BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

In the Matter of	)	**Case No: INS 04-03-011**
	)	
LELAND S. HILL	)	**PROPOSED ORDER**
	)	
	)	

HISTORY OF CASE

On March 16, 2004, the Director of the Department of Consumer and Business Services, Insurance Division (the director or department) issued a Notice of Proposed Action (Notice) proposing to revoke the Oregon resident agent license issued to Leland S. Hill (Respondent) pursuant to ORS 744.013(1)(a) (1999). Respondent timely requested a hearing challenging the proposed action. On March 26, 2004, the department referred this matter to the Office of Administrative Hearings (OAH) for hearing.

On September 30, 2004, Administrative Law Judge Ella D. Johnson conducted a hearing in this matter. Assistant Attorney General Kathleen Dahlin represented the department. Respondent appeared in person and represented himself *pro se*. The department called Jody McCall, Tisha Smith, and Samantha Ripley as witnesses. Respondent testified on his own behalf. The record closed on September 30, 2004.

ISSUES

(1) Whether Respondent violated ORS 746.100 in three instances by allegedly making a false or fraudulent statement or representation on or relative to an application for insurance.

(2) Whether these violations, if proven, warrant revocation of Respondent's Oregon insurance agent license.

EVIDENTIARY RULINGS

The department's Exhibits A1 through A19 and Respondent's Exhibits R1 through R23 were admitted into the record without objection.

FINDINGS OF FACT

(1) Respondent has been licensed in Oregon as an insurance agent since 1998. He was appointed by several insurance companies to sell life and health insurance, including Fortis Insurance Company (Fortis). (Ex. A1.)

(2) On March 21, 2001, Respondent solicited, completed and received an application from Tisha Smith for individual health insurance for her and her children to be provided through Fortis. The application required completion of the Oregon Standard Health Statement. Respondent asked Smith question number 46 on the application, which asked if Smith had used tobacco in any form within the previous five years. Smith told Respondent that she smoked cigarettes. Respondent looked at her and said "but your are quitting, right." After a short discussion about quitting smoking, Respondent marked "no" as the answer to the question. Smith was not told that Fortis did not insure smokers. (Exs. A4, A6, A12, A16, A17, A19; test. of Smith.)

(3) On November 24, 2001, Smith had an allergic reaction to some medication she was taking and was treated at an urgent care office. She was treated twice more at the urgent care office when her symptoms returned and several times at her doctor's office. After the bills were submitted, Fortis cancelled the coverage for her and her children and denied payment of the bills because she smoked. Smith hired an attorney and filed suit against Respondent and Fortis. She also filed a complaint with the department. (Exs. A4, A6; test. of Smith.)

(4) On August 10, 2001, Respondent solicited, completed and received an application from Don and Jody McCall for family health insurance to be provided through Fortis. The application required the completion of the Standard Health Statement. Respondent asked Jody McCall question number 46 on the application, which asked if she had used tobacco within the previous five years. Mrs. McCall told Respondent that she did smoke cigarettes but she was trying to quit. Respondent told them not to mention it to Fortis and to say that she started smoking after they took out the policy. He said that, if Fortis discovered she smoked, the premium would just increase. (Exs. A2, A7, A9, A14; test. of Don McCall.)

(5) In September 2001, Mrs. McCall discovered she was pregnant. Fortis refused coverage after receiving a medical report from her physician indicating that she smoked. Fortis does not insure anyone who has smoked in the last five years. Fortis dropped her from the policy as of August 21, 2001 because of discrepancies in the application. As a result, Mrs. McCall had no insurance and the expenses of the pregnancy were not covered by insurance. Don McCall filed a complaint with the department concerning Respondent's conduct. The following year, the McCall family was forced to file for bankruptcy due to uncovered medical expenses. (Exs. A2, A7, A12; test. of Don McCall.)

(6) On November 21, 2001, Respondent solicited, completed and received from Samantha Ripley an application for an individual health insurance to be provided by Fortis. The application required the completion of the Oregon Standard Health Statement. Respondent asked Ripley question number 46 on the application, which asked whether Ripley had used tobacco in any form within the previous five years. Ripley told Respondent that she had stopped smoking in August 2001, but she did not know if it would last. Respondent told her that they would not bother checking her records and he marked "no" to the question, stating that since she had not smoked in a while, she could mark "no" to the question. (Ex. A3, A12, A14; test. of Ripley.)

(7) Ripley subsequently fired Respondent as her insurance agent for reasons not relevant to this matter.[1] She found out from her new agent that, because Respondent had misrepresented her smoking history on the application, she would have to be a non-smoker for one year or Fortis would refuse payment and cancel her insurance. (Ex. A3; test. of Ripley.)

(8) Respondent denied all allegations, except that he acknowledged that he completed the Oregon Standard Health Statement for Smith and Ripley. He denied that he completed the Oregon Standard Health Statement for McCall. (Ex. A13; test. of Respondent.)

CONCLUSIONS OF LAW

(1) Respondent violated ORS 746.100 in three instances by making a false or fraudulent statement or representation on or relative to an application for insurance

(2) These violations are proven and warrant revocation of Respondent's Oregon insurance agent license.

OPINION

The issues to be resolved in this agent sanction case are whether Respondent violated ORS 746.100 in three instances and whether these violations warrant revocation of Respondent Oregon insurance license. 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). I conclude that the department has met its burden.

Violations

The department alleges that Respondent violated ORS 746.100 in three instances. 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 insurance producer.

Here, the record establishes that all three individuals who purchased Fortis health insurance truthfully told Respondent that they did smoke and Respondent nonetheless checked

[1] The department did not include any life insurance matter as a violation in its Notice of Proposed Action, even though Ripley's complaint included a narrative of his handling of the life insurance policies.

"no" on question number 46 of the Oregon Standard Health Statement certifying that they had not used tobacco in the prior five years. When the applications were submitted and the policies issued, Respondent received a commission on each policy when issued.

Respondent's misrepresentations on these three applications are indicative of untrustworthy behavior. Respondent's actions here caused significant harm to these customers and damaged the injured customers' ability to place their trust insurance agents. Once McCall and Smith filed claims with Fortis, the company was entitled to copies of their medical records. After reviewing their medical records, Fortis discovered that there was a material misrepresentation on their applications, *i.e.* that they both had smoked cigarettes within the last five years and were currently smokers. Fortis denied payment of Smith's medical bills for her allergic reaction leaving her without coverage for the bills and cancelled her policy, leaving her children without any insurance. Fortis also cancelled Mrs. McCall's coverage and left her family without coverage for her pregnancy. The following year, the McCall family was forced to file for bankruptcy due to uncovered medical expenses. Ripley was told by her new agent that Fortis would cancel her insurance because of the misrepresentation on the application if she filed a claim and they obtained her medical records. As a practical matter, she would not be covered for 12 months from the date she quit smoking, if she was in fact able to refrain from smoking.

Respondent denied that he had misrepresented to Fortis that his customers had not used tobacco and attempted to shift blame to Fortis and to the customers. However, I do not find Respondent's arguments and testimony in that regard persuasive. Accordingly, I conclude that the department has proven the allegations by a preponderance of the evidence.

Sanction

ORS 744.013 (1999) states in material part:

> (1) If the Director of the Department of Consumer and Business Services finds with respect to a licensee or an applicant 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.
>
> * * * * *
>
> (2) The director may take any disciplinary action under subsection (1) of this section on one or more of the following grounds:
>
> * * * * *

> (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.

Here, there is no question that Respondent's misrepresentations on the insurance applications of these three customers demonstrated untrustworthiness and a source of injury to each customer. Accordingly, finding no mitigating factors, I affirm the department's proposed revocation of Respondent's Oregon insurance agent license.

ORDER

I recommend that the department issue a final order revoking Leland S. Hill's Oregon resident insurance license.

IT IS SO ORDERED.

Dated this 10th day of November 2004.

/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
Oregon Insurance Division
PO Box 14480
Salem, OR 97309-0405