Order No. E24-51

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DKT. NO.: BKI 05071-20
AGENCY DOCKET NO. E20-10

JUSTIN ZIMMERMAN,[1] ACTING COMMISSIONER, Petitioner,	)	
v.	)	FINAL DECISION AND ORDER
PETER M. FORDE AND MADISON INSURANCE AND FINANCIAL SERVICES, LLC Respondents	)	

This matter comes before the Acting Commissioner of Banking and Insurance ("Commissioner") pursuant to the authority of the New Jersey Insurance Producer Licensing Act at N.J.S.A. 17:22A-26 to -48 ("Producer Act"), and all powers expressed or implied therein, for the purposes of reviewing the May 7, 2024 Initial Decision ("Initial Decision") of Administrative Law Judge Julio C. Morejon ("ALJ").

In the Initial Decision, the ALJ granted the Department of Banking and Insurance's ("Department") motion for Summary Decision against Respondents Peter M. Forde ("Forde") and Madison Insurance and Financial Services, LLC. ("Madison") (collectively, "Respondents") on Counts One and Two, as alleged in Order to Show Cause No. E20-10 ("OTSC"). Additionally, the ALJ recommended that the Respondents' insurance producer licenses be suspended for 120

[1] Pursuant to R. 4:34-4, Acting Commissioner Justin Zimmerman has been substituted in place of former Commissioner Marlene Caride in the caption.

days, and that civil penalties in the amount of $46,000 be imposed against the Respondents. Further, the ALJ recommended that the Respondents shall reimburse the Department $2,225 for the costs of investigation and prosecution pursuant to N.J.S.A. 17:22A-45(c).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 7, 2020, the Department issued the OTSC against the Respondents. The OTSC contains two Counts as follows:

> Count One: By failing to place insurance for L.D.'s trucking company, Respondents demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of insurance business, in violation of N.J.S.A. 17:22A-40(a)(8); and
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> Count Two: By providing L.D.'s trucking company with eleven Certificates of Liability Insurance that contained fabricated insurance policy numbers for insurance policies that did not actually exist, the issuance of each Certificate of Liability Insurance constituting a separate offense under the Producer Act, Respondents violated N.J.S.A. 17:22A-40(a) (2), (5), (8), and (16).

On March 5, 2020, the Respondents filed an Answer to the OTSC, wherein the Respondents denied all of the allegations set forth in the OTSC and requested a hearing. Initial Decision at 2. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on June 2, 2020. Ibid.

On December 22, 2021, the Department filed a motion for summary decision. Ibid. The Respondents filed opposition, and the Department filed its reply. Ibid. Oral argument was held on June 2, 2022, the record was closed on April 1, 2024, and the ALJ granted summary decision to the Department on May 7, 2024. Ibid.

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ's Factual and Legal Findings

The ALJ stated that a "party may move for summary decision upon all or any of the substantive issues in a contested case." Id. at 5 (quoting N.J.A.C. 1:1-12.5(a)). The ALJ stated that summary decision may be granted if "the papers and discovery which have been filed, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. (quoting N.J.A.C. 1:1-12.5(b)). In order to prevail, the adverse party must "set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Id. at 5-6 (quoting N.J.A.C. 1:1-12.5(b)). Further, the ALJ stated whether a "genuine issue" of material fact exists requires the consideration of whether the competent evidential materials present, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party. Id. at 6 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

The ALJ found that the Department presented sufficient proof that there was no genuine issue of material fact, and that it was entitled to prevail as a matter of law. Id. at 8 (citing N.J.A.C. 1:1-12.5(b)). The ALJ found the following relevant facts in granting the Department's Motion for Summary Decision.

Facts Relevant to All Counts

The ALJ found that Forde is an actively licensed New Jersey resident insurance producer and is the owner and Designated Responsible Licensed Producer ("DRLP") of Madison, which is an actively licensed New Jersey resident business entity producer. Id. at 3. Respondents have been in business since 2007. Ibid.

Madison had commercial automobile, general liability, and motor truck cargo insurance policies with Progressive Insurance ("Progressive"), from June 20, 2013, through June 20, 2014,

for MD Trucking of Middletown, New Jersey ("MD Trucking"). Ibid. MD Trucking is owned by MD and his wife, LD. MD Trucking had been working with the Respondents since approximately October 2009. Ibid.

In August 2014, MD Trucking requested that Respondents obtain new general liability and motor truck cargo insurance policies for MD Trucking. Ibid. On or about August 14, 2014, Respondents submitted to Essex Insurance Company ("Essex Insurance"), via Risk Placement Services, Inc. ("Risk Placement"),[2] an unsigned application for motor truck cargo insurance for MD Trucking. Ibid. Also, on or about August 14, 2014, Respondents submitted to Covington Specialty Insurance Co. ("Covington"), via Risk Placement, an unsigned application for general liability insurance. Ibid. On August 14, 2014, Covington provided Respondent a quote for general liability insurance for MD Trucking. Ibid. In August 2014, the Respondents e-mailed the insurance quotes for general liability and motor truck cargo insurance policies to MD Trucking. Ibid.

On November 19, 2015, MD Trucking had an incident involving a cargo spill in one of its trucks. Id. at 5. MD Trucking submitted a claim to ARI for $8,873.53 for cleanup of Hazardous Materials for "Hole poked by another piece of freight." Ibid.

Count One

The ALJ stated that the Department alleged in Count One of the OTSC that the Respondents' failure to place general liability and motor truck cargo insurance policies for MD Trucking violated N.J.S.A. 17:22A-40(a)(8). Id. at 8.

[2] Risk Placement Services is a company that assists insurance agents and brokers obtain insurance coverage for their clients. Shannon Cert. at ¶ 6.

The ALJ found that although e-mail correspondence between Respondents and MD Trucking led MD Trucking to believe the motor truck cargo and general liability insurance policies were being bound and finalized, the Respondents never finalized or placed the motor truck cargo or general liability policies on behalf of MD Trucking. Id. at 5.

The ALJ found that after Forde told LD that Progressive would no longer cover MD Trucking, and MD Trucking moved over to ARI,[3] she "assumed" that she had general liability and motor truck cargo coverage through ARI "[b]ecause I only was making one payment to Progressive for all of those coverages, so I assumed that it was the same situation with ARI." Id. at 8 (quoting Certification of Eugene Shannon in Support of Petitioner's Motion for Summary Decision ("Shannon Cert.") at Ex. D).

The ALJ concluded that the Respondents led MD Trucking to believe that it had general liability and motor truck cargo insurance when it did not. Id. at 11. Accordingly, the Department proved that the Respondents violated N.J.S.A. 17:22A-40(a)(8) because their conduct demonstrated a disregard for the standards of the insurance profession. Ibid.

Count Two

The ALJ stated that the Department alleged in Count Two of the OTSC that the Respondents' fabrication and issuance of eleven Certificates of Liability Insurance ("COLIs") for policies that never existed violated N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). Id. at 9.

The ALJ found that between June 2015 and January 2016, the Respondents issued eleven COLIs to MD Trucking purporting to show that MD Trucking had both general liability insurance and motor cargo insurance. Ibid.

[3] The ALJ did not define ARI, which is ARI Mutual Insurance Company. Shannon Cert. ¶ 6, Ex. E. On June 11, 2014, MD, on behalf of MD Trucking, completed and signed a Commercial Business Auto Application for insurance, which the Respondents submitted to ARI. Ibid.

Specifically, the Respondents issued the following COLIs:

DATE COLI ISSUED	POLICY[4]	CERTIFICATE HOLDER
6/8/2015	CGL081414PF	Interpool, Inc.
6/8/2015	CGL081414PF	Direct ChassisLink Inc.
8/11/2015	CGL081414PF	Direct ChassisLink Inc.
8/11/2015	CGL081414PF	CH Robinson & Subsidiary Companies
8/12/2015	CGL081414PF	Land Link Traffic Systems
8/13/2015	CGL081414PF	Landstar Systems Inc.
8/18/2015	CGL081414PF	Direct ChassisLink Inc.
11/16/2015	CGL081414PF	CH Robinson & Subsidiary Companies
11/18/2015	VBA071819	CH Robinson & Subsidiary Companies
11/24/2015	CGL081414PF	CH Robinson & Subsidiary Companies
1/21/2016	VBA071819	XPO Logistics Inc.

Id. at 4.

The ALJ found that the Respondents issued the COLIs based on the understanding that MD Trucking would tender payment to obtain the requested insurance so that MD Trucking could continue its business uninterrupted. Ibid. Respondents never received any money from MD Trucking for the motor truck cargo and general liability insurance policies. Ibid. The COLIs sent to the various companies for MD Trucking had temporary binder numbers that had been generated in the Respondents' internal computer system. Ibid. These binder numbers were used instead of true policy numbers, because the Respondents had never finalized and placed the motor truck cargo

[4] The policy numbers used by Respondents were fictitious and fabricated by Respondents based on binder numbers that they generated. Shannon Cert. ¶ 17-18, Exs. J, K.

or general liability policies. Ibid. It was the regular practice of the Respondents to sell an insurance policy and create a binder number, even if their customer had not yet paid for a policy. Id. at 5. Forde stated that customers expected this of him so that they would be able to continue their businesses uninterrupted. Id. at 10. Forde admitted that he issued the COLIs in anticipation that he would receive money. Ibid. He further admitted that he should have edited the COLIs after he was aware that there was no policy, and he never corrected the COLIs in the computer system after they were not placed. Ibid. (Citing Shannon Cert. Ex. J., Voluntary Sworn Statement of Peter Forde, October 11, 2017, p. 51).

The Respondents did not accept any money in exchange for the COLIs with fictitious policy numbers. Id. at 5. Further, they have put remedies in place to ensure that this does not happen again. Ibid.

The ALJ concluded that the Department proved that the Respondents issued COLIs for policies that did not exist and led MD Trucking and its customers to believe that MD Trucking had general liability and motor truck cargo insurance. Id. at 11. The ALJ found that although the Respondents may not have intended to deceive, intention is not a necessary element of common law fraud. Id. at 13 (citing State v. Nasir, 355 N.J. Super. 96, 106 (App. Div. 2002), certif. denied, 175 N.J. 549 (2003)). Accordingly, the ALJ found that the Respondents violated N.J.S.A. 17:22A-40(a)(5) and (8). Id. at 10-11.

Penalties Recommended by the ALJ

The ALJ noted that under the Producer Act, the Commissioner may impose a penalty of not more than $5,000 for the first violation, a penalty of not more than $10,000 for any subsequent violation, and reimbursement for the costs of investigation. Id. at 14 (citing N.J.S.A. 17:22A-45(c)). The ALJ noted that the Department sought civil penalties in the amount of $115,000,

consisting of a $5,000 civil penalty for Count One and civil penalties of $10,000 each for eleven separate violations in Count Two. Id. at 14.

The ALJ analyzed the seven factors for determining monetary penalties set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 15-19. These factors include: (1) the good faith or bad faith of the Respondent; (2) the Respondent'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. Id. at 25.

The ALJ explained that evaluating the first factor in Kimmelman—whether the Respondents acted in good or bad faith—requires assessing how serious the alleged misconduct was, whether the Respondents reasonably believed their actions were legal, and when they realized their previous actions might be illegal.. Id. at 15 (citing Kimmelman, 108 N.J. at 137). The ALJ found that Forde acknowledged that he did not follow the proper procedure and made mistakes, but repeatedly insisted that he never had any intent to defraud anyone. Ibid. The ALJ concluded that although Forde's conduct was improper and grossly incompetent, the Respondents did not act in bad faith. Ibid.

As to the second factor in Kimmelman, the ability to pay, the ALJ stated that the Respondents have made clear that they do not have the means to pay the maximum fine of $115,000 requested by the Department. Id. at 16. The ALJ found that Madison is a small business and Forde would not be able to pay a heavy fine. Ibid.

As to the third factor, the profits obtained, the ALJ stated that there was no evidence that the Respondents received any profit from their conduct. Id. at 16-17. The ALJ found that this factor weighed in favor of a lesser penalty. Id. at 17-18.

As to the fourth factor, injury to the public, the ALJ found that there was harm to the public because the Respondents submitted COLIs that falsely confirmed MD Trucking's insurance coverage to companies who were deciding if they would work with MD Trucking. Id. at 18. The ALJ concluded that the Respondents' conduct caused injury to the public and required the imposition of a civil penalty, but the Department's potential recovery of $115,000 was "disproportionate to the amount of fraud that occurred." Ibid.

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that this is a significant factor. Id. at 19. The ALJ found that the Respondents presented the Essex Insurance and Covington insurance policies as if they were bound and finalized over the course of approximately seven months, between June 2015 and January 2016. Ibid. The ALJ concluded that this factor weighed in favor of a monetary penalty. Ibid.

Regarding the sixth factor, the existence of criminal charges or treble damage actions related to the matter, the ALJ found that the Respondents have not faced any criminal or treble damages actions. The ALJ concluded that this factor weighed in favor of not ordering a monetary penalty. Ibid.

For the final factor in Kimmelman, previous relevant regulatory and statutory violations, the ALJ found that neither Forde nor Madison had ever been fined or sanctioned by the Department. Id. at 19-20. The ALJ concluded that this factor "strongly" suggested that the maximum penalty was not warranted. Id. at 20.

The ALJ also found that the presence of mitigating factors warranted against lesser penalties and revocation of the Respondents' producer licenses. Id. at 20-21. The ALJ found that the Respondents invested in a new computer system to ensure that the mistakes that occurred in this matter will not happen again. Id. at 21. They also hired a new finance company which they

use to secure down payments from customers. Ibid. Prior to binding any agency billed policy, the down payment is first secured electronically by uploading the payment directly from the insured's checking account directly onto the finance company's website. Ibid.

The ALJ concluded that the mitigating factors of no previous disciplinary history, lack of bad faith, absence of any misappropriation of client funds, and the significant steps taken to prevent oversights from happening again, weighed in favor of suspending, rather than revoking, the Respondents' insurance producer licenses and lesser civil penalties than requested by the Department. Ibid.

The ALJ concluded that the Respondents' producer licenses should be suspended for 120 days. Ibid. Further, civil penalties in the amount of $2,000 for the violations in Count One and $4,000 for each of the eleven violations in Count Two, for a total of $46,000 were appropriate. Id. at 22. The ALJ did not indicate whether the fine was to be paid jointly and severally. The ALJ also found that it was appropriate to grant the Department's request for costs of investigation of $2,225 under N.J.S.A. 17:22A-45(c). Ibid.

EXCEPTIONS

Pursuant to N.J.A.C. 1:1-18.4(a), Exceptions were due on May 20, 2024. The Department filed its exceptions on May 15, 2024, and the Respondents filed theirs on May 20, 2024.

Department Exceptions

The Department agreed with the ALJ's findings of fact, conclusions of law, and the penalties recommended. Department Exceptions at 2. However, the Department indicated that there was a typographical error in the ALJ's discussion of the sixth Kimmelman factor. Ibid. (citing Initial Decision at 19). In the Initial Decision, the ALJ stated that the Respondents "have not faced any criminal or treble damages actions" and concluded that this factor "weighs in favor

of no penalty." Department Exceptions at 2 (quoting Initial Decision at 19). The Department states that this is an incorrect interpretation of Kimmelman. Department Exceptions at 2. The Department asserts that the sixth factor under Kimmelman addresses whether Respondents have been subject to criminal actions and if a civil penalty would be unduly punitive if other sanctions have already been imposed. Ibid. (citing Kimmelman, 108 N.J. at 137-139). The Department argues that the correct application would lead to the conclusion that the lack of criminal or treble damage actions suggests that a significant penalty would not be unduly punitive. Ibid.

Respondents' Exceptions

The Respondents took exception to the ALJ's finding that they "violated N.J.S.A 17:22A-40(a)(5)('[i]ntentionally misrepresenting the terms of an actual or proposed insurance contract, policy or application for insurance')." Respondents Exceptions at 1 (quoting Initial Decision at 12). The Respondents state that they erred in bypassing internal safeguards to meet a customer's request. Respondents Exceptions at 1. The customer then failed to send payment and signed paperwork, which went unnoticed by the Respondents' office. Ibid. The Respondents aver that 2015 was a hard year because Forde's wife was diagnosed with breast cancer. Id. at 2.

The Respondents contend that they did not intend to violate any laws and they were mistaken in issuing the COLIs, but had "no intent to falsify, misrepresent or defraud." Id. at 1. The Respondents state that they have not committed any violations "before or after the events that created this situation." Id. at 2. The Respondents asked that the monetary penalties of $46,000 and the 120-day suspension be reconsidered. Ibid. The Respondents attached a summary of the Department's enforcement activity in 2022, to illustrate that the penalty "seems way out of proportion in comparison." Ibid.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in an Order to Show Cause 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. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975).

As noted by the ALJ, N.J.A.C. 1:1-12.5(b) provides the standard to determine whether summary decision should be granted in a contested case. Specifically, the provision states that a summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. The rule also provides that "when a motion for summary decision is made and supported, an adverse party, in order to prevail must, by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

The ALJ found that the Respondents failed to adduce evidence that would create a genuine issue as to any material fact and that summary decision is appropriate as to the allegations contained in Counts One and Two of the OTSC and I ADOPT this finding.

Allegations Against Respondents

The OTSC alleges that the Respondents failed to place motor truck cargo and general liability insurance for MD trucking, and issued eleven COLIs that contained fabricated insurance policy numbers for insurance policies that did not actually exist.

Count One –Respondents' Failure to Place Insurance for MD Trucking

Count One of the OTSC alleges that by failing to place insurance for MD Trucking, the Respondents demonstrated incompetence, untrustworthiness, or financial irresponsibility in the conduct of insurance business, in violation of N.J.S.A. 17:22A- 40(a)(8).

The ALJ found that although e-mail correspondence between Respondents and MD Trucking led MD Trucking to believe the motor truck cargo and general liability insurance policies were being bound and finalized, the Respondents never finalized or placed the motor truck cargo or general liability policies on behalf of MD Trucking. Initial Decision at 5. The ALJ concluded that the Respondents led MD Trucking to believe that it had general liability and motor truck cargo insurance when it did not. Id. at 11. Accordingly, the Department proved that the Respondents violated N.J.S.A. 17:22A-40(a)(8) because their conduct demonstrated a disregard for the standards of the insurance profession. Ibid.

The Respondents argue that they never intended to falsify, misrepresent, or defraud anyone. Respondents' Exceptions at 1. Under the Producer Act, the Respondent's intent is irrelevant. That is, it does not matter whether or not they intended to deceive. Fraudulent acts under the Producer Act, including an intentional misrepresentation of policy terms, do not require intent to deceive. See Commissioner v. Dobrek, BKI 2360-13, Initial Decision, (06/02/14), Final Decision and Order, (01/15/15), 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).

Accordingly, I ADOPT the ALJ's determination and find that the Respondents violated N.J.S.A. 17:22A-40(a)(8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility) as alleged in Count One of the OTSC.

Count Two –Issuance of COLIS with Fabricated Information

Count Two of the OTSC alleges that the Respondents provided MD Trucking with eleven Certificates of Liability Insurance that contained fabricated insurance policy numbers for insurance policies that did not actually exist in violation of N.J.S.A. 17:22A- 40(a) (2), (5), (8), and (16).

The ALJ found that between June 2015 and January 2016, the Respondents issued eleven COLIs to MD Trucking purporting to show that MD Trucking had both general liability insurance and motor truck cargo insurance. Initial Decision at 9. The COLIs sent to the various companies for MD Trucking had temporary binder numbers that had been generated in the Respondents' internal computer system. Ibid. These binder numbers were used instead of true policy numbers, because the Respondents had never finalized and placed the motor truck cargo or general liability policies. Ibid. Forde admitted that he should have edited the COLIs after he was aware that there was no policy, and he never corrected the COLIs in the computer system after they weren't placed. Ibid. The ALJ concluded that the Department proved that the Respondents issued COLIs for policies that did not exist and led MD Trucking and its customers to believe that MD Trucking had general liability and motor truck cargo insurance. Id. at 11. Accordingly, the ALJ found that the Respondents violated N.J.S.A. 17:22A-40(a)(5) and (8). Id. at 10-11.

As noted above, the Respondents argue that they never intended to falsify, misrepresent, or defraud anyone. Respondents' Exceptions at 1. However, intent is not a necessary element under the Producer Act.

Accordingly, I ADOPT the ALJ's determination and find that the Respondents violated N.J.S.A. 17:22A-40(a)(5) (intentionally misrepresenting the terms of an insurance contract, policy, or application) and (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility). The ALJ did not address whether the Respondents also violated N.J.S.A. 17:22A-40(a)(2) and (16) as alleged in the OTSC. Accordingly, I MODIFY to find that the Respondents also violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation) and (16) (any fraudulent act) when they issued COLIs for policies that did not exist, leading their client and other companies to believe that MD Trucking had general liability and motor truck cargo insurance.

PENALTY AGAINST RESPONDENTS

Respondents' Producer Licenses

The ALJ concluded that the Respondents' producer licenses should be suspended for 120 days. Initial Decision at 20. The Department did not take exception to this conclusion. The Respondents ask that this suspension be reconsidered in light of their clean record and lack of intent to defraud. Respondent Exceptions at 2. With respect to the appropriate action to take against the Respondents' insurance producer licenses, I FIND that the record supports the 120-day suspension of their licenses.

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)). An insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent. 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 Respondents bypassed internal safeguards to meet their customer's request, and failed to notice that their customer did not submit payment and signed paperwork to place the insurance policies. Respondent Exception at 1. This was irresponsible. The Respondents then compounded their error by issuing 11 COLIs that contained false information, leading MD Trucking and its customers to believe that MD Trucking had general liability and motor truck cargo insurance.

The ALJ found that several mitigating factors weighed in favor of suspending, rather than revoking, the Respondents' insurance producer licenses. These factors include no previous disciplinary history, a lack of bad faith, the absence of any misappropriation of client funds, and the significant steps taken to prevent oversights from happening again. Initial Decision at 21. I ADOPT these findings and conclude that the 120-day suspension of the Respondents' licenses is appropriate.

Monetary Penalties Against the Respondents

The Commissioner has broad discretion in determining sanctions for violations of the laws he 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 Commissioner may levy penalties against any person violating the Producer Act, not exceeding $5,000 for the first offense and not exceeding

$10,000 for each subsequent offense. N.J.S.A. 17:22A-45(c). In addition, the Commissioner may order reimbursement of the costs of investigation and prosecution for violations of the Producer Act. Ibid.

As stated by the ALJ, under Kimmelman, 108 N.J. at 137-139, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act.

The first Kimmelman factor addresses the good faith or bad faith of the violator. The ALJ found that although Forde's conduct was improper and grossly incompetent, the Respondents did not act in bad faith. Initial Decision at 15. The Department did not take Exception to this finding. The Respondents have steadfastly maintained that they made mistakes, but never intended to defraud anyone. I ADOPT the ALJ's determination and find that this factor weighs in favor of a lesser penalty.

The second Kimmelman factor is the ability of the respondent to pay the penalties imposed. 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). The ALJ found that Respondents have made clear that they do not have the means to pay the maximum fine of $115,000 requested by the Department. Initial Decision at 16. The ALJ found that Madison is a small business and Forde would not be able to pay a heavy fine. Ibid. The Department did not take Exception to this finding. I find that the Respondents have not shown any evidence of their inability to pay a fine and this factor is neutral.

The third Kimmelman factor relates to the profits obtained. 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 stated that there was no

evidence that the Respondents received any profit from their conduct. Initial Decision at 16-17. The ALJ found that this factor weighed in favor of a lesser penalty. Id. at 17-18. I agree with the ALJ that there is no evidence that the Respondents profited from their conduct, and I find that this factor weighs in favor of a lesser penalty.

The fourth Kimmelman factor addresses the injury to the public. The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. The ALJ found that there was harm to the public because the Respondents submitted COLIs that falsely confirmed MD Trucking's insurance coverage to companies that were deciding if they would work with MD Trucking. Id. at 18. I agree with the ALJ's determination and find that this factor weighs in favor of a higher 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 found that this is a significant factor. Initial Decision at 19. The ALJ found that the Respondents presented the Essex Insurance and Covington insurance policies as if they were bound and finalized over the course of approximately seven months, between June 2015 and January 2016. Ibid. The ALJ concluded that this factor weighed in favor of a monetary penalty. Ibid. I agree and find that this factor weighs in favor of a higher penalty.

The sixth factor contemplated in Kimmelman is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. A large civil penalty may be unduly punitive if other sanctions have been imposed for the same violation Kimmelman, 108 N.J. at 139. The ALJ found that the Respondents have not faced any criminal

or treble damages actions, and concluded that this factor weighed in favor of not ordering a monetary penalty. Initial Decision at 19. In its Exceptions, the Department states that this is an incorrect interpretation of Kimmelman. Department Exceptions at 2. The Department argues that the correct application would lead to the conclusion that the lack of criminal or treble damage actions suggests that a significant penalty would not be unduly punitive. Ibid. I agree with the Department and MODIFY the Initial Decision to find that under this factor a large penalty would not be unduly punitive.

The final factor examined in Kimmelman is the existence of previous relevant regulatory and statutory violations of the respondent, and if past penalties have been insufficient to deter future violations. The ALJ found that neither Forde nor Madison had ever been fined or sanctioned by the Department. Id. at 19-20. The ALJ concluded that this factor "strongly" suggested that the maximum penalty was not warranted. Id. at 20. I agree with the ALJ and find that this factor weighs in favor of a lower monetary penalty.

I further ADOPT the ALJ's finding regarding mitigating factors, including that the Respondents invested in a new computer system to ensure that the mistakes that happened in this matter will not happen again. Initial Decision at 21. The Respondents also hired a new finance company which they use to secure down payments from customers. Ibid. Prior to binding any agency billed policy, the down payment is first secured electronically by uploading the payment directly from the insured's checking account directly into the finance company's website. Ibid.

In their Exceptions, the Respondents attached a summary of the Department's enforcement activity in 2022, to illustrate that the penalty "seems way out of proportion in comparison." Respondents' Exceptions at 2. Two of these cases, Commissioner v. Ng, Order No. E22-82, and Commissioner v. Asuncion, Order No. E22-74, were Consent Orders. Although the fines were

lower and the producers' licenses were not revoked in these cases, several fact-specific considerations may have been made in reaching a settlement in these cases, including the strength of the Department's proofs and likelihood of success at a hearing.

Two more of the cases the Respondents cite, Commissioner v. Slay, Order No. E22-78 and Commissioner v. Acosta, Order No. E22-66, were default Orders. The producers in these cases were ordered to pay the maximum fines under N.J.S.A. 17:22A-45(c) ($5,000 for the first offense and not exceeding $10,000 for each subsequent offense). Slay and Acosta were each ordered to pay $25,000 for the Producer Act violations over three counts. Although the total fines may have been less than the Respondents are ordered to pay in this case, it is because Slay and Acosta committed fewer violations than the Respondents here. Slay's and Acosta's licenses were also revoked, while the Respondents' licenses here are only being suspended.

The last case the Respondents cite is Commissioner v. Fabian, OAL Dkt No.: BKI-02214-21, Initial Decision (11/3/22), Final Decision and Order (12/8/22). In Fabian, where the Department was granted summary decision, Fabian was ordered to pay $20,000 in fines for three violations and his license was revoked. While this is less money than the Respondents here are ordered to pay, there were less violations in Fabian, and the Respondents' licenses are suspended rather than revoked.

The cases cited by the Respondents do not support his argument that the fines and penalty here are inconsistent with prior matters.

The ALJ found that civil penalties in the amount of $2,000 for the violations in Count One was appropriate. Initial Decision at 22. As to Count Two, the ALJ found $4,000 for each of the eleven violations, for a total of $44,000 was appropriate. Ibid. I note that each COLI is a separate violation of the Producer Act and civil penalties should be assessed for each act. Commissioner

v. Kumar, OAL Dkt. No.: BKI 0040-19, Initial Decision (11/29/19); Final Decision and Order No. E22-23 (3/30/22) (Respondent submitted six insurance applications containing false and misleading information, with each application a different violation of the Producer and Fraud Acts); Nasir, 355 N.J. Super. at 107-08.

After weighing the Kimmelman factors, and the mitigating factors found by the ALJ, including steps that the Respondents have taken to prevent any further violations, I ADOPT the ALJ's recommendation that the Respondents pay civil monetary penalties in the amount of $2,000 for the violations in Count One and $4,000 for each of the eleven COLIs issued in Count Two, for a total of $46,000. I MODIFY and find that the Respondents are responsible for this fine jointly and severally.

Pursuant to N.J.S.A. 17:22A-45(c), it is also appropriate to impose reimbursement of the costs of investigation. The ALJ recommended that the Respondents pay costs of investigation in the amount of $2,225. Initial Decision at 22. I ADOPT the ALJ's determination and find that the Respondents are liable for the costs of investigation in the amount of $2,225, which is consistent with the amount in in the Certification of Investigator Shannon. Shannon Cert. ¶¶21-24 and Ex. N attached thereto. I MODIFY and find that the Respondents are responsible for these costs jointly and severally.

CONCLUSION

Having reviewed the Initial Decision, the parties' exceptions, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in the Initial Decision, except as modified herein. Specifically, as to Count One, I ADOPT the ALJ's conclusions and hold that the Department proved that the Respondents violated N.J.S.A. 17:22A-40(a)(8). As to Count Two, I ADOPT the ALJ's conclusions and hold that the Department proved that the Respondents violated

N.J.S.A. 17:22A-40(a)(5) and (8). I MODIFY and hold that the Respondents also violated N.J.S.A. 17:22A-40(2) and (16).

I ADOPT the recommended civil monetary penalty and ORDER that the Respondents are responsible for an administrative penalty in the amount of $2,000 for their violation in Count One of the OTSC, and $4,000 for each COLI issued by the Respondents, for a total of $44,000 as to Count Two. Respondents shall pay a total fine of $46,000. I MODIFY the ALJ's Order and find that the Respondents are responsible for this fine jointly and severally. I ADOPT the ALJ's determination and find that the Respondents are liable for the costs of investigation in the amount of $2,225. I MODIFY to find that they are responsible for these costs jointly and severally.

Finally, I ADOPT the ALJ's conclusion that the Respondents' insurance producer licenses be suspended for 120 days, effective as of the date of this Final Order and Decision.

It is so ORDERED on this ___8_____ day of _August_____ 2024.

Justin Zimmerman
Acting Commissioner

jd Forde FO/Final Orders-Insurance