

Great American Insurance Co.

SELF-INSURANCE

Insolvency of self-insured employer

If the terms of a bond require that the penal sum of the bond be forfeited to the Department when the self-insured employer becomes insolvent, the Department can require the entire bond be forfeited, notwithstanding the fact that there were no unpaid claims.*In re Great American Insurance Co., BIIA Dec., 09 22005 (2011)* [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 11-2-00612-1.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: GREAT AMERICAN INSURANCE) DOCKET NO. 09 22005**
2 **COMPANY)**
3 **FIRM NO. 706,182-00) DECISION AND ORDER**

4 **APPEARANCES:**

5 Firm, Great American Insurance Company, by
6 Stewart, Sokol & Gray, LLC, per
7 Jan D. Sokol

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
10 Natalee Fillinger, Assistant

11 The firm, Great American Insurance Company, filed an appeal with the Board of Industrial
12 Insurance Appeals on November 23, 2009, from an order of the Department of Labor and Industries
13 dated July 29, 2009. In this order, the Department reaffirmed their formal demand made on July 9,
14 2009, that the penal sum of the bond, \$250,000, be paid to the Department no later than August 21,
15 2009. The Department order is **AFFIRMED**.

16 **DECISION**

17 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
18 review and decision. The employer filed a timely Petition for Review of a Proposed Decision and
19 Order issued on September 30, 2010, in which the industrial appeals judge affirmed the
20 Department order dated July 29, 2009.

21 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
22 no prejudicial error was committed. The rulings are affirmed.

23 The question in this appeal is whether Great American Insurance Company is liable to the
24 Department for the penal sum of \$250,000. We agree with the decision reached by our industrial
25 appeals judge in holding that GAIC is liable for the penal sum and we remand to the Department for
26 action consistent with our opinion. We have granted review to explain more fully our reasoning.

27 There is no dispute regarding the facts material to a judgment in this case, which was
28 appropriately decided on the motion for summary judgment filed by each party.

1 The following documents were called to the attention of the Board before the motion for
2 summary judgment was granted:

- 3 • Self-Insurer's Bond;
- 4 • Notice of Cancellation or Nonrenewal Great American Insurance Company;
- 5 • Letter dated July 9, 2009, from Larry Wilkinson to Great American Insurance
6 Company;
- 7 • Letter dated July 16, 2009, from Larry Wilkinson to Jan D. Sokel;
- 8 • Letter dated July 13, 2009, from Jan D. Sokel to Larry Wilkinson;
- 9 • Letter dated July 22, 2009, from Jan D. Sokel to Larry Wilkinson;
- 10 • Notice of Bankruptcy Case Filing, United States Bankruptcy Court, District of
11 Delaware;
- 12 • Order Converting Cases from Chapter 11 to Chapter 7 of the Bankruptcy Code;
- 13 • House Bill Report for HB 3061;
- 14 • Senate Bill Report for HB 3061; and
- 15 • Individual State Agency Fiscal Note for HB 3061.

16 Avado Brands as principal and Great American Insurance Company as surety, posted
17 Self-Insurer's Bond No. FS 133 97 14 in the penal sum of \$250,000, effective March 7, 2005. The
18 bond set out contractual obligations assumed by the principal and by the surety.

19 In early 2008, Avado Brands, Inc. (hereinafter Avado), filed for Chapter 11 bankruptcy.
20 Shortly thereafter, on March 10, 2008, Great American Insurance Company, (hereinafter GAIC),
21 notified the Department that the bond would terminate 30 days after the Department received the
22 notice of termination. The action taken by the surety in terminating the bond, which was effective
23 April 16, 2008, is authorized by RCW 51.14.040 and as well as by paragraph 11 of the bond. The
24 Department did not take action against the bond at that time, noting that companies are able to
25 reorganize under a Chapter 11 bankruptcy while remaining in business and meeting their financial
26 obligations.

27 On April 20, 2009, the Chapter 11 bankruptcy was converted to a Chapter 7 bankruptcy.
28 Avado had no remaining assets and the company was dissolved. It is undisputed that Avado had
29 no open claims, no claims have been opened since, and no claim costs have been unsatisfied.

30 In a letter to GAIC dated July 9, 2009, from Larry J. Wilkinson, a Certification Service
31 Manager for the Department of Labor and Industries, formal demand was made for the penal sum
32 of the bond in the amount of \$250,000 in accordance with the provisions of the bond. In
correspondence with the Department, GAIC disputed their obligation to forfeit the penal sum. On
July 29, 2009, the Department issued an Order and Notice to GAIC for the penal sum of the bond,
citing as its authority RCW 51.14.020(2), which stipulates in part: "In the event of a default the
self-insurer loses all right and title to, any interest in, and any right to control the surety." The Order

1 and Notice reaffirmed the demand made on July 9, 2009, that the penal sum was to be paid no later
2 than August 21, 2009. GAIC filed this appeal from the Department's demand, arguing that Avado is
3 not in default because there have never been any uncompensated claim costs.

4 WAC 296-15-125(1) describes a default as occurring when a self-insured employer no
5 longer provides benefits to its injured workers in accordance with Title 51 of the Revised Code of
6 Washington. A default can be a voluntary action of the self-insured employer, or an action brought
7 on by the employer's inability to pay the obligation. Similarly, *Black's Law Dictionary 712* (7th ed.
8 1999), defines "default" as the "the omission or failure to perform a legal or contractual duty,
9 especially the failure to pay a debt when due."

10 We are not convinced that a self-insured employer is in default as that term is contemplated
11 by statute or is commonly used when, as here, there are no unpaid obligations when the discharge
12 is granted and the company dissolved. We are convinced however, that under the terms of the
13 bond, GAIC is obligated to the Department for the penal sum of the bond in the amount of
14 \$250,000. The Self-Insurer's Bond executed by Avado and GAIC and accepted by the Department
15 of Labor and Industries, requires in the relevant portion of paragraph 6 of the bond, that if the
16 principal becomes insolvent, the surety becomes liable to the Department of Labor and Industries to
17 the extent of the bond without regard to any proceedings for liquidation of the principal.

18 On April 20, 2009, United States Bankruptcy Judge Mary F. Walrath, for the District of
19 Delaware, granted the Debtor's Motion to Convert Cases from Chapter 11 to Chapter 7 of the
20 Bankruptcy Code in Case No. 07-11276. Avado Brands, Inc., the principal, became insolvent no
21 later than April 20, 2009, when that motion was granted.

22 The obligation of the surety as set forth in the bond is clear and unambiguous. Upon
23 insolvency, the surety is liable to the Department to the extent of the bond.

24 Self-insured employers in the State of Washington are responsible for future costs of any
25 claim that occurred during the time they held self-insured status and GAIC, as surety for Avado, is
26 liable for those costs if Avado defaults on payment. It is not unusual for an injured worker to reopen
27 a claim upon a showing of worsening, or for an occupational disease to be diagnosed well after
28 exposure to the conditions that resulted in the disease. Because Avado no longer holds the status
29 of a self-insured employer, is insolvent, and no longer in existence, the Department is responsible
30 for administration of claims pursuant to RCW 51.14.060. The contractual obligation assumed by
31 GAIC to surrender the penal sum of the bond to the Department if the principal became insolvent, is
32 consistent with the Department's obligation to administer claims as necessary in the future.

1 The Department is entitled to the penal sum of the bond in the amount of \$250,000. The
2 Order and Notice dated July 29, 2009, is correct and is affirmed.

3 **FINDINGS OF FACT**

- 4 1. The Department of Labor and Industries made a formal demand upon Great
5 American Insurance Company (GAIC), as the surety for the principal,
6 Avado Brands, Inc., in Bond No FS 133 97 14, for the penal sum of
7 \$250,000, by letter dated July 9, 2009. GAIC filed a Protest and Request
8 for Reconsideration to the demand on July 28, 2009.

9 On July 29, 2009, the Department issued its Order and Notice in which it
10 reaffirmed the demand of July 9, 2009, with payment of \$250,000 due no
11 later than August 21, 2009.

12 On November 23, 2009, GAIC, filed a Notice of Appeal with the Board of
13 Industrial Insurance Appeals from the July 29, 2009 Order and Notice.

14 On December 23, 2009, January 4, 2010 and January 12, 2010, the Board
15 issued Orders Extending Time to Act on Appeal for an Additional Ten Days.

16 On January 12, 2010, the Board issued an Order Granting Appeal Subject
17 to Proof of Timeliness.

- 18 2. On March 7, 2005, Avado Brands, Inc., as principal, and Great American
19 Insurance Company, as surety, posted Self-Insurer's Bond
20 No. FS 133 97 14 in the penal sum of \$250,000, which was accepted by the
21 Department of Labor and Industries on March 23, 2005.
- 22 3. Self-Insurer's Bond No. FS 133 97 14, paragraph 6, requires that if the
23 principal shall become insolvent, the surety becomes liable to the
24 Department of Labor and Industries to the extent of the bond without regard
25 to any proceedings for the liquidation of the bond.
- 26 4. In early 2008, Avado Brands, Inc., filed for a Chapter 11 bankruptcy. On
27 March 10, 2008, GAIC notified the Department that the bond would
28 terminate 30 days after the notice of termination was received by the
29 Department. That action was taken in accordance with RCW 51.14.040
30 and paragraph 11 of the bond. The bond terminated on April 16, 2008.
- 31 5. On April 20, 2009, the Honorable Mary F. Walrath, United States
32 Bankruptcy Judge for the District of Delaware, granted the Debtor's Motion
to Convert Cases from Chapter 11 to Chapter 7 of the Bankruptcy Code in
Case No. 07-11276.
6. By letter dated July 9, 2009, to GAIC, Larry J. Wilkinson, Department of
Labor and Industries Certification Services Manager Self-Insurance, notified
GAIC that the Department had received notification from the Chapter 7
trustee, that Avado Brands would not be able to continue to provide any
future benefits that might become due under its former self-insurance
obligation and that in accordance with the provisions of the bond, formal
demand was made for the entire penal sum of \$250,000. The letter did not
have language informing the recipient of a deadline for disputing the
demand as required by RCW 51.52.050(1).

- 1 7. On July 29, 2009, the Department issued its Order and Notice in which it
2 demanded payment of the penal sum of the bond in the amount of
3 \$250,000, no later than August 21, 2009. The Order and Notice did not
4 have language informing the recipient of a deadline for disputing the
5 demand as required by RCW 51.52.050(1).
6
7 8. Avado has no open claims and no claim costs have been unsatisfied.
8
9 9. The pleadings, affidavits and exhibits submitted by each party in support of
10 its motion for summary judgment, demonstrate there is no genuine issue as
11 to any material fact.
12

13 **CONCLUSIONS OF LAW**

- 14 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
15 and the subject matter of this appeal, which was timely filed.
16 2. The parties are entitled to a decision as a matter of law as contemplated by
17 CR 56.
18 3. Avado Brands, Inc. became insolvent no later than July 20, 2009.
19 4. Pursuant to Self-Insurer's Bond No. FS 133 97 14, provision 6, GAIC is
20 liable to the Department of Labor and Industries, for the penal sum of
21 \$250,000, when Avado Brands, Inc., became insolvent as a result of its
22 bankruptcy action.
23 5. The Order and Notice issued by the Department of Labor and Industries on
24 July 29, 2009, in which the Department demanded payment from Great
25 American Insurance Company of the penal sum of \$250,000 of Bond
26 No. FS 133 97 14, is correct and is affirmed.
27

28 Dated: February 14, 2011.

29 BOARD OF INDUSTRIAL INSURANCE APPEALS

30 /s/ _____
31 DAVID E. THREEDY Chairperson

32 /s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
LARRY DITTMAN Member