

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL Dkt. No.: BKI 06053-14  
Agency Ref. No.: 14-46 &14-130

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Commissioner of the New Jersey		)	
Department of Banking and Insurance,		)	
	Petitioner	)	DECISION AND ORDER
		)	ON INTERLOCUTORY REVIEW
v.		)	OF NOVEMBER 6, 2019 ORDER
		)	
John Savadjian,		)	
	Respondent.	)	
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This matter comes before the Commissioner of the New Jersey Department of Banking and Insurance (“Commissioner”) pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.A.C. 1:1-1 to -21, N.J.A.C. 1:1-14.10, the New Jersey Insurance Producer Licensing Act of 2001 at N.J.S.A. 17:22A-26 to -48 (“Producer Act”) and all powers expressed or implied therein.

On November 14, 2019, Petitioner, the New Jersey Department of Banking and Insurance (“Department”), requested interlocutory review of the November 6, 2019 decision (“November 6, 2019 Order”) issued by Administrative Law Judge Barry E. Moscovitz (“ALJ”). The ALJ’s November 6, 2019 Order interpreted the Commissioner’s October 16, 2018 Decision and Order No. A18-111 (“Order No. A18-111”), which related to the authentication and admission into evidence of specific pieces of documentary evidence in the underlying hearing(s) in this matter.

Specifically, this request for interlocutory review concerns an interpretation made by the ALJ in relation to Order No. A18-111, which modified the ALJ’s August 29, 2018 Order Barring

Testimony (“August 29, 2018 Order”) and ruled that the Department satisfied the requirements for authenticity and admissibility of a report created by Prudential’s Corporate Investigations Division (“CID Report”), detailing the Corporate Investigations Division’s (“CID”) investigation into the Respondent, and its annexed exhibits, which included an Excel Spreadsheet with embedded audio recordings and information about the calls that the Respondent allegedly made to Prudential’s Customer Service Office (“Excel Spreadsheet”). The ALJ ruled in his November 6, 2019 Order “that the Excel Spreadsheet, PRU-009042, which is a paper spreadsheet, is hereby admitted into evidence, and since the digital recordings embedded in the Excel Spreadsheet remain inaccessible through it, the digital recordings remain inadmissible in this proceeding.” Id. at 4.

Respondent John Savadjian (“Respondent”) opposed the Department’s request for interlocutory review on or about November 19, 2019.

On November 25, 2019, Acting Commissioner Justin Zimmerman<sup>1</sup> (“Acting Commissioner Zimmerman”) issued a letter granting the Department’s request for interlocutory review of the ALJ’s November 6, 2019 Order, pursuant to N.J.A.C. 1:1-14.10(a) (November 25, 2019 Letter”). Acting Commissioner Zimmerman noted in the letter that “based upon the parties’ submissions and the ALJ’s November 6, 2019 decision, there remains confusion surrounding the specific pieces of documentary evidence that the Department sought to enter into the record at the underlying hearing(s) in this matter, and for which, the ALJ’s previous ruling discussed.” November 25, 2019 Letter at 4. Acting Commissioner Zimmerman additionally noted that “[a]

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<sup>1</sup> The Respondent requested in his November 19, 2019 opposition brief that the Commissioner recuse herself from this interlocutory review and the remaining proceedings in this matter. However, the Commissioner fully believes that she can be impartial in this matter and will not be recusing herself in relation to this Decision and Order. However, it is noted that the Commissioner voluntarily recused herself from the initial interlocutory review request and extension order in this matter, as a result of the press of other Department business at the time each was issued.

thorough review of the record and all proffered evidence is . . . needed,” and requested that the parties submit supplemental briefs that included information, documentation, and/or certifications that addressed the following:

- A detailed description and submission of copies of the specific pieces of documentation in the exact format that the Department sought to admit into evidence and for which, the ALJ ruled to not admit and which are the subjects of the current motion for interlocutory review;
- A detailed description of the format of the Excel Spreadsheet that was presented for introduction into evidence during the underlying hearing(s) in this matter;
- A detailed description regarding what version of the Excel Spreadsheet was marked as PRU-009042. Specifically, was PRU-009042 only the computer printout or paper copy of the Excel Spreadsheet or was PRU-009042 the electronic version of the Excel Spreadsheet;
- Set forth whether each piece of documentation was marked for identification during the underlying hearings(s) in this matter, and if so, the marking for each; and
- Is the electronic version of the Excel Spreadsheet, with embedded audio recordings, on a CD, flash drive, or other device that is a separate piece of evidence from the CD originally discussed in this matter that contains the audio recordings?

Id. at 4-5.

Pursuant to Acting Commissioner Zimmerman’s requests, the Department submitted its supplemental brief on November 29, 2019 (“Department’s November 29, 2019 Brief”), and stated that the Department marked a paper copy of the Excel Spreadsheet as PRU-009042.000001 through PRU-009042.000016,<sup>2</sup> an electronic version of the Excel Spreadsheet as PRU-009042,<sup>3</sup>

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<sup>2</sup> The Department stated that the paper version of the Excel Spreadsheet was marked as “PRU-00942.000001 through PRU-00942.0000016.” This appears to be a typographical error. A review of the record provided by the parties shows that the Prudential bates stamp numbering on the paper version of the Excel Spreadsheet is “PRU-009042.000001 through PRU-009042.000016.” As such, this latter version will be referenced.

<sup>3</sup> The Department stated that the electronic version of the Excel Spreadsheet was marked as “PRU-00942;” however, this additionally appears to be a typographical error, and the reference should be “PRU-009042.” As such, the latter version will be referenced.

and the CD with the audio recording of the calls as 0768 for identification at the underlying hearings in this matter. Department's November 29, 2019 Brief at 7 and 9-10. However, the Department noted that it did not attempt to admit the CD marked as 0768 into evidence. Id. at 10.

The Department reproduced a section from Order No. A18-111 in relation to Acting Commissioner Zimmerman's request for a detailed description of the format of the Excel Spreadsheet that was presented for introduction into evidence during the underlying hearing(s) in this matter. Ibid. (citing Order No. A18-111 at 50). Additionally, the Department attached an electronic version of the Excel Spreadsheet to its November 29, 2019 Brief as Exhibit B, which was provided on a DVD-R. Ibid. The DVD-R has a white label on it that contains the following typed language: "DoBI v. Savadjian, OAL DKT NO. BKI-6053-14, Petitioner's Exh. 13.5<sup>4</sup>/PRU-009042."<sup>5</sup> Id. at Exhibit B.

On December 4, 2019, the Respondent submitted his supplemental brief ("Respondent's December 4, 2019 Brief"), which reiterated his previous arguments and did not include any specific responses to the requests made by Acting Commissioner Zimmerman in his November 25, 2019 Letter.

On December 4, 2019, Order No. A19-115 was issued granting an extension of time to December 24, 2019 to issue a decision in this matter, pursuant to N.J.A.C. 1:1-14.10(c).

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<sup>4</sup> It appears that the typed language on the white label originally stated "Petitioner's Exh. 13." The "13" was blacked out with a black marker and "13.5" was handwritten in the same black marker.

<sup>5</sup> The Department, however, did not provide a complete copy of the CID Report and all annexed exhibits.

## LEGAL DISCUSSION AND ANALYSIS

### Authority of an Agency Head

As noted in Order No. A18-111, N.J.A.C. 1:1-15.1(c) affords an ALJ, as trier of fact, broad discretion in determining whether to admit evidence at a hearing. As such, the ALJ is tasked with determining whether the probative value of the evidence offered is substantially outweighed by the risk that its admission would create an undue consumption of time or create substantial danger of undue prejudice or confusion.

However, the Legislature specifically addressed the role of the ALJ in the review of contested matters, stating that the OAL shall not “deprive the head of any agency of the authority to . . . adopt, reject or modify the findings of fact or conclusions of law of any administrative law judge.” N.J.S.A. 52:14F-7. The legislative intent was reaffirmed by In re Appeal of Certain Sections of the Unif. Admin. Procedure Rules, 90 N.J. 85, 94 (1982), which held that ALJs “have no independent decisional authority.” The Legislature preserved agency jurisdiction and regulatory responsibility, with the agency retaining “the exclusive right ultimately to decide these cases.” N.J. Election Law Enf’t Comm’n v. DiVincenzo, 451 N.J. Super. 554, 566 (App. Div. 2017) (quoting King v. N.J. Racing Com., 103 N.J. 412, 417 (1986)). See also N.J.S.A. 52:14B-10(c) (gives the head of an agency the power to “adopt, reject or modify the recommended report and decision” of an ALJ); N.J.S.A. 52:14F-7(a) (The APA “shall [not] be construed to deprive the head of any agency of the authority . . . to determine whether a case is contested or to adopt, reject or modify the findings of fact and conclusions of law of any” ALJ); and N.J.S.A. 52:14F-8(b) (providing that no ALJ shall hear a contested case in which the agency head has determined “to conduct the hearing directly and individually”).

Furthermore, leave may be granted in cases for good cause shown or where justice suggests the need for interlocutory review. In re Appeal, 90 N.J. at 100. Good cause exists when the Commissioner deems it likely that an OAL order “will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.” Ibid.

In addition, the New Jersey Supreme Court in In re Kallen, 92 N.J. 14 (1982), examined whether an agency head appropriately remanded a hearing back to the OAL to admit further evidence prior to the entry of a final decision, and held that “because the agency has the statutory jurisdiction to set and enforce regulatory policy, the final decision in contested cases is entrusted solely to the agency head.” In re Kallen, 92 N.J. at 20 (citing In re Appeal, 90 N.J. at 96). Moreover, “an agency head has the sole power to make the final decision in contested cases and . . . an ALJ does not have the authority to refuse to comply with an order of remand of an agency head.” Id. at 30.

The Commissioner is vested with the sole regulatory authority over the Respondent as an insurance producer. N.J.S.A. 17:22A-26 to -48; See also In re Appeal, 90 N.J. at 99. The Respondent has been ordered to show cause as to serious allegations of fraudulent conduct and dishonesty involving the alleged recorded statements to Prudential. The August 29, 2018 Order and the November 6, 2019 Order have an enormous impact on the scope of issues and presentation of evidence. As such, the granting of interlocutory review of both of these Orders was appropriate.

### **Issues and Determination on Interlocutory Review**

#### **Order No. A18-111**

In their briefs related to the current interlocutory review request, the parties reiterated their previous arguments related to the authentication and admissibility requirements of the electronic

version of the Excel Spreadsheet with embedded audio recordings. However, these arguments were already previously discussed and ruled upon in Order No. A18-111 and will not be reanalyzed again. The Commissioner refers the parties to review the ruling set forth in Order No. A18-111, which stated that the Department had sufficiently met the low burden of authentication in an administrative proceeding as it related to the CID Report and annexed exhibits, including the Excel Spreadsheet with embedded audio recordings. Order No. A18-111 at 46. The ruling set forth in Order No. A18-111 clearly refers to the electronic version of the Excel Spreadsheet and not the paper version of the Excel Spreadsheet, which the Respondent is now arguing. Below is a summary of the Commissioner's ruling, as set forth in Order No. A18-111.

In Order No. A18-111, the Commissioner noted that administrative hearings are not bound by statutory or common law rules of evidence except where specifically provided by the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -31, ("APA") and evidentiary rulings will be made to protect "fundamental principles of fairness and justice and to aid in the ascertainment of truth". Id. at 34 (citing N.J.A.C. 1:1-15.1(b)).

The Commissioner addressed the authentication of evidence in this matter at length. She noted that pursuant to N.J.A.C. 1:1-15.6, where a genuine question of authenticity is raised, a judge may accept submission of proof, in the form of an affidavit, certified document or other similar proof. Id. at 36. Further, the Commissioner stated that the bar for authentication is not designed to be onerous and "as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." Id. at 36 (citing State v. Hannah, 448 N.J. Super. 78, 89 (App. Div. 2016); N.J.R.E. 901).

As it relates to the authentication of the audio recordings embedded in the electronic version of the Excel Spreadsheet, the Commissioner applied the test set forth in State v. Driver, 38

N.J. 255 (1962), which requires that the proponent show: that the device can record the conversation or statement; that its operator was competent; that the recording is authentic and correct; and that no changes, additions, or deletions have been made. The Commissioner found that the first factor, whether the device can record the conversation or statement, was not at issue. Order No. A18-111 at 36 (citing Order No. A17-105 at 24 and August 29, 2018 Order at 20). The Commissioner found that the second prong, whether the operator of the recording system was competent, was adequately addressed in Order No. A17-105.<sup>6</sup> Id. at 37.

The Commissioner held that a prima facie showing exists to support a finding that the audio recordings embedded in the electronic version of the Excel Spreadsheet are accurate and correct, as required by the third prong in Driver. Id. at 39. The certifications of Daxesh Patel (“Patel”), Thomas Schreck (“Schreck”), and the testimony of Charles Shanley (“Shanley”) support such a finding. Ibid.

As to the final prong of Driver, the Commissioner found that the record indicated that a prima facie showing had been made and that no changes, additions, or deletions have been made to the audio recordings embedded in the Excel Spreadsheet, relying on Acting Commissioner Peter Hartt’s prior finding that Shanley had direct knowledge to demonstrate that the audio recordings are what they purport to be, without alteration, and that the written entries on the Excel Spreadsheet contain information that should be used to further authenticate and verify the reliability of the audio recordings. Id. at 39-40 (citing Order No. A17-105 at 25-26).

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<sup>6</sup> The Commissioner noted that Acting Commissioner Peter Hartt previously found that there is no indication or challenge from the Respondent as to the competency of the operator under prong two of Driver. Id. at 37 (citing Order No. A17-105 at 24). The Commissioner also noted that the second factor no longer requires separate consideration because of technological advances. See August 29, 2018 Order at 20 (citing State v. Nantambu, 221 N.J. 390, 406 (2015)).



Lastly, the Commissioner noted that the documentation submitted indicated that audio recordings created in the Verint System are “tamper proofed automatically” and that there was no documentation that has been submitted that indicated that a user is able to download an audio recording from the Verint System, modify it, and then upload that same audio recording back into the Verint System to replace the original audio recording. Id. at 41 (citation omitted).

The Commissioner held that based on the record provided, there was sufficient direct and circumstantial proof in the record to find that the Excel Spreadsheet is an authentic writing, based on Schreck’s certification detailing the creation of the Excel Spreadsheet, which was not adequately contemplated in the ALJ’s August 29, 2018 Order, and Shanley’s subsequent recreation of Schreck’s investigation. Id. at 44. The Commissioner further held that Shanley’s recreation of Schreck’s investigation constitutes circumstantial evidence as described under Konop v. Rosen, 425 N.J. Super. 391, 411 (App. Div. 2012) (circumstantial evidence to authenticate a writing includes “intimate knowledge of information which one would expect only the person alleged to have been the writer or participant to have”). Thus, the Commissioner concluded that the embedded calls and the data in the Excel Spreadsheet have been sufficiently authenticated to permit admission into the record. Id. at 45.

As it relates to the CID Report, the Commissioner found that Shanley’s testimony established that the CID Report and exhibits are what the proponent claims them to be. Id. at 46 (citation omitted). Furthermore, the Commissioner noted that there was no evidence that suggested that the CID Report was not what it purports to be. Upon a review of the record, the Commissioner found that Shanley’s testimony satisfied the low burden of authentication in an administrative proceeding. Ibid. The Commissioner emphasized that no evidence had been presented to suggest that the CID Report has been altered. Ibid.

The Commissioner concurred with the ALJ's determination that the audio recordings contained in the Excel Spreadsheet were not hearsay because they were not offered to prove the truth of the matter asserted. Order No. A18-111 at 47 (citing August 29, 2018 Order at 31). The Commissioner additionally concurred with the ALJ that the CD,<sup>7</sup> the written submissions on the Excel Spreadsheet, and the CID Report are hearsay. The Commissioner concluded that the audio recordings were not hearsay and were admissible, unless another Rule of Evidence barred their admission. Id. at 47. However, based on a review of the record, the Commissioner held that the written statements on the Excel Spreadsheet and the CID Report constituted a business record exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6).<sup>8</sup>

As it relates to the written statements on the Excel Spreadsheet, the Commissioner noted that no evidence was presented to suggest that Schreck was not the author of the Excel Spreadsheet and the certification of Tino Kryprianou ("Kryprianou"), the Respondent's digital forensics expert, found that the spreadsheet was last modified on July 9, 2013. Order No. A18-111 at 51 (citing Schreck Cert. at ¶4, ¶5, ¶9, and ¶10 and Kryprianou Cert. at ¶45-46). The Commissioner found that this evidence, when read together, indicated that the written statements that appeared on the Excel Spreadsheet were made near or at the time of observation by a person with actual knowledge or from information supplied by such a person. Id. at 51. Further, the Commissioner established

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<sup>7</sup> The Commissioner noted that the Department was not seeking admission of the CD marked 0768, but the admission of the audio recordings embedded in the Excel Spreadsheet. Order No. A18-111 at 47. The Commissioner also held that as the audio recordings had been deemed as non-hearsay, no hearsay analysis was required as it relates to the audio recordings. Ibid.

<sup>8</sup> Business records are defined as statements contained in a writing, made near or at the time of observation by a person with actual knowledge or from information supplied by such a person, made in the regular course of business, and, it was the regular practice of the business to make the record, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy. N.J.R.E. 803(c)(6).

that based on Schreck's certification, this writing was made in the course of regular business. Id. at 51 (citing Schreck Cert. ¶¶4-11). Lastly, the Commissioner found that the final prong of the business records analysis, that sources of information or the method, purpose, or circumstances of preparation indicate that the Excel Spreadsheet is trustworthy, had been met, by relying on the finding of the Respondent's digital forensics expert, Kryprianou, that the Excel Spreadsheet has not been modified since July 9, 2013 and Shanley's testimony that the written entries contained within the Excel Spreadsheet correspond with the original audio recordings stored in the Verint System. Id. at 52 (citing Kryprianou Cert. at ¶46; T2,<sup>9</sup> 100:14-101:24).

As it relates to the CID Report, the Commissioner held that because a witness may testify to evidence based on personal knowledge obtained through hearsay, pursuant to N.J.A.C. 1:1-15.8(c), Shanley's statement that he was informed by an employee of Prudential's legal department that Schreck authored the report meets the first requirement to constitute a business record exception. Id. at 54 (citing T2, 52:20-53:15). The Commissioner held that that the CID Report was made in the regular course of businesses by Schreck. Id. at 54. Lastly, the Commissioner held that the sources of information or the method, purpose, or circumstances of preparation indicated that the CID Report was trustworthy and there was no evidence to support a finding that the report was made for an unusual or suspect purpose or by utilizing an untrustworthy method. Id. at 55.

As it relates to the issue of "hearsay within hearsay,"<sup>10</sup> the Commissioner noted that hearsay is admissible if each hearsay statement meets an exception to the hearsay rule. Ibid. The

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<sup>9</sup> T2 refers to the Transcript of Recorded Proceedings on August 29, 2017.

<sup>10</sup> N.J.R.E. 805 contemplates hearsay within hearsay, which reads: "[a] statement within the scope of an exception to Rule 802 shall not be inadmissible on the ground that it includes a statement made by another declarant which is offered to prove the truth of its contents if the included

Commissioner found that while portions of the CID Report and Excel Spreadsheet contained hearsay within hearsay and may not be admissible or should be given limited weight, the entire CID Report and electronic version of the Excel Spreadsheet should not be disregarded as they were admissible pursuant to the business record exception to the hearsay rule. Ibid. However, an analysis of whether such statements constitute hearsay, whether the truth of the statements therein are competent and/or relevant to proving the charges alleged by the Department in the Amended Order to Show Cause in this matter and whether they should be admitted is beyond the scope of that interlocutory review and the issue was remanded to the ALJ. Id. at 56.

Lastly, the Commissioner noted that applying the residuum rule requires identifying the "ultimate finding of fact" that must be supported by a residuum of competent evidence. Id. at 57 (citation omitted). Further, the Commissioner noted that the residuum rule does not require that every fact be based on a residuum of legally competent evidence, but is concerned with its weight relative to facts material to the case. Ibid. The ALJ found that hearsay cannot provide the residuum for an ultimate finding of fact, but then required residuum to support the authenticity of the CD, Excel Spreadsheet, and CID Report. Id. at 58 (citing August 29, 2018 Order at 29). The Commissioner held that was a misapplication of the residuum rule, as residuum plays no role in the authentication analysis and only applies to evidence that is inadmissible under the rules of evidence, but is permissible in administrative proceedings where the strict rules of evidence do not apply. Id. at 58.

The Commissioner thus ordered that the matter be remanded back to the OAL in accordance with the ruling therein that the Department had satisfied the requirements for

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statement itself meets the requirements of an exception to Rule 802." N.J.R.E. 802 states "Hearsay is not admissible except as provided by these rules or by other law."

authenticity and admissibility of the CID Report and annexed exhibits, including PRU-009042, the electronic version of the Excel Spreadsheet, and embedded audio recordings. Id. at 58-59.

### **November 6, 2019 Order**

The ALJ's November 6, 2019 Order reproduced sections of his August 29, 2018 Order and provided that "a recording of the calls is embedded in the Spreadsheet, but the Spreadsheet is a computer printout, so the audio recordings are not accessible through the Spreadsheet." See November 6, 2019 Order at 2. While the ALJ's August 29, 2018 Order did state that the Excel Spreadsheet was a paper copy or computer printout, it also stated that the Excel Spreadsheet contained audio recordings embedded therein, was an electronic writing, and discussed both the CD and Excel Spreadsheet in tandem when discussing the admissibility of computer-generated records. August 29, 2018 Order at 3, 25, and 32. As such, the ALJ's November 6, 2019 Order appears to now be attempting to clarify the ALJ's previous ruling in his August 29, 2018 Order, and states that the ALJ only ruled as to the authenticity and admissibility of the paper version of the Excel Spreadsheet, in conjunction with barring the CD and CID Report, in his August 29, 2018 Order. However, after the August 29, 2018 Order was issued, the parties, in their briefs related to the interlocutory review request of that August 29, 2019 Order argued, at length, regarding the electronic version of the Excel Spreadsheet, which contained the embedded audio calls. Neither the Department nor the Respondent argued, until the present interlocutory review request, that the Department may have only sought to admit the paper version of the Excel Spreadsheet into evidence in this matter. It appears that up until Order No. A18-111 was issued, the parties knew what the Department was seeking to admit into evidence at the underlying hearings in this matter, and only now that the ALJ has attempted to clarify his previous ruling is the Respondent arguing

that the Department never sought to introduce the electronic version of the Excel Spreadsheet into evidence.

Moreover, the ALJ's November 6, 2019 Order stated that Order No. A18-111 could not have meant to admit the electronic version of the Excel Spreadsheet into evidence, as the electronic version "was never produced during discovery or at the hearing and [the Department] never challenged my ruling on interlocutory appeal regarding the authenticity and admissibility of the digital recordings."<sup>11</sup> November 6, 2019 Order at 3. However, based upon a review of the record provided by the parties, this assertion is incorrect. The Department contended both in its November 14, 2019 Brief and in the transcript from the August 29, 2017 hearing that the electronic version of the Excel Spreadsheet was provided to the Department by the Respondent in discovery. See Department's November 14, 2019 Brief at 15-16 and T2, 64:17-22. The Department maintained that Prudential produced the electronic version of the Excel Spreadsheet to the Respondent in response to the Respondent's subpoena duces tecum. Ibid. There was no evidence presented by the parties that suggested that the Department's contentions were incorrect. Additionally, the Department sought to project the electronic version of the Excel Spreadsheet at the August 29, 2017 hearing in this matter to have the electronic version of the Excel Spreadsheet identified by Shanley; however, the ALJ would not allow the Department to do so. See T2, 69:24 to 70:20. Nevertheless, the Department still attempted to authenticate the electronic version of the Excel Spreadsheet through the direct examination of Shanley. See T2, 99:17 to 105:21. As noted

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<sup>11</sup> This is a reference to the ALJ's August 29, 2018 Order, which discussed a compact disc containing audio recordings ("CD"); however, the Department's previous request for interlocutory review of the August 29, 2018 Order indicated that the Department sought to authenticate and admit into evidence the CID Report and its annexed exhibits, which included the electronic version of the Excel Spreadsheet, and not the audio recordings on the CD. See Department's September 6, 2018 Brief at 2-3 and 36. As such, Order No. A18-111 did not rule on the authentication or admissibility of the CD and the audio recordings contained thereon.

in Order No. A18-111, the testimony supplied by Shanley during this August 29, 2017 hearing was sufficient to authenticate the electronic version of the Excel Spreadsheet. The ALJ cannot now state that the Department failed to produce the electronic version for the Excel Spreadsheet at the August 29, 2017 hearing, when testimony regarding same took place and the ALJ affirmatively estopped the Department from projecting the electronic version of the Excel Spreadsheet during Shanley's testimony at the August 29, 2017 hearing. T2, 70:7-20.

However, it is noted that the Department failed to formally mark the electronic version of the Excel Spreadsheet for identification during the August 29, 2017 hearing. Pursuant to N.J.A.C. 1:1-15.7(a), the record of the proceedings must include references to all exhibits and as to each, the offering party, a description of the exhibit, and the marking. Moreover, the standard markings for exhibits shall be: (1) P = petitioner, (2) R = respondent. Additionally, the ALJ may direct additional markings for clarity. N.J.A.C. 1:1-15.7(c)7. A review of the August 29, 2017 transcript that was provided in an appendix to the Department's current request for interlocutory shows that the Department only marked two exhibits for identification at the hearing: (1) P-13: the CID Report and (2) P-48: the Thomas Schreck certification. See T2 at 3. While the Excel Spreadsheet was discussed by the parties and was used during Shanley's testimony during the August 29, 2017 hearing, neither version of the Excel Spreadsheet was separately marked and the parties referred to the Excel Spreadsheet as an exhibit to both Exhibits P-13 and P-48, e.g., Exhibit 5 of Exhibit P-13, or as "PRU-009042," which the Department argued is the electronic version of the Excel Spreadsheet. See Department's November 29, 2019 Brief at 7 and 9-10.

In response to the November 25, 2019 letter from Acting Commissioner Zimmerman, the Department argued that it marked the paper version of the Excel Spreadsheet as "PRU-009042.000001 through PRU-009042.000016" and the electronic version of the Excel Spreadsheet

as “PRU-009042.” Ibid. However, these markings appear to be bates stamp numbering that was done by Prudential during its investigation into the Respondent. These markings are not the exhibit markings that are required pursuant to N.J.A.C. 1:1-15.7(c)7. Thus, while sufficient testimony regarding the electronic version of the Excel Spreadsheet took place during the August 29, 2017 hearing, which supported the Commissioner’s findings regarding authenticity and admissibility of the electronic version of the Excel Spreadsheet in Order No. A18-111, the Department failed to mark the electronic version of the Excel Spreadsheet for identification, pursuant to N.J.A.C. 1:1-15.7.

In light of the above analysis, I disagree with the ALJ’s November 6, 2019 Order that the Department only sought to admit the paper version of the Excel Spreadsheet into evidence in this matter. The record is sufficient to support a finding that the Department did, in fact, attempt to produce the electronic version of the Excel Spreadsheet into evidence but was estopped from doing so by the ALJ. Moreover, and as noted in Order No. A18-111, the Department has sufficiently met the low burden of authentication in an administrative proceeding as it related to the CID Report and annexed exhibits, including the electronic version of the Excel Spreadsheet with embedded audio recordings. However, I direct the parties in this matter to clearly mark all evidence to be identified in accordance with N.J.A.C. 1:1-15.7, which will clarify the record and allows all parties to fully understand the evidence at issue.

### **CONCLUSION**

For the reasons set forth above, the ALJ’s November 6, 2019 Order is **MODIFIED**. Moreover, for the above reasons it is on the 24<sup>th</sup> day of December, 2019

**ORDERED** that:



This matter is hereby remanded to the OAL for continued proceedings in accordance with the ruling herein that Order No. A18-111 specifically directed that the electronic version of the Excel Spreadsheet with embedded audio recordings be admitted into evidence, as the Department had satisfied the requirements of authenticity and admissibility through its direct examination of Charles Shanley at the August 29, 2017 hearing in this matter.

It is further ORDERED that:

The Department be permitted to formally mark into evidence the electronic version of the Excel Spreadsheet with embedded audio recordings in accordance with N.J.A.C. 1:1-15.7.

  
Marlene Caride  
Commissioner

December 24, 2019

Savadjian Interlocutory Review Order 12.24.2019/Final Orders ~ Insurance/Interlocutory Review/AV Savadjian 11.2019