearings Officer should reconsider his  
6 Findings of Fact, Conclusions of Law, and Final Order because of the reasons and arguments  
7 set forth herein and in Respondents' motion.

8 DATED this 25th day of February, 2015.

9 RYAN, SWANSON & CLEVELAND, PLLC

10  
11 By   
12 Gulliver A. Swenson, WSBA #35974  
13 Attorneys for Respondents

14 1201 Third Avenue, Suite 3400  
15 Seattle, Washington 98101-3034  
16 Telephone: (206) 464-4224  
17 Facsimile: (206) 583-0359  
18 swenson@ryanlaw.com  
19  
20  
21  
22  
23  
24  
25  
26

DECLARATION OF SERVICE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

I hereby declare as follows:

1. I am a citizen of the United States and a resident of the state of Washington. I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Ryan, Swanson & Cleveland, PLLC, 1201 Third Avenue, Suite 3400, Seattle, Washington, 98101-3034.

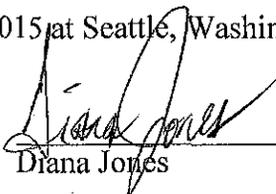
2. On the 25<sup>th</sup> day of February, 2015, I caused to be served upon counsel of record at the address and in the manner described below the foregoing document:

Marcia G. Stickler  
Office of Insurance Commissioner  
PO Box 40255  
Olympia, WA 98504

- U.S. Mail
- Hand Delivery
- E-mail
- Facsimile
- Federal Express

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

DATED this 25<sup>th</sup> day of February, 2015 at Seattle, Washington.

  
Diana Jones