

parties that he would consider the letters of May 16, 2005, and June 3, 2005, as each party's statement of its position respecting this appeal.

Protemps was given until July 18, 2005, to file a written response to Travelers' June 3, 2005, correspondence. On July 15, 2005, Protemps responded. Upon agreement of the parties, the hearing was set for Thursday, September 15, 2005, commencing at 9:00 a.m. in a hearing room at the Department of Insurance office, 941 "O" Street, Suite 400, Lincoln, Nebraska. The hearing officer further requested that all discovery be completed by August 31, 2005. A further prehearing conference was set for September 7, 2005, and was held with the same parties appearing and participating as at the July 13, 2005, prehearing conference. The parties agreed that the case could not be tried as scheduled on September 15, 2005, and requested that the matter be continued until discovery was completed.

At a prehearing conference on October 7, 2005, the parties agreed that discovery had been completed, and the matter could be set for hearing. It was accordingly set for November 22, 2005, commencing at 9:00 a.m., at the same location as previously scheduled. The parties further agreed to exchange witness and exhibit lists on or before November 8, 2005, and to submit any foundational objections to exhibits to the opposing party, as well as to the hearing officer, on or before November 15, 2005. All such witness and exhibit lists were timely filed.

The appeal and responses thereto came on for hearing before the undersigned hearing officer on November 22, 2005, in the Department conference room, fifth floor, 941 "O" Street, Lincoln, Nebraska. Protemps was represented by Justin Eichmann, its attorney. Testifying on behalf of Protemps was JoAngela King, its President, and James King, her husband. Travelers was represented by Camille Bienvenu Poché, its attorney. Testifying on behalf of Travelers was

Carla Townsend, Team Coordinator, and Mark Mocadlo, Special Investigations Unit. Christine Neighbors was also present on behalf of the Department to assist the hearing officer. Tracy Gruhn recorded the proceedings. Testimony and exhibits were received into evidence, and at approximately 4:00 p.m., all parties rested. The parties stated that they wished to submit written summation and arguments. Protemp was given until December 6, 2005, to submit its argument; Travelers was given until December 13, 2005, to submit its response; and Protemp was given until December 20, 2005, for rebuttal. All written summations were timely received, and upon a consideration of the same, the evidence in the record, and the file with the Department, the hearing officer makes the following Findings of Fact, Conclusions of Law, Discussion and Recommended Order to the Director of the Department:

II. FINDINGS OF FACT

1. *Neb. Rev. Stat.* §48-146.01 (Reissue 2004) states that a system shall be implemented which guarantees that all assigned risk employers possess workers' compensation insurance covering its employees. An assigned risk employer is defined in Section 48-146.01 (1)(a) as a Nebraska employer that is in good faith entitled to, but is unable to obtain workers' compensation insurance through ordinary means.

2. In accordance with the above legislative authority, see *Neb. Rev. Stat.* §48-416.01 (2)(b), Travelers entered into an agreement with the Department to provide workers' compensation insurance to assigned risk employers and has served as the plan administrator and contract insurer since July 1, 2000. (E1, E2).

3. James King and JoAngela King are husband and wife and have been at all times since 1988. Since 1982, Mrs. King has worked in the temporary personnel and full-time

placement business, working for different companies until October of 1993 when she began working for Protemps, Inc.

4. Protemps, Inc., was incorporated on October 24, 1993, under the laws of the State of Nebraska with Charles M. Bressman, Jr., as the incorporator. (E5). From June 23, 1994, to September 22, 1995, JoAngela and James King were the sole shareholders of Protemps. Prior to that time, Mr. King had no experience in the temporary personnel or full-time placement business other than voluntarily assisting Mrs. King. However, he served as vice president and treasurer of Protemps from June 17, 1994 to September 22, 1995, when he resigned. (E5,4).

5. Since September 22, 1995, Mrs. King has owned 100 percent of the stock of Protemps and has served as the sole officer and director of Protemps. (E65, Stipulations of Fact, 1:8).

6. From 1993 to 1995, Protemps provided temporary and full-time personnel placement services, including blue-collar and clerical placement. Among the clients to whom Protemps provided blue-collar labor services included Artic Insulation, B&B Investments, B&K of Kansas, B&K of Nebraska, Deeter Foundry, Expert Roofing, H-20 Irrigation, High Plains Roofing, McEwen Irrigation, Mogensen Steel Company, Nebraska Hydroseeding, Northern Quality Concrete, R. L. Kraft Co., Weathercraft of Garden City, Weathercraft of Grand Island, Weathercraft of Lincoln, Weathercraft of McCook, Weathercraft of North Platte, and Weathercraft of Scottsbluff. (E66).

7. From 1995 to present, Protemps continued to provide white-collar or clerical personnel placement, but returned to blue-collar personnel placement in early 2005. (E65,3:31-35).

8. In addition to Protemps, Mrs. King has managed the business and affairs of companies named ProPayroll Limited and Pro Search, Inc., from January 1, 2000. (E65,2:10,11). From 2002 to the present, Mr. and Mrs. King have jointly owned a company named AAA Personnel. (E65,2:12).

9. On September 8, 1995, First Temporaries, Inc., was incorporated under the laws of the State of Nebraska. (E65,2:14). Since its incorporation, Mr. King has been the record owner of 100 percent of the stock. On September 22, 1995, he gave up his stock in Protemps and resigned his position as officer and director of the same. On that date, Mrs. King became the sole record owner of 100 percent of the stock of Protemps, and the sole officer and director of the same. (E5,4).

10. Around September 8, 1993, when First Temporaries was formed, Protemps discontinued its blue-collar personnel placement business and First Temporaries commenced the same business. First Temporaries' clients included Artic Insulation, B&B Investments, B&K of Kansas, Deeter Foundry, Expert Roofing, H-20 Irrigation, High Plains Roofing, McEwen Irrigation, Mogussen Steel Company, Nebraska Hydroseeding, Northern Quality Concrete, R. L. Kraft Co., Weathercraft of Garden City, Sampson Construction, Weathercraft of Lincoln, Weathercraft of McCook, Weathercraft of North Platte, and Weathercraft of Scottsbluff. Many of these clients were also previous clients of Protemps.

11. Also on or about September of 1995, Protemps began providing outsourcing services to First Temporaries. (E65,3:23). Through this outsourcing, Mrs. King continued to operate the business in substantially the same manner as it had been operated by Protemps. Since its incorporation, First Temporaries' office address has been the home address of the

Kings. (E65,3:15). First Temporaries discontinued active business operations in September of 2002. (E65,2:21).

12. About the time that First Temporaries discontinued its operations, the Kings started a business named AAA Personnel, which provided many of the same services as Protemps and First Temporaries. AAA Personnel had no employees, with the customers being responsible for obtaining their own workers' compensation insurance. Many of the same clients of Protemps and First Temporaries were clients of AAA Personnel. Mrs. King and Protemps provided AAA Personnel with the same services that they previously provided to First Temporaries.

13. In June of 2003, the Kings organized a company named Pro Search, Inc., which engaged in the blue-collar temporary personnel business. They operated this business until December of 2004. Pro Search's clients were many of those whom were previous clients of Protemps, First Temporaries and AAA Personnel, including Expert Roofing, High Plains Roofing, Weathercraft of Garden City, Weathercraft of McCook, Weathercraft of North Platte, and Weathercraft of Scottsbluff. Mrs. King and Protemps provided Pro Search with the same services previously provided to First Temporaries and AAA Personnel.

14. In January of 2005, Mrs. King again began operating Protemps as a blue-collar temporary personnel business. Among the clients were Expert Roofing, High Plains Roofing, Weathercraft of Garden City, Weathercraft of North Platte, and Weathercraft of Scottsbluff, which had previously been clients of Protemps, First Temporaries, AAA Personnel and Pro Search.

15. Protemps did not file federal income tax returns for calendar years 2003 and 2004. (E65,4:36,37). First Temporaries did not file federal income tax returns for calendar years 2003 and 2004. (E65,4:38,39).

16. As the plan administrator and contract insurer, Travelers issued a workers' compensation and employers liability policy to First Temporaries, which was effective from September 10, 2000, through September 10, 2001, referred to as the 2000-2001 policy year. (E12;E65,2:19). This policy was renewed the following year for a period commencing September 10, 2001, through September 10, 2002, or the 2001-2002 policy year. (E65,2:19). This policy was not renewed for an additional term after September 10, 2002, at First Temporaries' request. (E65,2:20). Premiums due under the latter policy have not been paid, and judicial notice is taken of the fact that on December 9, 2005, after all parties had rested in the matter herein, a judgment for unpaid premium was entered in the District Court of Douglas County, Nebraska, Docket 1035, Number 454, in the sum of \$1,003,225.11, in favor of Travelers Indemnity Company against First Temporaries, Inc. The premium then owed by First Temporaries to Travelers is \$1,193,225.11, which is the total of the \$190,000 partial summary judgment plus the \$1,003,225.11 in the December 9, 2005, judgment. Thus, there is no sum in dispute at this time.

17. On April 7, 2005, Protemps submitted an application for coverage under the NWCP, and on April 18, 2005, Travelers issued a policy pursuant to that request. (E58, E59). Five days later, on April 21, 2005, Travelers, through a letter to Protemps' insurance agent, stated that it had determined Protemps was not in good faith entitled to coverage because a common managing or management interest existed between Protemps and First Temporaries,

and the insurance policy would be canceled unless Protemps paid \$190,165. (E60). That sum was the amount of a partial judgment entered against First Temporaries on March 23, 2005, in the Douglas County District Court case referred to herein. Carla Townsend testified that Travelers decided not to seek the remaining amount owed by First Temporaries until a final judgment was entered in the litigation pending in the Douglas County District Court. Protemps failed to pay the \$190,165 requested by Travelers, and effective May 6, 2005, Travelers canceled the policy on the grounds that Protemps was not in good faith entitled to coverage and, therefore, not eligible for coverage under the NWCP. (E61). The appeal of that decision initiated this proceeding before the Department of Insurance under *Neb. Rev. Stat.* §48-146.01 and *Neb. Rev. Stat.* §44-7511(15) and §44-7532.

III. DISCUSSION

The NWCP Agreement, Article III, provides rules for determining an employer's eligibility to participate in the NWCP. Specifically, Article III, A, 2 (b) states:

“[a]n Employer is not eligible for coverage if it has an outstanding obligation for premium on previous Workers' Compensation Insurance about which there is no formal dispute. For purposes of applying this provision, an Employer includes an enterprise with a common managing (or management) interest, such as where one or more individuals are owners or officers of or perform management functions for two or more entities or a succession of entities. A “formal dispute” exists only where the Employer has documented in writing the amount and rationale for disputed premium and is actively pursuing the administrative or legal remedy for resolving such dispute. In addition, an Employer involved in a formal dispute is not eligible for coverage if undisputed portions of the premium have not been paid.”

There are two issues to be decided in this appeal, both of which relate to whether Protemps is eligible for coverage under the NWCP. The first is whether there is an outstanding premium obligation for which there is no dispute. There is no question that First Temporaries has an outstanding obligation to Travelers for premium on previous workers' compensation

insurance. However, Protemps and First Temporaries contend that there is a formal dispute. Although a stronger argument could have been made prior to December 9, 2005, regarding the balance that was not covered by the partial summary judgment, with the entry of the judgment on that date, there is now no formal dispute. Even though First Temporaries may appeal that decision, that does not constitute a dispute under the terms of the NWCP, as such an interpretation would prohibit any insurer from attempting to legally collect an outstanding obligation.

The second and more difficult question is whether Protemps is an enterprise with a common managing or management interest with First Temporaries, such as where one or more individuals are owners or officers of or perform management functions for two or more entities or a succession of entities.

As can be seen through the chronology of facts, Mr. and Mrs. King have been providing the same services to essentially the same clients for twelve years through Protemps, First Temporaries, AAA Personnel, Pro Search, and again Protemps. These businesses were managed and operated as a single entity, primarily by Mrs. King. Mrs. King performed management functions on behalf of both First Temporaries and Protemps. Management is defined in Black's Law Dictionary, 6th Ed., as the "government, control, superintendence, physical or manual handling or guidance; act of managing by direction or regulation, or administration, as management of family, or of household, or of servants, or of great enterprises, or of great affairs."

Mr. King testified at the hearing that he could not think of any task or activity related to the operation of First Temporaries that he did not delegate to Mrs. King and Protemps. Mr. King

further testified that he did not talk to any clients of First Temporaries prior to the decision to transfer business from Protemps to First Temporaries. First Temporaries' office address has always been the residence of Mr. and Mrs. King. (E65,2:15). Mrs. King had access to First Temporaries' letterhead and signed letters on behalf of that entity. An employee of Protemps utilized First Temporaries letterhead to communicate with clients and identified herself as First Temporaries' human resources manager. (E3:26). Both of the Kings were authorized to sign on all bank accounts maintained by Protemps and First Temporaries from January 1, 2000 to present. (E65,3:28,29). Mr. King's description of his involvement in the operation of First Temporaries consisted of non-managerial errands.

Mrs. King, on the other hand, working through Protemps, was directly responsible for and involved in all aspects of the managing of First Temporaries' business. During the hearing, Mr. King even described First Temporaries' clients as "her" clients. Both First Temporaries' and Protemps' standard invoice billing form contained a notation, "We appreciate your business," signed by JoAngela Evans King. (E63). Phone calls to the First Temporaries line were forwarded to Protemps and handled by Protemps personnel, including Mrs. King. She prepared all invoices submitted by First Temporaries to its clients, prepared all payroll checks to payees, conducted all sales activities, handled client relations, responded to correspondence, provided bookkeeping services, balanced bank accounts, handled workers' compensation audits, reported employee injuries to First Temporaries' compensation insurer, and provided the necessary information to First Temporaries' accountants in connection with the preparation of its income tax returns.

The fact that Mrs. King was never a shareholder, officer or director of First Temporaries is not controlling, considering the actual practice and operation of the business. During calendar years 1998 through 2001, over ninety percent of Protemps' income was received from First Temporaries for its management and operation. (E69). The relationship was not an arms-length agreement for outsourcing between two separate entities, as there was no written contract for the same, invoices were never issued for the services provided, reports were never made of the activities, and the parties never itemized the services provided.

Based on all of the above, it is clear that Protemps provided management functions for two or more entities or a succession of entities in accordance with the language of the NWCP Agreement. Although it does not have the burden to do so, Travelers has proven by a preponderance of the evidence that Protemps, Inc., is an enterprise with a common managing or management interest where one or more individuals are owners or officers of or perform management functions for two or more entities or a succession of entities. Consequently, Protemps is an employer with a common managing or management interest with First Temporaries, and therefore is not eligible for coverage under the NWCP in view of First Temporaries' outstanding obligation for previous workers' compensation insurance premium.

IV. CONCLUSIONS OF LAW

1. All proceedings herein have been conducted in accordance with applicable constitutional, statutory, and regulatory requirements.
2. The Department of Insurance has jurisdiction and control over this proceeding in accordance with *Neb. Rev. Stat.* §44-101.01, §48-146.01, §44-7511 and §44-7532 (Reissue 2004) and the appeal filed herein under the NWCP by Protemps, Inc. on May 16, 2005.

3. Travelers has complied with the terms of the NWCP Agreement entered into by the Nebraska Department of Insurance and Travelers Indemnity Company.

V. RECOMMENDED ORDER

Based upon the Findings of Fact, Discussion, and Conclusions of Law above, it is therefore recommended by the hearing officer that the appeal of Protemp, Inc., filed on the 16th day of May, 2005, under the Nebraska Workers' Compensation Plan, be denied and dismissed.

Dated this 1st day of February, 2006.



Samuel Van Pelt
Hearing Officer

CERTIFICATE OF ADOPTION OF ORDER

I have reviewed the foregoing Findings of Fact, Discussion, Conclusions of Law, and Recommended Order, and hereby certify that the Recommended Order is adopted as the official and final order of the Department of Insurance in Cause No. I-60 In Re Workers' Compensation Appeal of Protemp, Inc.

Dated this 1st day of February, 2006.



L. Tim Wagner
Director of Insurance
State of Nebraska

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Findings of Fact, Discussion, Conclusions of Law, Recommended Order, and Certificate of Adoption of Order was served upon the parties by mailing a copy via certified mail, return receipt requested, to Mr. Justin D. Eichmann, Bradford & Coenen, 1620 Dodge Street, Suite 1800, Omaha, NE 68102-1505 and Ms. Camille Bienvenu Poché, Perret Doise, Suite 1200, First National Bank Towers, 600 Jefferson Street, Lafayette, LA, 70501 on this 1st day of February, 2006:


