

FILED

**BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER**

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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of

**WASHINGTON TECHNOLOGY
INDUSTRY ASSOCIATION,**

Applicant.

Docket No. 15-0290

**OIC MOTION FOR SUMMARY
JUDGMENT**

The Insurance Commissioner for the state of Washington ("OIC"), by and through the undersigned Insurance Enforcement Specialist, his authorized designee, submits this Motion for Summary Judgment. The plain language of Chapter 48.125 RCW makes clear that Washington Technology Industry Association ("WTIA") is not eligible to receive a certificate of authority as a self-funded multiple employer welfare arrangement ("MEWA"). WTIA's application for such a certificate was properly denied, and therefore the OIC respectfully requests that the chief presiding officer dismiss WTIA's appeal.

ISSUES

1. Is WTIA, which has no history of self-funded operations, eligible for a certificate of authority under RCW 48.125.030? Answer: No.
2. If the chief presiding officer disagrees and finds that WTIA is eligible for a certificate of authority under Chapter 48.125 RCW, is WTIA's application timely under RCW 48.125.020? Answer: No.
3. In light of the requirements of RCW 48.125.030 through RCW 48.125.070, was WTIA's application substantially complete? Answer: No.

1 **DOCUMENTS RELIED UPON**

- 2 1. Declaration of Gayle Pasero
3 2. Declaration of Steven E. Drutz
4 3. All other filings and pleadings in this case.
5

6 **BACKGROUND**

7 “For many years, promoters and others have established and operated multiple employer
8 welfare arrangements (MEWAs), also described as ‘multiple employer trusts’ or ‘METs,’ as
9 vehicles for marketing health and welfare benefits to employers for their employees.”¹ “By
10 avoiding State insurance reserve, contribution and other requirements applicable to insurance
11 companies, MEWAs are often able to market insurance coverage at rates substantially below
12 those of regulated insurance companies, thus, in concept, making the MEWA an attractive
13 alternative for those small businesses finding it difficult to obtain affordable health care
14 coverage for their employees.”²

15 “In practice, however, a number of MEWAs have been unable to pay claims as a result
16 of insufficient funding and inadequate reserves.”³ “Or in the worst situations, they were
17 operated by individuals who drained the MEWA’s assets through excessive administrative fees
18 and outright embezzlement.”⁴ “Recognizing that it was both appropriate and necessary for
19 States to be able to establish, apply and enforce State insurance laws with respect to MEWAs,
20 the U.S. Congress amended ERISA in 1983, as part of Public Law 97-473, to provide an
21 exception to ERISA’s broad preemption provisions for the regulation of MEWAs under State
22 insurance laws.”⁵

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24 ¹ Employee Benefits Security Administration, U.S. Department of Labor, *MEWAs: Multiple Employer
Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and
State Regulation* 3 (August 2013), <http://www.dol.gov/ebsa/pdf/mwguide.pdf>.

25 ² *Id.*

³ *Id.*

26 ⁴ *Id.*

⁵ *Id.*

1 Thus, in 2004 the Washington Legislature enacted Chapter 48.125 RCW, providing for
2 the regulation of self-funded MEWAs.⁶ After the statute was enacted, three domestic self-
3 funded MEWAs, already in operation, applied for and were granted a certificate of authority.⁷
4 Subsequent to these first applications, other entities inquired about obtaining a certificate of
5 authority.⁸ After discussions with the OIC, those entities learned that they did not meet the
6 statutory requirements, and did not submit an application.⁹ In the meantime, all but one of the
7 self-funded MEWAs that had previously obtained a Washington certificate of authority
8 experienced financial difficulties and had to cease operations.¹⁰

9 On March 27, 2015, WTIA submitted the first application for a certificate of authority
10 that the OIC had received since the initial set of applicants.¹¹ The OIC informed WTIA that its
11 application was not substantially complete, and requested additional information and
12 documentation.¹² WTIA disputed the fact that its application was not substantially complete,
13 and re-submitted its original application on or about October 29, 2015.¹³ On November 18,
14 2015, the OIC notified WTIA's representatives by letter that its application was denied.¹⁴ The
15 OIC explained that Chapter 48.125 RCW did not authorize:

16 "the Commissioner to issue a certificate of authority to a MEWA such as [WTIA]
17 that has no history of self-funded operation and that failed to submit a substantially
18 complete application by the April 1, 2005 statutory cut-off date."¹⁵

19 The OIC further explained that, as with WTIA's first application, "the resubmitted application
20 does not provide all of the information required in RCW 48.125.030 through 48.125.070 and

21 ⁶ Laws of 2004, ch. 260.

22 ⁷ Declaration of Steven E. Drutz, page 3, para. 9.

23 ⁸ Declaration of Gayle Pasero, page 2, para. 7.

24 ⁹ *Id.*

25 ¹⁰ Declaration of Steven E. Drutz, page 3, para. 9.

26 ¹¹ WTIA Demand for Hearing, page 1; Declaration of Gayle Pasero, page 2, para. 7.

¹² Declaration of Gayle Pasero, page 1, para. 4.

¹³ *Id.* at pages 2-3, para. 8.

¹⁴ Letter of Steven E. Drutz of November 18, 2015, attached to WTIA Demand for Hearing ("Drutz letter"), page 1.

¹⁵ *Id.* (emphasis added).

1 does not demonstrate compliance with these other statutory requirements.¹⁶ WTIA appealed
2 the denial of its second application.

3 4 ARGUMENT

5 **1. Procedure**

6 Contested hearings involving the OIC are governed by Chapter 48.04 RCW, Chapter
7 34.05 RCW, the Administrative Procedure Act, and Chapter 10.08 WAC. WAC 284-02-
8 070(2)(a). “A motion for summary judgment may be granted and an order issued if the written
9 record shows that there is no genuine issue as to any material fact and that the moving party is
10 entitled to judgment as a matter of law.” WAC 10-08-135. “When considering a summary
11 judgment motion, the court must construe all facts and reasonable inferences in the light most
12 favorable to the nonmoving party.” *Triplett v. Dep't of Soc. & Health Servs.*, 166 Wn. App.
13 423, 427 (2012) (citation omitted). Statutory interpretation is a question of law that is
14 appropriate for resolution by summary judgment. *Id.*

15 **2. Rules of Statutory Interpretation**

16 Case law has laid down a number of rules for statutory interpretation. “Our obligation
17 is to give effect to legislative intent.” *Regence Blueshield v. Ins. Comm'r*, 131 Wn. App. 639,
18 646 (2006) (citation omitted). “Where a statute uses plain language and defines essential terms,
19 the statute is not ambiguous.” *Id.* (citing *McFreeze Corp. v. Dep't of Revenue*, 102 Wn. App.
20 196, 200 (2000)). “Moreover, if the statutory language is clear, the court may not look beyond
21 that language or consider legislative history but should glean the legislative intent through the
22 statutory language.” *Regence*, 131 Wn. App. at 646-647 (citation omitted). “Substantial weight
23 and deference should be given to an agency's interpretation of the statutes and regulations it
24 administers.” *Seatoma Convalescent Ctr. v. DSHS*, 82 Wn. App. 495, 518 (1996) (citations
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¹⁶ *Id.*

1 omitted). “The agency's interpretation should be upheld if it reflects a plausible construction of
2 the language of the statute and is not contrary to the legislative intent.” *Id.*

3 **3. WTIA, which has no history of self-funded operations, is not eligible for a**
4 **certificate of authority under RCW 48.125.030.**

5 In Washington, “a person may not establish, operate, provide benefits, or maintain a
6 self-funded multiple employer welfare arrangement in this state unless the arrangement first
7 obtains a certificate of authority from the commissioner.” RCW 48.125.020(1). The insurance
8 commissioner “may not issue a certificate of authority to a self-funded multiple employer
9 welfare arrangement unless the arrangement establishes to the satisfaction of the commissioner
10 that” all the requirements of RCW 48.125.030 are met by the arrangement. Furthermore, the
11 “commissioner shall deny the application of an arrangement that does not satisfy the applicable
12 requirements of RCW 48.125.030 through 48.125.070.” RCW 48.125.080(3).

13 A primary requirement for a certificate of authority under Chapter 48.125 RCW is that
14 a MEWA must be an “arrangement.” RCW 48.125.030. An “arrangement” is defined in
15 Chapter 48.125 RCW as a MEWA “that does not provide for payment of benefits under the
16 arrangement solely through a policy or policies of insurance issued by one or more insurance
17 companies licensed under this title.” RCW 48.125.010(7). In other words, to meet the statutory
18 definition of “arrangement,” a MEWA must be self-funded.¹⁷ *Id.* A further requirement for a
19 certificate of authority as a self-funded MEWA is that:

20 “[t]he arrangement has been in existence and operated actively for a continuous
21 period of not less than ten years as of December 31, 2003, except for an
22 arrangement that has been in existence and operated actively since December 31,
23 2000, and is sponsored by an association that has been in existence more than
24 twenty-five years.”

24 RCW 48.125.030(8) (emphasis added). The defined term “arrangement,” which carries with it
25 a meaning of self-funded operation within this chapter of the Code, must exist for the statutory
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¹⁷ Declaration of Gayle Pasero, page 2, para. 5.

1 | time period. *Id.*; *see also* RCW 48.125.010(7). Thus, the plain language of Chapter 48.125
2 | RCW requires that a MEWA must have a history of self-funded operation for the specified
3 | period of time in order to be eligible for a certificate of authority. RCW 48.125.030(8); RCW
4 | 48.125.010(7); *see Regence*, 131 Wn. App. at 646. This construction is also the interpretation
5 | of the OIC, which administers this statute.¹⁸ *Seatoma*, 82 Wn. App. at 518.

6 | This interpretation also furthers one of the defined purposes of the Chapter 48.125
7 | RCW, to “[r]egulate self-funded multiple employer welfare arrangements in order to ensure the
8 | financial integrity of the arrangements.” RCW 48.125.005(2). Self-funded MEWAs operate
9 | very differently than fully insured MEWAs.¹⁹ In particular, self-funded MEWAs act like a
10 | health insurance company by taking on insurance risk, collecting premiums, and setting aside
11 | reserves in order to pay the medical costs of its members.²⁰ These tasks require significant
12 | expertise in several areas of operations.²¹

13 | The Legislature’s requirement of significant history of self-funded operations has been
14 | justified by the subsequent experience of admitted self-funded MEWAs in Washington. Even
15 | experienced self-funded MEWAs have had difficulties meeting their obligations and remaining
16 | solvent.²² Lacking the self-funded experience that these entities had, WTIA is even less likely
17 | to remain financially solvent, increasing risk for its members.²³

18 | WTIA is a fully-insured MEWA and has “no history of self-funded operation,” as stated
19 | in the OIC’s letter denying WTIA’s resubmitted application.²⁴ There is no genuine issue of fact
20 | here since WTIA cannot meet this statutory requirement and is therefore not eligible for a
21 | certificate of authority at all. RCW 48.125.030(8); RCW 48.125.010(7); *see* WAC 10-08-135.
22 | Under both the plain language of these statutes and under the OIC’s interpretation of the same,
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24 | ¹⁸ *Id.*

25 | ¹⁹ Declaration of Steven E. Drutz, page 2, paras. 5-7.

26 | ²⁰ *Id.* at page 2, para. 7

²¹ *Id.*

²² *Id.* at page 3, para. 9.

²³ *See id.* at pages 2-3, paras. 5-8.

²⁴ Declaration of Gayle Pasero, page 2, para. 5; *see also* Drutz letter, page 1.

1 WTIA's appeal should be dismissed as a matter of law. WAC 10-08-135; *Regence*, 131 Wn.
2 App. at 646; *Seatoma*, 82 Wn. App. at 518.

3 **4. If the chief presiding officer disagrees with the OIC and finds that WTIA is eligible**
4 **for a certificate of authority under Chapter 48.125 RCW, WTIA's application is untimely**
5 **under RCW 48.125.020.**

6 Assuming, for the sake of argument, that WTIA is eligible to apply for a certificate of
7 authority under this chapter, it is too late to do so. WTIA has been operating as a fully-insured
8 MEWA since 2000.²⁵ If this arrangement were eligible for a certificate of authority now, it
9 would have been also at that time, since its form is unchanged.²⁶ However, "[a]n arrangement
10 established, operated, providing benefits, or maintained in this state prior to December 31, 2003,
11 has until April 1, 2005, to file a substantially complete application for a certificate of authority."
12 RCW 48.125.020(3). So, if WTIA otherwise qualified to apply today, it is time barred from
13 doing so under the statutory limitations period. *Id.*

14 **5. In light of the requirements of RCW 48.125.030 through RCW 48.125.070, WTIA's**
15 **application was not substantially complete.**

16 Even if WTIA is not found to be unqualified as an "arrangement" or untimely, as
17 explained above, all requirements of RCW 48.125.030 through RCW 48.125.070 still must be
18 met before the OIC may grant a certificate of authority to operate as a self-funded MEWA.
19 RCW 48.125.080. WTIA has not met all of these requirements.²⁷ Crucially, WTIA has not
20 demonstrated that it will meet the minimum surplus requirement of RCW 48.125.060. In order
21 to be eligible for a certificate of authority as a self-funded MEWA, an arrangement must
22 continuously maintain "a surplus equal to at least ten percent of the next twelve months
23 projected incurred claims or two million dollars, whichever is greater." RCW 48.125.060.
24 WTIA provided in support of its application a Milliman report dated January 29, 2015, which

25 ²⁵ WTIA Demand for Hearing, page 1; Declaration of Gayle Pasero, page 2, para. 5.

26 ²⁶ *Id.*

27 ²⁷ Drutz letter, page 1; Declaration of Gayle Pasero, page 3, paras. 9-10.

1 stated that WTIA requires \$5.4 million in surplus as of September 1, 2015, increasing to \$5.8
2 million as of September 1, 2016.²⁸ It appears that WTIA's trust has reported reserves of \$2.3
3 million in the 2013 audited financial statement, more than \$3 million short of what RCW
4 48.125.060 requires.²⁹ Thus, the documents and information provided by WTIA demonstrate
5 that WTIA has not met the requirements of RCW 48.125.060.³⁰ This is particularly concerning
6 because even authorized self-funded MEWAs that have met this surplus requirement have had
7 significant difficulties remaining solvent.³¹ Assuming WTIA is even eligible for a certificate
8 of authority at all, it is not entitled to one here because it has failed to meet the statutory surplus
9 requirement. RCW 48.125.080. Therefore, the OIC is entitled to summary judgment on this
10 alternative ground. WAC 10-08-135.

11 12 CONCLUSION

13 The plain language of Chapter 48.125 RCW indicates that a MEWA must have an
14 extensive history of self-funded operations in order to be eligible for a certificate of authority
15 under this chapter. The OIC's interpretation finds the same meaning in the statutory language.
16 WTIA, which has always been fully insured, cannot meet this requirement. Moreover, WTIA
17 was in existence in its current form prior to December 31, 2003. If WTIA qualifies to apply
18 now, it did so at that time as well, and is therefore time-barred since it failed to make its
19 application by the April 1, 2005 deadline. Finally, WTIA has not met the additional statutory
20 requirement of sufficient minimum surplus, which it would need to meet if it were otherwise
21 eligible to apply. Each of these alternative arguments demonstrate that WTIA is not entitled to
22 a certificate of authority, and that the OIC is entitled to summary judgment as a matter of law,
23 dismissing WTIA's appeal.

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25 ²⁸ Declaration of Gayle Pasero, page 3, para. 9.

26 ²⁹ *Id.*

³⁰ *Id.*

³¹ Declaration of Steven E. Drutz, page 3, para. 9.

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RESPECTFULLY SUBMITTED this 22nd day of January, 2016.



MIKE KREIDLER
Insurance Commissioner

By and through his designee



Darryl E. Colman
Insurance Enforcement Specialist
Legal Affairs Division

1 CERTIFICATE OF MAILING

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

6 On the date given below I caused to be served the foregoing OIC MOTION FOR
7 SUMMARY JUDGMENT, DECLARATION OF GAYLE PASERO, and DECLARATION OF
8 STEVEN E. DRUTZ on the following individuals by hand delivery, email and by placing same
9 in the U.S. mail, via state Consolidated Mail Services, at the below indicated addresses:

10 **Via Hand Delivery**

11 William Pardee, Presiding Hearings Officer
12 Washington State Insurance Commissioner
13 5000 Capitol Blvd
14 Tumwater, WA 98501

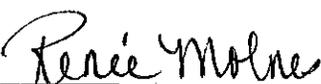
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30 SIGNED this 22nd day of January, 2016, at Tumwater, Washington.

31 

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