

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DEPARTMENT**

In the Matter of) **Case No: INS 02-10-015**
)
HENRI J. BROWN &) **PROPOSED ORDER**
HENRI J. BROWN INSURANCE)
AGENCY)

HISTORY OF CASE

On January 14, 2003, the Director of the Department of Consumer and Business Services, Insurance Department (the director or department) issued a Notice of Proposed Action (Notice) proposing to revoke the Oregon insurance agent license issued to Henri J. Brown (Respondent) pursuant to ORS 744.013(1)(a) (1999). The director also proposed to revoke the Oregon insurance agent license issued to Henri J. Brown Insurance Agency (BIA) pursuant to ORS 744.013(3) (1999). Respondent requested a hearing challenging the proposed actions. On March 18, 2003, the department referred this matter to the Hearing Officer Panel (now, the Office of Administrative Hearings) for hearing.

On August 19, 2003, Administrative Law Judge Ella D. Johnson conducted a hearing in this matter in Salem, Oregon. The department was represented by Assistant Attorney General Kathleen Dahlin. Respondent appeared and was represented by his attorney Thomas E. McDermott. The department called Respondent, the alleged victim Brian Geraths, Respondent's former employee Kelly W. Manser, and commercial insurance underwriter Eric Smith to testify. Respondent testified on his own behalf. The record was left open for closing arguments and the testimony of Respondent's handwriting expert¹ and closed on September 25, 2003 following closing argument by telephone.

ISSUES

(1) Whether Respondent violated ORS 744.013(2)(g), ORS 746.100., and OAR 836-074-0025.

(2) If proven, whether these violations warrant revocation of Respondent's Oregon agent license pursuant to ORS 744.013(1)(a) (1999).

(3) If proven, whether these violations subject BIA to disciplinary action in the form of revocation of BIA's Oregon insurance agent license pursuant to ORS 744.013(3) (1999).

¹ Respondent subsequently declined to offer the testimony of a handwriting expert.

EVIDENTIARY RULINGS

The department's Exhibits A1 through A16 and Respondent's Exhibits R1 and R2 were admitted into the record without objection.

FINDINGS OF FACT

(1) Respondent was first licensed in Oregon as a resident insurance agent (license number 600844) in November 1991. Respondent's license expired in January 2002. Respondent's owned his own insurance agency, BIA, in Portland, Oregon, which was licensed in Oregon (license number 805675) since 1993. Respondent owned BIA as a sole proprietor. Respondent was licensed to sell health, life, property and general lines of insurance and held an appointment by many insurance companies, including Farmers Insurance Exchange (Farmers). (Exs. A1, A2.)

(2) On or about November 30, 1998, Respondent solicited an application for commercial liability and property insurance from his neighbor, Brian E. Geraths who was a professional photographer starting a new business called Prints Charming. The business was located in the basement of his home but he often worked off-premises taking photographs. Respondent told Geraths that he could provide him with insurance at a lower cost than his current insurance. The insurance was to be provided through Farmers. Geraths wanted the coverage to increase the off-premises personal property insurance from \$5,000 to \$20,000. Respondent told Geraths that the annual premium for the insurance would be \$370 and that it would include an increase in the off-premises property business coverage to \$20,000. Geraths took detailed notes concerning the transaction in his day calendar. Geraths orally agreed to purchase the insurance but wanted it effective January 1, 1999 because of cash flow issues. He did not sign and was not asked to sign an insurance application. (Ex. A8; test. of Geraths.)

(3) Thereafter, Respondent received Geraths' check, check number 1229, dated December 1, 1998 for \$370 made payable to Farmers Insurance. Respondent did not deposit Geraths' check in his insurance premium trust account until on or about April 16, 1999. (Ex. A3; test. of Geraths.) In late March 1999, Geraths had not received his policy and contacted Respondent. Respondent said he was just working on it and would make it effective in April and backdate the policy if necessary. In April 1999, Respondent gave Geraths a certificate of liability to show to potential clients that he had coverage but the amounts on the certificate were incorrect. Geraths thought he had \$20,000 in property insurance from December 1998 through April 1999 but did not. Geraths received the policy in April and called Respondent to see if he had to sign anything and Respondent said no, that was already covered. He did not read the policy. (Ex. A3; test. of Geraths.) Farmers' practice is to send the policy to the agent and then the agent reviews the policy to determine if the coverage is right. (Test. of Respondent.) Respondent did not review the policy before mailing it to Garths. The policy indicated that Geraths had personal off-premises property coverage in the amount of only the standard \$5,000. (Exs. A7, A13; test. of Smith.)

(4) On May 12, 1999, Farmers received Geraths' payment for \$370 from Respondent. On May 17, 1999, Farmers received an application from Respondent for Geraths, which was dated April 25, 1999 and purportedly signed by Geraths and Respondent. Respondent asked that the policy become effective May 1, 1999. Respondent failed to ask for an increase in the off-premises property insurance from \$5,000 to \$20,000.² Farmers issued policy number 73-3497-76-81 which was effective on May 1, 1999. (Ex. A3.)

(5) On October 9, 1999, some of Geraths photography equipment was damaged while at an off-premises job. Farmers covered all but his \$500 deductible. On November 1, 2000, Respondent resigned from Farmers and merged his insurance agency with Wilmarth Insurance Agency because he was unable to keep up on the paperwork. (Exs. A3, A6; test. of Respondent.)

(6) On May 1, 2000, Geraths allowed his policy with Farmers to lapse due to cash flow problems but then renewed the same policy on May 28, 2000. (Exs. A7, A11; test. of Geraths.)

(7) On December 8, 2000, \$11,000 of Geraths' photography equipment was stolen while he was working off-premises at Embassy Suites Hotel. The hotel declined to reimburse Geraths for his stolen equipment stating that they were not liable but did pay him \$500 as a goodwill gesture. (Ex. A3; test. of Geraths.)

(8) Geraths contacted Respondent and filed a claim with Farmers. When he tried to obtain reimbursement for the equipment he had purchased to replace the equipment stolen, he was told by the claims adjuster that he had off-premises property insurance for only \$5,000, not the \$20,000 he had requested and was quoted. Geraths contacted Respondent and Respondent stated that he had requested that Farmers provide \$20,000 in coverage but that he was no longer with Farmers. Respondent advised him to contact the department and referred him to Farmers agent Steve Wilmarth to pull the quote from Respondent's files. Wilmarth told Geraths that even if the \$20,000 was on the quote, unless it was on the policy, it was not part of the coverage. Wilmarth advised Geraths to contact Respondent's errors and omissions (ENO) insurer. (Ex. A3; test. of Geraths.)

(9) Respondent could have written the policy to include \$20,000 in off-premises personal property coverage, even though there was no box on the application, simply by putting the increased coverage in the "remarks" section of the application.³ On April 4, 2001, Respondent told Geraths that the coverage for \$20,000 had been approved by his Farmers Regional District agent Paul Nedermeyer. (Exs. A3, A5, A11; test. of Smith.)

(10) After confirming that there was no evidence that a higher personal property insurance coverage had been requested, Farmers subsequently paid Geraths the full policy limit of \$5,000 for his claim. (Ex. A5.) On April 12, 2001, Geraths filed a consumer complaint with

² Respondent testified that he usually attaches a "speedy memo" when he does not know where on the application to put additional coverage. However, there is no evidence that such a memo was attached to the application.

³ Geraths testified that a senior claims adjuster for Farmers told him that Farmers did not even offer off-premises property insurance for more than \$5,000. However, Smith who is a senior commercial underwriter testified that it was possible to increase the amount from \$5,000 to \$20,000.

the department concerning his claim with Farmers and Respondent's failure to provide the coverage requested. (Ex. A4.) After receiving copies of the underwriting file from the department, Geraths realized that his signature had been forged on the insurance application. (Ex. A7; test. of Geraths.) There were also numerous incorrect facts in the application concerning Geraths' employment history and desire for commercial auto coverage. The coverage for personal property in the amount of \$20,000 was also crossed out. (Exs. A8, A9.) There was no evidence in Farmers' file that Respondent had requested \$20,000 in personal off-premises property coverage. (Ex. A10; test. of Smith.)

(11) Eventually, Respondent's ENO insurance paid the remainder of Geraths' loss but it took months and a substantial amount of Geraths' time. (Test. of Geraths.)

CONCLUSIONS OF LAW

(1) Respondent violated ORS 744.013(2)(g), ORS 746.100, and OAR 836-074-0025.

(2) These violations warrant revocation of Respondent's Oregon agent license.

(3) These violations also subject BIA to disciplinary action in the form of revocation of BIA's Oregon insurance agent license pursuant to ORS 744.013(3) (1999).

OPINION

The issues to be resolved in this agent sanction case are whether Respondent violated ORS 744.013(2)(g), ORS 746.100, and OAR 836-074-0025, and whether these violations, if proven warrant revocation of Respondent's and BIA's Oregon insurance agent licenses. In this regard, the department has the burden of proving the allegations and the propriety of the sanction by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). 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

The department alleges that Respondent violated ORS 744.013(2)(g), ORS 746.100, and OAR 836-074-0025. ORS 744.013(2)(g) (1999) states in relevant part:

(2) The director may take any disciplinary action under subsection (1)⁴ of this section on one or more of the following grounds:

⁴ Subsection (1) of ORS 744.013 (1999) states:

* * * * *

(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.

At hearing, the department argued that Respondent acted in an incompetent and untrustworthy manner which was the source of injury to Geraths, the insured. In support of its argument, the department pointed to the manner in which Respondent handled Geraths' insurance. The weight of the credible evidence establishes that Respondent failed to timely prepare and submit Geraths' insurance application and failed to obtain Geraths' signature. Respondent also failed to request the \$20,000 off-premises personal property insurance that Geraths needed to cover his photography equipment. Respondent also failed to check the policy once it was received from Farmers to ensure that the amount of insurance was correct. As a result of Respondent's incompetence, Geraths' was not covered for three months because Respondent delayed in submitting the application and premium to Farmers. Also as a result of his incompetence, Geraths was not properly covered with \$20,000 of personal property insurance when \$11,000 of his photography equipment was stolen while photographing a party at the Embassy Suites Hotel.

Furthermore, Respondent was untruthful in his response to the insurance department in its investigation of this matter and to me at hearing by lying about and trying to shift the blame first to Manser and then to Farmers; blaming Manser for forging Geraths' signature on the application and failing to review Geraths policy for the correct coverage; blaming Farmers for failing to provide the department with the alleged speedy memo requesting \$20,000 in personal property coverage. Finally, the weight of the credible evidence establishes that Respondent's handling of this matter was a source of injury and loss to Geraths because Geraths was operating a struggling new photography business out of his own home and had to take time away from his business to try to obtain reimbursement for the stolen

If the Director of the Department of Consumer and Business Services finds with respect to a licensee * * * that one or more of the grounds set forth in subsection (2) of this section exist, the director may take the following disciplinary actions:

- (a) The director may refuse to renew or may suspend or revoke a license issued under ORS 744.002 or the authority under a license to engage in any category of insurance business or any class of insurance.
- (b) The director may refuse to issue a license under ORS 744.002 or refuse to grant authority under a license to engage in any category of insurance business or any class of insurance.

equipment which was critical to the success and survival of his business. Although he finally was reimbursed by Respondent's ENO carrier, it took months and a substantial amount of his time to obtain the reimbursement he should have been able to obtain directly from Farmers if Respondent had handled Geraths' insurance in a competent manner. Consequently, on this record, I conclude that Respondent violated ORS 744.013(2)(g).

In addition, ORS 746.100 provides:

No person shall make a false or fraudulent statement or representation on or relative to an application for insurance, or for the purpose of obtaining a fee, commission, money or benefit from an insurer or agent.

The department argued at hearing that Respondent violated ORS 746.100 by falsely representing to Farmers that Geraths had signed the insurance application in May 1999. At hearing, Respondent tried to shift the blame for the problems with Geraths' policy to Manser. He also argued that Manser must have signed Geraths' name and dated it May 17, 1999 before sending the application to Farmers. However, Manser credibly testified that she did not sign Geraths' name on the application and send the application to Farmers.⁵ Consequently, I conclude that Respondent violated ORS 746.100 by falsely signing Gerath's name on the application and dating it May 17, 1999 before sending the application to Farmers.

Finally, the department argued that Respondent violated OAR 836-074-0025, which states in pertinent part:

An agent shall deposit and pay premium funds received as provided in this rule. When deposit is required, the agent shall deposit the funds not later than the seventh day after they are received. When a payment is owed to an insured, the agent shall pay the premium funds not later than the 30th day after the receipt of the funds.

The evidence establishes that Respondent received Geraths' check for \$370 on December 1, 1998 for payment of the annual premium on the Farmers policy. Respondent did not deposit it into his premium trust account until 136 days later on April 16, 1999. Additionally, Farmers did not receive the payment for 163 days after he receiving Geraths' check, on May 12, 1999. Consequently, I conclude that Respondent violated OAR 836-074-0025 by failing to deposit Geraths' check within seven days of receipt and failing to pay the funds to Farmers within 30 days after receipt of the funds from Geraths.

⁵ Respondent testified that he fired Manser because she was not doing what she was hired to do. However, the glowing reference letter he wrote for her indicates that she was a good employee and that she was laid off, not fired. He testified that he wrote that letter so she could get unemployment benefits but I do not find that believable inasmuch a reference letter is usually written to obtain subsequent employment, not unemployment benefits. (Ex. A7; test. of Manser and Respondent.)

Sanction

The department proposes revocation of Respondent’s Oregon agent license pursuant ORS 744.013(1)(A) (1999). There is no question that the department has the authority under ORS 744.013(1)(A) (1999) to revoke Respondent’s Oregon insurance agent license. See FN 4. At hearing, Respondent argued that revocation was a “draconian measure” because he will lose his job if his license is revoked. However, the department has carried its burden of proving by a preponderance of the evidence that Respondent is incompetent and untrustworthy in his violation of ORS 744.013(2)(g), ORS 746.100, and OAR 836-074-0025. Consequently, I conclude that revocation of Respondent’s license is within the department’s authority and is warranted based on the threat he poses to the insurance buying public.

The department also proposes revocation of BIA’s Oregon insurance agent license pursuant to ORS 744.013(3) (1999). ORS 744.013(3) (1999) states in relevant part:

- (3) The director may refuse to issue or renew or may revoke or suspend the license of a firm or corporation or may take any such action with respect to any authority applied for by or granted to the firm or corporation to engage under the license in any category of insurance business or class of insurance if the director finds that any ground set forth in subsection (2) of this section exists:
 - (a) With respect to any individual licensee employed by or under contract with the firm or corporation.

Inasmuch as the department has carried its burden of proving by a preponderance of the evidence that Respondent violated ORS 744.013(2)(g) and he was the sole proprietor of BIA, I conclude that revocation of BIA’s license is also warranted. Accordingly, the department’s Notice of Proposed Action is affirmed.

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ORDER

I recommend that the department issue the following order:

The Oregon insurance agent licenses of Henri J. Brown and Henri J. Brown Insurance Agency shall be revoked.

IT IS SO ORDERED.

Dated this 23rd day of October 2003.

/s/ Ella D. Johnson
Ella D. Johnson, Administrative Law Judge
Office of Administrative Hearings

NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this Proposed Order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this Proposed Order. Mail exceptions to:

Mitchel D. Curzon
Chief Enforcement Officer
Insurance Division
PO Box 14480
Salem OR 97309-0405