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

In the Matter of	)	**PROPOSED ORDER**
	)	
BAILEY & DeBERNARDI INSURANCE, INC	)	**Case No: INS 04-09-014**
	)	
	)	

HISTORY OF CASE

On March 2, 2005, the Director of the Department of Consumer and Business Services, Insurance Department (Department) issued a Notice of Proposed Action proposing to revoke the Oregon resident business entity insurance producer license of Bailey & DeBernardi Insurance, Inc. (B&D or Respondent). Respondent requested a hearing challenging the proposed actions. On March 23, 2005, the Department referred this matter to the Office of Administrative Hearings (OAH) for hearing.

On June 16, 2005, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Assistant Attorney General Kathleen G. Dahlin represented the Department. Attorney at Law Danny Lang represented Respondent Bailey & DeBernardi, Inc. Respondent moved for postponement and I denied the motion pursuant to OAR 137-003-0525(2)(a). Insurance Department Investigator Gary Holliday testified on the Department's behalf. Corporate President Warren L. Marcotti testified on B&D's behalf. The record closed on the date of hearing.

ISSUES[1]

(1) Whether Respondent violated ORS 744.083(2) in five instances by commingling premium money with other money in a trust account.

(2) Whether Respondent violated OAR 836-074-0025 in one instance by failing to timely deposit insurance premium into a trust account.

(3) Whether Respondent violated ORS 744.074(1)(d) in four instances by misappropriating or withholding moneys.

(4) Whether Respondent violated ORS 731.296 in two instances by failing to timely respond to the Director's inquiry.

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1 At hearing, the Department withdrew two allegations listed in the Notice of Proposed Action. The Department withdrew the allegation that Respondent violated ORS IRS 744.083(1) in two instances by failing to deposit insurance premium into a trust account.

(5) Whether, if proven, these violations warrant revocation of Respondent's resident business entity insurance producer license.

EVIDENTIARY RULINGS

The Department's Exhibits A1 through A12 as well as A14, A15, A17, A19 through A21 were admitted into the record without objection. Exhibit A13 was admitted into the record over Respondent's lack of foundation and hearsay objections. Exhibits A16 and A18 were admitted over Respondent's relevance objection. Respondent's Exhibits R1 through R5 were admitted into the record without objection; Respondent's Exhibit R6 was admitted into the record over the Department's relevance and reliability objections. Finally, pursuant to OAR 137-003-0615, I take official notice of the 2003 calendar showing that Labor Day fell on Monday, September 1.

FINDINGS OF FACT

(1) B&D Insurance, Inc. (Respondent) is an insurance agency that has operated in Roseburg, Oregon since 1943. Respondent has been licensed as a resident insurance agent since 1968. (Ex. A2-1.) Respondent holds licenses in several classes including health, life, casualty, property and general. (Ex. 1-2.) Marcotti became a partner in B&D in 1983 and sole owner in 1994. (Testimony of Marcotti.) Marcotti holds individual producer licenses in life, health, property and casualty. (Ex. 1-4.)

(2) In 2003, Marcotti, worked as an agent. His wife, Rhonda Marcotti and his daughter, Janelle Bangs worked in Respondent's office. The Marcotti's four-year-old son died and Rhonda Marcotti began working in the office to relieve her depression. Additionally, Sharon Blodgett, an insurance agent, worked in the office for four months in 2003. (Testimony of Marcotti.)

(3) In 2003, Respondent maintained two premium trust accounts. The primary trust account (PTA) was number 044021908. (Ex. 3-2.) A secondary money market trust account was number 44000131. (Exs. A3-2 and A10-2; testimony of Holliday and Marcotti.) On August 19, 2003, Respondent issued check number 1162 on trust account number 044021908, in the amount of $2,068.83, payable to "account 44000131" to pay for bank charges that were incurred on its other insurance premium trust account, number 44000131. (Ex. A3-2.)

(4) On August 26, 2003, Respondent received from Ted Glick, doing business as AAA Gardening and Landscaping, check number 8427, dated August 24, 2003, in the amount of $500 as payment of the annual premium for a commercial auto insurance policy, number BA 091062815, to be issued by Austin Mutual Insurance Company (AMIC). (Exs. A4-2, A18-5 and R4-3; testimony of Holliday and Marcotti.) On August 26, 2003, Respondent issued check number 11665 on its PTA in the amount of $500, made payable to AMIC to forward the premium to insurer. (Ex. R4-3.) Labor Day fell on Monday, September 1, 2003. (Official Notice.) On September 5, 2003, Respondent

deposited Glick's check into its trust account. (Exs. A3-4 and A4-1; testimony of Holliday and Marcotti.) AMIC declined to provide insurance to Glick due to his driving history. (Ex. R4-4; testimony of Marcotti.) AMIC did not negotiate the check and returned it to Respondent. On September 22, 2003, Respondent received the non-negotiated $500 check from AMIC. Agent Blodgett subsequently misfiled it. (Exs. R4-5 and A20-1; testimony of Marcotti.)

(5) On August 29, 2003, Respondent received $200 cash from John Stroud as partial payment of premium on a Zurich policy. (Ex. A20-13.) Respondent failed to make the payment to Zurich and the policy was cancelled for non-payment. (Exs. A20-1, A20-12 and R3; testimony of Holliday and Marcotti.) Subsequently, with Stroud's permission, Respondent applied the $200 to the premium for another policy which is still in effect. (Ex. A20-1; testimony of Holliday and Marcotti.)

(6) On September 16, 2003, Respondent received $100 cash from Kevin Reber, doing business as A-1 Buyers, as partial payment of premium on a Western Surety bond. (Ex. A20-10.) Without depositing $100 into the trust account, on October 29, 2003, Respondent issued check number 11670 on the PTA for $100 for the Reber bond. (Ex. A5-2.)

(7) On November 21, 2003, Respondent issued check number 11671 on the PTA in the amount of $150, payable to client Tamara Ballard to reimburse her for overdraft bank charges she incurred that were caused by Respondent. (Exs. A5-2, A18-1 and A20-1; testimony of Holliday and Marcotti.) Agent Blodgett had misinformed Ballard as to the date premium would be automatically withdrawn from her bank account, resulting in overdraft charges. (Testimony of Marcotti.)

(8) On November 24, 2003, Respondent issued check number 11672 on the PTA in the amount of $200.00 payable to Janelle Bangs to reimburse her for purchasing office supplies for Respondent. (Exs. A3-2 and A5-2; testimony of Holliday and Marcotti.)

(9) In November 2003, the balance in the PTA was negative $131.63. (Ex. A5-1.)

(10) On or about December 16, 2003, Respondent received a check in the amount of $1,622.00 from Chuck Pittman, doing business as Chuck's Auto Wholesale, as premium payment for a McFall policy. (Ex. A6.) On December 18, 2003, Respondent deposited the check into the PTA. (Ex. A7-1.) Of the $1,622, Respondent was required to forward $1,467.91 to McFall, and was entitled to retain the balance of $154.09 as commission. (Testimony of Holliday and Marcotti.) On December 22, 2003, Respondent issued check number 11675 in the amount of $1,467.91 to McFall to forward payment of the premium. The check was written on the PTA. (Ex. A5-2.)

(11) On December 17, 2003, Respondent issued check number 11673 on the PTA in the amount of $150.00 to Bangs to reimburse her for purchasing office supplies for Respondent. (Exs. A3-4 and A7-2; testimony of Holliday and Marcotti.)

(12) On March 22, 2004, Respondent authorized Shell Oil Company via telephone to issue check number 11691 on the PTA in the amount of $371.75 payable to Shell – Commercial to pay for business expenses of Respondent's. (Ex. A8; testimony of Holliday and Marcotti.)

(13) On April 5, 2004, Respondent entered into a Stipulation and Final Order with the Department. Respondent stipulated that it had violated ORS 744.013(2)(d) in one instance by illegally withholding premium for insurance and agreed to pay $294.62 to Kempke. Respondent further stipulated that it had violated ORS 731.296 in three instances by failing to respond to the Department's inquiries. Finally, Respondent agreed to pay a civil penalty of $5,000 and submit to a Department audit of its premium trust account. (Ex. A2.)

(14) On April 26, 2004, Department investigators Gary Holliday and Rich Zafuto conducted an audit of Respondent's trust account beginning April 1, 2003. (Ex. A9.) The audit period was April 1, 2003 through April 26, 2004. (*Id*; testimony of Holliday.)

(15) Following the audit, Holliday called to Respondent's attention that it had failed to refund the $500 non-negotiated check from AMIC to Glick. (Ex. A14-2; testimony of Holliday and Marcotti.) On June 7, 2004, Respondent issued check number 11707 in the amount of $500.00 to Glick to refund the premium for the declined auto insurance policy. (Exs. 4-5 and A14-2; testimony of Holliday and Marcotti.)

(16) In 2003, following the audit, Respondent retained Weinberg & Associates, PC to reconcile and verify its bank records. (Testimony of Marcotti.) Weinberg & Associates employs Lyn Murto who is an accountant but not a certified public accountant. (Ex. R6.)

(17) On May 4, 2004, the Department faxed a letter to B&D requesting certain information by May 21, 2004. (Ex. A10.) The letter read, "Failure to respond, delay in responding or incompletely responding to this letter within the time allowed is a violation of ORS 731.296." (Ex. A10-4.) On May 19, 2004, B&D requested and the Department granted an extension until May 28, 2004. (Exs. A11 and A12.) On June 14, 2004, the Department received a letter from Respondent dated June 4, 2004 providing some of the requested information. (Ex. A14.) Respondent's letter did not include a spreadsheet of the amount of commission it kept in its trust account, number 44021908, at Douglas National Bank, each month during the period from October 2003 to April 2004 as requested. (*Id.*) On June 25, 2004, the Department received the spreadsheet by fax. (Ex. A15.)

(18) On May 24, 2004, Sagamore Insurance Company informed the Department that it had terminated its producer-company agreement with Respondent due to Respondent's failure to remit insured premium. (Ex. A13.)

(19) On July 6, 2004, the Department faxed to Respondent a letter requesting certain information by July 23, 2004. (Ex. A16.) The letter read, "Failure to respond, delay in responding or incompletely responding to this letter within the time allowed is a violation of ORS 731.296." (Ex. A16-3.) On July 26, 2004, Respondent requested and the Department granted an extension until July 29, 2004. (Ex. A17.) On August 2, 2004, the Department received all of the requested information. (Ex. A18.)

CONCLUSIONS OF LAW

(1) Respondent violated ORS 744.083(2) in five instances by commingling premium money with other money in a trust account.

(2) Respondent violated OAR 836-074-0025 in one instance by failing to timely deposit insurance premium into a trust account.

(3) Respondent violated ORS 744.074(1)(d) in four instances by misappropriating or withholding moneys.

(4) Respondent violated ORS 731.296 in two instances by failing to timely respond to the Director's inquiry.

(5) These violations warrant revocation of Respondent's resident business entity insurance producer license.

OPINION

The issues to be resolved in this agent sanction case are whether Respondent committed various statutory and administrative violations and whether these violations, if proven, warrant revocation of Respondent's Oregon resident business entity insurance producer license. In this regard, the Department has the burden of proving the allegations and the propriety of the proposed sanctions 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. Violations

A. Commingling Funds

The Department contends that Respondent violated ORS 744.083 by commingling other money in a trust account in five instances. Claimant contends that the violations were errors without intent to misuse client funds.

ORS 744.083 provides:

> (1) All premium funds received by a resident insurance producer shall be accounted for and maintained in a trust account separate from all other business and personal funds.
>
> (2) Except as provided in subsection (3) of this section, a resident insurance producer may not commingle or otherwise combine premiums with any other moneys.
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> (3) A resident insurance producer may commingle with premium funds in the trust account required by subsection (1) of this section any additional funds the insurance producer deems prudent for the purpose of advancing premiums, establishing reserves for the paying of return premiums, or for any contingencies that may arise in the course of receiving and transmitting premium or return premium funds.

A preponderance of the evidence establishes that on August 19, 2003, Respondent paid the bank charges of one trust account out of funds in its other trust account. Next, the evidence shows that on November 21, 2003, Respondent paid Ballard out of a trust account for overdraft charges she incurred that were caused by Respondent. Also, on November 24, 2003 and again on December 17, 2003 Respondent paid for office supplies out of a trust account. Additionally, on March 22, 2004, Respondent paid Shell Oil Company for business expenses out of a trust account. Finally, contrary to Respondent's position, the statute requires no showing of intent to defraud. Consequently, based on the record, I find that the Department has carried its burden of proving that Respondent violated ORS 744.083 in five instances.

B. Failing to Timely Deposit Funds

The Department contends that Respondent violated OAR 836-074-0025 in one instance by failing to timely deposit premium into a trust account. Respondent contends that it was excused from timely depositing the check because the Labor Day Holiday fell during the seven day period. However, the text of the rule provides no extension for holidays.

OAR 836-074-0025 provides 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.

On August 26, 2003, Respondent received from Ted Glick, doing business as AAA Gardening and Landscaping, a check as payment of the annual premium for a commercial auto insurance policy. On September 5, 2003, Respondent deposited Glick's check into its trust account. Pursuant to OAR 836-074-0025 Respondent was required to deposit Glick's check into the trust account within seven days of receipt, by Tuesday, September 2, 2003. Inasmuch as Respondent deposited the check more than seven days after receipt, it violated the administrative rule.

C. Withholding, Misappropriating or Converting Money

The Department contends that Respondent improperly withheld, misappropriated or converted premium funds in four instances. Respondent contends that the violations were errors without intent to defraud.

ORS 744.074 provides in pertinent part:

> (1) The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:
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> *****
>
> (d) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business.

A preponderance of the evidence establishes that in September 2003, Respondent received a non-negotiated premium check from AMIC and failed to refund the $500 to Glick until June 2004, following the Department's audit. Thus, Respondent withheld premium it received from Glick. Next, the evidence shows that beginning in August 2003 and for an unknown period, Respondent withheld $200 in premium it received from Stroud. Also, in October 2003, Respondent paid Reber's $100 premium out of the PTA without having deposited the cash it had received from Reber. Thus, Respondent misappropriated premium by using one person's premium to pay that of another person. Finally, in December 2003, Respondent deposited a $1,622 premium payment received from Pittman and forwarded the premium to McFall, but the trust account was

overdrawn. Thus, Respondent misappropriated premium by using it for a purpose other than that for which it was received.

D. Failure to Timely Provide Information

ORS 731.296 provides:

> The Director of the Department of Consumer and Business Services may address any proper inquiries to any insurer, licensee or its officers in relation to its activities or condition or any other matter connected with its transactions. Any such person so addressed shall promptly and truthfully reply to such inquiries using the form of communication requested by the director. The reply shall be verified by an officer of such person, if the director so requires. A reply is subject to the provisions of ORS 731.260.[2]

On May 4, 2004, the Department faxed a letter to B&D requesting certain information by May 21, 2004. On May 19, 2004, B&D requested and the Department granted an extension until May 28, 2004. On June 14, 2004, the Department received a letter from Respondent dated June 4, 2004 providing some of the requested information. Respondent's letter did not include a spreadsheet of the amount of commission it kept in its trust account, number 44021908, at Douglas National Bank, each month during the period from October 2003 to April 2004 as requested. On June 25, 2004, the Department received the spreadsheet by fax. Thus, Respondent provided most of the information 17 days late and the remaining information 28 days late.

On July 6, 2004, the Department faxed to Respondent a letter requesting certain information by July 23, 2004. On July 26, 2004, Respondent requested and the Department granted an extension until July 29, 2004. On August 2, 2004, the Department received all of the requested information. Thus, Respondent provided the information four days late. Based on the record, I find that Respondent violated ORS 731.296 in two instances.

II. Sanction: ORS 744.013[3] authorizes the director of the Department to refuse to renew, suspend or revoke an insurance agent's license for violations of the Insurance Code. The

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2 ORS 731.260 provides:
False or misleading filings. No person shall file or cause to be filed with the Director of the Department of Consumer and Business Services any article, certificate, report, statement, application or any other information required or permitted to be so filed under the Insurance Code and known to such person to be false or misleading in any material respect.

3 ORS 744.013 provides:
Disciplinary actions against applicant, adjuster or insurance consultant. (1) If the Director of the Department of Consumer and Business Services finds with respect to an adjuster or insurance consultant or an applicant for an adjuster or insurance consultant license that one or more of the grounds set forth in subsection (2) of this section exist, the director may take the following disciplinary actions:

Department contends that the violations warrant revocation of Respondent's Oregon resident business entity insurance producer license. At hearing, the Department withdrew two allegations listed in the Notice of Proposed Action; nevertheless, the Department seeks maximum sanction. In contrast, Respondent argues that the circumstances do not

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(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.

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

(a) Incompetence or untrustworthiness of the applicant or adjuster or insurance consultant.

(b) Falsification by the applicant or adjuster or insurance consultant of the application for the license or an amendment thereto, or engagement in any dishonest act in relation to the application or examination therefor.

(c) Violation of or noncompliance with any applicable provision of the Insurance Code or any rule or order of the director.

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

(e) Conviction in any jurisdiction, of an offense which if committed in this state, constitutes a felony, a misdemeanor involving dishonesty or breach of trust, or an offense punishable by death or imprisonment under the laws of the United States. The record of the conviction shall be conclusive evidence of the conviction.

(f) Material misrepresentation of the terms of any insurance policy or proposed insurance policy.

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

(h) Error by the director in issuing or renewing a license.

(i) Failure to pay a civil penalty assessed by the director that has become final by operation of law or upon appeal.

(j) Failure to pay any fee or charge to the director.

(k) Use of the license principally to effect insurance on property or against liability of the applicant or adjuster or insurance consultant, or to evade the provisions of ORS chapter 746.

(L) Cancellation, revocation, suspension or refusal to renew by any state of a license or other evidence of authority to act as an insurance producer, adjuster or insurance consultant. The record of the cancellation, revocation, suspension or refusal to renew shall be conclusive evidence of the action taken.

(m) Cancellation, revocation, suspension or refusal to renew by any state or federal agency of the authority to practice law or to practice under any other regulatory authority if the cancellation, revocation, suspension or refusal to renew was related to the business of an insurance producer, adjuster or insurance consultant or if dishonesty, fraud or deception was involved. The record of the cancellation, revocation, suspension or refusal to renew shall be conclusive evidence of the action taken.

(n) Failure to comply with continuing education requirements applicable to the license or any category of insurance authorized under the license, unless the director has waived the requirements.

(o) Dishonesty, fraud or misrepresentation not related to the business of an insurance producer, adjuster or insurance consultant.

(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 adjuster or insurance consultant employed by or under contract with the firm or corporation.

(b) With respect to a director or officer of the firm or corporation.

(c) With respect to any person who directly or indirectly has the power to direct or cause to be directed the management, control or activities of the adjuster or insurance consultant.

warrant revocation of the license held by an agency that has done business since 1943. Respondent further argues that the number of violations is relatively few, the dollar amounts in question are relatively small, and no client was harmed either by monetary loss or lack of insurance coverage. Respondent further argues that the violations represent *de minimus* errors without intent to defraud. Finally, Respondent argues that it has taken a remedial measure by retaining an accountant to verify its bank records.

In past cases, the Department has considered the following aggravating and mitigating factors when determining the proper sanction. *See 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 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. *Id.*

The mitigating factors include: absence of a prior 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.*

Here, Respondent has conducted business in Roseburg since 1943 and under the current owner since 1994 without disciplinary offense. Respondent's owner and staff suffered a devastating loss in the death of a child. Moreover, I find no bad faith obstruction of the disciplinary process and no submission of false evidence. Respondent was not indifferent and made restitution to Ballard and Stroud. Furthermore, Respondent has acknowledged the wrongful nature of the conduct and has hired an accountant to reconcile and verify its bank records.

On the other hand, Respondent's many years of experience weighs against it because Respondent should know how to properly manage a trust account. Furthermore, an accountant who reconciles and verifies bank records is unable to determine whether Respondent received premium and failed to deposit it. Even though Respondent's owner and employees suffered a family tragedy, the purpose of the statute and administrative rules is to protect the public. Moreover, the record shows multiple violations and a pattern of misconduct during the audit period. Additionally, Respondent provided investigative information in an untimely manner. Finally, overdrawing the trust account

reflects a selfish motive. In conclusion, I find that the aggravating factors outweigh the mitigating factors and license revocation is warranted.

ORDER

I propose that the Insurance Department issue the following order:

The Oregon business entity insurance producer license of Bailey & DeBernardi Insurance, Inc. is revoked.

Dated this 14th day of July 2005.

/s/ Catherine P. Coburn
Catherine P. Coburn, Administrative Law
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