

On November 6, 2002, the Administrative Law Judge¹, Ella D. Johnson, conducted a hearing in this matter. The department was represented by Assistant Attorney General Kathleen Dahlin. Respondent and Gilbertson Insurance were represented by attorney Deryl K. Nielsen. Insurance Division Chief Investigator Bill Karalekas and policyholder Barbara Wilson testified on behalf of the department. Respondent testified on his own behalf and called his wife, Judith Gilbertson, and his mother, Mary Edith Gilbertson, as witnesses.

Prior to and again at the hearing, Respondent requested a postponement. The department opposed Respondent's request. The ALJ denied Respondent's request to postpone the hearing but, at the close of the hearing, scheduled a telephone conference call for November 14, 2002, and directed that the record would close on December 12, 2002, to allow Respondent to submit documentation from his medical care providers. On November 26, 2002, Respondent submitted 5 additional exhibits, requesting that they be made part of the record. On December 12, 2002, Respondent submitted another 7 exhibits, requesting that they also be made part of the record. The department objected that all but one of the records were matters other than medical records and most were in existence before the date of the hearing, but were neither produced as requested in discovery nor offered at the hearing. A telephone hearing was held on December 19, 2002, to consider the department's objections to the introduction of the exhibits (other than medical records).

On January 30, 2003, the ALJ issued a Proposed Order finding that Respondent: (1) violated ORS 744.013(2)(d)(1999) in four instances by receiving payments for insurance but failing to timely remit those payments to the insurer, thereby causing the insurer to erroneously terminate the policies; (2) violated ORS 744.013(2)(d)(1999) by receiving several automobile insurance premium payments from a single insured but failing to timely remit those payments, thereby causing the insurer to erroneously terminate the automobile insurance; and (3) violated ORS 744.013(2)(g)(1999) by misrepresenting facts to an insured. The ALJ recommended that Respondent's license be suspended for six months and that Respondent be assessed a civil penalty of \$1,000. The ALJ did not make any conclusion or offer any recommendation regarding Gilbertson Insurance. Respondent filed exceptions to the Proposed Order on March 1, 2003. The department has reviewed and considered the exceptions.

¹ At the time it was drafted, the Proposed Order referred to Ms. Johnson as "Administrative Law Judge." This characterization was inconsistent with *Tew v. DMV*, 179 Or App 443, 445 at n. 1, 40 P3d 551 (2002). However, since that time, the Oregon legislature enacted House Bill 2526, in which Panel adjudicators are now characterized as "administrative law judges." See Or Laws 2003, ch ____, §§ 3, 4 (HB 2526 Enrolled). We use that term or the acronym, ALJ, throughout.

The department rejects certain determinations made by the ALJ and issues this Amended Proposed Order in accordance with OAR 137-003-0655(3). In accordance with Oregon law, the department identifies and explains its modifications to the form of order issued by the ALJ. Or Laws 1999, ch 849, § 12(2). In addition, the department adds new factual findings that address critical issues of fact upon which the ALJ did not make factual findings.

Issues

1. Whether Respondent received four payments on behalf of three insureds and failed to timely send the payments to the insurance companies, thereby violating ORS 744.013(2)(d) (1999);

2. Whether Respondent received several automobile insurance premium payments from Barbara Wilson and failed to timely send the payments to the insurer causing the insurer to cancel Wilson's insurance, thereby violating ORS 744.013(2)(d)(1999);

3. Whether Respondent misrepresented various facts to Wilson and Workmen's Auto Insurance Company (Workmen's)² such that Respondent's practices were dishonest or untrustworthy, thereby violating ORS 744.013(2)(g); and

4. Whether, if proven, these violations warrant revocation of Respondent's insurance agent license, assessment of a civil penalty of \$5,000 and revocation of the agency license issued to Gilbertson Insurance.

Evidentiary Rulings

The department's Exhibits A1 through A44 and Exhibit A46 were admitted into the record at the hearing. Respondent objected to Exhibit A45, which was offered as demonstrative evidence of when payments were made by Wilson to Gilbertson and when Workmen's received the payments. The ALJ took under advisement the objections to Exhibit A45 and ultimately admitted it into the record as relevant, material, and not unduly repetitious. See OAR 137-003-0610.

Respondent's Exhibits 101 through 113 were admitted into the record at the hearing.³

² The Proposed Order identified only representations made by Respondent to Wilson as an issue. Alleged violations of ORS 744.013(2)(g)(1999) include not only representations made to Wilson, but also representations made to Workmen's Auto Insurance Company (Workmen's). See Amended Notice, p. 2 ("Subsequently, Gilbertson sent the application to Workmen's thereby representing to Workmen's that Wilson had applied for a new policy. This representation was false and Gilbertson knew that it was false. Workmen's issued the policy.")

By letter dated November 26, 2002, Respondent offered “supplemental exhibits” 114 through 118 for inclusion in hearing the record. At the telephone conference on December 19, 2002, the parties discussed these exhibits. The ALJ indicated that she would take the submission under advisement and issue a ruling. The ALJ failed to address Exhibits 114 through 118 in the Proposed Order. The department rules that Exhibits 114 through 118 are admitted into the record, notwithstanding that the record was left open only for the introduction of Respondent’s medical records and Exhibits 114 through 118 are not medical records. See Appendix A.

On December 12, 2002, Respondent submitted additional “supplemental exhibits” 119 through 125 for inclusion in the hearing record. The department and Respondent had agreed at the hearing that after Respondent visited his medical care providers post-hearing, he could submit additional medical records into the hearing record. Those medical records are contained in Exhibit 124. In the telephone conference on December 19, 2002, the ALJ ruled that Exhibits 119 through 123 and Exhibit 125 were excluded from the record.⁴ But in the Proposed Order, the ALJ stated that Exhibits 119 through 125 should be admitted as relevant, material and not unduly repetitious. Proposed Order p. 2.⁵ The department rules that Exhibit 124 is admitted into the record as the medical records prepared by Respondent’s providers. The department rules that Exhibits 119 through 123 and Exhibit 125 are admitted into the record, notwithstanding that they are not records prepared by Respondent’s medical providers.

Findings of Fact

1. Gilbertson has been in the insurance business and a licensed Oregon insurance agent for 24 years. He is the sole owner of Gilbertson Insurance in Salem, Oregon, which he took over from his father. He holds several appointments, including an appointment by Workmen’s (Ex. A10). Gilbertson also had an agency/broker agreement with the Arrowhead Insurance Agency (Arrowhead) to sell Clarendon National Insurance (Clarendon), which Arrowhead administers. Arrowhead suspended the agreement on August 3, 1999. (Ex. A5). Arrowhead requires agents to submit premiums within 48 hours of payment but the practice is that payments made within five days will not result in a policy lapse. (Ex. A12; Ex. A15; test. of Gilbertson).

³ The ALJ incorrectly stated that Exhibits 101 through 114 were admitted into the record. See Proposed Order, p. 2.

⁴ The ALJ stated “I’m going to exclude Exhibits 119, 120, 121, 122, 123 and 125.” Telephone Conference, Dec. 19, 2002.

⁵ The ALJ also indicated that Exhibits 119 through 125 consist “of articles concerning ADHD [attention deficit hyperactive disorder] and Respondent’s medical records.” Proposed Order p. 2. With respect to Exhibit 123, a check, this characterization is incorrect.

2. On November 12, 1997, the department suspended the insurance agent licenses issued to Gilbertson and Gilbertson Insurance for six months. (Exs. A2, A3). The department found that Gilbertson failed to remit in a timely manner to Wasatch Crest Mutual Insurance Company (Wasatch) monies that he had received from at least seven insureds for application or premium payments. (Ex. A3). As a result, Wasatch cancelled the insurance policies. (Ex. A3). On December 10, 1996, Wasatch terminated Gilbertson's appointment for failure to timely submit premiums. (Exs. A3, A4). The department ultimately concluded that Gilbertson violated ORS 744.013(2)(d) (illegal withholding) and (2)(g) (a source of injury or loss to the public). (Ex. A3). The suspension was lifted on January 13, 1998 when the department determined that Gilbertson was in compliance with applicable insurance regulatory laws. (Ex. A4).

3. In July 1999, Larry Nelson called the Insurance Division. (Test. of Karalekas). The call was referred to Bill Karalekas, Chief Investigator, Insurance Division. *Id.* Nelson advised that he had received a notice canceling his automobile insurance, although he believed that his premiums were paid up. *Id.* The policy was written with Clarendon and placed through Gilbertson. (Exs. A8, A9).

4. By letter dated August 15, 2000, the department contacted Gilbertson inquiring about the cancellation of the Clarendon insurance purchased by Nelson from Gilbertson in 1999. (Ex. A6). Gilbertson responded that Nelson had made his premium payments in a timely manner, but Gilbertson failed to forward the April 1999 premium paid by Nelson to Clarendon. (Ex. A7). Gilbertson did not realize that he had failed to pay the premium until later. (Test. of Gilbertson). Gilbertson told Nelson what had happened and offered to pay the remainder of the six-month premium amount if Nelson wanted to start a new policy, which he did. (Exs. A7, A8). Later Gilbertson admitted that he realized he should have sent in the money as it belonged to the insurance company, not Nelson. (Test. of Gilbertson).

5. The department subsequently investigated Gilbertson's insurance operations. In particular, the department inquired of Arrowhead whether there were any other policies processed by Gilbertson (other than the Nelson policy) that were cancelled between December 14, 1998, and the date of Arrowhead's suspension of its agreement with Gilbertson. (Ex. A11). Arrowhead provided a list of 266 policies that were handled by Gilbertson and were cancelled for non-payment of premiums. (Ex. A19). Relevant to these proceedings, Gilbertson failed to timely submit four premium payments. These included a payment of \$61 made by Nelson on December 30, 1998, but not submitted until January 11, 1999; a payment of \$61 made by Nelson on April 29, 1999, but not submitted until July 28, 1999; a payment of \$68 made by Justo Ramirez on April 9, 1999, but not submitted until April 15, 1999; and a payment of \$177 made by Dianne Altamirano on May 28, 1999, but not submitted until June 30, 1999. (Exs. A10, A15, A21 through A24).

6. On March 9, 2001, Barbara Wilson purchased automobile insurance, policy number 111883, for a Ford Bronco and a Subaru Brat from Gilbertson to be provided by Workmen's. (Ex. A27). The policy period was six months. (Ex. A29). Wilson made monthly payments in person to Gilbertson at his office. (Test. of Wilson). Wilson paid only the minimum amounts due each month. *Id.* She did this because she was the only person working in her family – her husband was disabled – and it stretched her funds further. *Id.* Thereafter, Wilson requested that the policy be changed to delete the Subaru and add a Chevy van. On June 26, 2001, Gilbertson asked that Workmen's make this change. (Ex. 104). Workmen's failed to delete the Subaru resulting in more premiums due. (Test. of Gilbertson). Wilson timely paid her premium payments to Gilbertson. (Exs. A28, A33 through A40). Gilbertson failed to timely submit, or in some cases failed to submit, Wilson's premium payments to Workmen's. (Exs. A28, A33 through A40, A45) Gilbertson did not submit three payments made by Wilson – one on June 4, 2001, one on September 6, 2001, and one on October 12, 2001. (Exs. A35, A39, A40, A45).

7. On August 11, 2001, Workmen's cancelled Wilson's insurance due to non-payment of premium. (Ex. A46). Wilson was unaware that her insurance had been cancelled. Wilson had contacted Gilbertson numerous times asking him to fax her current insurance identification cards showing that she had automobile insurance coverage. (Test. of Wilson). Wilson learned of the cancellation in October 2001 because she called another insurance company to obtain a quote. *Id.* They checked the status of her policy and advised it was not in force. *Id.* Because Wilson needed insurance for her job, she told her employer. *Id.* Wilson also contacted Gilbertson. *Id.* He told her he would take care of the matter. *Id.* She drove to his office to pay her premium. *Id.* On October 12, 2001, Wilson wrote a check for \$69 to Gilbertson. (Ex. A40).

8. Unbeknownst to Wilson, after Gilbertson received her telephone call, he began preparing a new application form for her, not to reinstate her policy but to obtain a new Workmen's automobile insurance policy for her. (Ex. A32; test. of Wilson; Gilbertson). By creating a new policy application, Gilbertson could generate automobile temporary insurance cards for Wilson. (Ex. A32; test. of Gilbertson). Gilbertson filled out the application form using false information. Specifically, he used his own telephone number for her home and work numbers. (Ex. A32; test. of Wilson; test. of Gilbertson). Gilbertson used his own social security number in place of Wilson's social security number and altered his social security number by one digit to use in the place of Wilson's husband's social security number. *Id.* Gilbertson indicated a date when Wilson received her driver's license that was not correct. *Id.* He reported that Wilson had lived in her residence for one year when she had actually lived there fifteen years. *Id.* He listed an address for her employer that was not correct. *Id.* He indicated on the application that Wilson was a manager when she was really an intake worker. *Id.* Gilbertson listed the same

VIN number for both of the automobiles covered by the application. *Id.* Gilbertson made these false and mistaken statements because Wilson was on the way to his office and he had to insert information into the computer generated form to get to the last page and print off the insurance identification cards. (Test. of Gilbertson). Gilbertson admitted that he used his own social security number, used his own home phone number, made up the number of years that Wilson had lived in her residence, made up the number of years Wilson had held a driver's license, made up Wilson's employer's address, and answered the question whether Wilson had prior insurance "no" when he knew that she had been insured. (Test. of Gilbertson). He did all of these things in order to process the identification cards and obtain a new policy for Wilson with a discount that would not have been available if he had truthfully indicated she was previously insured with Workmen's. (Test. of Gilbertson). Even though this last question was listed under "Important Underwriting Information – Complete Disclosure Required," Gilbertson did not believe he needed to answer it truthfully. (Ex. A32; test. of Gilbertson). Gilbertson sent the application to Workmen's representing that Wilson applied for a new policy, policy number 917662. (Exs. A32; test. of Wilson; test. of Gilbertson.) Gilbertson believed that the original policy had been "incorrectly" cancelled because Workmen's had mistakenly added a third vehicle, thereby increasing the premiums. (Test. of Gilbertson). However, he took no affirmative action to attempt to correct the putative mistake. *Id.*

9. When Wilson learned that her policy had been cancelled, notwithstanding her payment of premiums, her employer suggested she contact the Insurance Commissioner. (Test. of Wilson). On October 12, 2001, Wilson filed a complaint with the Insurance Division. (Ex. A25). When Wilson later reviewed the materials that Gilbertson had given her, she realized that he had completed an application for a new policy and that she had been without insurance for a period of time from August to October 2001. (Test. of Wilson).

10. Gilbertson did not keep for his own use monies paid by insureds as premium payments. (Test. of Gilbertson; test. of Karalekas).

11. Gilbertson carries Errors and Omissions insurance, which protects when insureds' policies lapse due to an agent's negligence. (Ex. 106; test. of Gilbertson). But, if Wilson had been cited for driving without insurance or had lost her job because of the cancellation of her policy, Gilbertson's Errors and Omission policy would not cover Wilson's damages. (Ex. 106; test. of Gilbertson).

12. Gilbertson has been diagnosed with diabetes mellitus (type 2), hypoglycemia, and Adult Attention-Deficit Hyperactivity Disorder (ADHD). He was first diagnosed with diabetes in late August 1999. (Ex. 105; test. of Judith Gilbertson). Diabetes and hypoglycemia may cause impaired cognitive-motor functioning and a reduction in mental efficiency. (Ex. 111). Gilbertson's symptoms

included increased irritability and difficulty focusing. (Test. of Judith Gilbertson). He now controls his diabetes with exercise and diet, although he had not maintained his weight reduction, weighing 253 pounds versus the 238 pounds he weighed at the time of initial diagnosis. (Exs. 101, 124; test. of Judith Gilbertson).

13. Gilbertson was first diagnosed with ADHD on October 3, 2002 and referred to a psychiatrist for treatment. (Exs. 101, 105, 124). ADHD is classified as a mental disorder by the Diagnostic and Statistical Manual of Mental Disorders TR (4th Edition). ADHD is characterized by a persistent pattern of inattention and/or hyperactivity-impulsivity. (Ex. 110). Adults who suffer from ADHD have trouble with repetitive tasks, attention to detail, planning, organizing, and procrastination. Gilbertson's symptoms included impulsivity, an inability to stay organized, focused and on track, and difficulty in following through with tasks. He cannot concentrate on more than one thing at a time and is easily distracted. (Exs. 108, 109, 124; test. of Judith Gilbertson). Those who suffer from ADHD are also easily overwhelmed by everyday stress, are forgetful and routinely make careless mistakes. Although the disorder has no cure, it can be managed with medication, behavioral therapy, emotional counseling, and support. (Exs. 108, 109, 113). Gilbertson is now managing his disability with medication, counseling, and classes where he learns how to manage his ADHD. (Ex. 124; test. of Gilbertson).

14. Gilbertson is taking actions so that violations do not reoccur. In the future, Gilbertson will no longer accept premium payments at his office but will instead have the insureds send their payments directly to the insurance company. His mother will work with Gilbertson to assist him in organizing and managing the office procedures. Gilbertson has hired another agent to assist him with his workload. He will continue to manage his ADHD and diabetes. (Test. of Gilbertson and Mary Edith Gilbertson.)

15. With respect to Gilbertson Insurance, at all times relevant, Grant Gilbertson was the sole licensee for the firm. (Ex. A2).

Modifications to Factual Findings

For the reasons set forth below, the department deleted or modified certain factual findings made by the ALJ.

1. The department deleted the following phrase from Proposed Order Finding of Fact 4, "but had bound the coverage by notifying Clarendon of the payment by telephone." Such a finding is not a factual finding, but a legal conclusion. There is no evidence in the record that Clarendon was legally bound to provide coverage to Nelson – in fact, the evidence indicates that Clarendon cancelled the policy. Gilbertson *believed* that by telephoning Clarendon he had obligated Clarendon on

the coverage. In either case, the factual finding is not relevant to the conclusion that Gilbertson illegally withheld monies paid him by Nelson.

2. The department deleted the following phrase from Proposed Order Finding of Fact 4, “Nelson paid the next month’s premium.” This phrase was included in the sentence, “Gilbertson did not realize that he had failed to pay the premium until Nelson paid the next month’s premium.” This fact is not supported by the record. Gilbertson’s testimony is contrary.

3. The department deleted the following phrase from Proposed Order Finding of Fact 8, “on the three automobiles.” This phrase was included in the sentence, “On August 11, 2001, Workman’s [sic -Workmen’s] cancelled Wilson’s insurance due to non-payment of the full premium on the three automobiles.” This finding is not material to the ultimate finding of fact that Workmen’s cancelled Wilson’s policy.

4. The department deleted the following sentence from Proposed Order Finding of Fact 8, “The application had some errors but they were not material to Wilson’s ability to obtain insurance.” While it was Gilbertson’s testimony that all of the fictitious information he included in the application was “immaterial,” that assertion was blatantly false. One of the questions at issue was designated, “Important Underwriting Information – Complete Disclosure Required.” (Ex. A32) Moreover, there was no evidence in the record that Workmen’s would have written the policy without the fictitious and false information that Gilbertson inserted into the policy application.

5. The department deleted the following phrase from Proposed Order Finding of Fact 10, “did not misappropriate or convert.” This is not a factual finding but a legal conclusion. The department substituted the phrase “did not keep for his own use.”

Deletions and modifications were also made for clarity and textual placement. Spelling and grammatical errors were corrected. References to excluded evidence were deleted. In addition, the department added several findings of fact that are fully supported by the record and that more fully and fairly describe the course of the transactions and events.⁶

Response to Exceptions

On March 1, 2003, Respondent filed exceptions to the ALJ’s Proposed Order.

1. Respondent contends that Proposed Order Finding of Fact 6 and Conclusion of Law 2 should be modified to indicate that Respondent forwarded to Workmen’s payment of the premium for insurance covering two automobiles, and if Workmen’s

⁶ Factual findings were added in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 15.

had timely processed Wilson's request to delete coverage for a third automobile then Workmen's would not have charged Wilson additional premium, Workmen's would not have billed Wilson for the additional premium, and Workmen's would not have cancelled Wilson's policy for nonpayment of the additional premium. However, the underlying allegation and corresponding facts found in the Proposed Order do not relate to whether the amount Workmen's billed Wilson was correct or the reason Workmen's cancelled Wilson's policy was correct. Instead they only relate to whether Gilbertson received from Wilson certain insurance premium payments that Gilbertson failed to forward Workmen's which failure caused Workmen's to cancel Wilson's policy. Thus, Respondent's requested modifications are not relevant to the issue. Similarly, Conclusion of Law 2 should not be modified.

2. Respondent requests a reduced sanction from the six-month suspension recommended by the ALJ. For the reasons discussed below, the department concludes that the appropriate sanction in this case is revocation of Respondent's license and a \$5,000 civil penalty.

Conclusions of Law

1. Respondent violated ORS 744.013(2)(d) (1999) by receiving four payments on behalf of three insureds and failing to timely send the payments to the insurance company causing the insurance company to cancel the insureds' insurance.

2. Respondent violated ORS 744.013(2)(d) (1999) by receiving several automobile insurance premium payments from Barbara Wilson and failing to timely send the payments to the insurer causing the insurer to cancel Wilson's insurance.

3. Respondent violated ORS 744.013(2)(g) by misrepresenting to Wilson that the policy application for automobile insurance she signed was to renew her old policy when Respondent knew that the application was for a new policy to replace the cancelled policy and by misrepresenting to Workmen's both that Wilson wanted to apply for a new policy and several facts relating to Wilson made by Gilbertson in the application.

4. These violations warrant assessment against Gilbertson of a revocation and a \$5,000 civil penalty.

5. These violations also warrant revocation of the insurance agency license of Gilbertson Insurance, whose owner and agent the department finds violated ORS 744.013(2)(1999). See ORS 744.013(3)(1999).

Opinion

The issues to be resolved in this insurance agent disciplinary case are whether Respondent violated ORS 744.013(2)(d) (1999) with respect to four insureds and ORS 744.013(2)(g) (1999)⁷ with respect to one insured and whether these violations, if proven, warrant revocation of the Oregon insurance agent licenses issued to Respondent and Gilbertson Insurance. In this regard, the department has the burden of proving the allegations by a preponderance of the evidence. *See Gallant v. Bd. of Medical Examiners*, 159 Or App 175, 974 P2d 820 (1999).⁸ Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Violations

1. *Illegal Withholding*

ORS 744.013 (1999) gives the director of the department the authority to refuse to renew, suspend or revoke an insurance agent's license and the license of insurance agencies in which the agent is the principal owner for violations of the Insurance Code. Additionally, ORS 731.988 gives the director the authority to assess insurance agents a civil penalty in the amount of \$1,000 for each offense, with each violation of the Insurance Code constituting a separate offense.

⁷ ORS 744.013(2) (1999) states in relevant part:

(2) The director may take any disciplinary action under subsection (1) of this section on one or more of the following grounds:

* * * *

(d) Misappropriation or conversion to the licensee's own use, or illegal withholding, of money or property belonging to policyholders, insurers, beneficiaries or others, and received by the licensee in the conduct of business under the license.

* * * *

(g) Use of a fraudulent or dishonest practice by the licensee in the conduct of business under the license, or demonstration therein that the licensee is incompetent, untrustworthy or a source of injury and loss to the public or others.

⁸ The ALJ's proposed order opined that the department had the burden of proving the allegations and *the propriety of the proposed sanction* by a preponderance of the evidence. The cases cited do not require proving the propriety of the proposed sanction, nor are we aware of any controlling law requiring such.

The director is specifically authorized to revoke an insurance agent's license and impose civil penalties if the agent illegally withholds monies belonging to policyholders, insurers or others received by the agent in the conduct of the insurance business. ORS 744.013(2)(d)(1999); 731.988(1). Although the term "illegal withholding" is not defined by statute, its use can be ascertained by reference to the text and context of the statutes and by giving statutory terms their plain, natural and ordinary meaning. See *PGE v. Bureau of Labor & Industries*, 317 Or 606, 610 – 611, 859 P2d 1143 (1993). The plain meaning of "illegal" is "contrary to or violating a law or rule or regulation or something else (as an established custom) having the force of law." *Webster's Third Int'l Dictionary*, p. 1126 (1993). In Oregon, it is unlawful for any person to collect any sum as a premium for insurance that is not provided. ORS 746.120. Also, agents are bound by the terms of their agreements with the insurers to remit premiums within a time certain. "Withholding" means "to desist or refrain from granting, giving or allowing; to keep in one's possession or control; to keep back." *Webster's Third Int'l Dictionary*, p. 2627 (1993). An agent commits the offense of "illegal withholding" by retaining monies due an insurer and for which no insurance is ultimately provided. An agent also commits "illegal withholding" by retaining monies beyond the time in which the agent is contractually required to remit payments. See also *Berenter v. Gallinger*, 173 Ariz 7, 839 P2d 1120 (1992) (a licensed adjuster committed the offense of "illegal withholding" by refusing to endorse a draft payable to a restoration company, thereby preventing a party entitled to the proceeds from obtaining its money).

Gilbertson illegally withheld monies due Clarendon and paid by Nelson on December 30, 1998, until January 11, 1999, resulting in a lapse in coverage. (Ex. A15). Gilbertson illegally withheld monies due Clarendon and paid by Nelson on April 29, 1999, until July 28, 1999, resulting in cancellation of the policy. *Id.* Gilbertson illegally withheld monies due Clarendon and paid by Rameriez on April 9, 1999, until April 15, 1999, resulting in a lapse in coverage. (Ex. A22). Gilbertson illegally withheld monies due Clarendon and paid by Altamirano on May 28, 1999, until June 30, 1999, resulting in cancellation of the policy. (Ex. A23).

On several occasions, Gilbertson illegally withheld monies due Workmen's and paid by Barbara Wilson. Gilbertson did not remit Wilson's March 9, 2001, and April 9, 2001, payments to Workmen's until April 19, 2001. (Ex. A45). He did not remit her May 7, 2001, payment until May 17, 2001. *Id.* Gilbertson never remitted Wilson's \$58 payment of June 4, 2001. *Id.* Also, the payments made by Wilson on September 6, 2001, and October 12, 2001 to Gilbertson were not remitted for the original policy. *Id.* On August 11, 2001, Workmen's cancelled Wilson's policy for non-payment of premiums.

2. *Use of fraudulent or dishonest practice; incompetence, untrustworthy, source of injury or loss.*

Gilbertson acted in a manner that was dishonest or untrustworthy, when he misrepresented to Wilson that he had reinstated or renewed her original policy with Workmen's when in fact he wrote a new policy to take effect October 12, 2001, leaving a period of two months when Wilson was uninsured. By submitting the new policy application, Gilbertson also acted in a manner that was dishonest and untrustworthy when he misrepresented to Workmen's that Wilson had applied for a new policy, when she had not. On the policy application itself, Gilbertson created false and fictitious information which he supplied to Workmen's so that they would write the policy, with a discount. This information included the answer to an important underwriting question, namely that Wilson had not previously been insured (when she had).

3. *Misconduct of agent as grounds for agency license revocation*

Grant Gilbertson is an agent of Gilbertson Insurance. He owns and manages the firm. As such, his misconduct is a basis for revoking the agency license of Gilbertson Insurance. ORS 744.013(3)(a), (c).

Sanctions

In this case, the department proposes to revoke Gilbertson's and his agency's licenses for numerous violations of illegal withholding and one violation of engaging in dishonest or untrustworthy practices. The department has plenary authority to reject the ALJ's suggested sanction⁹ and enter its own sanction, subject to the statutory limits on its authority and to other limits on its discretion expressed in ORS 183.482(8)(b). Here, the facts are well within the law permitting the sanction of revocation, see ORS 744.013(1)(1999), and a civil penalty of \$5,000, see ORS 731.988.

In some past cases, the department has considered aggravating and mitigating facts when determining a proper remedy. The aggravating factors include: prior disciplinary offenses; dishonest or selfish motive; a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary process; submission of false evidence, false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge wrongful nature of conduct; vulnerability of victim; substantial experience in the profession; and indifference to making restitution. *In the Matter of Boyd & Co. Insurance*, case no. INS 89-04-04 (1990), citing, *In the Matter of Luebke*, 301 Or 321 (1986). See also *In the Matter of Giannetti*, case no. INS 90-12-006 (1993). The mitigating factors include: absence of a prior

⁹ The ALJ recommended a six-month suspension and a \$1,000 civil penalty.

disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the profession; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions in this proceeding; remorse; and remoteness of prior offenses. *Id.*

The department finds that the following factors aggravate. The department previously sanctioned Respondent for similar violations. There were multiple offenses giving rise to the department's 1997 action and there are multiple offenses giving rise to this action. In both the prior case and this case, Respondent's conduct involved a pattern of late or unpaid premiums, resulting in policy cancellations.

Respondent had dishonest motives in creating fictitious responses to an insurance policy application for Wilson which he then submitted to Workmen's. He wanted to create proof of insurance cards so that Wilson would not be aware her policy had cancelled and he wanted Workmen's to issue her a new policy. He also entered information that could qualify Wilson for a discount to which she would not otherwise have been entitled. But when confronted with his conduct, Respondent repeatedly stated that the questions on the application were "immaterial" and, therefore, he believed he could answer those questions falsely, contrary to Oregon law. See ORS 746.100. Respondent has yet to acknowledge the wrongful nature of his conduct.

Barbara Wilson was a vulnerable victim. She relied upon making minimum monthly payments to stretch her funds since she was the only person in her family with a job. She depended upon her insurance because it was a job requirement. And she relied upon Respondent to provide her with proof of insurance. She believed him when he told her that he would take care of any problems with her insurance.

Respondent is an experienced insurance agent. He has been an insurance agent for 24 years. He took over the operations of Gilbertson Insurance from his father, with whom he worked for several years.

The department finds that the following factors mitigate. Respondent provided additional funds to purchase a new policy for Nelson after the original policy was cancelled for non-payment of premiums. (Ex. A7). Respondent cooperated with the investigative process of the agency.

Respondent suffers from diabetes and ADHD. Before Respondent took steps to diet and exercise, Respondent's diabetes caused irritability, forgetfulness and excessive thirst. ADHD is a mental disorder and is characterized by a persistent

pattern of inattention. Persons who suffer from ADHD may have trouble with repetitive tasks, attention to detail, planning, organizing and procrastination. Respondent's symptoms include impulsivity, an inability to be organized and focused and difficulty in following through with tasks. Respondent indicated that he is taking actions to rehabilitate – namely declining to accept payments in his office, having his mother work on organizing his office and hiring another agent to assist him.

There are both aggravating and mitigating factors in this case. Unlike the ALJ, the department does not find that the mitigating factors outweigh the aggravating factors to an extent that the sanctions should be reduced. To the contrary, the department is of the opinion that Respondent has repeatedly demonstrated his inability or unwillingness to conform his practices to lawful requirements of handling premium payments. The result has been the lapse, termination or cancellation of the policies of numerous insureds that have depended upon him. To the extent that persons must depend upon the trustworthiness of the agent who receives their payments to remit those same payments to the insurer, Respondent has failed that trust. More importantly, in the Wilson matter, Respondent demonstrated that he is willing to lie and falsify documents to cover up his failings. He counters that his acts were 'immaterial' or should be excused by the conduct of others (the insurer failing to remove a vehicle at Wilson's request) or by his mental disorder. None of these things provide an excuse for dishonest behavior. On the basis of the falsified Wilson application alone, the department would find the sanction of revocation to be appropriate.

The nature of the continued pattern of violations, the existence of multiple violations, a violation predicated on dishonesty, previous discipline and the fact that Respondent is an experienced agent, all taken together, compels the department to conclude that this is an appropriate case for revocation and a \$5,000 civil penalty. Although Respondent provided evidence of a recently diagnosed mental disorder, ADHD, none of his medical providers testified at the hearing,¹⁰ nor did the medical reports in Exhibit 124 make any causal link between his diabetes and ADHD and his conduct. However, we may logically infer that Respondent's diabetes and/or ADHD could have been the reason for forgetfulness, inattention or lack of focus that, in turn, could have caused Respondent to neglect to remit insurance premiums in a timely manner. These conditions and their resulting symptoms would not, however, have caused Respondent to commit the intentional acts of falsifying an insurance application, thereby misrepresenting facts relative to such application.

¹⁰ Respondent's wife, a nurse, testified about Respondent's symptoms and condition, but not as his medical care provider.

The department's proposed sanction is neither extreme nor inconsistent with other department sanctions. See *In the Matter of Cecile G. Zimmerman*, case no. INS 00-12-008 (Feb. 22, 2001); *In the Matter of Gary Bergeson*, case no. INS 00-12-003 (Feb. 23, 2001); *In the Matter of Michael Morrow*, case no. INS 00-09-017 (Sept. 7, 2001).

Order

Pursuant to ORS 744.013(1) (1999), Gilbertson's Oregon resident insurance agent license shall be revoked on the date of the Final Order.

Pursuant to ORS 731.988, Gilbertson shall pay a civil penalty of \$5,000. The payment shall be made in the form of a check payable to the "Department of Consumer and Business Services" for the full amount due. The payment shall be delivered to the Insurance Division at the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailed to the Insurance Division at PO Box 14480, Salem, OR 97309-0405. Pursuant to ORS 183.090(2), the payment shall be received by the Insurance Division by 5:00 PM (PT) on the 71st calendar day after the date of the Final Order, unless the party timely appeals the Final Order.

Pursuant to ORS 744.013(3) (1999), Gilbertson Insurance's Oregon resident insurance agent license shall be revoked on the date of the Final Order.

Notice of Right to Administrative Review

Each party has the right to file with the director written exceptions to this Amended Proposed Order and written argument about such exceptions, pursuant to ORS 183.460 and OAR 137-003-0650. A party may send such exceptions and argument to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing them to PO Box 14480, Salem, OR 97309-0405, or faxing it to 503-378-4351; or e-mailing it to mitchel.d.curzon@state.or.us. The Insurance Division must *receive* the written exceptions and argument within *30 days* from the date this order was *sent* to the party.

Dated August 20, 2003

/s/ Cory Streisinger
Cory Streisinger
Director
Department of Consumer and Business Services

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