ORDER NO.: E16-28

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-13102-15
AGENCY DOCKET NO.: OTSC #E15-79

ACTING COMMISSIONER RICHARD J. BADOLATO NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE	)	
Petitioner,	)	FINAL DECISION AND ORDER
v.	)	
JEFFREY CLENDENNY	)	
Respondent.	)	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1 et seq., N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 et seq. ("Producer Act"), the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 et seq. ("Fraud Act"), and all powers expressed or implied therein, for the purposes of reviewing the Initial Decision of Administrative Law Judge Thomas R. Betancourt ("ALJ"), which was decided on January 7, 2015 ("Initial Decision"). In that decision, the ALJ granted summary decision to the Department of Banking and Insurance ("Department") against Respondent Jeffrey Clendenny ("Respondent" or "Clendenny") on Counts One, Two, Three, and Four alleged in the Department's Order to Show Cause No. E15-79 ("OTSC") and recommended revocation of Respondent's producer license

and the imposition of civil monetary penalties in the amount of $15,000, costs of investigation in the amount of $7,968[1], and a mandatory insurance surcharge[2] in the amount of $1,000.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 17, 2015[3], the Department issued the OTSC against the Respondent seeking to revoke his insurance producer license and impose civil monetary penalties, costs of investigation, attorneys' fees, and a mandatory insurance surcharge for alleged violations of the Producer Act and Fraud Act. In the OTSC, the Department alleges that the Respondent engaged in the following activities in violation of the insurance laws of this State:

> Count One – Clendenny knowingly made false and misleading statements to Mercer Insurance Company of New Jersey, Inc. by falsely stating that Pro Auto Body had no prior losses, when it did, in violation of N.J.S.A. 17:22A-40a(2), (5), (8) and (16);
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> Count Two – Clendenny knowingly made false and misleading statements to AmGuard Insurance Company by falsely stating the prior losses of Pro Auto Body, in violation of N.J.S.A. 17:22A-40a(2), (5), (8) and (16);
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> Count Three - Clendenny knowingly made false and misleading statements to Mercer Insurance Company of New Jersey, Inc. by falsely stating that Pro Auto Body had no prior losses, when it did, in violation of N.J.S.A. 17:33A-4a(4)(b);
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> Count Four - Clendenny knowingly made false and misleading statements to AmGuard Insurance Company by falsely stating prior losses of Pro Auto Body, in violation of N.J.S.A. 17:33A-4a(4)(b); and

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[1] Costs of investigation include costs of $225 for Civil Investigator, Elena Herbert, and attorneys' fees in the amount of $7,743 for Deputy Attorney General, Kristina Cretella, and Assistant Section Chief Joseph Snow.

[2] While the Initial Decision recommends a "mandatory surcharge," the surcharge imposed is an "insurance surcharge" under N.J.S.A. 17:33A-5.1. The Department noted the correct language in its Exceptions.

[3] While the Initial Decision states that the Department issued the OTSC on July 17, 2013, this appears to be a typographical error as the OTSC was issued on July 17, 2015. Additionally, the Department noted that the correct date was July 17, 2015 in its Exceptions.

> Count Five – Clendenny coerced and/or induced an insured to sign a statement drafted by Clendenny containing false or misleading statements that was submitted to the Department, in violation of N.J.S.A. 17:22A-40a(2), (8), and (16).

On August 5, 2015, Respondent filed an Answer to the OTSC, wherein the Respondent denied the allegations as set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") on August 24, 2015, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On November 9, 2015, the Department moved for Summary Decision against the Respondent. The Respondent filed his opposition on November 30, 2015, and on December 8, 2015, the Department filed its reply. On December 21, 2015, oral argument was held on the motion. Thereafter, on January 7, 2015, the ALJ granted Summary Decision on Counts One, Two, Three, and Four alleged in the OTSC and recommended revocation of the Respondent's producer license and the imposition of civil penalties in the amount of $15,000, costs of investigation in the amount of $7,968, and a mandatory insurance surcharge in the amount of $1,000.

ALJ'S FINDINGS OF FACT

The ALJ found the following relevant facts in his grant of summary decision. Since June 5, 1989, the Respondent has been a licensed resident insurance producer in the State of New Jersey. Initial Decision at 2. From 1999 through 2013, the Respondent was employed by Michael Bello Insurance Agency ("MB"). Ibid. However, in June 2013, the Respondent left MB and became employed by Raymond G. McCarthy & Co., Inc. ("McCarthy Insurance"). Id. at 3.

In 2010, the Respondent submitted an application for a garage policy for Pro Auto Body ("PAB") to Travelers Indemnity Company of America ("Travelers"). Id. at 2. Due to a loss ratio of over 200% during a three-year period and a loss of $158,728 on August 29, 2011, for which Travelers paid $146,988.16, Travelers did not renew the PAB policy in December 2011. Ibid. The ALJ additionally found that in January 2012, the Respondent completed and submitted an application for a replacement policy to Mercer Insurance Company of New Jersey, Inc. ("Mercer"). Initial Decision at 3. The Mercer application asked for information regarding any prior claims, to which the Respondent answered "no." Ibid. The ALJ found that the Respondent knew that his response to this question was false. Ibid. Mercer subsequently issued the garage policy to PAB, and in December 2013, Mercer declined to renew the PAB garage policy due to an adverse loss on two claims - one claim on October 29, 2012, in the amount of $72,986 and the second claim on January 1, 2013, in the amount of $23,687. Ibid. Mercer paid $97,463.55 in claims to PAB. Ibid.

In January 2014, the Respondent completed and submitted an application to AmGuard Insurance Company ("Guard") for a replacement garage policy for PAB. Ibid. Like the Mercer application, Guard's application also contained a question regarding prior losses. Ibid. The Respondent answered "yes" to this question and disclosed a loss of $12,905; however, the Respondent failed to disclose the losses incurred under the Travelers policy and the actual losses under the Mercer policy. Ibid. The ALJ found that the Respondent knew that his answer on the Guard application was false. Ibid. The ALJ further noted that the Respondent admitted to the failure to properly report prior losses on the Mercer and Guard applications in his Certification submitted in opposition to the Department's Motion for Summary Decision. Ibid.

ALJ'S LEGAL ANALYSIS AND CONCLUSIONS

The ALJ noted that motions for summary decisions are governed by N.J.A.C. 1:1-12.5, which mirrors the language of R. 4:46-2, the Superior Court rule governing motions for summary judgment. Initial Decision at 4. Pursuant to these rules, summary decision may be rendered if the papers and discovery, which have been filed, together with affidavits, show no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. Ibid. The ALJ further noted that when a motion for summary decision is made and supported, the burden shifts to the adverse party, who must respond by affidavit, setting forth specific facts showing that genuine issues of material fact exist and which are resolvable only by an evidentiary proceeding. Ibid. The judge, when deciding on a motion for summary decision, must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." (citing Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995)). Ibid. The ALJ additionally noted that even if the non-moving party comes forward with some evidence, summary decision must be granted if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Ibid.

ALJ'S Findings as to the Allegations against Jeffrey Clendenny

The ALJ noted that in administrative enforcement proceedings such as license revocation or suspension matters, the Commissioner bears the burden of proving a violation. (citing Commissioner v. Myerson, OAL Dkt. No. BKI 6740-01, Initial Decision, (06/14/02), Final Decision and Order (08/02/02)). Id. at 5. Furthermore, the ALJ noted that the Commissioner must establish the essential elements of fact by a fair preponderance of the evidence. (citing In re Polk, 90 N.J. 550, 560 (1982)). Ibid. A fair preponderance of the evidence is evidence that is

sufficient to assure reliability and to avoid the appearance of arbitrariness. (citing Commissioner v. Ladas, OAL Dkt. No. BKI 0947-02, Initial Decision, (02/05/04), Final Decision and Order (06/22/04)). Ibid. Based upon those standards, the ALJ determined that the Department should prevail on Counts One, Two, Three, and Four of the OTSC. The ALJ made no factual determinations or conclusions concerning the alleged violations contained in Count Five of the OTSC. Id. at 7.

The ALJ found that the Respondent knowingly submitted two insurance applications for a garage policy that contained inaccurate information. Initial Decision at 4. Specifically, the ALJ found that the Respondent omitted substantial losses claimed by PAB on both the Mercer and Guard applications, and the Respondent admitted to same in his Certification filed in opposition to the Department's Motion for Summary Decision. Id. at 3 and 4. The ALJ additionally determined that the Respondent's explanation that he did so based on information obtained from seminars and continuing education classes is without basis, as the Respondent failed to submit documentation to support his claim. Id. at 4. Further, the ALJ found that the Respondent's claim that he submitted the Mercer application after discussing omitting losses with his office manager does not negate the fact that he submitted the false applications. Ibid. Moreover, the ALJ concluded that this claim merely raises an issue as to whether or not the office manager should be the subject of an Order to Show Cause. Ibid.

Based upon the foregoing analysis, the ALJ found the following as to the violations alleged in the OTSC. As to Count One, the Respondent knowingly made false and misleading statements to Mercer by falsely stating that PAB had no prior losses, when it did, in violation of

N.J.S.A. 17:22A-40a(2), (5), (8), and (16)[4]. Id. at 6-7. As to Count Two of the OTSC, the Respondent knowingly made false and misleading statements to Guard by falsely stating prior losses of PAB, in violation of N.J.S.A. 17:22A-40a(2), (5), (8), and (16)[5]. Id. at 7. As to Count Three of the OTSC, the Respondent knowingly made false and misleading statements to Mercer by falsely stating that PAB had no prior losses, when it did, in violation of N.J.S.A. 17:33A-4a(4)(b). Ibid. As to Count Four of the OTSC, the Respondent knowingly made false and misleading statements to Guard by falsely stating the prior losses of PAB, in violation of N.J.S.A. 17:33A-4a(4)(b). Ibid.

ALJ'S FINDINGS AS TO THE PENALTY AGAINST RESPONDENT

Producer Act

The ALJ stated that the Producer Act authorizes the Commissioner to regulate the business of insurance producers in New Jersey and to revoke or suspend an insurance producer's license and to impose civil penalties for violations of the Producer Act. N.J.S.A. 17:22A-40a and -45c. Id. 7-8. The ALJ stated that violations of the Producer Act include the following: providing incorrect, misleading, incomplete, or materially untrue information in the license application; violating any insurance law, or violating any regulation, subpoena, or order of the Commissioner or of another state's insurance regulator; intentionally misrepresenting the terms of an actual or proposed insurance contract, policy, or application for insurance; using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of insurance business in this State or elsewhere;

[4] The Initial Decision states that the OTSC alleges a violation of the Producer Act and cites to N.J.S.A. 17:22A-4(a)(2), (5), (8), and (16). This appears to be a typographical error as the OTSC cites to N.J.S.A. 17:22A-40a(2), (5), (8), and (16), which is the correct citation to the Producer Act.

[5] The Initial Decision states that the OTSC alleges a violation of the Producer Act and cites to N.J.S.A. 17:22A-4(a)(2), (5), (8), and (16). This appears to be a typographical error as the OTSC cites to N.J.S.A. 17:22A-40a(2), (5), (8), and (16), which is the correct citation to the Producer Act.

intentionally withholding material information or making a material statement in an application for a license; and committing any fraudulent act. N.J.S.A. 17:22A-40a(1), (2), (5), (8), (15), and (16). Ibid.

The ALJ further noted that N.J.S.A. 17:22A-45 sets forth the powers of the Commissioner, and pursuant to N.J.S.A. 17:22A-45c, the Commissioner may levy monetary penalties not exceeding $5,000 for the first offense, $10,000 for each subsequent offense, and order the costs of investigation against any person who is found to have violated any provision of the Producer Act. Id. at 8.

Fraud Act

The ALJ noted that the Fraud Act was enacted to

> confront aggressively the problem of insurance fraud in New Jersey by facilitating the detection of insurance fraud, eliminating the occurrence of such fraud through the development of fraud prevention programs, requiring the restitution of fraudulently obtained insurance benefits, and reducing the amount of premium dollars used to pay fraudulent claims. (citing N.J.S.A. 17:33A-2). Id. at 6.

Further, the ALJ stated that a person or practitioner violates the Fraud Act if he or she prepares or makes any written or oral statement, intended to be presented to any insurance company or producer for the purpose of obtaining an insurance policy, knowing that the statement contains any false or misleading information concerning any fact or thing that is material to an insurance application. (citing N.J.S.A. 17:33A-4a(4)(b)). Ibid.

Additionally, the ALJ stated that the Fraud Act provides for monetary penalties of not more than $5,000 for the first violation, $10,000 for the second violation, and $15,000 for each subsequent violation. (citing N.J.S.A.17:33A-5b). Id. at 8. The ALJ further noted that pursuant to N.J.S.A. 17:33A-5.1, a person who is found in any legal proceeding to have committed

insurance fraud shall be subject to an insurance surcharge in the amount of $1,000, in addition to any other penalty, fine, or charge imposed. Ibid.

Revocation of Respondent's Producer License

The ALJ stated that a licensee's honesty, trustworthiness, and integrity are of paramount concern, since an insurance producer acts as a fiduciary to both the consumers and insurers they represent. Initial Decision at 6. The ALJ noted that the nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." (citing Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993)). Ibid. Additionally, the ALJ stated that a licensed producer is better placed than a member of the public to defraud an insurer. (citing Strawbridge v. New York Life Ins. Co., 504 F.Supp. 824 (1980)). Ibid. The ALJ further noted that a producer is held to a high standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public. Ibid.

The ALJ noted that because of the strong public interest in regulating insurance producers, the Commissioner has consistently imposed revocation against insurance producer licensees that engage in fraudulent acts. (citing to Commissioner v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13)). Id. at 8. Only the rarest of mitigating factors will preclude license revocation for those who directly commit fraud. (citing Commissioner v. Goncalves, OAL Dkt. No. BKI 31188-03, Initial Decision (12/03/03), Final Decision and Order (05/24/04), OAL Dkt. No. BKI 3301-05, On Remand, Initial Decision (11/17/05), Final Decision and Order (02/15/06)). Ibid. Moreover, the ALJ noted that the Commissioner has consistently held that misconduct involving "misappropriation of premium monies, bad faith and dishonesty compels license revocation." (citing Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order

(02/04/09)). Id. at 9. The ALJ found that the actions of the Respondent are clear and demand revocation. Initial Decision at 10.

Civil Monetary Penalties

The ALJ noted that the standards for determining the appropriateness of civil monetary penalties should be discussed as set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Ibid. The Kimmelman factors include: 1) the good or bad faith of the Respondent; 2) Respondent's ability to pay; 3) amount of profits obtained from the illegal activity; 4) injury to the public; 5) duration of the illegal activity or conspiracy; 6) existence of criminal actions; and 7) past violations. Ibid. The ALJ made the following determinations as to the Kimmelman factors: the Respondent did not act in good faith by omitting large losses from two insurance applications; the Respondent profited as he received commissions on both policies; and there is injury to the public, as the public faith in insurance providers must be maintained. Ibid.

Based upon this analysis, the ALJ determined that the following civil monetary penalties were appropriate in this case: $5,000 for the Mercer application in Count One and $10,000 for the Guard application in Count Two for a total of $15,000. Ibid. The ALJ also determined that imposition of the costs of investigation in the amount of $7,968[6] were also appropriate pursuant to N.J.S.A. 17:22A-45c. Ibid. Additionally, the ALJ determined that pursuant to N.J.S.A. 17:33A-5.1, the imposition of the mandatory insurance surcharge in the amount of $1,000 was warranted. Ibid.

[6] While the ALJ found that the imposition of costs of investigation in the amount of $7,968 was appropriate, the ALJ allotted this amount as $225 for Civil Investigator, Elena Herbert, and $7,643 for Deputy Attorney General Kristina Cretella and Assistant Section Chief Joseph Snow. This appears to be a typographical error as these amounts would only add up to $7,868, not the $7,968 imposed. It appears the correct amounts should have been $225 for Civil Investigator, Elena Herbert, and $7,743 for Deputy Attorney General, Kristina Cretella, and Assistant Section Chief, Joseph Snow, as set forth in the November 6, 2015 Certification of Deputy Attorney General Kristina Cretella and the Department's Exceptions.

EXCEPTIONS

By letter dated January 12, 2016, the Office of the Attorney General, on behalf of the Department, submitted timely Exceptions to the Initial Decision. The Respondent did not submit any Exceptions.

In its Exceptions, the Department concurs with the Initial Decision of the ALJ in regards to the findings of fact, conclusions of law, and recommended penalty of revocation of the Respondent's producer license, imposition of civil monetary penalties in the amount of $5,000 for Count One and $10,000 for Count Two, reimbursement for investigative costs and attorneys' fees in the amount of $7,968, and the imposition of a statutory insurance surcharge in the amount of $1,000. However, the Department wished to clarify several issues as follows.

First, the Department seeks to clarify the Initial Decision wherein it states that the "Petitioner, Acting Commissioner, Richard J. Badolato, New Jersey Department of Banking and Insurance, seeks revocation of respondent's, Jeffrey Clendenny, resident insurance producer's license, and the imposition of fines and costs of investigation." The Department asserts that it also sought imposition of attorneys' fees and an insurance surcharge and as such, these should be included in the penalties sought.

Further, the Department seeks to correct the Initial Decision wherein it references the date that the OTSC was issued. The Initial Decision reads that the "Petitioner, on July 17, 2013, issued an Order to Show Cause. . . ." However, the correct date should be July 17, 2015.

Additionally, while the Department concurs with the ALJ's conclusion that the Department has proved, by a preponderance of the credible evidence, the allegations contained in Counts Three and Four, which are both violations of the Fraud Act, the Department maintains that the ALJ inadvertently failed to impose civil monetary penalties for Counts Three and Four.

The Department asserts that since the Initial Decision states that the Department has proved the allegations in Counts Three and Four, civil penalties for violations of the Fraud Act should also be awarded to the Department. The Department maintains that the Fraud Act allows for penalties of not more than $5,000 for the first violation, $10,000 for the second violation, and $15,000 for each subsequent violation. N.J.S.A. 17:33A-5b. The Department states that even though the Respondent is subject to civil penalties up to $15,000 in accordance with N.J.S.A. 17:33A-5b, the Department is only requesting that the Respondent be ordered to pay $5,000 for Count Three and $5,000 for Count Four, which is the amount that the Department requested in its Motion for Summary Decision.

Moreover, the Department seeks to correct the Initial Decision wherein it notes that the Department is seeking "the costs of investigation in the amount of $225 for Civil Investigator Elena Herbert and $7,643 for Deputy Attorney General Kristina Cretella and Assistant Section Chief Joseph Snow." The Department requests that the amounts be separated and re-stated to read as follows: "as reimbursement of attorneys' fees totaling $7,743, and reimbursement of costs of investigation of $225." The Department maintains that these amounts should also be separated at all reference points in the Initial Decision.

Additionally, the Department seeks to correct the Initial Decision to provide that the surcharge incurred by any person who is found in any legal proceeding to have committed insurance fraud be referenced specifically as an "insurance surcharge."

The Department further notes that the OAL declined to make a factual conclusion or determination as to Count Five. As such, the Department withdraws the allegations contained in Count Five.

Lastly, the Department seeks to correct typographical errors contained in the Initial Decision. Specifically, the Department notes that in the second full paragraph on page ten, the reference to "OTSA" should be "OTSC." Additionally, the Department notes that in the same paragraph, the reference to Civil Investigator "Elenea Herbert," should be corrected to read "Civil Investigator Elena Herbert." Lastly, the Department notes that in the fourth full paragraph on page ten, the spelling of "CONDLUDE" should be corrected to read "CONCLUDE."

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. See, In re Polk, supra. The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975).

OTSC—Allegations Against Respondent

For all of the reasons set forth in the Initial Decision, I concur that summary decision is appropriate as to Counts One, Two, Three, and Four of the OTSC issued against the Respondent. As found by the ALJ, Respondent failed to adduce evidence that creates a genuine issue as to any material fact and his defenses as pled fail as a matter of law.

Counts One and Three: Providing False and Misleading Information Regarding Losses on Mercer Insurance Application

Count One and Count Three of the OTSC are based upon the same facts and allege that the Respondent completed and submitted false and misleading loss information to Mercer on an

application for a garage policy for PAB, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (5) (intentionally misrepresenting the terms of an actual or proposed insurance contract, policy or application for insurance), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act); and N.J.S.A. 17:33A-4a(4)(b) (preparing or making any written or oral statement, intended to be presented to any insurance company or producer for the purpose of obtaining an insurance policy, knowing that the statement contains any false or misleading information concerning any fact or thing material to an insurance application or contract).

The record is clear that the Respondent misrepresented PAB's loss history to Mercer in an attempt to secure a garage policy for PAB. Specifically, on December 11, 2009, the Respondent sold a garage policy for PAB through Travelers. LaManna Cert., attached to Cretella Cert. in support of Motion for Summary Decision as Exhibit B, at ¶ 6. Subsequently, on August 29, 2011, PAB had a substantial loss of $158,728, related to Hurricane Irene, and because of that loss, Travelers chose not to renew PAB's garage policy. Id. at ¶ 7; Clendenny Cert., attached to Rush Cert. in Opposition to the Department's Motion for Summary Decision as Exhibit C, at ¶ 8. As the Respondent maintained PAB's account while employed at MB Insurance and also thereafter at McCarthy Insurance, he was aware of this loss. LaManna Cert., at ¶ 4. However, on January 13, 2012, the Respondent applied for and sold a replacement policy for PAB through Mercer. Initial Decision at 3. The application for the replacement policy specifically asked if there were any prior losses and the Respondent selected "No" even though he was aware of the August 29, 2011 substantial loss under the Travelers policy. Ibid. Because of this omission, Mercer issued a replacement policy for PAB. Ibid.

Although the Respondent alleges in his Opposition to the Department's Motion for Summary Decision that he did not knowingly misrepresent any material information or knowingly submit false information to any insurance company, the Respondent, through his own admission, stated that during the application period for Mercer, he knew that PAB incurred the August 29, 2011 loss and had received payment under the Travelers policy for said loss. Clendenny Cert. at ¶ 7 and ¶ 8. The Respondent also admitted that he knowingly failed to disclose the loss on the Mercer application. Id. at ¶ 10. Additionally, fraudulent acts under the Producer Act, including an intentional misrepresentation of policy terms and/or information on an application, do not require intent to deceive. See Commissioner v. Pino, OAL Dkt. No. BKI 8070-02, Initial Decision (09/11/03), Final Decision and Order (10/30/03) (there is no mens rea requirement for violations of N.J.S.A. 17:22A-1 et seq., the predecessor of the Producer Act); Commissioner v. Uribe, OAL Dkt. No. BKI 07363-07, Initial Decision, (12/28/10), Final Decision and Order (9/28/11). Further, the Fraud Act does not require proof of the defendant's state of mind or that the defendant had intent to deceive. See State v. Nasir, 355 N.J. Super. 96 (App. Div. 2002), certif. den., 175 N.J. 549 (2003).

The Respondent avers that he had taken continuing education classes and seminars and from these, believed that he was not obligated to disclose the losses incurred from hurricanes as the damage from hurricanes are not "typical of the type of damages that would regularly occur in this type of business and under this type of 'garage policy' coverage." Clendenny Cert. at ¶ 9. The Respondent further stated that he reviewed the Mercer application and discussed the issue of the August 29, 2011 loss under Travelers with MB Insurance's office manager, Maria LaManna, who agreed with his assessment to omit the August 29, 2011 loss from the Mercer application. Id. at ¶ 10. These arguments are not persuasive and do not dissolve the Respondent of

culpability for his actions, and the Respondent has submitted no legally competent proofs to support these allegations. Additionally, the Respondent asserts that the August 29, 2011 loss "was not a customary type of loss." Id. at ¶ 9. However, the Mercer application specifically asked for the applicant to disclose "any insurance cancelled/declined/non-renewed for any reason?" See Mercer Application, page 3, attached to LaManna Cert. as Exhibit D. It also asks for prior carrier information and prior loss information, wherein the Respondent indicated no losses. Ibid. at page 1. The application did not instruct an applicant to exclude losses that were atypical under a garage policy.

Further, the Respondent is a licensed insurance agent and admitted to completing the applications and handling the PAB account while employed with both MB Insurance and McCarthy Insurance. As such, the Respondent cannot justify his omission of the August 29, 2011 loss from the Mercer application because he relied on the advice of a co-worker, his office manager, Ms. LaManna, or because of mere negligence. See Commissioner v. Prime Ins. Syndicate, Bickford, et al, OAL Dkt. No. 1168-06, First Order and Initial Decision for Summary Decision (01/12/06), Final Decision and Order on First partial Summary Decision (02/27/06), Second Order and Initial Decision on Motion for Summary Decision (05/12/06), Final decision and Order on Second Partial Summary Decision (06/26/06) (finding that being in a hurry does not provide a reasonable excuse for a failure to properly review an application before it's submitted, and reliance on another insurance producer or staff member does not justify submitting an inaccurate application). Further, the fact that the Respondent discussed omitting the loss with Ms. LaManna prior to submitting the application, shows that the Respondent's omission of the August 29, 2011 loss was not a mere oversight, but was, in fact, intentional.

In light of the foregoing and the factual conclusions determined by the ALJ, I concur with the ALJ's findings that the Department proved the allegations contained in Count One and Count Three and FIND that the Respondent made false and misleading statements to Mercer by submitting information that claimed that PAB had no prior losses, when the Respondent was aware that it did, in violation of N.J.S.A. 17:22A-40a(2), (5), (8) and (16); and N.J.S.A. 17:33A-4a(4)(b).

Counts Two and Four: Providing False and Misleading Information
Regarding Losses on Guard Insurance Application

Count Two and Count Four of the OTSC are based upon the same facts and allege that the Respondent completed and submitted false and misleading loss information to Guard on an application for a garage policy for PAB, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (5) (intentionally misrepresenting the terms of an actual or proposed insurance contract, policy or application for insurance), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act); and N.J.S.A. 17:33A-4a(4)(b) (preparing or making any written or oral statement, intended to be presented to any insurance company or producer for the purpose of obtaining an insurance policy, knowing that the statement contains any false or misleading information concerning any fact or thing material to an insurance application or contract).

The record is clear that the Respondent misrepresented PAB's loss history to Guard in an attempt to secure a garage policy for PAB. Specifically, in January 2014, after Mercer canceled or refused to renew PAB's policy because of adverse losses on two claims (one on October 29, 2012 in the amount of $72,986 and one on January 1, 2013, in the amount of $23,687), the Respondent submitted an application to Guard for a replacement garage policy for PAB. Initial

Decision at 3. The Guard application specifically asked "has the prospect had any losses in the past four years (current policy and prior 3 years)?" Hersher Cert., attached to Cretella Cert., in support of Motion for Summary Decision as Exhibit D, at Exhibit A, Page 3. The Respondent answered "yes" and stated that a loss occurred on January 17, 2013 in the amount of $12,905 due to vehicle theft. Ibid. In support of this loss, the Respondent submitted a letter that was issued by Mercer in error, with a loss that did not match anything related to PAB or its business. Pitner Cert., attached to Cretella Cert., in support of Motion for Summary Decision as Exhibit C, at ¶ 15 and Exhibit G. The Respondent also failed to include the August 29, 2011 loss from Hurricane Irene that was incurred under the Traveler's policy. Hersher Cert. at Exhibit A.

The Respondent subsequently also submitted a loss run report, allegedly from Mercer, to Guard that showed a loss of $23,687.43 on October 29, 2012, as a result of Hurricane Sandy, when PAB's Loss on October 29, 2012 was actually $72,986.22. Id. at ¶ 6 and Exhibit B. Mercer advised that the loss run report provided to Guard was an inaccurate loss and not issued by Mercer. Pitner Cert. at ¶14 and Exhibit F. Mercer additionally stated that from January 13, 2012, to the present, no party, including the insured, requested Mercer to produce a loss run for PAB. Id. at ¶ 11. Mercer additionally confirmed that the loss run report showing the alleged October 29, 2012 loss in the amount of $23,687.43 was not issued by Mercer and it is Mercer's policy to only issue loss run reports to the current agent of a policy or the insured directly. Id. at ¶ 12.

The Respondent avers in his Opposition to the Department's Motion for Summary Decision that the amount disclosed on the Guard application is incorrect because he used documentation that was provided by the insured, PAB. However, at all times during which PAB incurred losses under both the Travelers and Mercer policies, the Respondent was the insurance

producer for PAB. As an insurance producer, he is held to a high standard of conduct. The Respondent knew that his answers on the Guard application were false and even admitted that he omitted the loss under the Travelers policy from the Guard application. Clendenny Cert. at ¶ 18. The Respondent claims that he omitted this loss for the same reasons that he omitted it from the Mercer applications, namely, that a loss from a hurricane is "not a customary type of loss." Id. at ¶ 10. However, it should be mentioned that the Respondent submitted the inaccurate Mercer loss run report to Guard showing an alleged loss from Hurricane Sandy, even though this contradicts his reasoning as to why he omitted the August 29, 2011 loss from Hurricane Irene under the Travelers policy.

Further, the Respondent alleges in his Opposition to the Department's Motion for Summary Decision that he did not knowingly misrepresent any material information or knowingly submit false information to any insurance company. As discussed in Count One and Three above, fraudulent acts under the Producer Act do not require intent to deceive. See Commissioner v. Pino and Commissioner v. Uribe, supra. Also discussed above, the Fraud Act does not require proof of the defendant's state of mind or that the defendant had intent to deceive. See Nasir, supra.

In light of the foregoing and the factual conclusions determined by the ALJ, I concur with the ALJ's findings that the Department proved the allegations in Count Two and Count Four and FIND that the Respondent made false and misleading statements to Guard by submitting information that claimed that PAB had a losses in the amount of $12,905 and $23,687.43, when the Respondent was aware that statement was false, in violation of N.J.S.A. 17:22A-40a(2), (5), (8) and (16); and N.J.S.A. 17:33A-4a(4)(b).

Count Five: Coercing and/or Inducing an Insured to Sign
a Statement and Submitting Same to the Department

Count Five of the OTSC alleges that the Respondent coerced and/or induced an insured to sign a statement that was drafted by the Respondent and then submitted to the Department, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act). The ALJ made no factual determination as to the allegations contained in Count Five of the OTSC. Additionally, in its Exceptions, the Department withdrew the allegations contained in Count Five. As such, I make no factual findings or determinations related to Count Five of the OTSC and the charges of this Count are HEREBY DISMISSED.

Penalty against Respondent

Revocation of Respondent's Producer License

With respect to the appropriate action to take against Respondent's insurance producer license, I find that the record is more than sufficient to support license revocation and, in fact, compels the revocation of Respondent's producer license. As such, I concur with the ALJ's recommendation that the Respondent's license be revoked.

The public, in general, is adversely affected in a significant way by insurance fraud. New Jersey views insurance fraud as a serious problem to be confronted aggressively and it has a particularly strong public policy against the proliferation of insurance fraud. Palisades Safety and Insurance Association v. Bastien, 175 N.J. 144, 150 (2003). In decisions by prior Commissioners in similar cases, revocation has consistently been imposed upon licensees who have personally engaged in fraudulent acts, as both insureds and insurers must place their trust in the information insurance producers convey to them. Our strong policy is to instill public confidence in both insurance professionals and the industry as a whole. In re Parkwood Co., 98

N.J. Super. 263 (App. Div. 1963). Courts have long recognized that the insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979).

I agree with the ALJ's findings that Respondent's activities were clear and demand the revocation of the Respondent's producer license. As the decisions cited to by the ALJ demonstrate, revocation is appropriate in almost all cases wherein a licensed insurance producer has engaged in fraud, bad faith, and dishonesty. Here, the Respondent omitted and misrepresented previous substantial losses by PAB on two separate applications. The record shows that the Respondent knowingly omitted substantial losses in the amount of $158,728 that were incurred under the Travelers policy when submitting an application for a replacement policy to Mercer. Initial Decision at 3. Further, while the Respondent listed losses on the Guard application in the amounts of $12,905 and $23,687.43, both the scope and facts of those losses were misrepresented. Specifically, the loss reported to Guard in the amount of $12,905, was not a loss sustained by PAB but was set forth in a letter mistakenly issued to PAB by Mercer. Pitner Cert. at ¶15 and Exhibit G. Similarly, the Respondent submitted a fraudulent loss run report to Guard that listed that the $23,687.43 loss on October 29, 2012, was a result from Hurricane Sandy; however, PAB's actual loss on this date was $72,986.22. Hersher Cert. at ¶ 6 and Exhibit B. Additionally, the Respondent knowingly failed to disclose PAB's loss under the Traveler's policy and the $72,986 loss under the Mercer policy to Guard when he sought a replacement policy for PAB. Initial Decision at 3. Accordingly, based upon my review of the record and the ALJ's Initial Decision, I am compelled to agree with the ALJ's determination that the revocation of the Respondent's producer license is necessary and appropriate.

Civil Monetary Penalties against Respondent

As noted by the ALJ, the factors set forth in Kimmelman are to be examined when assessing administrative monetary penalties such as those that may be imposed pursuant to N.J.S.A. 17:22A-45 upon insurance producers. Kimmelman, supra, 108 N.J. at 137-39.

The record herein indicates the following with respect to the Kimmelman factors. The Respondent demonstrated bad faith by intentionally acting to deceive insurers to obtain insurance policies for his client when he failed to disclose actual substantial losses on two separate applications and by submitting altered loss run reports/documents. Specifically, the Respondent knowingly misrepresented PAB's substantial losses to Mercer, by falsely stating that there were no prior losses, when the Respondent was aware of the prior loss with Travelers in the amount of $158,728. Initial Decision at 6. Further, Respondent provided Guard with false information regarding PAB's substantial losses as well. Ibid. The Respondent stated that PAB had a loss in the amount of $12,905 due to a vehicle theft on January 17, 2013. Ibid. The Respondent knowingly submitted a letter reflecting the $12,905 loss to Guard that was issued by Mercer in error and submitted a fraudulent Mercer loss run report that showed an October 29, 2012 loss in the amount of $23,687.43 as a result of Hurricane Sandy, when PAB's actual loss on this date was $72,986.22. Pitner Cert. at ¶ 15 and Exhibit G; Hersher Cert. at ¶ 6 and Exhibit B. The Respondent's conduct showed that he intentionally acted to deceive an insurer to obtain insurance policies for his client when he failed to disclose actual substantial losses on two separate occasions and by submitting false loss run reports/documents. This factor weighs in favor of a significant monetary penalty.

As to the second Kimmelman factor, the Respondent has not provided any indication that he has a limited ability to pay a civil monetary penalty. Respondents who claim an inability to

pay civil penalties bear the burden of proving their incapacity. Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). An insurance producer's ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. Moreover, the Commissioner has issued substantial fines against insurance producers despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (issuing a $100,500 civil penalty despite the producer arguing that he was unable to pay); See also Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from $2,500 to $20,000 even though the producer argued an inability to pay fines in addition to restitution); Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (fine of $100,000 imposed despite evidence of the Respondent's inability to pay).

The third Kimmelman factor addresses the amount of profits obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, supra, 108 N.J. at 138. In the present action, the Respondent's intentional misrepresentations and omissions led to commission on the policies sold. This factor weighs in favor of a significant monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. In re Parkwood Co., 98 N.J. Super. at 268. Moreover, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. "When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected

insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." Commissioner v. Fonseca, supra. Here, the Respondent engaged in fraudulent activities against two insurance companies, Mercer and Guard. Although his actions may not have directly affected specific consumers, there is a potential of harm to the public's image of insurance producers when a licensed producer, such as the Respondent, commits acts of dishonesty. Moreover, had the insurance companies known the loss history of PAB, they may have increased their premium or declined to insure.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Respondent's actions were not isolated to a single incident but were a series of fraudulent activities against multiple insurance companies since at least 2012 when he submitted the Mercer application. Initial Decision at 3. Such a long period of time shows a pattern of behavior and accordingly weighs heavily in favor of a substantial monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelmen, supra, 108 N.J. at 139. This factor weighs in favor of a substantial monetary penalty because the Respondent has not been subjected to criminal punishment for his actions.

The last Kimmelman factor deals with whether the producer had previously violated the Producer Act or Fraud Act and if past penalties have been insufficient to deter future violations. The Respondent does not have any known prior violations of the Producer Act or Fraud Act.

In light of the above Kimmelman analysis and based on the violations I have concluded that Respondent committed, I concur with the recommendations of the ALJ and FIND that the

Respondent shall pay civil monetary penalties for Count One in the amount of $5,000 and Count Two in the amount of $10,000.

As to Counts Three and Four of the OTSC, the ALJ concluded that the Department was entitled to Summary Decision as to those Counts, but failed to recommend a monetary penalty relating to the Fraud Act violations contained in those Counts. The Fraud Act provides that civil monetary penalties may be imposed of not more than $5,000 for the first violation, $10,000 for the second violation, and $15,000 for each subsequent violation. N.J.S.A. 17:33A-5b. "The Department notes that the Commissioner has consistently held that insurance producers who commit insurance fraud will face civil penalties under both the Fraud Act and the Producer Act." Commissioner v. Hohn, supra; See also Commissioner v. Furman, OAL Dkt. No. BKI 3891-06, Initial Decision (6/21/07), Final Decision and Order (9/17/07) (fining the producer $5,000, plus $1,200 in costs, and revoking the producer's license where the producer previously settled an insurance fraud lawsuit, paid a $5,000 civil penalty and admitted that he committed fraud by making false statements in connection with a life insurance application); Commissioner v. Goncalves, supra (issuing a $5,000 civil penalty under the Producer Licensing Act, plus $312.50 in costs, against each producer where they had previously paid civil penalties under the Insurance Fraud Prevention Act); Commissioner v. Nasir, OAL Dkt. No BKI 2335-03, Order on Motion for Reconsideration of Penalties (9/9/08) (issuing a penalty of $14,000 plus $700 in costs, and revoking the producer's license where the producer had already been assessed $43,710 in penalties and attorneys' fees in a separate action under the Insurance Fraud Prevention Act where the producer made misrepresentations on his disability application). Therefore, as requested by the Department in its Exceptions, I MODIFY the Initial Decision and FIND that the Respondent shall pay civil monetary penalties in the amount of $5,000 for Count Three of the

OTSC and $5,000 for Count Four of the OTSC for violations of the Fraud Act. The fines are fully warranted, not excessive or unduly punitive, and are necessary to demonstrate the appropriate level of opprobrium for the Respondent's fraudulent conduct.

Pursuant to N.J.S.A. 17:22A-45c, it is appropriate to impose reimbursement of the costs of investigation. Further, pursuant to N.J.S.A. 17:33A-5c, it is appropriate to impose reimbursement of attorneys' fees. As such, I further concur with the recommendations of the ALJ that the Respondent shall pay costs of investigation and attorneys' fees in the amount of $7,968. However, as requested by, and for the reasons asserted by, the Department in its Exceptions, I MODIFY the Initial Decision, in part, to allocate this amount as follows: costs of investigation in the amount of $225 and attorneys' fees in the amount of $7,743.

Further, I concur with the ALJ and FIND that the Respondent be assessed an insurance surcharge of $1,000, pursuant to N.J.S.A. 17:33A-5.1.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in the Initial Decision except as modified herein. Specifically, I ADOPT the ALJ's conclusion and hold that the Respondent violated the Producer Act and Fraud Act as charged in the OTSC and has failed to present any legally or factually viable defenses to the violations of the Producer Act and Fraud Act. Further, I ADOPT the conclusion that the Department's Motion for Summary Decision should be granted on Counts One, Two, Three and Four as charged in the OTSC. As the Department withdrew Count Five of the OTSC, I HEREBY DISMISS Count Five of the OTSC.

I also ADOPT the ALJ's recommendation and hereby ORDER the revocation of the Respondent's insurance producer license. Further, I MODIFY the Initial Decision as it relates to

the allocation of the costs of investigation and attorneys' fees and impose the following: costs in the amount of $225 and attorneys' fees in the amount of $7,743. I further ADOPT the ALJ's recommendations and ORDER the Respondent to pay an insurance surcharge of $1,000, pursuant to N.J.S.A. 17:33A-5.1. I MODIFY the Initial Decision to clarify that the surcharge imposed is a statutory insurance surcharge, as averred by the Department in its Exceptions. I further ADOPT the ALJ's recommendations as to the fines for Counts One and Two of the OTSC and I MODIFY the Initial Decision to impose fines as to Counts Three and Four of the OTSC. Therefore, I impose the following fines: Count One: $5,000, Count Two: $10,000, Count Three: $5,000, and Count Four: $5,000, for a total civil monetary penalty of $25,000 against Respondent. Lastly, I MODIFY the Initial Decision to correct any misspellings as set forth in the Department's Exceptions.

It is so ORDERED on this 1st day of April, 2016

Richard J. Badolato
Acting Commissioner

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