

**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 AND PROPOSED**
) **ORDER**
)
 AQA INSURANCE, INC., Respondent) OAH Case No. INS 13-02-001

HISTORY OF THE CASE

On June 6, 2013, the Department of Consumer and Business Services, through the Insurance Division (Division), issued a Notice of Proposed Action to AQA Insurance, Inc. (Respondent). Respondent timely requested a hearing.¹

On June 6, 2013, the Division referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Rick Barber to preside at hearing. A prehearing conference was held on July 25, 2013, and the case was set for a hearing to be held on November 7, 2013. The parties also developed a briefing schedule for the Motion for Summary Determination the Division intended to file.

On September 6, 2013, Senior Assistant Attorney General Judith Anderson filed the Motion for Summary Determination. Pursuant to the schedule developed at the prehearing, Respondents were to provide a response on or before September 20, 2013. No response was received.

For the reasons that follow, the Division's Motion is granted and all of the issues raised by the Notice are decided. Consequently, pursuant to OAR 137-003-0580(12), this decision is issued as a Proposed Order and the hearing, scheduled for November 7, 2013, is canceled.

ISSUES

1. Whether Respondent transacted insurance business in Oregon as an intermediary without a license.
2. Whether Respondent failed to notify the Director of an affiliation with an insurance producer.

¹ Respondent requested that the Division refer the matter for a contested case hearing prior to the Division's notice. The June 6, 2013 Notice acknowledged that the hearing request had been previously filed, and indicated no further hearing request was necessary.

3. Whether Respondent failed to timely respond to the Director's inquiry.
4. Whether, if the violations are established, Respondent must pay a civil penalty in the amount of \$30,000.

NATURE OF THE REVIEW

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 sets forth the standard by which I review the motion and states in part:

Motion for Summary Determination

* * * * *

(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.

(9) A party or the agency may satisfy the burden of producing evidence through affidavits. Affidavits shall be made on personal knowledge, establish that the affiant is competent to testify to the matters stated therein and contain facts that would be admissible at the hearing.

(10) When a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's notice or answer, if any. When a motion for summary determination is made and supported as provided in this rule, the administrative law judge or the agency must explain the requirements for filing a response to any unrepresented party or parties.

(11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case.

(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 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. Pursuant to this rule, I examine the motion and the response to determine whether there are questions of material fact that remain to be decided, and further look to determine whether the moving party (in this case, the Insurance Division) is entitled to a ruling as a matter of law.

RECORDS REVIEWED FOR THE MOTION

I have read and considered the Division's Motion, the affidavit of Mitch Curzon, and Exhibits 1 through 6 that were attached to the Motion.

FINDINGS OF FACT

1. AQA was licensed in Oregon as a nonresident business entity insurance producer between February 6, 2007 and February 26, 2011. AQA attempted to renew its nonresident license in December 2010, but the Division refused to renew the license when it discovered that AQA's resident license in Washington (the license which made a nonresident license in Oregon possible) had expired on December 20, 2010. On January 27, 2011, the Division sent an email to Nhat Nguyen, AQA's president, informing him that AQA's nonresident Oregon license could not be renewed. AQA's nonresident license expired on February 28, 2011, and AQA was not licensed in Oregon again until August 20, 2012, when it obtained a resident producer license. (Aff. of Curzon).

2. Mitch Curzon is the Chief Enforcement Officer for the Division. He began an investigation of AQA in 2012. On July 12, 2012, Curzon sent an email to Nguyen asking him whether AQA had transacted business in Oregon since March 1, 2011. Nguyen responded on August 14, 2012:

Since 3/1/11 AQA Insurance Inc. dba: Allstate Insurance transacted through AQA entity form in Washington as Resident with Non-resident producer in Oregon.

(Ex. 1; Aff. of Curzon).

3. Between March 1, 2011 and August 2, 2012, Allstate Insurance paid commissions to AQA in the amount of \$270,644.60. The commissions were for insurance sales in Oregon. Allstate stipulated to payment of a \$50,000 civil penalty to the Division for paying commissions to unlicensed producers in Oregon. (Ex. 2; Aff. of Curzon).

4. Teresa Garcia worked for AQA from February 17, 2011 until November 1, 2012. As part of her duties, Garcia wrote in an email to Curzon's law clerk, Tyler Larson, she would "process policy endorsements, assist with cross selling to existing and new customers, and gather quoting information (quote, sell, and close new business applications including underwriting)." AQA did not inform the Division of its affiliation with Garcia until Nguyen sent an email to Larsen on November 16, 2012. (Aff. of Curzon).

5. On August 29, 2012, the Division sent a request to AQA for "a copy of each commission statement of each insurer that paid AQA commissions since 3/1/11." The Division required AQA to respond to the request on or before September 19, 2012. AQA had 18 statements; it provided 14 of them on September 6, 2012, two more on September 25, 2012, and the final two on November 9, 2012. (Aff. of Curzon).

6. The Division served a Notice of Proposed Action on AQA on June 6, 2013, proposing to assess a \$30,000 civil penalty for: 1) transacting business in Oregon as an intermediary without a license; 2) failing to notify the director of the affiliation with Garcia; and 3) failing to timely respond to the director's inquiries.

OPINION

The Division seeks summary determination of the issues raised in its Notice, contending that there are no material facts remaining to be decided in this case. Evaluating the facts in a matter most favorable to Respondent, I agree with the Board that there are no facts left to be decided in the case.

Transacting Business without a License. The Division contends that AQA was unlicensed for a period of time in 2011 and 2012 when the Division could not renew AQA's nonresident license. ORS 744.053 states:

Requirements to be licensed as insurance producer for class of insurance. A person may not sell, solicit or negotiate insurance in this state for any class or classes of insurance unless the person is licensed as an insurance producer for that class or those classes in accordance with ORS 744.052 to 744.089.

In order to sell insurance in Oregon, a producer must be licensed. The evidence is un rebutted that AQA was unlicensed between February 28, 2011 and August 20, 2012. Although AQA applied to renew its nonresident producer license, the Division informed AQA that the license could not be renewed without a valid license in another state—and AQA's Washington license had expired in December 2010.

The evidence further establishes that Allstate Insurance paid AQA \$270,644.60 in commissions for insurance products sold in Oregon during that period of time. Therefore, the Division has established that AQA transacted business as an insurance producer in Oregon during a time when it was not licensed. There are no material questions of fact to be decided.

Failure to Give Notice of Affiliation. Teresa Garcia became affiliated with AQA when

she began working for the company on February 21, 2011, and she worked as a producer for the company until November 16, 2012. ORS 744.068 states in pertinent part:

Required notifications; maintenance of usual and customary records; rules.

* * * * *

(5) Not later than the 30th day after the authority of an individual insurance producer to act for an insurance producer that is a business entity has commenced or terminated, the business entity shall notify the director of the commencement or termination. The director may establish by rule a different period within which the business entity must notify the director under this subsection.

By statute, AQA was required to inform the Division of the commencement of Garcia's employment as a producer within 30 days of her start in February 2011. However, AQA did not inform the Division of Garcia's affiliation until November 2012, more than 18 months later. The undisputed facts show that AQA failed to give notice of the affiliation in a timely fashion, thereby violating the statute.

Failure to Timely Respond. The evidence presented by the Division establishes that AQA was required to provide 18 specific documents to the director on or before September 19, 2012. AQA provided 14 of the documents in a timely fashion, but provided the remaining four after the deadline. ORS 731.296 states in part:

Director's inquiries. 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 language of the statute raises multiple factual questions, including: 1) Did the director address an inquiry to AQA? 2) Was it a "proper" inquiry? and 3) Did AQA fail to "promptly and truthfully reply" to the director's inquiries?

The evidence shows that the Division requested the information from AQA on August 29, 2012, giving the insurer three weeks to provide its response. Thus, the initial question is answered affirmatively.

The requested documents addressed commissions paid during the period when AQA did not have a license as an insurance producer. The request for those documents was "proper" in the sense that it was an appropriate and relevant question to ask of the insurer under the circumstances.

Finally, although it is possible that AQA might be able to provide an explanation for why the final four documents were provided beyond the 21-day window, there is no evidence from AQA in the record, nor has such a defense been raised in the case. Consequently, I conclude that

there are no material issues of fact left to be decided in this issue. AQA failed to provide all of the requested information to the director in a timely fashion.

The Sanction. The Division has established the three violations it alleged in the Notice. Based upon those violations, it contends that AQA owes a civil penalty in the amount of \$30,000 based upon ORS 731.988, which states in part:

Civil penalties. (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.

The Division points to the three violations of the Insurance Code noted above, and contends that it is entitled to assess a civil penalty of \$10,000 for each of the three violations, for a total of \$30,000.

The evidence in the case does not explain the reasoning of the Division in concluding that each violation justified a \$10,000 civil penalty. If AQA had presented some evidence to demonstrate why it failed to respond fully to the director's request for records, I would have been inclined to leave the amount of the penalty on the third violation to be decided at hearing.

However, there is no evidence from AQA. The statute gives the Division the right to assess up to \$10,000 in civil penalties for each violation, and does not require that the Division provide a justification for the amount of the penalty. The Notice is direct evidence of the Division's intent to assess the full penalty. Accordingly, the evidence supports assessment of the entire civil penalty of \$30,000.

I am granting the Motion for Summary Determination. Because this ruling resolves all issues for the upcoming hearing, the November 7, 2013 hearing is canceled.

RULING AND ORDER

The Motion for Summary Determination is GRANTED. I propose that the Division's Notice of Proposed Action dated June 6, 2013 be AFFIRMED.

Rick Barber

Administrative Law Judge
Office of Administrative Hearings

NOTICE OF RIGHT TO FILE EXCEPTIONS 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 the 26th day of September 2013, I mailed the foregoing RULING ON MOTION FOR SUMMARY DETERMINATION AND PROPOSED ORDER in Reference No. **13-02-001**.

BY FIRST CLASS MAIL:

Nhat Alexander Nguyen
AQA Insurance Inc.
8120 NE Fremont Street
Portland, OR 97213-7128

Grant Yoakum
Attorney at Law
5895 Jean Road
Lake Oswego, OR 97035-5303

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

Ryan Clark

Hearing Coordinator
Office of Administrative Hearings