

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

1

OAL DOCKET NO.: BK1-09148-18
AGENCY DOCKET NO.: OTSC #E18-36

MARLENE CARIDE,)
COMMISSIONER, NEW JERSEY)
DEPARTMENT OF BANKING AND)
INSURANCE,)
)
Petitioner,)
)
v.)
)
AVELINO C. ANDRADE)
)
Respondent.)

FINAL DECISION AND ORDER

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”) pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 (“Producer Act”), and all powers expressed or implied therein, for the purposes of reviewing the January 24, 2019 Initial Decision (“Initial Decision”) of Administrative Law Judge Tricia M. Caliguire (“ALJ”), which granted a Motion for Summary Decision brought by the Department of Banking and Insurance (“Department”) on four Counts alleged in the Department’s Order to Show Cause No. E18-36 (“OTSC”), and recommended suspension of the Respondent Avelino C. Andrade’s (“Andrade”) insurance producer license until he provides the Department with proof that he has established a trust account, and the imposition of civil monetary penalties in the amount of \$16,000 and \$400 for the costs of investigation.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about April 20, 2018, the Department issued the OTSC against Andrade seeking to revoke or suspend Andrade's producer license and impose civil monetary penalties and costs of investigation for alleged violations of the Producer Act, and the regulations governing the conduct of insurance producers in this State. The OTSC contains four counts as follows:

Count One – The Respondent misappropriated and failed to remit premium to an insurer, and allowed CLD's policy to be terminated for failure to make payment, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(a); and

Count Two – The Respondent issued six checks for the payment of premiums that were dishonored by the Respondent's bank for insufficient funds, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(a); and

Count Three – The Respondent issued six checks for the payment of premiums from a non-trust account, commingled premium funds with other funds, and failed to maintain a trust account in violation of N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17C-2.1(b), and N.J.A.C. 11:17C-2.3(a); and

Count Four – The Respondent failed to maintain copies of receipts for insurance premium payments, in violation of N.J.S.A. 17:22A-40(a)(2), N.J.A.C. 11:17C-2.5(a), and N.J.A.C. 11:17C-2.6(b).

On or about May 8, 2018, Andrade sent a letter, wherein he admitted certain allegations and denied certain allegations 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 June 27, 2018, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23.

On or about December 14, 2018, the Department filed a Motion for Summary Decision against Andrade. Initial Decision at 2-3. Andrade filed a reply letter on January 2, 2019. Id. at 3. The Department filed a reply on January 8, 2019 and the record was closed that day. Ibid. The

ALJ granted summary decision to the Department on all Counts of the OTSC. Id. at 15. The ALJ recommended suspension of Andrade's insurance producer license until he provided proof to the Department that he had established a trust account and the imposition of civil monetary penalties against Andrade in the amount of \$16,000 and \$400 for the costs of investigation for a total of \$16,400. Id. at 13 and 15.

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ applied the standard for summary decision pursuant to N.J.A.C. 1:1-12.5 and Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). Id. at 8-9. The ALJ noted that a Summary Decision may be rendered if there is no genuine issue of material fact and inferences of doubt are drawn against the moving party. Initial Decision at 9, citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 74-75 (1954). The ALJ concluded that there was no genuine issue of material fact and found that Summary Decision was appropriate as to all Counts of the OTSC. Id. at 15.

The ALJ found undisputed facts supported by the record. Specifically, the ALJ found that Andrade was licensed by the State of New Jersey as a resident insurance producer on November 8, 1971 and that he maintains an office in Union City, New Jersey. Initial Decision at 4. On August 9, 1996, the Commissioner and Andrade entered into Consent Order No. E96-259 in which Andrade agreed to pay \$7,500 and admitted that between 1988 and 1991, he placed eight existing life insurance policies with new life insurance policies underwritten by the same insurance company without providing the insureds the required disclosure forms. Ibid.

Further, the ALJ found that during 2015 and 2016, Andrade sold automobile insurance policies to consumers through the New Jersey Personal Automobile Insurance Plan ("NJPAIP"), the assigned risk mechanism for drivers who are unable to obtain coverage in the New Jersey auto insurance market. Ibid. He also sold automobile insurance policies through the New Jersey

Special Automobile Insurance Plan (“NJSAIP”), the assigned risk mechanism to help make limited auto insurance coverage available to New Jersey drivers who are eligible for Federal Medicaid with hospitalization. Ibid.

As to Count One of the OTSC, the ALJ found that on May 6, 2015, Andrade sold a NJSAIP policy to C.L.¹ and received a payment for the full year’s premium in the amount of \$360. That same day, Andrade sent NJSAIP a completed application for C.L. with the premium deposit of \$180, plus a \$5 installment fee. Id. at 4-5. On May 29, 2015, Continental Insurance Company (“Continental”) issued an automobile insurance policy to C.L. that was effective from May 29, 2015 to May 29, 2016. Id. at 5. On September 25, 2015, Continental sent notices to Andrade and to C.L.’s home address that the residual \$180 payment was due by October 26, 2015. Ibid. Neither C.L. nor Andrade paid the remaining balance. Ibid. On October 30, 2015, Continental sent notices to Andrade and to C.L.’s home address that C.L.’s policy would terminate on November 28, 2015 for nonpayment of premium; and on November 28, 2015, Continental terminated C.L.’s policy. Ibid. C.L. had moved without notifying Continental or Andrade and did not receive any of the notices from Continental. Ibid. On March 29, 2016, C.L. was stopped by police when operating her vehicle and was issued a summons for failure to maintain automobile insurance and driving with a suspended registration. Ibid. Once notified by C.L., Andrade refunded her the unpaid premium and paid C.L. \$100 towards the cost of restoring her registration, but did not assist her with the payment of court costs. Ibid. The ALJ concluded that Andrade withheld a portion of C.L.’s premium and then allowed her Continental policy to lapse, which constituted withholding or misappropriating a premium in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16);

¹ The OTSC refers to this individual as “CLD” while the Initial Decision refers to this individual as “C.L.” In order to maintain consistency with the Initial Decision, this Final Decision will also refer to this individual as C.L.

violating his fiduciary responsibilities to C.L. in violation of N.J.A.C. 11:17A-4.10, and failing to remit premiums within five days of receipt in violation of N.J.A.C. 11:17C-2.1(a) and N.J.A.C. 11:17C-2.2(a). Initial Decision at 11.

As to Count Two of the OTSC, the ALJ found that in January 2016, Andrade made six payments to NJSAIP by six checks that were drawn on his business account on behalf of six clients (J.R., C.J., Z.O., A.B.L., A.F., and E.M.B.). Ibid. The checks were declined by Andrade's bank for insufficient funds. Ibid. The ALJ concluded that the six checks that Andrade used to pay premiums to NJSAIP were dishonored by Andrade's bank due to insufficient funds, which constituted withholding or misappropriating premiums and incompetence or financial irresponsibility in violation of N.J.S.A. 17:22A-40(a)(2), (4), and (8), violating his fiduciary responsibilities in violation of N.J.A.C. 11:17A-4.10, and failing to remit premiums within five days of receipt in violation of N.J.A.C. 11:17C-2.1(a) and N.J.A.C. 11:17C-2.2(a). Initial Decision at 11.²

As to Count Three of the OTSC, the ALJ found that Andrade did not maintain a trust account. Id. at 11-12. The ALJ found that the Respondent admitted to never establishing a trust account and provided no plausible justification for his failure to do so. Id. at 7 and 12. The ALJ concluded that the six dishonored checks were drawn by Andrade on his business account, that premium funds were comingled with other funds in the business account, and that Andrade failed to maintain a trust account. Accordingly, the ALJ concluded that Andrade violated N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17C-2.1(b), and N.J.A.C. 11:17C-2.3(a). Initial Decision at 11-12.

² The Initial Decision does not address whether Andrade also violated N.J.S.A. 17:22A-40(a)(16) as alleged in the OTSC.

As to Count Four of the OTSC, the ALJ found that the Department asked Andrade for copies of the receipts he issued to the six clients referenced in Count Two of the OTSC (J.R., C.J., Z.O., A.B.L., A.F., and E.M.B.) for their premium payments. Id. at 5. However, Andrade did not retain copies of these receipts, and admitted that he did not maintain those receipts. Id. at 5 and 7. The ALJ concluded that Andrade failed to maintain receipts for premium payments in violation of N.J.S.A. 17:22A-40(a)(2), N.J.A.C. 11:17C-2.5(a), and N.J.A.C. 11:17C-2.6(b). Initial Decision at 12.

As to the appropriate penalty, the ALJ noted that the Act provides that the Commissioner may place on probation, suspend, revoke or refuse to renew an insurance producer's license or may levy a civil penalty or any combination of actions for violations of the Act as found in this matter. Id. at 12. The ALJ noted that suspension or revocation may be necessary to protect the public from untrustworthy or fraudulent behavior. Initial Decision at 12, citing, Commissioner v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13). The ALJ concluded that although the Department was within its statutory right to request revocation of Andrade's insurance producer license, because he misappropriated funds, acted irresponsibly, and failed to protect his clients' interests, the Department instead requested that Andrade's license be suspended until Andrade establishes a trust account in accordance with N.J.A.C. 11:17C-2.3(a). Initial Decision at 13. The ALJ concluded that the penalty of suspension until Andrade established a trust account was appropriate. Ibid.

As to the appropriate monetary penalty in this matter, the ALJ noted that the factors for determining monetary penalties are set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Initial Decision at 13-14. These factors include: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the 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.

Regarding the first factor, the ALJ determined that Andrade acted in bad faith when he received notices that C.L. would be without insurance and that he failed to protect her (Count One). Id. at 14. The ALJ noted the same failure to act in his clients' best interests resulted in the dishonoring of six premium checks (Count Two). Ibid.

As to the second factor, the ALJ concluded that while he argues that he is unable to pay any penalty, Andrade failed to provide competent evidence of his finances (such as bank statements, tax returns, bills, and/or obligations), his medical condition, and expenses as required by Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). The ALJ also noted that he could quickly have his license reinstated by establishing a trust account. Ibid.

Regarding the third factor, the ALJ concluded that there was no evidence of the profit Andrade made on the sale of the policies at issue. Ibid. The six dishonored checks were for \$185 each, and there was no evidence that Andrade did not eventually remit the premiums to the insurance company (Count Two). Ibid. Further, C.L. paid only \$360 for a year-long policy and the Respondent paid C.L. back for the premium he withheld (Count One). Ibid. Accordingly, the ALJ concluded that there was a lack of evidence that Andrade's illegal conduct generated much profit. Ibid.

As to the fourth factor, the ALJ found there was injury to the public, particularly to C.L. in that she was unknowingly operating a vehicle without the required insurance, was stopped by the police, issued a summons, and fined \$139 (Count One). Id. at 14. Further, the ALJ noted the need to maintain public faith in insurance producers. Id. at 14-15.

As to the fifth factor, the duration of the conduct, the ALJ concluded that although the incidents alleged in the OTSC took place during May 2015 through March 2016, Andrade never maintained a trust account during the “many years” that he has been licensed in New Jersey. Id. at 15.

As to the sixth factor, the ALJ determined that the Andrade had not been charged with violations of criminal statutes and had not been assessed other penalties for the actions alleged in the OTSC. Ibid.

As to the final factor, the ALJ concluded that the Respondent had entered into Consent Order No. E96-259 with the Department in 1996 and paid \$7,500 for violations of the Act. Ibid.

Based upon the above analysis, the ALJ recommended that a civil monetary penalty be imposed against the Respondent in the amount of \$16,000³ and \$400 for the costs of investigation pursuant to N.J.A.C. 17:22A-45(c). Ibid.

EXCEPTIONS

Exceptions to the Initial Decision were due on February 6, 2019. By letter dated January 29, 2019, the Department stated that it concurred with all parts of the Initial Decision and declined to file Exceptions. The Respondent did not file Exceptions.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably

³ The ALJ did not indicate how the monetary penalty should be allocated. The Department, through counsel, DAG Ryan S. Schaffer, requested \$16,000 in fines allocated as follows: Count One, \$5,000; Count Two, \$5,000; Count Three, \$5,000; and Count Four, \$1,000. Brief in Support of Petitioner’s Motion for Summary Decision at 16.

cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance has been described as “the greater weight of credible evidence in the case is not necessarily dependent on the number of witnesses, but having the greater convincing power.” State v. Lewis, 678 N.J. 47 (1975).

Allegations Against Respondent

For the reasons stated in the Initial Decision and those that follow, I concur with the ALJ’s finding that summary decision is appropriate as to all four Counts against Andrade as alleged in the OTSC. Andrade admitted to the underlying conduct in the OTSC and failed to adduce evidence that creates a genuine issue as to any material fact, and his defenses to the OTSC fail as a matter of law. Accordingly, the Department is entitled to prevail as a matter of law.

Count One

Count One of the OTSC alleges that Andrade misappropriated and failed to remit a premium to an insurer, and allowed C.L.’s policy to be terminated for failure to pay the premium, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8) and (16), N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(a). The ALJ found as fact that Andrade withheld a portion of C.L.’s premium and then allowed her Continental policy to lapse, which constituted withholding or misappropriating a premium. Initial Decision at 11. I concur with the ALJ that such conduct violates N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting moneys), (8) (demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act); violated his fiduciary responsibilities to C.L. pursuant to N.J.A.C. 11:17A-4.10, and that Andrade failed to remit premiums within five days of receipt in violation of N.J.A.C. 11:17C-2.1(a) and N.J.A.C. 11:17C-2.2(a).

Count Two

Count Two of the OTSC alleges that the Respondent issued six checks for the payment of premiums for six clients that were dishonored by Respondent's bank for insufficient funds, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(a). The ALJ found as fact that the six checks that Andrade issued from his business account to pay premiums to NJSAIP were dishonored by Andrade's bank due to insufficient funds. Initial Decision at 5. The ALJ found that Andrade was forced to leave town due to an urgent family matter and was aware that he had insufficient funds to cover the rent for his office and the checks for payments of premium. Id. at 7. He believed that his landlord had agreed not to deposit the rent check, but the landlord did so. Ibid. The ALJ found that Andrade's actions were incompetent and financially irresponsible in that he risked his clients' interest on the verbal agreement with his landlord that the landlord would not cash the rent check. Id. at 11. I concur with the ALJ that the Department proved the allegations in Count Two of the OTSC and that such conduct violates N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (4) (improperly withholding, misappropriating, or converting moneys), (8) (demonstrating incompetence, untrustworthiness, and financial irresponsibility), violated his fiduciary responsibilities in violation of N.J.A.C. 11:17A-4.10, and that Andrade failed to remit premiums within five days of receipt in violation of N.J.A.C. 11:17C-2.1(a) and N.J.A.C. 11:17C-2.2(a). However, there was no finding as to a violation of N.J.S.A. 17:22A-40(a)(16) (committing any fraudulent act). Although Andrade may not have meant to deceive his clients, his actions still constitute fraud under the Producer Act. Fraudulent acts under the Producer Act do not require intent to deceive. See Commissioner v. Dobrek, BK1 2360-13, Initial Decision, (06/02/2014), Final Decision and Order, (01/15/2015), at 20, aff'd sub nom. Badolato v. Dobrek, No. A-2990-14 (App. Div. June

30, 2016); 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 to -25, 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). “A fraudulent act under the Producer Act does not require criminal intent.” Commissioner v. Shih, 94 N.J.A.R. 2d (INS) 34 (March 2, 1994). “Proof of fraud under the [Producer Act], as opposed to common law fraud, does not require proof . . . of an intent to deceive.” Commissioner v. Dobrek, citing, Open MRI of Morris & Essex, L.P. v. Frieri, 405 N.J. Super. 576, 583 (App. Div. 2009).

Further, the failure to remit premiums constitutes fraud in violation of N.J.S.A. 17:22A-40(a)(16). See Commissioner v. Strandkov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); Commissioner v. Edwards, OAL Dkt. No. BKI 13459-12, Initial Decision (12/19/16), Final Decision and Order (05/04/17); Commissioner v. Charles, OAL Dkt. No. BKI 06530-14, Initial Decision (03/02/15), Final Decision and Order (08/28/15).

As such, and in light of the ALJ’s findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to specifically set forth that the Respondent’s conduct amounts to fraud. Therefore, I FIND that the Respondent’s actions, as set forth in Count Two of the OTSC, also constitute a violation of N.J.S.A. 17:22A-40(a)(16).

Count Three

Count Three of the OTSC alleges that the Respondent issued six checks for the payment of premiums from a non-trust account, commingled premium funds with other funds, and failed to maintain a trust account in violation of N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17C-2.1(b), and N.J.A.C. 11:17C-2.3(a). The ALJ found as fact that Andrade failed to maintain a trust account,

and that the six dishonored checks were comingled with other funds in Andrade's business account, thus commingling the clients' funds with his business's operating funds. Initial Decision at 11-12. Andrade admitted that he never established a trust account and failed to provide a justification for his failure to do so. Id. at 12. I concur with the ALJ and ADOPT the ALJ's findings that the Department proved the allegations in Count Three of the OTSC and that such conduct violates N.J.S.A. 22A-40(a)(2) (violating any insurance law) and (8) (demonstrating incompetence, untrustworthiness, or financial irresponsibility), N.J.A.C. 11:17C-2.1(b) (premium funds shall not be comingled with any other funds), and N.J.A.C. 11:17C-2.3(a) (producers shall establish and maintain trust accounts).

Count Four

Count Four of the OTSC alleges that the Respondent failed to maintain copies of receipts for payment of insurance premiums, in violation of N.J.S.A. 17:22A-40(a)(2), N.J.A.C. 11:17C-2.5(a), and N.J.A.C. 11:17C-2.6(b). The ALJ found as fact that Andrade failed to maintain receipts for premium payments by J.R., C.J., Z.O., A.B.L., A.F., and E.M.B. Initial Decision at 12. I concur with the ALJ that the Department proved the allegations in Count Four of the OTSC and that such conduct violates N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation); N.J.A.C. 11:17C-2.5(a) (producers shall maintain accurate books and records; and N.J.A.C. 11:17C-2.6(b) (all records for which producers are responsible must be furnished to the Commissioner upon request).

PENALTIES AGAINST THE RESPONDENT

Suspension of the Respondent's Insurance Producer License

With respect to the appropriate action to take against Andrade's insurance producer license, I FIND that the record is more than sufficient to support the suspension of Andrade's license. However, I believe that the ALJ's recommendation that the Respondent's license be suspended

until he establishes a trust account is insufficient in light of the resultant impacts of the Respondent's misconduct.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). An insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent. Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Ibid. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). Insurance premiums held on behalf of an insurer are trust funds to be received, held, and disbursed in a fiduciary capacity. Bohlinger v. Ward & Co., 34 N.J. Super. 583 (App. Div. 1955), *aff'd*, 20 N.J. 331 (1956). A producer is held to a high standard of conduct and should fully understand and appreciate the effect of irresponsible conduct on the insurance industry and on the public.

Here, the Respondent commingled funds for years, failed to remit premiums within regulatory timeframes that resulted in the cancellation of one client's auto policy, issued checks for six clients' premiums that were dishonored for insufficient funds, and failed to act in accordance with his fiduciary duties to his clients. The record before me is that an insurance producer with over four decades of experience has admitted to never maintaining a trust account for deposit of his clients' funds as required by the insurance laws of this State. Despite this, Andrade has not been previously cited by this Department for premium commingling or misappropriation. Additionally, Andrade attempted to mitigate the harm to his clients upon notice through refunding of C.L.'s premium and payment of \$100 towards the cost of restoring her

vehicle's registration. Initial Decision at 5. Further, there is no evidence in the record to suggest that the Respondent did not address the issue of the premium payments made by J.R., C.J., Z.O., A.B.L., A.F., and E.M.B. being declined.

Andrade's violations may have been prevented if he had a separate trust account to maintain clients' funds to avoid commingling them with other general business funds, like his rent. The Department has previously declined to take licensure action against producers' licenses for comingling premiums and failing to maintain books. Commissioner v. Wang and Hu, Consent Order No. E14-106 (09/18/14) (Respondents fined \$40,000 for comingling insurance premiums, failure to maintain books, and other violations, but no action taken against licenses). Nevertheless, Andrade's commingling in this instance resulted in the misappropriation of at least C.L.'s insurance premium for a period of time, issuance of a summons to C.L. for driving without insurance and suspension of her vehicle registration. This would not have occurred if Andrade had responded to the notices that the premium payment was due. There is no excuse for this failure to remit the premium, and consequently, a lengthier suspension is necessary to deter similar conduct by Andrade and other insurance producers, and to demonstrate the appropriate level of opprobrium for failing to maintain the precision, accuracy and forthrightness required of insurance producers in this State. Commissioner v. Charles, OAL Dkt. No. BK1 06530-14, Initial Decision (03/02/15), Final Decision and Order (08/28/15).

Accordingly, I find that suspending the Respondent's license for two (2) years is necessary and appropriate on the record before me, and such license shall not be eligible for reinstatement until Andrade provides evidence that he has established a trust account in accordance with N.J.A.C. 11:17C-2.3(a). This licensure penalty serves the need of protecting the public and maintaining public faith in the insurance industry.

Monetary Penalties Against the Respondent

The Commissioner has broad discretion in determining sanctions for violations of the laws that she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The penalties set forth in the Producer Act “are expressions by the Legislature that serve a distinct remedial purpose.” Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09). The Producer Act provides that the Commissioner may impose a penalty not exceeding \$5,000 for the first offense and not exceeding \$10,000 for each subsequent offense. N.J.S.A. 17:22A-45. However, I am not bound by the order in which the allegations were pled with regard to the imposition of monetary penalties. Commissioner v. Kwasnik, OAL Dkt. No. BKI 10910-16, Initial Decision (02/05/18), Final Decision and Order (05/01/18).

Further, the maximum monetary penalty has been imposed for comingling funds. Commissioner v. Montesinos and Premier Agency, OAL Dkt. No. BKI 12544-07, Final Order (09/19/08) (imposing \$5,000 fine by Respondents, jointly and severally, for improper bookkeeping, comingling of monies, failures to issue receipts). The fine of \$5,000 has also been imposed for issuing premium checks without sufficient funds. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (\$5,000 fine for issuing three premium checks drawn on insufficient funds).

As discussed by the ALJ, under Kimmelman, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 (“[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case”).

After reviewing the evidence presented and the Kimmelman factors, the ALJ recommended a total of \$16,400 in monetary penalties (representing \$16,000 in civil monetary penalties and \$400 for the costs of investigation). Initial Decision at 14-15. For the reasons set forth below, I MODIFY the ALJ's recommendation to impose total civil monetary penalties of \$26,000.

Regarding the first Kimmelman factor (good or bad faith), the ALJ found that Andrade acted in bad faith when he failed to protect C.L. when he received notices that she would be without insurance and he also failed to act in his clients' best interests resulted in the dishonoring of six premium checks. Initial Decision at 14. I concur with the ALJ that such conduct demonstrates bad faith. I also find that Andrade acted in bad faith failing to maintain a trust account for the duration of his licensure and maintain copies of receipts. This factor weighs in favor of a monetary penalty.

As to the second Kimmelman factor (ability to pay), the ALJ found that Andrade argued that he is unable to pay any monetary penalties. Initial Decision at 14. The ALJ noted, however, that the Respondent failed to provide competent evidence of his finances. Ibid. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Commissioner 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, substantial fines have been issued 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. 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); and 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). Here, as noted by the ALJ, the Respondent failed to provide competent evidence of his inability to pay a fine.

The third Kimmelman factor addresses the amount of profits obtained or likely to be 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, 108 N.J. at 138. Under Kimmelman, the analysis of whether there is illegal profit is not limited to actual pecuniary profit and can take into account potential profits from a licensee's misconduct, even if it is not successful. Kimmelman, 108 N.J. at 138. Moreover, whether or not restitution has been made, "the greater the profits a defendant is likely to obtain ... the greater the penalty must be if penalties are to be a deterrent." Ibid. I FIND that the Respondent's conduct of failing to remit premiums in Count One, comingling funds and issuing checks for the payment of premiums that could not be honored because of insufficient funds demonstrates that he had – at least the potential – to profit from his illegal activity by \$1,285, regardless of whether the monies were ultimately paid back to C.L. and his other six clients' insurer. There was no evidence presented that he profited from not maintaining a trust account or failing to keep receipts. Accordingly, I FIND that the third Kimmelman factor, profits from illegal activity, weighs in favor of civil penalties.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. N.J.A.C. 11:17A-4.10, In re Parkwood, 98 N.J. Super. at 268. 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, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). As to Count One of the OTSC, the ALJ found there was injury to the public, particularly to C.L. because she was unknowingly uninsured and incurred financial penalties as a result Initial Decision at 14. I concur with the ALJ that C.L. was harmed by Andrade's conduct. I also find that other clients, J.R., C.J., Z.O., A.B.L., A.F., and E.M.B., were harmed when Andrade failed to protect their financial interests and act in a fiduciary capacity. Further, as also noted by the ALJ, when insurance producers do not act in a fiduciary capacity, the public as a whole is harmed. Initial Decision at 14-15. Accordingly, this factor weighs in favor of the imposition of a monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Kimmelman, 108 N.J. at 139. The longer the illegal conduct, the more significant civil penalties should be assessed. Ibid. I agree with the ALJ that while the incidents alleged in the OTSC took place during May 2015 through March 2016, it is significant that Andrade has never maintained a trust account since his licensure in 1971. Initial Decision at 15. Accordingly, I agree with the ALJ that this factor weighs in favor of a monetary penalty.

The sixth factor is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. 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. Ibid. Here, Andrade has not been charged criminally or faced other penalties for his conduct in this matter. Accordingly, this factor weighs in favor of a monetary penalty.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act, and if past penalties have been insufficient to deter future violations. In 1996, Andrade entered into Consent Order No. E96-259 with the Department wherein the Respondent agreed to pay a penalty of \$7,500 and admitted that between 1988-1991, he replaced eight existing life insurance policies with new life insurance policies underwritten by the same insurance company without providing the insureds the required disclosure forms, in violation of N.J.S.A. 17:22A-17a(20) (demonstrated unworthiness, lack of integrity, bad faith, dishonesty, financial irresponsibility or incompetency to transact business as an insurance producer)⁴ and N.J.A.C. 11:4-2.4(b) (required an agent to present to the applicant a Notice Regarding Replacement of Life Insurance). Stewart Cert., ¶¶ 15-16, Exhibit I attached thereto. Accordingly, this factor weighs in favor of a monetary penalty.

In light of the above Kimmelman analysis, and based upon the violations I have concluded that the Respondent committed, I MODIFY the recommendation of the ALJ that the Respondent shall pay \$16,000 in civil monetary penalty impose a total monetary penalty of \$26,000 to be allocated as follows:

Count One: \$10,000 for misappropriating and failing to remit premium to an insurer, and allowing C.L.'s policy to be terminated for failure to make payment, in violation of N.J.S.A.

⁴ This violation is currently codified as N.J.S.A. 17:22A-40(a)(8). N.J.S.A. 17:22A-1 to -25 was the predecessor of the Producer Act.

17:22A-40(a)(2), (4), (8) and (16), N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(a);

Count Two: \$8,500 for issuing six checks for the payment of premiums that were dishonored by Respondent's bank for insufficient funds where there was no demonstration of misappropriation or cancellation of policies, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(a);

Count Three: \$5,000 for issuing six checks for the payment of premiums from a non-trust account, commingling premium funds with other funds, and failing to maintain a trust account in violation of N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17C-2.1(b), and N.J.A.C. 11:17C-2.3(a); and

Count Four: \$2,500 for failing to maintain copies of receipts, in violation of N.J.S.A. 17:22A-40(a)(2), N.J.A.C. 11:17C-2.5(a), and N.J.A.C. 11:17C-2.6(b).

These penalties are necessary and appropriate under the above Kimmelman analysis given the Respondent's conduct. Respondent did not pay C.L.'s full premium, did not maintain a trust account, which caused checks for premiums to be dishonored for insufficient funds, and failed to maintain records. Counts One and Two are the most serious in that they involve fraudulent conduct in violation of N.J.S.A. 17:22A-40(a)(16). Accordingly, the fines imposed for these counts reflect this egregious conduct. I note that \$26,000 is far less than the maximum amount could be imposed under N.J.S.A. 17:22A-45, which allows the imposition of up to \$5,000 for the first violation and up to \$10,000 for any subsequent violations of the Producer Act.

Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to impose reimbursement of the costs of investigation. The ALJ recommended that the Respondent pay costs of investigation in the amount of \$400. This amount is consistent with the amount in the Certification of Investigator

Jared Stewart. Stewart Cert., ¶¶ 17-20, Ex. J attached thereto. Accordingly, I ADOPT the amount and ORDER the Respondent to reimburse the Department for the costs of investigation in the amount of \$400.


CONCLUSION

Having carefully reviewed the Initial Decision and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in Initial Decision, except as MODIFIED as set forth herein. Specifically, as to Count One, I ADOPT the ALJ's conclusion and hold that Andrade violated N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16); N.J.A.C. 11:17A-4.10; N.J.A.C. 11:17C-2.1(a); and N.J.A.C. 11:17C-2.2(a). As to Count Two, I ADOPT the ALJ's conclusion and hold that Andrade violated N.J.S.A. 17:22A-40(a)(2), (4), and (8); N.J.A.C. 11:17A-4.10; N.J.A.C. 11:17C-2.1(a); and N.J.A.C. 11:17C-2.2(a). I MODIFY the Initial Decision to specifically find that Andrade also violated N.J.S.A. 17:22A-40(a)(16). As to Count Three, I ADOPT the ALJ's conclusion and hold that Andrade violated N.J.S.A. 17:22A-40(a)(2) and (8); N.J.A.C. 11:17C-2.1(b); and N.J.A.C. 11:17C-2.3(a). Finally, as to Count Four, I ADOPT the ALJ's conclusion and hold that Andrade violated N.J.S.A. 17:22A-40(a)(2); N.J.A.C. 11:17C-2.5(a); and N.J.A.C. 11:17C-2.6(b).

I further MODIFY the recommended civil monetary penalty and ORDER the Respondent to pay a total of \$26,000 in fines and \$400 in costs of investigation and MODIFY the Initial Decision to allocate the monetary penalties among the various counts as set forth above. Lastly, I ADOPT the recommended suspension of Andrade's license; however, I MODIFY the length of the suspension and hereby ORDER the suspension of Andrade's license for two (2) years effective as of the date of this Final Order and Decision, further ORDER that Andrade shall not be eligible

for reinstatement of his license until he provides evidence to the Department that he has established a trust account in accordance with N.J.A.C. 11:17C-2.3(a).

It is so ORDERED on this 4th day of April 2019.



Marlene Caride
Commissioner

JD Andrade FOFinal Orders-Insurance