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FILED

NOV 24 2009

Hearings Unit, OIC
Patricia D. Petersen
Chief Hearing Officer

FILED

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Hearings Unit, OIC
Patricia D. Petersen
Chief Hearing Officer

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF

Respondent PacifiCare of Washington,
Inc.
Authorized Health Care Service Contractor.

ORDER NO. 09-0010

RESPONDENT'S REPLY IN SUPPORT
OF ITS MOTION FOR SUMMARY
JUDGMENT RE: STATUTE OF
LIMITATIONS

Respondent PacifiCare of Washington, Inc. ("PCW") has moved for an order dismissing the instant action because it was commenced after the statute of limitations expired. The Office of the Insurance Commissioner ("OIC") does not dispute a single fact material to the Court's determination of this issue.¹ Therefore, the matter is ripe for adjudication, PCW respectfully submits this motion should be granted as a matter of law, and a decision should be entered that OIC's request for imposition of a fine is time barred.

A. OIC Failed to Commence This Matter Within the Statute of Limitations.

There is no dispute that OIC learned of the facts underlying its charges no later than August 9, 2007; there is no dispute this matter is governed by a two-year statute of limitations; and there is no dispute this action was commenced after August 9, 2009. Therefore, while OIC attempts to distract the Court from the simplicity of the issue, the material, undisputed facts clearly show this matter is time-barred and should be dismissed.

¹ As indicated in PCW's motion for summary judgment, PCW and OIC are certainly not in agreement with regard to the facts and applicable law underlying OIC's case in chief. PCW respectfully but vigorously continues to dispute OIC's characterization of the company's conduct and motives, and further disputes the applicability of OIC's proffered legal authority. Nevertheless, none of these OIC allegations has any bearing on the narrow statute of limitations issue presently before the Court on this motion.

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT RE: STATUTE OF LIMITATIONS - 1
ORDER NO. 09-0010

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SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

1 1. The cause of action accrued no later than August 9, 2007. A statute of limitations
2 begins to run when the cause of action accrues. RCW 4.16.005. Even with the application of the
3 discovery rule, “the cause of action does not accrue until the plaintiff discovers, or in the reasonable
4 exercise of diligence, should discover the elements of the cause of action.” Simply stated, “the
5 action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of
6 action.” *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 575-76, 146 P.3d 423
7 (2006) (internal citations omitted). OIC does not dispute that it learned of the salient facts
8 underlying the elements of its cause of action in a conference call on August 9, 2007. Therefore,
9 even applying the discovery rule, this cause of action accrued no later than August 9, 2007.

10 2. This matter is governed by a two-year statute of limitations. OIC concedes that the
11 applicable statute of limitations is two years. This is an action by the state purely to seek a penalty.
12 OIC acknowledges that PCW has long since stopped making any and all disputed payments and all
13 payments previously made have been reimbursed. Therefore, OIC concedes that the applicable
14 statute of limitations is two years, pursuant to RCW 4.16.100(2).

15 3. This proceeding commenced on September 8, 2009. This is an administrative
16 adjudicative proceeding, governed by the Administrative Procedure Act, RCW 34.50 *et seq.* The
17 APA specifies that “[a]n adjudicative proceeding commences when the agency or a presiding officer
18 notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding
19 will be conducted.” RCW 34.05.413(5). The first notification of this kind occurred on September 8,
20 2009, when Presiding Officer Judge Burdue circulated the Notice of Pre-Hearing Conference by
21 Telephone to the parties. *See* Ex. R-10, attached to Supplemental Declaration of Jeffrey L. Gingold.
22 Therefore, this proceeding commenced on September 8, 2009.²

23 _____
24 ² The parties exchanged communications before September 8, 2009 regarding a potential prehearing conference, but true
25 notice was not given in any of these prior exchanges. On August 12, 2009, OIC’s counsel contacted the Hearings Unit
26 and PCW’s counsel to give notice it was “planning to file a Notice of Prehearing Conference”. On August 14, 2009, the
OIC Hearing Unit informed all parties that the appropriate procedure would be for OIC’s counsel to file a Notice of
Request for Hearing, and the Hearings Unit would then send all parties notice of a prehearing conference. On August
17, OIC’s counsel served its Notice of Request for Hearing for Imposition of Fines. On August 31, 2009, the Hearings
(continued . . .)

provided for, useful and proper for the efficient administration of any provision of this code.

RCW 48.02.060(1):

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

Third, even if the Court were to accept this completely unsupported assertion that the Commissioner was somehow restricted from pursuing this cause of action until after completing the examination, it would not as a matter of law affect the accrual date. Laws and regulations preventing immediate resort to judicial action do not necessarily delay the accrual of a cause of action. *U.S. Oil & Refining Co. v. Dept. of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981). When the owner of a cause of action is required to take some preliminary step before being permitted to bring the action, he or she is not allowed to indefinitely suspend the operation of the statute of limitations by delaying in taking that step. *Young v. City of Seattle*, 30 Wn.2d 357, 191 P.2d 273 (1948). Here, OIC took over a year to wind up the examination after it discovered evidence of the alleged wrongdoing. OIC cannot be permitted to suspend the statute of limitations – as it is seeking to do – by delaying the conclusion of its examination report.

Quite simply, OIC has failed to present any legally valid reason why the date of the examination is relevant to the statute of limitations on its claim against PCW. The facts here are straightforward: the alleged wrongdoing took place from 1999 to 2006, and OIC learned of the alleged wrongdoing on August 9, 2007, at the latest. Therefore, the cause of action accrued no later than August 9, 2007.

C. There is No Basis for OIC's Claims for Equitable Relief.

1. Discovery Rule. When a court chooses, in its discretion, to apply the discovery rule, the cause of action accrues once the plaintiff discovers, or in the reasonable exercise of diligence, should discover the facts underlying his or her cause of action. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 575-76, 146 P.3d 423 (2006). OIC discovered the facts underlying its cause of action on August 9, 2007. Therefore, even if this Court were to apply the discovery rule

1 to the facts presented for purposes of this motion, the accrual date would still be August 9, 2007. In
2 other words, OIC's request for the Court to apply the discovery rule gains it nothing.

3 2. Equitable Estoppel. As OIC identified in its briefing, equitable estoppel requires (1)
4 an admission, statement, or act by one party that is inconsistent with a claim it asserted later, (2)
5 reasonable reliance by a second party on that admission, statement, or act, and (3) injury to that
6 second party as a result of reasonably relying. With all due respect, OIC does not come close to
7 establishing these elements.

8 There is no inconsistency in disputing underlying facts and, at the same time, asserting one's
9 right to have a matter dismissed when the proceeding is not commenced within the statute of
10 limitations. Even if one were to accept for purposes of this motion that OIC relied upon PCW's
11 responses, any such reliance ended on August 9, 2007. Similarly, if for purposes of this motion it
12 were accepted that OIC had been misled (which we vigorously dispute), no injury resulted therefrom
13 because OIC had two years – between August 9, 2007 and August 9, 2009 – in which it clearly and
14 indisputably was aware of the facts and was able to seek relief. There was simply no injury.

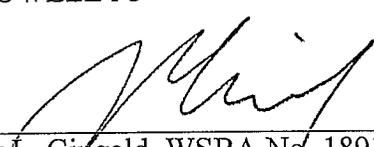
15 Moreover, the equitable relief OIC seeks with respect to this issue would already be provided
16 through application of the discovery rule. As discussed above, the discovery rule suspends the
17 accrual of a cause of action until the plaintiff knows of the injury and has a fair chance to bring his
18 or her claim. Once this is achieved, there is no basis for any further equitable measures. In other
19 words, there is no reason why OIC should not be required to comply with the statute of limitations,
20 beginning on August 9, 2007, just as a court would require of any other plaintiff.

21 3. Tolling. OIC cites *U.S. Oil & Refining Co. v. Dept. of Ecology, supra*, and *Dolman v.*
22 *Dept. of L & I*, 105 Wn.2d 560, 716 P.2d 852 (1986), for the proposition that the statute of
23 limitations was tolled when OIC served PCW with its Consent Order on February 9, 2009. OIC
24 overlooks the important distinctions, however, between the role of the notice documents in those
25 cases and the role of the consent order here. The *U.S. Oil* court explicitly stated that the notice
26 document in that case commenced the proceeding because it was the effective equivalent of a

1 be granted, a decision should be entered that OIC's request for imposition of a fine is time-barred,
2 and this action should be dismissed.

3
4 DATED this 23rd day of November, 2009.

5 LANE POWELL PC

6
7 By 

8 Jeffrey L. Gingold, WSBA No. 18915
9 Andrew G. Yates, WSBA No. 34239
10 Andrew W. Steen, WSBA No. 38408
11 Attorneys for PacifiCare of Washington Inc.

CERTIFICATE OF SERVICE

I assert that true and exact copies of the Respondent's Reply in Support of Its Motion for Summary Judgment Re: Statute of Limitations were hand-delivered by ABC-LMI and mailed postage prepaid on November 23, 2009, to the following parties at the following addresses:

Hon. Cindy L. Burdue
Office of Administrative Hearings
PO Box 9046
2420 Bristol St SW
Olympia, WA 98507

Andrea Philhower
Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
5000 Capitol Blvd
Tumwater, WA 98504-0255

Patricia Petersen
Chief Hearing Officer
Office of the Insurance Commissioner
PO Box 40255
5000 Capitol Blvd
Tumwater, WA 98504-0255

Wendy Galloway
Admin. Asst. to Chief Hearing Officer
Office of the Insurance Commissioner
PO Box 40255
5000 Capitol Blvd
Tumwater, WA 98504-0255


Deborah Strayer
Legal Assistant

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF

Respondent PacifiCare of Washington,
Inc.
Authorized Health Care Service Contractor.

ORDER NO. 09-0010

**SUPPLEMENTAL DECLARATION OF
JEFFREY L. GINGOLD IN SUPPORT
OF RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT**

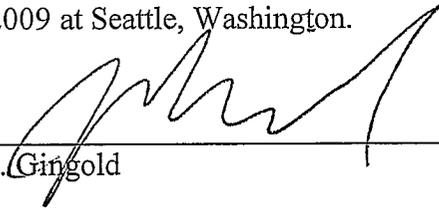
I, Jeffrey L. Gingold, make the following declaration based upon my own personal knowledge:

1. I am over the age of eighteen (18) years and am competent to testify to the facts and matters contained herein, based upon my own knowledge. I am one of the attorneys for PacifiCare of Washington, Inc. ("PCW") in the captioned matter.

2. Attached hereto as Exhibit R-10 is a true and correct copy of the Notice of Pre-Hearing Conference by Telephone circulated by Judge Cindy L. Burdue, dated September 8, 2009.

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

Executed this 23rd day of November, 2009 at Seattle, Washington.



Jeffrey L. Gingold

CERTIFICATE OF SERVICE

I assert that true and exact copies of the Supplemental Declaration of Jeffrey L. Gingold in Support of Respondent's Motion For Summary Judgment were hand-delivered by ABC-LMI and mailed postage prepaid on November 23, 2009, to the following parties at the following addresses:

Hon. Cindy L. Burdue
Office of Administrative Hearings
PO Box 9046
2420 Bristol St SW
Olympia, WA 98507

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Legal Affairs Division
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PO Box 40255
5000 Capitol Blvd
Tumwater, WA 98504-0255

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Wendy Galloway
Admin. Asst. to Chief Hearing Officer
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Tumwater, WA 98504-0255



Deborah Strayer
Legal Assistant

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE OFFICE OF INSURANCE COMMISSIONER

RECEIVED

SEP 11 2009

LANE POWELL PC

IN THE MATTER OF:

Docket No. 2009-INS-0001

PacifiCare of Washington, Inc.,
Authorized Health Care Service Contractor.

NOTICE OF PRE-HEARING
CONFERENCE BY TELEPHONE

YOU ARE HEREBY NOTIFIED that a pre-hearing conference has been scheduled in the above-entitled matter. The purpose of the pre-hearing conference is to define and/or clarify the issues for the hearing, discuss the handling of evidentiary evidence, witnesses, etc., and to resolve any other matters prior to the administrative hearing.

A date for the hearing will be selected which is acceptable to all parties at this hearing, so please come prepared with your schedule to choose a date for this hearing.

The pre-hearing conference is being held pursuant to WAC 10-08-130. See also Title 48 RCW, Title 284 WAC and Chapter 34.05 RCW.

The date and time of the pre-hearing conference is as follows:

DATE: Friday, September 18, 2009

TIME: 11:00 AM

INSTRUCTION: (BY TELEPHONE) All parties will appear by telephone by calling: **LOCALLY (360) 753-7328** or **LONG DISTANCE (TOLL FREE) 1-800-843-7712** at the time designated above.

JUDGE: Cindy L. Burdue

Parties who fail to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default in accordance with RCW 34.05.434 and RCW 34.05.440.

Additional Information: General information about the hearing process can be found on the Office of Administrative Hearings web page at www.oah.wa.gov. Firearms and other dangerous weapons are prohibited at hearings and all Office of Administrative Hearings offices. (WAC 10-20-010)

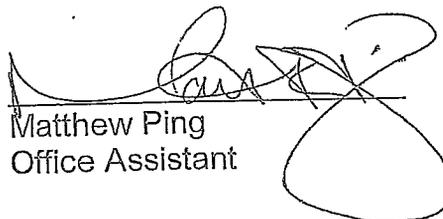
Dated and Mailed at Olympia, Washington this 8th day of September, 2009.



Cindy L. Burdue
Administrative Law Judge
Office of Administrative Hearings
2420 Bristol Ct SW
PO Box 9046
Olympia, WA 98507-9046

Certificate of Service

I assert that true and exact copies of the Notice of Prehearing Conference by telephone were mailed to the following parties on the 8th day of September, 2009.



Matthew Ping
Office Assistant

Copies Mailed To:

Andrea Philhower
Staff Attorney for Legal Affairs
Office of Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

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