ORDER NO.: E20-04

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-15433-18
AGENCY DOCKET NO.: OTSC #E18-91

MARLENE CARIDE, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	FINAL DECISION AND ORDER
v.	)	
BILAL PEKDEMIR	)	
Respondent.	)	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 ("Producer Act"), and all powers expressed or implied therein, for the purposes of reviewing the December 12, 2019 Initial Decision ("Initial Decision") of Administrative Law Judge Kimberly A. Moss ("ALJ"). In the Initial Decision, the ALJ found in favor of the Department of Banking and Insurance ("Department") against Respondent Bilal Pekdemir ("Respondent") on the sole count of the Department's Order to Show Cause No. E18-91 ("OTSC"). The ALJ ordered that the Respondent's insurance producer license be suspended for 30 days and a monetary fine in the amount of $2,000 be imposed.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about September 6, 2018, the Department issued the OTSC against the Respondent seeking to revoke his producer license and impose civil monetary penalties and costs of the

investigation for alleged violations of the Producer Act. The OTSC contained one count alleging that the Respondent engaged in the following conduct in violation of the insurance laws of this State:

> Count One – Respondent, by adding comprehensive-only automobile insurance coverage for second vehicles to Farmers policies for the Insureds, which vehicles were not owned by or registered to the Insureds, and without the Insureds' knowledge or consent, in order to qualify the Insureds for multi-vehicle discounts to which the Insureds were not entitled, violated N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16).

On or about September 18, 2018, the Respondent filed an Answer, wherein he admitted and denied certain allegations set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") on October 22, 2018, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. The Department filed a motion for summary decision on January 4, 2018[1] and the Respondent filed a reply to the motion on January 28, 2019. Initial Decision at 2. The ALJ denied the motion on February 4, 2019. Ibid. The hearing was held on November 20, 2019, at which time the record was closed. Ibid.

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ noted that the parties stipulated to the following:

1. The Respondent was a Farmers Insurance Company ("Farmers") insurance agent from 2013 to 2016.

2. The Respondent has been a licensed New Jersey insurance producer since 1997.

3. The Respondent's Farmers user identification number ("user ID") was "pekdo82."

[1] The Initial Decision indicates that the Department moved for Summary Decision on January 4, 2018. Initial Decision at 2. The Department's Brief in Support of Summary Decision is dated January 4, 2019.

4. On or about May 13, 2015, the Respondent added comprehensive-only coverage for a second vehicle to a Farmers automobile insurance policy for Turgay Aytac ("Aytac").[2]

5. Aytac was the Respondent's client.

6. The Respondent added comprehensive-only coverage for a second vehicle to Aytac's Farmers policy in order to qualify Aytac for a multi-vehicle discount.

7. The Respondent added comprehensive-only coverage for a second vehicle to Aytac's Farmers policy in order to lower the insurance premiums Aytac would have to pay.

8. The Respondent added comprehensive-only coverage for a second vehicle to Aytac's Farmers policy without informing Aytac.

9. The Respondent added comprehensive-only coverage for a second vehicle to Aytac's Farmers policy in order to keep Aytac's automobile insurance premiums competitive as compared to premiums offered by Respondent's competitors.

10. The Respondent added comprehensive-only coverage for a second vehicle to Aytac's Farmers policy for a second vehicle using the Respondent's Farmers user ID.

11. On or about February 25, 2015, the Respondent added comprehensive-only coverage for a second vehicle to a Farmers automobile insurance policy for Sunny Sahin ("Sahin").

12. Sahin was the Respondent's client.

13. The Respondent added comprehensive-only coverage for a second vehicle to Sahin's Farmers policy in order to qualify Sahin for a multi-vehicle discount.

14. The Respondent added comprehensive-only coverage for a second vehicle to Sahin's Famers policy in order to lower the insurance premiums Sahin would have to pay.

15. The Respondent added comprehensive-only coverage for a second vehicle to Sahin's Farmers policy in order to keep Sahin's automobile insurance premiums competitive as comparted to premiums offered by respondent's competitors.

[2] The OTSC refers to the insureds by their initials while the Initial Decision refers to them by their names. In order to maintain consistency with the Initial Decision, this Final Decision will also refer to the insureds using their names.

16. The Respondent added comprehensive-only coverage for a second vehicle to Sahin's Farmers policy without informing Sahin.

17. The comprehensive-only coverage added by respondent to Sahin's Farmers policy for a second vehicle was added using the Respondent's Farmers user ID.

18. On or about April 14, 2014, the Respondent added comprehensive-only coverage for a second vehicle to a Farmers automobile insurance policy for Sibel Icke ("Icke").

19. Icke was the Respondent's client.

20. The Respondent added comprehensive-only coverage for a second vehicle to Icke's Farmers policy in order to qualify Icke for a multi-vehicle discount.

21. The Respondent added comprehensive-only coverage for a second vehicle to Icke's Farmers policy in order to lower the insurance premiums Icke would have to pay.

22. The Respondent added comprehensive-only coverage for a second vehicle to Icke's Farmers policy in order to keep Icke's automobile insurance premiums competitive as compared to premiums offered by Respondent's competitors.

23. The Respondent added comprehensive-only coverage for a second vehicle to Icke's Farmers policy without informing Icke.

24. The comprehensive-only coverage added by the Respondent to Icke's Farmers policy for a second vehicle using respondent's Farmers user ID.

25. On February 2, 2016, respondent participated in a conference call with Farmers representatives Ryan Summy[3] ("Summy") and Dwayne Pink ("Pink").

26. Following the February 2, 2016, call, the Respondent provided a statement to Farmers.

27. The statement was written in English.

28. English is the Respondent's second language.

29. The Respondent signed the statement.

30. During portions of 2013 and 2016, an agent named Eun Jung Kim (aka Jolene Kim) worked for the Respondent.

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[3] The ALJ refers to this individual as Ryan Sammy when listing the stipulations. Initial Decision at 4. The ALJ also refers to this individual as Ryan Summy. Id. at 6. The individual's name is Ryan Summy. T1-30:5-8.

31. All applications in question were submitted under Pekdemir's user ID number.

32. Respondent added comprehensive-only coverage to the seven clients' policies in question, without the clients' knowledge, to allow his clients to pay lower premium. Id. at 2-4.[4]

The ALJ found additional facts from the evidence presented. The ALJ found that the Respondent was first licensed as an insurance producer in Pennsylvania in 1996 and was licensed in New Jersey in 1997. Id. at 4. The Respondent has worked primarily in life insurance. Ibid.

The ALJ found that the Respondent began working for Farmers in 2013 and received four days of training, three of which were related to automobile insurance. Id. at 5. The Respondent requested additional training from Farmers. Ibid. Farmers sent a trainer to his office for one day, who did not provide the Respondent with additional training in the area of automobile insurance. Ibid.

The ALJ found that Pink, a representative of Farmers, recommended Eun Jung Kim ("Jolene Kim") to the Respondent. Ibid. Though Jolene Kim was not an agent,[5] Pink stated that Kim would be a good producer and was experienced in the writing of automobile insurance. Ibid. The Respondent hired Jolene Kim in 2013 and she showed the Respondent how to prepare automobile policies. Ibid. She worked for the Respondent until 2014 and left Respondent's employ, though she later returned to work for him again.[6] Ibid. The ALJ noted that Jolene Kim

[4] As discussed below, additional policies were written under the Respondent's auspices by Jolene Kim, an employee.

[5] The ALJ indicates that Jolene Kim was not an agent. However, it appears that while Jolene Kim was not an agent of Farmers, but she was a licensed insurance producer.

[6] The ALJ does not indicate when Jolene Kim returned to work for the Respondent, nor is the record clear on this point. Jolene Kim worked for the Respondent when all seven of the comprehensive-only policies at issue were written. T1-103:15-104:5

worked with clients who spoke Korean and the Respondent worked with clients who spoke Turkish. Ibid.

The ALJ found that Jolene Kim used the Respondent's user ID when submitting insurance applications to Farmers because she did not have her own Farmers user ID. Ibid. The ALJ states in the Initial Decision that the Respondent trusted Jolene Kim to handle the automobile insurance applications. Ibid. The ALJ found that Jolene Kim wrote additional comprehensive-only automobile insurance policies[7] for Monica Cho ("Cho") on or about June 15, 2015; Yumion Jong ("Jong") on or about January 31, 2015; Hyun Kim ("Kim") on or about April 30, 2015; and Susana Jung ("Jung") on or about February 24, 2015. Ibid. Jolene Kim did not inform Cho, Jong, Kim, or Jung that she was adding the comprehensive-only coverage to their existing automobile insurance policies. Ibid. The comprehensive-only policies were written on cars that were not owned by Cho, Jong, Kim, or Jung at the time the policies were written. Ibid.

The ALJ found that the Respondent added comprehensive-only coverage on vehicles of Aytac on May 13, 2015; Sahin on February 25, 2015; and Icke on April 14, 2014. Id. at 2-5. These clients did not own the vehicles that were listed on the comprehensive-only coverage added by the Respondent. Id. at 5.

The ALJ found that the Respondent wrote the comprehensive-only coverage for the seven policies in question to lower his client's premiums.[8] Id. at 6. The Respondent checked the

[7] Comprehensive coverage pays an insured if the insured's automobile "is stolen or for damage to the automobile caused by things not covered under collision coverage, such as vandalism, flooding, fire, a broken windshield or damage from an animal." New Jersey Auto Insurance Buyer's Guide at 9.

[8] The Initial Decision is categorizes who wrote the comprehensive-only policies for Cho, Jong, Kim, and Jung differently at various points. The ALJ initially found that Jolene Kim wrote these policies. Initial Decision at 5. However, the ALJ later noted that the Respondent wrote the comprehensive-only coverage for the seven policies to lower premiums. Id. at 6. Finally, the ALJ concluded that the Respondent, himself or through Jolene Kim, wrote comprehensive-only policies

comprehensive loss underwriting exchange ("CLUE") to determine that the seven clients owned the cars that he added to their insurance policies. Ibid. However, the CLUE shows a seven-year-loss history. Ibid. When a vehicle is involved in an accident, the CLUE indicates the date of the accident and the owner of the car at that time. Ibid. If the vehicle owner sold the car after the date of the accident, the information about the new owner would not be in the CLUE system. Ibid. The Respondent did not use any other method to verify that his clients owned the cars to which he had added the comprehensive-only coverage. Ibid. He was unaware that his clients no longer owned those cars. Ibid.

That ALJ found that in December 2015 Farmers Sales Specialist Michael Gervasio ("Gervasio") came to the Respondent's office. Ibid. Gervasio informed the Respondent that he could not write the comprehensive-only coverage without confirming ownership. Ibid. The Respondent ended that practice after the conversation with Gervasio. Ibid.

The ALJ found that on February 2, 2016, the Respondent spoke to Pink and Summy, an investigator for Farmers, regarding the comprehensive-only coverage on the policies of Aytac, Sahin, Icke, Cho, Jung, Kim, and Jong. Ibid. Summy wrote a statement of their conversation and sent it to the Respondent for his signature. Ibid. The Respondent signed the statement and returned it. Ibid. The Respondent understood the conversation and did not ask for an attorney. Ibid. Summy did not tell the Respondent that signing the statement could result Farmers terminating his employment. Ibid.

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for seven clients. Id. at 8. In all cases, the Respondent's user ID was utilized to write the policies in question.

The ALJ found that the seven customers for whom the comprehensive-only policies were written saved between $26.00 and $43.00.[9] Ibid. Because the premiums were less expensive, the Respondent earned a lower commission. Ibid.

The ALJ concluded that the Respondent violated N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16) because he added comprehensive-only coverage to the policies of Aytac, Sahin, Icke, Cho, Kim, Jung, and Jong without their knowledge and on vehicles that they did not own. Id. at 8.

Penalty Recommended by the ALJ

Based upon the above findings, the ALJ recommended that the Respondent's insurance producer license be suspended for 30 days. Id. at 9. As to the appropriate monetary penalty in this matter, the ALJ noted that the factors for determining monetary penalties are set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Initial Decision at 8. These factors include: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Ibid.

Regarding the first factor, the ALJ determined that the Respondent exhibited bad faith by adding comprehensive-only coverage on the policies of Aytac, Sahin, Icke, Cho, Kim, Jung, and Jong without their knowledge or consent and without verifying that they owned the vehicles that the comprehensive policies were added to, and allowed Jolene Kim to do the same using his user ID. Id. at 8-9.

[9] It is unclear from the record from where the ALJ obtained these figures.

Regarding the second factor, the ALJ determined that the Respondent's monthly income is $2,000, while his wife and daughter's monthly income is $5,000.[10] Id. at 9. The Respondent is $100,000 in debt. Ibid.

As to the third factor, the ALJ concluded that the Respondent did not obtain any profit from adding the comprehensive-only coverage on the policies of vehicles that did not belong to his clients. Ibid. The ALJ found that the Respondent lost money because by lowering his client's premiums, he also lowered his commission. Ibid.

As to the fourth factor, the ALJ determined that the public was not injured by the Respondent's conduct. Ibid.

As to the fifth factor, the duration of the conduct, the ALJ concluded that six of the seven policies[11] were written in a five-month period from January 2015 to June 2015. Ibid.

As to the sixth and seventh factor, the ALJ determined that there were no criminal charges against the Respondent and the Respondent has no prior violations. Ibid.

Based upon the above analysis, the ALJ recommended that a civil monetary penalty be imposed against the Respondent in the amount of $2,000. Ibid. The ALJ did not address reimbursement for the costs of investigation pursuant to N.J.A.C. 17:22A-45(c).[12]

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[10] The Respondent testified that his wife and daughter work and the total monthly net income for his household is approximately $5,000 a month. T1-136:21-137:4.

[11] Icke's comprehensive-only policy was written on April 14, 2014.

[12] The Department asked for the costs of investigation in its closing argument. T1-145:2-5. The Department did not indicate the amount of costs of investigation or prosecution, and did not submit a certification as to these costs at the time of the hearing. The Department submitted a certification that the costs of investigation and prosecution at the time it moved for Summary Decision. The costs at that time were $737.50. Certification of Daxesh Patel, Ex. 4.

EXCEPTIONS

The Department's Exceptions to the Initial Decision

By letter dated December 24, 2019 the Department filed timely Exceptions to the Initial Decision ("Department Exceptions Brief") pursuant to N.J.A.C. 1:1-18.4. The Department agreed with the ALJ's analysis that the Respondent added comprehensive-only policies to seven clients' policies and in doing so violated N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). Department Exceptions Brief at 2. However, the Department disagreed with the ALJ's analysis of the Kimmelman factors and the assessment of $2,000 in penalties. Ibid.

Specifically, the Department argued that the Respondent's actions caused injury to the public. Id. at 3. The Department argued that the public is harmed whenever an insurance producer commits fraud. Ibid. (citing Commissioner v. Goncalves, OAL Dk. No. BKI 03301-05, Initial Decision (11/17/05), Final Decision (02/15/06)).

The Department also argues that, aside from the Respondent's testimony, no evidence was produced regarding the Respondent's inability to pay fines. Id. at 5. While the Responded testified that his household income was approximately $7,000 month, consisting of $2,000 from himself and $5,000 from his wife and daughter, he provided no documentary evidence regarding a financial hardship or inability to pay.[13] Ibid. The Department therefore requested that the Commissioner increase the penalty from $2,000 to $5,000 pursuant to N.J.A.C. 17:22A-45(c). Id. at 6.

The Department did not take exception to the ALJ not addressing the costs of investigation and prosecution. The Department also did not take exception the ALJ suspending, rather than revoking, the Respondent's license.

[13] The Respondent testified that his wife and daughter work and the total monthly net income for his household is approximately $5,000 a month, not $7,000. T1-136:21-137:4.

Respondent's Reply to Department 's Exceptions

By letter dated December 26, 2019, the Respondent, through counsel, Joseph Michelini, Esq., filed a Reply to the Department's Exceptions pursuant to N.J.A.C. 1:1-18.4(d). ("Respondent Reply Brief"). The Respondent argued that the ALJ heard numerous witnesses and did not overlook or fail to consider evidence. Respondent Reply Brief at 1.

The Respondent argued that the Department did not cross-examine or otherwise rebut the Respondent's testimony as to his income and his total household income. Id. at 2. The Respondent argued that the Department was provided with "significant documentation" regarding the Respondent's financial condition. Ibid. The Respondent argues that this was not produced at trial because it would have been duplicative of the Respondent's testimony and was unnecessary, since it would have only prolonged the hearing when the Respondent's testimony was not challenged. Ibid.

The Respondent argues that the ALJ properly considered that the Respondent did not obtain any profits, and actually lost money by lowering his commissions; the conduct occurred only during a short period of time; there were no criminal violations and the Respondent has been licensed for 23 years with no violations. Ibid. The Respondent agreed with the ALJ that the public was not harmed due to the "de minimis nature of the matter." Ibid. The Respondent argued that the Respondent's actions were largely the result of Farmer's failure to adequately train the Respondent. Ibid. The Respondent requested that the Commissioner adopt the ALJ's decision. Id. at 3. In the alternative, the Respondent argues that if the ALJ's decision was to be "disturbed", that the fine be "vacated given the de minimis nature" of the Respondent's actions. Ibid.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bomstein v. Metro. Bottling Co., 26 N.J. 263 (1958). A fair preponderance of the evidence is evidence that is sufficient to assure reliability and to avoid the appearance of arbitrariness. Commissioner v. Ladas, OAL Dkt. No. BKI 0947-02, Initial Decision, (02/05/04), Final Decision and Order, (06/22/04). Preponderance has been described as "the greater weight of credible evidence in the case is not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975).

Allegations Against the Respondent

The OTSC charges the Respondent with violations of the Producer Act, which governs the licensure and conduct of New Jersey insurance producers and empowers the Commissioner to suspend or revoke the license of, and to fine, an insurance producer for violations of its provisions. The OTSC alleges that the Respondent violated the Producer Act by violating any insurance laws or regulation in violation of N.J.S.A. 17:22A-40(a)(2); intentionally misrepresenting the terms of an actual or proposed insurance contract, policy, or application for insurance in violation of N.J.S.A. 17:22A-40(a)(5); demonstrating incompetence or irresponsibility in violation of N.J.S.A. 17:22A-40(a)(8); and committing fraud in violation of N.J.S.A. 17:22A-40(a)(16).

The following will evaluate the charges of the OTSC under the factual record created during the OAL proceeding.

Count One

Count One alleges that the Respondent added comprehensive-only automobile insurance coverage for second vehicles that insureds did not own, and without their knowledge or consent in order to qualify the insureds for multi-vehicle discounts to which they were not entitled in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). The ALJ found that the Respondent personally, or through his employee Jolene Kim, wrote comprehensive-only policies for seven clients without their knowledge and on vehicles they did not own. Initial Decision at 8. The ALJ concluded that this conduct violated N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). Ibid.

The evidence in the record shows that Respondent has been a licensed New Jersey insurance producer since 1997. Joint Stipulation of facts at ¶2, T1-91:21-23.[14] The Respondent principally worked in life and health insurance and had very little experience in property and casualty insurance. T1-92:20-93:4, 93:22-94:3. In 2013, the Respondent met with Farmers and then began working for them. T1-94:24-25:2. Farmers provided the Respondent with four days of training, three days of which were on automobile and home insurance. Id. at 97:14-19. At the Respondent's request, Farmers also sent a trainer to the Respondent's office to give him additional training in 2013 in writing homeowners insurance. Id. at 109:22-110:25.

The Respondent hired Jolene Kim at the suggestion of Pink, a manager at Farmers. Id. at 99:2-13; 100:7-10. Pink told the Respondent that Jolene Kim was experienced in the area of property and casualty insurance. Id. at 100:11-17. Jolene Kim's native language was Korean and she would be responsible for handling the Respondent's Korean clients' insurance policies. Id. at 106:7-21.

[14] T1 refers to the hearing transcript dated November 20, 2019.

Jolene Kim worked for the Respondent starting in 2013, and left later that year after having a child. Id. at 102:13-103:5. Jolene Kim later returned to work for the Respondent and worked for him during the time period when the comprehensive-only policies for Cho, Jong, Aytac, Sahin, Icke, and Kim were created. Id. at 103:15-104:5. During that time, Jolene Kim did not have a Farmers producer user ID because it had been deleted after she left Respondent's employ in 2013, so she used the Respondent's Farmers producer user ID with his permission. Id. at 105:2-16, 107:3-11. Jolene Kim showed the Respondent how to add comprehensive-only policies to save clients money. Id. at 108:2-4, 109:16-20, 121:8-12.

Farmers investigated the Respondent because Farmers received information that the Respondent had added comprehensive-only policies to clients' policies. T1-31:21-24. The Respondent met with Summy, a Farmer's investigator, and Pink on February 2, 2016, to discuss policies that contained comprehensive-only coverage. T1-33:14-25. The policies they discussed are contained in a Table in Ex. P-11A, which is a statement based on the conversation that the Respondent signed. T1-36:3-17.

During the meeting, the Respondent admitted that he had written comprehensive-only policies in order to qualify clients for a multi-vehicle discount in order to keep their insurance rates competitive. Id. at 32:1-8. The Respondent indicated to Summy that he had obtained information regarding the vehicles on which comprehensive-only policies were written from a CLUE report. Ex. P-11A, T1-52:16-21. A CLUE report indicates insurance claims that an individual has filed within the last seven years on any vehicles he or she owned. T1-50:24-51:7. However, the CLUE reports do not indicate the current owner of a vehicle, only who owned the vehicle at the time of loss. Id. at 51:15-25. The Respondent did not know that the CLUE report listed vehicles that may not have been owned by his clients. Id. at 118:25-119:7.

After meeting with Summy and Pink, the Respondent signed a statement wherein he admitted that he would not confirm with his clients if they still owned vehicles that were in the CLUE report. Ex. P-11A, T1-34:15-25; 55:24-56:23. The Respondent indicated that he believed it was acceptable to assume if the vehicle was on the CLUE report, it could be added to the policy. Ex. P-11A. The Respondent further indicated that he adopted this business practice to keep rates competitive with other insurance companies. Ibid. The Respondent also stated that he stopped this practice in December 2015 after he was told by Gervasio, a manager at Farmers, that it was wrong. Ex. P-11A; T1-113:8-114:3. By writing policies with multi-vehicle discounts, the Respondent saved his clients money. T1-73:16-21, 74:8-11. The Respondent's commissions would have been greater had he not given his clients the multi-vehicle discount. Id. at 73:22-74:7.

The evidence in the record indicates that on or about May 13, 2015, the Respondent added comprehensive-only coverage for a second vehicle to a Farmers automobile insurance policy for Aytac, one of the Respondent's clients, in order to qualify Aytac for a multi-vehicle discount and lower Aytac's premiums. Joint Stipulation of facts at ¶¶ 4-7. The Respondent added the vehicle to Aytac's policy without informing Aytac. Id. at ¶ 8. Aytac did not own the vehicle for which the comprehensive-only policy was written. T1-38:2-10.

On or about February 25, 2015, the Respondent added comprehensive-only coverage for a second vehicle to a Farmers automobile insurance policy for Sahin, one of the Respondent's clients, in order to qualify Sahin for a multi-vehicle discount and lower Sahin's premiums. Joint Stipulation of facts at ¶¶ 11-14. The Respondent added the vehicle to Sahin's policy without informing Sahin. Id. at ¶ 16. Sahin did not own the vehicle for which the comprehensive-only policy was written. T1-38:2-10.

On or about April 14, 2014, the Respondent added comprehensive-only coverage for a second vehicle to a Farmers automobile insurance policy for Icke, one of the Respondent's clients, in order to qualify Icke for a multi-vehicle discount and lower Icke's premiums. Joint Stipulation of facts at ¶¶ 18-21. The Respondent added the vehicle to Icke's policy without informing Icke. Id. at ¶ 23. Icke did not own the vehicle for which the comprehensive-only policy was written. T1-38:2-10.

On or about June 15, 2015, an application for automobile insurance was submitted to Farmers for Cho. Ex. P-12, P-19. A second vehicle listed on the policy, a 2007 Nissan Altima, had comprehensive-only coverage. Ex. P-12, Ex. P-19, T1-50:16-8, T1-84:16-25. Cho did not own the vehicle for which the comprehensive-only policy was written. T1-38:2-10. The application was submitted using the Respondent's user ID. Ex. P-11A, T1-43:17-20, 49:16-19.

On or about January 31, 2015, an application for automobile insurance was submitted to Farmers for Jong. Ex. P-13. A second vehicle listed on the policy, a 2010 Toyota Rav4, had comprehensive-only coverage. Ex. P-13, T-46:19-22. Jong did not own the vehicle for which the comprehensive-only policy was written. T1-38:2-10. The application was submitted using the Respondent's user ID. Ex. P-11A, T1-49:16-19.

On or about February 24, 2015, an application for insurance was submitted to Farmers for Jung. Ex. P-19. The application was submitted using the Respondent's user ID. Ex. P-11A, T1-49:16-19. Jung did not own a 2000 Honda Accord, which was on her policy. Ex. P-10.

On or about April 20, 2015, an application for automobile insurance was submitted to Farmers for Kim. Ex. P-19. The policy contained a premium for a vehicle with comprehensive-only coverage. Ex. P-19, T1-84:16-25. The comprehensive-only policy for Kim is not included in the table in the statement that the Respondent signed. Ex. P-11A. The policies in the table are

those that the Respondent discussed with Summy and Pink. T1-36:3-17. No evidence was introduced regarding whether Kim owned this vehicle.

While the Respondent testified that he did not know that he was doing anything wrong when he added vehicles from the CLUE report to clients' policies. However, fraudulent acts under the Producer Act, including an intentional misrepresentation of information on an application, do not require intent to deceive. See Commissioner v. Dobrek, BKI 2360-13, Initial Decision, (06/02/2014), Final Decision and Order, (01/15/2015), at 20, aff'd sub nom. Badolato v. Dobrek, No. A-2990-14 (App. Div. June 30, 2016); Commissioner v. Pino, OAL Dkt. No. BKI 8070-02, Initial Decision (09/11/03), Final Decision and Order (10/30/03) (there is no mens rea requirement for violations of N.J.S.A. 17:22A-1 to -25, the predecessor of the Producer Act); Commissioner v. Uribe, OAL Dkt. No. BKI 07363-07, Initial Decision, (12/28/10), Final Decision and Order (9/28/11). "A fraudulent act under the Producer Act does not require criminal intent." Commissioner v. Shih, 94 N.J.A.R. 2d (INS) 34 (March 2, 1994). "Proof of fraud under the [Producer Act], as opposed to common law fraud, does not require proof . . . of an intent to deceive." Badolato v. Dobrek, citing, Open MRI of Morris & Essex, L.P. v. Frieri, 405 N.J. Super. 576, 583 (App. Div. 2009).

I find that the Respondent personally, or through his employee, Jolene Kim, wrote comprehensive-only policies for Aytac, Sahin, Icke, Cho, Jung, and Jong on vehicles that they did not own and without their consent. The Respondent is responsible for his employee's insurance-related conduct. N.J.A.C. 11:17-2.10(b)(4). Accordingly, I ADOPT the ALJ's findings and find that the Respondent violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (5) (intentionally misrepresenting the terms of an actual or proposed insurance contract, policy, or application for insurance) (8) (using fraudulent, coercive, or dishonest practices or demonstrating

incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act). However, I REJECT the ALJ's finding that the Respondent personally, or through his employee, wrote a comprehensive-only policy for Kim without Kim's knowledge and on a vehicle Kim did not own. No evidence was introduced as to whether Kim owned the vehicle on which the comprehensive-only policy was written.

Penalties Against the Respondent

Suspension of Respondent's Insurance Producer License

With respect to the appropriate action to take against Andrade's insurance producer license, I FIND that the record is more than sufficient to support the suspension of the Respondent's license.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Ibid. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). A producer is held to a high standard of conduct and should fully understand and appreciate the effect of irresponsible conduct on the insurance industry and on the public.

Here, the Respondent acted incompetently and fraudulently when he added comprehensive-only policies for vehicles his clients did not own and did so without their knowledge. Accordingly, I find that suspending the Respondent's license for 30 days in accordance with the ALJ's recommendation is necessary and appropriate on the record before me.

This licensure penalty serves the need of protecting the public and maintaining public faith in the insurance industry. I also note that the Department did not take Exception to this recommendation.

Monetary Penalty Against the Respondent

The Commissioner has broad discretion in determining sanctions for violations of the laws she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The penalties set forth in the Producer Act "are expressions by the Legislature that serve a distinct remedial purpose." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09). The Producer Act provides that the Commissioner may impose a penalty not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense. N.J.S.A. 17:22A-45.

As discussed by the ALJ, under Kimmelman, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 ("[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case").

After reviewing the evidence presented and the Kimmelman factors, the ALJ recommended a total of $2,000 in monetary penalties. Initial Decision at 9. For the reasons set forth below, I MODIFY the ALJ's recommendation to impose total civil monetary penalties of $5,000.

The first Kimmelman factor addresses the good faith or bad faith of the violator. Here, the ALJ found that the Respondent exhibited bad faith by adding comprehensive-only coverage on his clients' policies without their knowledge or consent and without verifying that they owned the vehicles that the comprehensive policies were added to, and allowed Jolene Kim to do the same

using his user ID. Id. at 8-9. For the reasons set forth in the Initial Decision, I concur with the ALJ that such conduct demonstrates bad faith.

The second Kimmelman factor is the Respondent's ability to pay. Here, the ALJ determined that the Respondent's monthly income is $2,000, while his wife and daughter's monthly income is $5,000 and the Respondent is $100,000 in debt. Initial Decision at 9. However, the ALJ's determination of the Respondent's ability to pay is misplaced. The Respondent testified that the total monthly net income for his household is approximately $5,000 a month. T1-136:21-137:4. In its exceptions, the Department argues that aside from the Respondent's testimony, no evidence was produced regarding his inability to pay fines. Department Exceptions Brief at 5. In his reply, the Respondent argued that the Department did not cross-examine or otherwise rebut the Respondent's testimony as to his total household income. Respondent Reply Brief at 2. The Respondent argued that the Department was provided with "significant documentation" regarding the Respondent's financial condition. Ibid. The Respondent argues that this was not produced at trial because it would have been duplicative of the Respondent's testimony and was unnecessary, since it would have only prolonged the hearing when the Respondent's testimony was not challenged. Ibid.

Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). An insurance producer's ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. Substantial fines have been imposed against insurance producers despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order

(12/28/11) (issuing a $100,500 civil penalty despite the producer arguing that he was unable to pay); See also Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (fine of $100,000 imposed despite evidence of the Respondent's inability to pay); Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from $2,500 to $20,000 even though the producer argued an inability to pay fines in addition to restitution). I find that this factor mitigates against a large penalty. As discussed below, the maximum penalty that could be imposed in this matter is $55,000.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. The ALJ concluded that the Respondent did not obtain any profit from adding the comprehensive-only coverage on the policies of vehicles that did not belong to his clients. Initial Decision at 9. Rather, the Respondent lost money because by lowering the client's premiums, he also lowered his commission. Ibid. I concur with the ALJ that the Respondent did not profit from his conduct. Accordingly, I find that this factor mitigates against a large monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. The ALJ determined that the public was not injured by the Respondent's conduct. Initial Decision at 9. The Department argued that the Respondent's actions caused injury to the public because that the public is harmed whenever an insurance producer commits fraud. Department Exceptions Brief at 3 (citing Commissioner v. Goncalves, OAL Dk. No. BKI 03301-05, Initial Decision (11/17/05), Final Decision (02/15/06)). In his reply, the Respondent agreed with the ALJ that the public was not

harmed due to the "de minimis nature of the matter." Respondent Reply Brief at 2. I disagree and I REJECT the ALJ's finding and find that the public was harmed by the Respondent's actions. The insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979). Both insureds and insurers must place their trust in the information insurance producers convey to them. There can be no compromise in the level of honesty and integrity required of these professionals. See Commissioner v. Ladas, OAL Dkt. No. BKI 0947-02, Initial Decision, (02/05/04), Final Decision and Order (06/18/04), Amended Final Decision and Order (06/22/04). A licensee's honesty, trustworthiness, and integrity are of paramount concern. The public is significantly harmed when licensed insurance professionals engage in dishonest activity. Accordingly, I find that this factor weighs in favor of a monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Kimmelman, 108 N.J. at 139. The longer the illegal conduct, the more significant civil penalties should be assessed. Ibid. The ALJ concluded that six of the seven policies were written in a five-month period from January 2015 to June 2015. Only one policy at issue was written in 2014. Initial Decision at 9. I agree that a majority of the policies were written in a short, discrete amount of time. Accordingly, this factor weighs against the imposition of a large monetary penalty.

The sixth Kimmelman factor is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty

because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. The ALJ determined that there were no criminal charges against the Respondent. Initial Decision at 9. I concur with the ALJ that there is no evidence that the Respondent was held accountable in a criminal court or paid criminal sanctions. Accordingly, this factor weighs in favor of the imposition of a monetary penalty.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act or Fraud Act, and if past penalties have been insufficient to deter future violations. Kimmelman, 108 N.J. at 139. The ALJ found that the OTSC issued by the Department in 2018 was the first action the Department took against the Respondent. Initial Decision at 9. I concur and find that this factor does not weigh in favor of a large monetary penalty.

Weighing all of the Kimmelman factors, and based upon the violations of the Producer Act as set forth above, I ADOPT the recommendations of the ALJ that the Respondent shall pay civil monetary penalties. However, I MODIFY the ALJ's recommendation that the Respondent be fined $2,000 in civil monetary penalties. The nature of the Respondent's violations warrants the imposition of a higher civil monetary penalty than that recommended by the ALJ. Accordingly, I MODIFY the recommendations of the ALJ and find the Respondent liable for a monetary penalty of $5,000, the amount requested by the Department.

These penalties are necessary and appropriate under the above Kimmelman analysis given the Respondent's conduct. The Respondent submitted insurance applications containing false information. Regardless whether the Respondent knew what he was doing was wrong, this behavior demonstrates fraud and incompetence. Moreover, these penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by the Respondent and the industry as a whole. I also note it is far less than the Department could

have requested under N.J.S.A. 17:22A-45, which allows the imposition of up to a $5,000 fine for the first violation and up to a $10,000 fine for any subsequent violations of the Producer Act, making the possible maximum monetary penalty that could be imposed against the Respondent is $55,000, because each application for a comprehensive-only policy was a separate violation of the Producer Act. Separate civil penalties may be assessed for each act. Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (6/16/08); Final Decision and Order No. E08-82 (9/15/08) (Respondent criminally convicted of theft of insurance premiums totaling approximately $20,000, and each individual misappropriation of the eighteen insurance premiums were held to constitute a violation of the Producer Act); Nasir, 355 N.J. Super. at 107-08; see also State v. Fleischman, 189 N.J. 539 (2007); Maglaki, 126 N.J. at 439 (imposition of a penalty for each false statement submitted by the defendant was appropriate).

Further, the penalty of $5,000 is appropriate and consistent with prior actions against producers who have engaged in similar conduct. See Commissioner v. Jung. Final Olrder (06/01/18) (Respondent failed to respond to an Order to Show Cause and fined $5,000 for violating the Producer Act by fraudulently writing nine comprehensive-only automobile insurance policies for vehicles insureds did not own in order to qualify them for multi-vehicle discounts). Accordingly, I find that the Respondent be fined $5,000 for violating N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16).

CONCLUSION

Having carefully reviewed the Initial Decision, the parties' Exceptions and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in Initial Decision, except as modified as set forth herein. Specifically, as to Count One, I ADOPT the ALJ's finding that the Respondent violated N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16).

I MODIFY the recommended civil monetary penalty and ORDER the Respondent to pay a total of $5,000 in civil monetary penalties.

Finally, I ADOPT the ALJ's conclusion that Pekdemir's license be suspended for 30 days and hereby ORDER the suspension of the Respondent's license effective as of the date of this Final Order and Decision.

It is so ORDERED on this 9th day of January 2020.

Marlene Caride
Commissioner

JD Pekdemir FO/Final Orders