

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of)	RULING ON MOTION FOR
)	SUMMARY DETERMINATION;
M. LINDA MOMBERGER)	PROPOSED ORDER
dba JACK BARBER INSURANCE)	
RESPONDENT)	Case No. INS 08-10-007

On February 4, 2009, the Insurance Division served a Notice of Proposed Action on M. Linda Momberger dba Jack Barber Insurance (Licensee). Licensee filed a request for hearing on February 25, 2009. Hearing in the matter has been scheduled for April 30, 2009. The Division is represented by Assistant Attorney General Judith Anderson. The matter was referred to the Office of Administrative Hearings (OAH) on February 26, 2009, and assigned to Administrative Law Judge (ALJ) Rick Barber.

On March 19, 2009, the Division filed a Motion for Summary Determination. The motion explained the method by which Licensee could respond. On April 6, 2009, I wrote a letter to Licensee reiterating the importance of the motion and giving her until April 13, 2009 to respond to the motion. No response was received.

ISSUE

1. Whether Licensee failed to respond to the Director's inquiry, in violation of ORS 731.296.
2. Whether, if there was a violation, Licensee should pay a civil penalty in the amount of \$2,000.

NATURE OF THE REVIEW

Pursuant to OAR 137-003-0580, a Motion for Summary Determination may be filed by the agency or a party not less than 28 days before the date set for hearing, requesting a ruling on the legal issues in the contested case. The rule, quoted in part below, sets forth the standard by which I review the motion:

- (6) The administrative law judge shall grant the motion for a summary determination if:
 - (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show

that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * *

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with OAR 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

OAR 137-003-0580.

DOCUMENTS RELIED UPON

The Division's motion included ten exhibits that were referenced in the motion. I have considered the motion and the exhibits in my ruling herein. No other documents have been received from either side in this proceeding.

FINDINGS OF FACT

1. Jack Barber Insurance (JBI) is an assumed business name for M. Linda Momberger, and has been licensed to produce insurance since August 22, 1978. (Ex. 1).

2. On October 15, 2007, the Division received a complaint from one of Licensee's customers, Chappell. (Ex. 2). On October 19, 2007, the Director sent a letter to Licensee, advising of the complaint and asking for a response to the complaint. The letter requested a response within 21 days, or by November 12, 2007. (Ex. 3).

3. As of November 28, 2007, Licensee had not responded to the letter. On that date, the Director sent a second letter, requesting a response by December 12, 2007. The letter was sent certified mail. (Ex. 4).

4. The November 28 letter was returned to the Director's office on January 2, 2008, marked as "unclaimed." (Ex. 5).

5. On April 24, 2008, the Director again sent a letter to Licensee asking for information concerning the Chappell complaint. Licensee was to reply on or before May 16, 2008. The letter was sent certified to Licensee's business address and also her home address. (Ex. 6). Both were returned marked "unclaimed."

6. On May 27, 2008, Division investigator Dale White spoke with Licensee on the phone and then emailed her a copy of the April 24 letter. White told Licensee that the Division needed a response to the request on or before June 13, 2008. (Ex. 8).

7. On June 16, 2008, Licensee responded by letter to the Division's request. The letter was received by the Division on June 17. Licensee explained that she had written down the incorrect date, and explained several medical issues she was facing. Licensee further explained how she had resolved the complaint issues with Chappell. (Ex. 9).

8. Licensee has been disciplined by the Director once before, in 2004. One of the allegations against Licensee in that proceeding was a failure to respond, violating the same statute raised by the Director in this case. The Director assessed a civil penalty for the failure to respond. (Ex. 10).

CONCLUSIONS OF LAW

1. Licensee failed to respond to the Director's inquiry, in violation of ORS 731.296.
2. Licensee should pay a civil penalty in the amount of \$2,000.

RULING

The Division has established that Licensee failed to respond in a timely fashion. ORS 731.296 states:

The Director of the Department of Consumer and Business Services may address any proper inquiries to any insurer, licensee or its officers in relation to its activities or condition or any other matter connected with its transactions. Any such person so addressed shall promptly and truthfully reply to such inquiries using the form of communication requested by the director. The reply shall be verified by an officer of such person, if the director so requires. A reply is subject to the provisions of ORS 731.260.

(Emphasis added). The Division takes issue with Licensee's promptness in responding to the Director.

The Division mailed several letters to Licensee, asking for an explanation of the Chappell matter. The regular mail letters were not returned; the certified letters were

returned as unclaimed but, under Oregon law, are deemed to have been served on Licensee. *Stroh v. SAIF*, 261 Or 117 (1972). The Division has established that Licensee received its requests for information, as early as October 2007.

The record also establishes that Licensee did not respond to the requests until June 17, 2008, the day her letter was received by the Division and almost eight months after the Division first requested the information. Even that letter was late, since she was told that her response needed to be received by June 13, 2008. The Division has established that Licensee did not promptly respond to its requests, as the statute requires, and has thereby established a violation of ORS 731.296.

A civil penalty of \$2,000 is appropriate. The Director's authority to sanction licensees for violation of the Insurance Code is found in ORS 744.074, which states in part:

(1) The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:

* * *

(b) Violating any insurance laws, or violating any rule, subpoena or order of the director or of the insurance commissioner of another state or Mexico or Canada.

By violating ORS 731.296, Licensee violated an insurance law and is subject to sanction.

ORS 731.998 describes how civil penalties are determined when a licensee violates the Insurance Code:

(1) Any person who violates any provision of the Insurance Code, any lawful rule or final order of the Director of the Department of Consumer and Business Services or any judgment made by any court upon application of the director, shall forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the director of not more than \$10,000 for each offense. *In the case of individual insurance producers, adjusters or insurance consultants, the civil penalty shall be not more than \$1,000 for each offense.* Each violation shall be deemed a separate offense.

By statute, the civil penalty cannot be more than \$1,000 for each violation.

The only question that is raised by this statute, as it applies to this case, is whether there is more than one offense involved. If there is only one offense, the maximum civil penalty would be \$1,000.

The Division contends that each of the times it wrote to Licensee and Licensee did not respond constituted a separate violation of the Code, so multiple penalties are due. That is a plausible reading of the statute, considering the circumstances of the case. Furthermore, Licensee has not presented any disagreement with that interpretation.

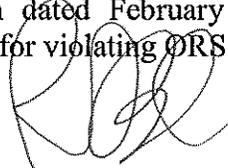
Under the Division's reading of the statute, Licensee could actually owe more than \$2,000 in civil penalties. However, the Division only seeks that amount. Accordingly, I conclude that Licensee must pay a \$2,000 civil penalty for the violations of the Insurance Code.

Proposed Order. Because this Ruling on Motion for Summary Determination decides all of the issues set for hearing on April 30, 2009, that hearing is being cancelled and I am including Proposed Order language at the end of this decision.

ORDER

Based upon the foregoing, it is hereby proposed:

That the Division's Notice of Proposed Action dated February 4, 2009 be **AFFIRMED**. Licensee must pay a civil penalty of \$2,000 for violating ORS 731.296.



Rick Barber
Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: April 16, 2009

Notice of Right to File Exception to Proposed Order

If the proposed order is adverse to a party, then the party has the right to file written exceptions to the order and present written argument concerning those exceptions pursuant to ORS 183.460. A party may file the exceptions and argument by sending them to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing them to P.O. Box 14480, Salem, Oregon 97309-0405; or faxing them to 503-378-4351; or e-mailing them to mitchel.d.curzon@state.or.us. The Insurance Division must receive the exceptions and argument within 30 days from the date this order was sent to the party.

CERTIFICATE OF SERVICE

On 16th day of April 2009, I mailed the foregoing Ruling on Motion for Summary Determination; Proposed Order in Reference No. 0810007.

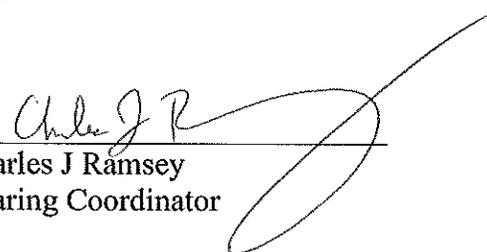
BY FIRST CLASS MAIL:

M Linda Momberger
dba Jack Barber Insurance
PO Box 7279
Aloha OR 97007-7279

Judith Anderson AAG
General Counsel Division
Assistant Attorney General, DOJ
1162 Court Street NE
Salem OR 97301-4096

VIA ELECTRONIC MAIL:

Mitchel Curzon
Chief Enforcement Officer
Insurance Division
Department of Consumer and Business Services



Charles J Ramsey
Hearing Coordinator