Order No. E25-03

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DKT. NO.: BKI 05907-20
AGENCY DOCKET NO. E20-16

JUSTIN ZIMMERMAN,[1] COMMISSIONER, Petitioner,	)	
v.	)	FINAL DECISION AND ORDER
MARGOT BROWN, Respondent.	)	

This matter comes before the 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"), the New Jersey Fraud Prevention Act, N.J.S.A. 17:33A-1 to -30 ("Fraud Act"), and all powers expressed or implied therein, for the purposes of reviewing the November 22, 2024 Initial Decision ("Initial Decision") of Administrative Law Judge Hon. Elia A. Pelios ("ALJ").

The Initial Decision incorporates the December 6, 2021 Order Granting Partial Summary Decision ("PSD") issued by the ALJ, which denied Respondent Margot Brown's ("Brown") Motion for Summary Decision and granted the Department of Banking and Insurance's ("Department") Cross-Motion for Summary Decision. In the PSD, the ALJ found for the Department and against Brown on Counts One and Two as alleged in Order to Show Cause No.

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

E20-16 ("OTSC").[2] The ALJ reserved his recommendation regarding the assessment of civil monetary penalties.

After a hearing on penalties, the ALJ recommended that Brown be fined $5,000 for violations of the Producer Act in Count One; $5,000 for the Fraud Act violation in Count Two; a $1,000 surcharge for violating the Fraud Act, $15,000 in attorneys' fees under the Fraud Act, and $350 for investigative costs for a total of $26,350 in monetary penalties. He further recommended that Brown's insurance producer license be revoked.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 13, 2020 the Department issued the OTSC against Brown. The OTSC contains two Counts as follows:

> Count One: Respondent provided false information on an application for homeowners insurance, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16); and
>
> Count Two: Respondent provided false information on an application for homeowners insurance, in violation of N.J.S.A. 17:33A-4(a)(4)(b).

On June 8, 2020, Brown filed an Answer to the OTSC, wherein she denied all of the allegations set forth in the OTSC and requested a hearing. PSD at 2; 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 26, 2020. Ibid.

[2] Brown filed a motion for reconsideration on May 3, 2022, which the Department opposed. The ALJ denied Brown's motion on November 2, 2023 because Brown should have moved for interlocutory review under N.J.A.C. 1:1-14.10(b). Further, the ALJ stated that substantively, Brown's arguments would be "more appropriately be termed a disagreement with the conclusions" that the ALJ reached and not that the ALJ "failed to consider or appreciate the evidence in the record." Order Denying Motion to Reconsideration at 4.

On October 2, 2020, Brown filed a Motion for Summary Decision. Ibid. On November 24, 2020, the Department filed a Cross-Motion for Summary Decision and in Opposition to Brown's Motion for Summary Decision. Ibid. On January 15, 2021, Brown filed a Reply Brief in Support of her Motion for Summary Decision and in Opposition to the Department's Cross-Motion for Summary Decision. Ibid. On February 3, 2021, the Department filed a response to Brown's Reply, in support of its Cross-Motion and in Opposition to Brown's motion. Ibid.

The ALJ granted partial summary decision to the Department on September 6, 2023 as to liability on both counts of the OTSC, but denied as to the penalty. Initial Decision at 2. The ALJ conducted a hearing regarding the appropriate penalty in this matter on May 21, 2024, at which Brown was the only witness to testify. Ibid. On June 12, 2024, the parties submitted a stipulation of attorneys' fees and investigative fees. Id. at 2-3. The Initial Decision was issued on November 22, 2024 and the ALJ recommended that the Respondent be assessed a monetary penalty of $5,000 for the Producer Act violations; $5,000 for the Fraud Act violations; a $1,000 Fraud Act surcharge; $350 in investigative costs; and $15,000 in attorneys' fees for a total of $26,350. Id. at 12.

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ's Factual and Legal Findings

The ALJ stated that the Department had the burden of proving the allegations by a preponderance of the competent, relevant, and credible evidence. PSD at 5 (citing Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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." Ibid. (quoting State v. Lewis, 678 N.J. 47, 48 (1975)).

The ALJ stated that summary decision may be granted if "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." PSD at 5 (quoting N.J.A.C. 1:1-12.5(b)). To survive summary decision, the adverse party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. (quoting N.J.A.C. 1:1-12.5(b)). If the adverse party cannot meet this burden, the moving party is entitled to summary judgment. Ibid. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). An issue of fact is genuine only if, considering the burden of persuasion, the evidence submitted by the parties on the motion, together with all legitimate inferences favoring the nonmoving party, would require submissions of the issues to the trier of fact. Id. at 6 (citing R. 4:46-2).

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 on both counts of the OTSC. Id. at 8, 11-12, 16. The ALJ found the following relevant facts in granting the Department's Motion for Summary Decision.

ALJ's Findings of Fact

The ALJ found that Brown has been a licensed insurance producer in New Jersey since October 13, 1988. PSD at 2, Initial Decision at 3. On June 2, 2015, Brown submitted a claim to Farmers Insurance Company ("Farmers") for a Cartier watch that she had lost, valued at $6,000. PSD at 3, Initial Decision at 3. On June 8, 2015, Farmers paid Brown $6,000 for the lost Cartier watch. Ibid.

On May 2, 2016, Brown submitted a claim for a lost diamond ring, valued at $47,500, to Lexington Insurance Company, a subsidiary of AIG ("Lexington") ("Lexington Ring Claim"). Ibid. On May 10, 2016, Lexington sent a Notice of Nonrenewal of Insurance to Brown because

the "sole item insured had been reported for a claim, which is currently open and in the process of being settled." Ibid. On May 18, 2016, Lexington sent Brown a letter denying Brown's Lexington Ring Claim. Ibid.

On May 25, 2016, Brown and Christine Erickson ("Erickson"), a Personal Lines Underwriter at Farmers, communicated via e-mail concerning a phone conversation the week before in which Erickson and Brown discussed renewing Brown's insurance, as well as Farmers' "request to remove the jewelry floater." Ibid. In her email, Erickson stated that the Farmers had received an inquiry from another insurance carrier regarding another piece of expensive jewelry of Brown's that went missing, and that Farmers would prefer to issue Brown's renewal without coverage for Brown's jewelry. PSD at 3; Initial Decision at 3-4.

On May 26, 2016, Brown responded via email to Erickson that she had decided to replace her homeowners insurance with another carrier, that Brown had recovered her the diamond ring at issue in the Lexington Ring Claim, and the claim was closed without payment being issued. PSD at 3; Initial Decision at 4.

On June 29, 2016, Brown applied for a homeowners insurance policy with Preferred Mutual Insurance Company ("Preferred Mutual"). Ibid. The Preferred Mutual application ("Application") was filled out by Darlene Labagnara ("Labagnara"), a member of Brown's staff, but reviewed and approved by Brown. PSD at 3-4; Initial Decision at 4. The Application asked if the applicant has had "[a]ny losses, whether or not paid by insurance, during the last three years, at this or at any other location?" PSD at 4; Initial Decision at 4. Labagnara, on Brown's behalf and with her approval, answered "No" to this question. Ibid.

On July 14, 2018, Brown filed a claim with Preferred Mutual for a lost diamond ring valued at $40,000 ("Preferred Mutual Ring Claim"). Ibid. On August 10, 2018, Preferred Mutual e-

mailed Brown confirming that Brown had left a voicemail with them on August 9, 2018, advising Preferred Mutual that Brown had found her ring while packing for vacation and was withdrawing the Preferred Mutual Ring Claim. Ibid. Preferred Mutual closed the claim file. Ibid. On that same day, Brown emailed Lexington informing them that the "ring in question was found in the dryer after the claim was closed, in the same policy period." Ibid.

On August 21, 2018, Frank Emmerich ("Emmerich"), an investigator with Preferred Mutual interviewed Brown regarding her loss history. Ibid. In that interview, Brown stated that the checked "No" box on her Application regarding losses was inaccurate as to the Cartier watch and she should have answered in the affirmative. Ibid. In reference to the Lexington Ring Claim, Brown stated that she "didn't know [Preferred Mutual] still wanted the claim that was not paid." Ibid.

Count One

The ALJ stated that the Department alleged in Count One of the OTSC that Brown provided false information on an application for homeowner's insurance in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16). PSD at 6.

The ALJ first analyzed whether Brown's lost Cartier watch and Lexington Ring Claim constitute losses that should have been disclosed on her Application. Id. at 6-8. The ALJ noted that Brown did not dispute that her claim to Farmers for the lost Cartier watch should have been disclosed. Id. at 7. However, she mistakenly omitted it from the Application. Ibid.

The ALJ found that the Lexington Ring Claim was also a loss that should have been disclosed on the Application. Ibid. The ALJ found that in May 2016 Brown filed a property loss claim with Lexington for her missing ring, which was denied. Ibid. Later that month, Brown

decided not to renew her policy with Lexington[3] and in June 2016 applied for homeowners insurance with Preferred Mutual. Ibid. The Application clearly asks if the applicant had "any losses, whether or not paid by insurance, during the last 3 years, at this or at any other location." Ibid.

The ALJ stated that Brown cited to the National Association of Insurance Commissioners' ("NAIC") definition of loss as "physical damage to property or bodily injury, including loss of use or loss of income." Id. at 8. The ALJ found that this definition supports finding that the ring was a "loss" because Brown experienced a "loss of use" when her diamond ring was missing. Ibid. The ALJ noted that there is no requirement that the use of loss be permanent. Ibid.

The ALJ concluded that there is no genuine factual dispute that both Brown's Lexington Ring Claim and Cartier watch were losses that occurred within three years of Brown's submission of the Application to Preferred Mutual and therefore should have been disclosed. Ibid.

The ALJ next analyzed whether not disclosing these losses on the Application constituted violations of N.J.S.A. 17:22A-40(a)(2), (8), and (16) as alleged in Count One of the OTSC. Id. at 8-12.

The ALJ noted that the Department did not need to prove that Brown acted intentionally or knowingly when she denied having prior losses in the last three years. Id. at 9. The ALJ stated that Brown had been licensed for many years and should have been more vigilant in her review of the Application, "knowing that the penalties were severe." Id. at 10. She also stated in her interview with Emmerich that she took responsibility for the "inconsistencies" on the Application.

---

[3] Although the PSD indicates that Brown decided chose not to renew her policy with Lexington, Lexington sent a Notice of Nonrenewal of Insurance to Brown because the "sole item insured had been reported for a claim, which is currently open and in the process of being settled." PSD at 3; Brown's Responses to the Department's Discovery Requests attached as Exhibit B to the Certification Ashleigh B. Shelton; Penalty Hearing Exhibit P-3.

Ibid. The ALJ stated that even if Brown carelessly reviewed the questions on the Application, this demonstrates incompetence in violation of N.J.S.A. 17:22A-40(a)(8), which is not limited to the conduct of insurance business, but applies to licensees' personal business as well. Ibid. Therefore, it is irrelevant that the Application was for Brown's personal home insurance. Id. at 11.

The ALJ also found that Brown's incorrect answer regarding if she had prior losses in the last three years was enough to establish fraud under the Producer Act. Ibid. It is irrelevant whether Brown mistakenly answered "no" to the question regarding if she had prior losses, or whether she intended to deceive Preferred Mutual about her loss history. Ibid.

The ALJ found that the Department proved, by a preponderance of the credible evidence, that Brown provided an untrue answer to a question on the Application, which constitutes incompetence, a fraudulent act, and violates insurance law. Ibid. Brown failed to create a genuine issue of material fact that would require a hearing. Id. at 11-12. The ALJ concluded that that the Department proved that Brown violated N.J.S.A. 17:22A-40(a)(2), (8), and (16), that the Department's motion for summary decision as to Count One should be granted, and Brown's should be denied. Id. at 12.

Count Two

The ALJ stated that the Department alleged in Count Two of the OTSC that Brown provided false information on an application for homeowner's insurance in violation of N.J.S.A. 17:33A-4(a)(4)(b), which states that a person violates the Fraud Act if she "[p]repares or makes any written or oral statement, intended to be presented to any insurance company or producer for the purpose of obtaining ... an insurance policy, knowing that the statement contains any false or misleading information concerning any fact or thing material to an insurance application or contract." Id. at 13.

The ALJ found that the omission in Brown's Application was material because Preferred Mutual would not have insured Brown if she had disclosed her two prior losses. Id. at 14.

The ALJ also found that Brown acted knowingly. Id. at 14-16. The ALJ stated that a party's knowledge as to the falsity of his conduct may be inferred from surrounding circumstances. Id. at 14 (citing Allstate Ins. Co. v. Northfield Med. Ctr., 228 N.J. 596, 620 (2017)). The ALJ stated that summary decision would be appropriate if the Department established that Brown provided false information that was within her knowledge. Ibid. (citing State v. Nasir, 355 N.J. Super. 96, 106 (App. Div. 2002)). The ALJ stated that in Nasir, the defendant incorrectly answered a question regarding if he had seen a physician within the past five years on an application for disability benefits. Id. at 15 (citing Nasir, 355 N.J. at 105). The Court determined that summary decision was appropriate because Nasir answered a question with incorrect information when the correct answer was "within his knowledge" and he was held to a higher standard because of his background in the insurance industry. Ibid. (citing Nasir, 355 N.J. at 106).

The ALJ stated that two years before filling out the Application, Brown lost her Cartier watch and received $6,000 from Farmers. Id. at 14. Two months before she completed the Application, she filed the Lexington Ring Claim, which was denied. Ibid. The ALJ noted that both the loss of her Cartier watch and the Lexington Ring Claim were quite significant and they were both within Brown's knowledge. Ibid.

The ALJ concluded that the Department had proved by a preponderance of credible evidence that Brown violated the Fraud Act when she knowingly answered an objective question incorrectly on her homeowner's application and where the correct information was clearly within her knowledge. Id. at 16. The ALJ granted the Department's motion for Summary Decision on Count Two of the OTSC. Ibid.

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. Initial Decision at 7 (citing N.J.S.A. 17:22A-45(c); N.J.A.C. 11:17A-1.8). Additionally, Brown's insurance producer license may be revoked. Ibid. Under the Fraud Act, the Commissioner may impose an administrative penalty not to exceed $5,000 for the first offense, not to exceed $10,000 for the second offense, and not to exceed $15,000 for each subsequent offense. Ibid. (citing N.J.S.A. 17:33A-5(a) and (c)). The Commissioner may also order the recovery of the costs of prosecution, including attorneys' fees, and a $1,000 surcharge. Ibid. (citing N.J.A.C. 11:16-7.9(c); N.J.S.A. 17:33A-5.1).

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 8-10. 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 8.

As to the first factor, the ALJ found that Brown knowingly answered an objective question incorrectly on the Application where the correct information was clearly within her knowledge, constituting incompetence in the conduct of insurance business, and a fraudulent act. Id. at 9. The ALJ found that this showed bad faith. Ibid.

As to the second factor in Kimmelman, the ability to pay, the ALJ stated that the evidence in the record, including Brown's jewelry collection, showed that she had the ability to pay a monetary penalty. Ibid.

As to the third factor, the profits obtained, the ALJ found the Department's argument that Brown's false statement on the Application resulted in her receiving a lower rate, and should be considered as a potential profit, was "tenuous" and found that this factor was neutral. Id. at 9-10.

As to the fourth factor, injury to the public, the ALJ found that the time and resources the State spent investigating Brown's false statements and her lack of compliance with laws designed to protect the public constituted a significant public injury. Id. at 10.

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ stated that the parties agreed, and he concurred, that this was a single occurrence in a long career and weighed in favor of a lower penalty. Ibid.

Regarding the sixth factor, the existence of criminal charges or treble damage actions related to the matter, the ALJ found that there were no criminal or treble damage actions. Ibid. The ALJ stated that this factor was neutral. Ibid.

The ALJ next considered the seventh factor, past violations. The ALJ found that Brown had not previously violated the Fraud Act or the Producer Act. Ibid.

The ALJ concluded that a fine of $5,000 for violations of the Producer Act; $5,000 for the violation of the Fraud Act; a $1,000 surcharge for violating the Fraud Act; $15,000 in attorneys' fees and $350 for the costs of investigation are appropriate. Id. at 12.

The ALJ also recommended revocation of Brown's insurance producer license. Id. at 12. The ALJ stated that the Department had proven that Brown violated N.J.S.A. 17:22A-40(a)(2), (8), and (16), which authorizes the Commissioner to suspend or revoke Brown's insurance producer's license. Id. at 11. The ALJ stated that the producers who engage in fraudulent acts frequently have their licenses revoked. Id. at 11-12 (citing Commissioner v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13)).

EXCEPTIONS

Pursuant to N.J.A.C. 1:1-18.4(a), Brown submitted timely exceptions on December 4, 2024. ("Brown Exceptions"). The Department advised that it did not have any exceptions to the Initial Decision on December 4, 2024. The Department submitted its timely reply to Brown's exceptions on December 11, 2024. ("Department Reply").

Brown's Exceptions and Department's Reply

In her Exceptions, Brown argued that she had presented material issues of fact, and should have been granted a hearing. Brown Exceptions at 1-5. The Department argues in its reply that there is no genuine issue of material fact, and a hearing was unnecessary. Department Reply at 1-3.

Claim Regarding the Cartier Watch

Brown admitted that she made a mistake when she answered "no" on the Application in response to the question that asked if she had "Any losses, whether or not paid by insurance, during the last 3 years, at this or at any other location?" Brown Exceptions at 2. Brown acknowledged that in 2015 she lost her Cartier watch, filed a claim, and recovered $6,000. Ibid. Brown states that she had forgotten about this loss at the time she completed the Application, which has not been "substantively disputed." Id. at 3. Further, Brown argues, there is no evidence to contradict her explanation or even to assess her credibility on this issue. Ibid.

The Department counters that Brown's claim that she had forgotten about the Cartier watch when filling out the Application is immaterial. Department Reply at 3. The Department argues that the Fraud Act does not require proof of Brown's state of mind, or that she had intent to deceive. Ibid. (citing Nasir, 355 N.J. Super. at 96). Rather, the Department must only show that Brown provided false information and that the information in the application was within the

respondent's knowledge. Ibid. (citing Nasir, at 105-106). Brown's claim for a lost Cartier watch was within her knowledge, and she should have answered affirmatively to the question on the Application, which read: "Any losses, whether or not paid by insurance, during the last three years, at this or any other location?" Id. at 3-4.

The Department argues that if the Brown's defense was successful, everyone who ever made a false statement to an insurer could claim they had simply forgotten the truth. Id. at 4. Brown had the duty, as a licensed insurance producer, to ensure that the information on the Application was accurate, and if she was unsure to check her records to ensure that she was providing true information. Id. at 4-5.

Lexington Ring Claim

Brown next turns to the Lexington Ring Claim that she claimed as a loss to Lexington shortly before filling out the Application. Brown argues that was not a "loss" because she found her missing diamond ring and withdrew the Lexington Ring Claim before any money was paid. Brown Exceptions at 3. Brown argues that the ALJ misconstrued the sequence of events when he found that Brown had not withdrawn the Lexington Ring Claim before filling out the Application. Id. at 3-4. (citing PSD at 7). Brown argues that the ALJ overlooked her certification and e-mails to Farmers on May 26, 2016 wherein she states that "My ring was recovered soon after its disappearance and that claim was closed with no payment." Id. at 4-5.

Brown argues that she had found her missing diamond ring and called Lexington to withdraw the Lexington Ring Claim before filling out the Application. Id. at 4. Because she had found her ring and received no money from her claim, she did not believe this was a "loss" when she filled out the Application. Id. at 6. Accordingly, Brown took exception to the ALJ's findings

of fact that the Lexington Ring Claim was a "loss" that she should have disclosed on the Application. Ibid.

The Department argues that Brown has never submitted evidence that she withdrew the Lexington Ring Claim. Department Reply at 5. As proof that she withdrew the Lexington Ring Claim, Brown submitted evidence that she sent an email that she had withdrawn the Lexington Ring Claim to Farmers when Farmers advised that it did not want to renew Brown's homeowners insurance with the jewelry rider because Farmers had received information from Lexington about the existence of the Lexington Ring claim. Ibid. Brown's e-mail to Farmers informing them that her the Lexington Ring claim was closed is not the same as withdrawing the Lexington Ring Claim with Lexington itself, as Farmers and Lexington are unrelated. Id. at 5-6. Further, the Department asserts that in her e-mail to Farmers, Brown states that the ring claim was "closed with no payment." Id. at 6 (quoting Brown's Exceptions at 5). Brown does not say that the Lexington Ring Claim had been withdrawn. Ibid. The Department argues that Brown did not withdraw the Lexington Ring Claim, rather it was denied. Ibid. The denial letter from Lexington stated, in pertinent part, "we do not cover losses involving disappearance." Id. at 7 (quoting Lexington's May 18, 2016 Denial letter, Ex. E attached to the Certification of Jared Stewart ("Stewart Cert")). The Department argues that the Lexington Ring Claim was denied because it was not covered under the policy terms, and Brown did not withdraw it, as she claims. Ibid.

Meaning of "Loss"

Brown next took exception to the ALJ's finding that the Application presented an objective question regarding the meaning of "loss." Brown Exceptions at 6-8. Brown took exception to the ALJ's finding that the Department proved "that Brown violated the Fraud Act when she knowingly answered an objective question incorrectly on her homeowner's

application and where the correct information was clearly within her knowledge." Id. at 6 (quoting PSD at 16). Brown argued that the ALJ erred in concluding that the term "loss" as used in the Application can only have one meaning. Ibid. Brown believed that her diamond ring that was the subject of the Lexington Ring Claim was not a "loss" because she quickly found the ring before any money was paid and withdrew her claim. Ibid.

Brown argued that the Department, in its response to a discovery question regarding whether it contended that Brown's Lexington Ring Claim constituted a "loss" as used in the Application, objected to the question, in part, because it called for a legal conclusion. Id. at 6-7. Brown argued that she is not an attorney, and should not have her license revoked because she reasonably did not think that the Lexington Ring Claim constituted a loss. Id. at 7. Brown argues that the ALJ's conclusion that the Application's question was objective and Brown should have known how to answer is "untenable" particularly without the benefit of a hearing. Ibid.

Brown argues that the definition of "loss" accepted by the ALJ that includes a temporary loss of use "cannot withstand basic scrutiny." Ibid. Brown argues that under that definition dropping a ring off at a jeweler for repair would constitute a loss, as would losing one's keys. Id. at 7, 8. Brown argues that the term "loss" as used in the Application means something more than a "mere temporary loss of use." Id. at 7. Brown submits that had the Application asked if she had any "claims" within the last three years, that question would have been objective and removed any doubt as to what information the Application was seeking. Id. at 7-8. Brown argues that the temporary loss of use of an item does not require reporting it on an insurance application. Id. at 8.

Brown argues that when an insurer drafts the terms contained in its documents and fails to clarify its intent the insured's interpretation should prevail. Ibid. (citing Benjamin Moore & Co. v. Aetna Casualty & Sur. Co., 179 NJ. 87 (2004)). Brown argues that Preferred Mutual should have made its Application clearer, and "its failure to do so should not lead to the revocation of Brown's Producer license." Ibid.

Lastly, Brown argues that there is no proof that she sought to use her diamond ring at issue in the Lexington Ring Claim during the few weeks it was lost, and the Department is unable to prove that she actually suffered a "loss of use." Ibid. Brown argues that her experience was a claim, but was not a loss. Ibid. Brown argues that the record does not establish that she knowingly provided false information, and took exception to the ALJ's contrary finding, especially without the benefit of any testimony. Ibid.

The Department argues that Brown's defense that she found the diamond ring at issue in the Lexington Ring Claim and did not consider it a loss fails. Department Reply at 6-7. The question on the Application reads, "Any losses, whether or not paid by insurance, during the last three years, at this or any other location?" Id. at 7. Lexington's denial letter regarding the Lexington Ring Claim stated, "we do not cover losses involving disappearance." Ibid. Lexington denied the claim because it was not covered under its policy terms. The Application required Brown to report all losses, whether or not they were paid by insurance. Ibid. Accordingly, Brown should have answered this question affirmatively. Ibid. The Department argues that the Lexington Ring Claim was a "loss" and resulted in a claim with Lexington. Ibid. The objective answer to the question on the Application regarding losses within the last three years should have been answered affirmatively. Ibid. The Department argues that Brown's subjective belief that it

was not a "loss" because she had found her diamond ring at issue in the Lexington Ring Claim is immaterial under Nasir. Ibid.

Materiality of Misrepresentation on the Application

Brown next argues that the Department failed to prove that Brown's misrepresentation was material. Brown Exceptions at 8-9. Brown asserts that proving a violation of N.J.S.A. 17:33A-4(a)(4)(b) requires the Department to prove that Brown's alleged misrepresentation was "material" to the insurance application. Id. at 8. Brown argues that that Department submitted a certification,[4] but this was improper since the affiant was never deposed. Ibid. Brown challenged whether Preferred Mutual would have rejected Brown's application for insurance had Brown indicated she did have losses within the last three years or that the answer to this single question was "material" to its decision. Id. at 9. Brown argues that the ALJ had no basis to find that Brown's alleged misrepresentation was "material." Ibid.

The Department argues that Brown's false statement was material because Preferred Mutual would have denied Brown's Application for a policy if they had known the truth. Department Reply at 8. (citing e-mail dated November 4, 2020 from Emmerich of Preferred Mutual, attached as Ex. J to Stewart Cert.) ("Emmerich e-mail"). The Department contends that Brown has not presented any facts to contradict Preferred Mutual's statement that it would have denied the application if Brown had been truthful about her previous claims. Ibid.

---

[4] In its response brief in support of its motion for summary decision, the Department submitted a Certification of Duane Meszler ("Meszler Cert."), an Underwriter Manager at Preferred Mutual. Meszler certified that had Brown disclosed the loss for the $6,000 Cartier watch and Lexington Ring Claim within the last three years, Preferred Mutual would not have accepted the risk. Meszler Cert. ¶ 6. However, in making the determination that Brown's misrepresentation was material, the ALJ relies on an e-mail from Emmerich dated November 4, 2020 wherein he states that he "had checked with our underwriting department in August, 2018 and was advised that, had the application been correctly completed, they would have declined to write the risk." PSD at 14 (citing Ex. J to Stewart Cert).

The Department avers that Preferred Mutual's questions were on the application so it could properly assess its risk in issuing insurance coverage. Ibid. However, Brown deprived Preferred Mutual of the ability to accurately assess the risk of insuring her because she lied on the Application. Id. at 9. Unsurprisingly, Brown then filed the Preferred Mutual Ring Claim. Id. at 8-9.

Kimmelman Factors

Lastly, Brown argues that the ALJ did not properly weigh the Kimmelman factors in concluding that Brown's license should be revoked. Brown Exceptions at 9-12.

Brown took exception to the ALJ's finding that she acted in bad faith. Id. at 11. Brown argues that in making this finding, the ALJ repeated his mistaken opinion that Brown gave an incorrect answer to an objective question on the Application where the correct information was within her knowledge. Id. at 9. Brown argues that the meaning of the word "loss" as used in the Application is not objective in the context of insurance law and "as applied to the circumstances of Brown's ring claim." Ibid.

Brown also argues that the ALJ wrongly understood the sequence of events that underpinned the Department's argument that Brown changed her story, was not credible, and acted in bad faith. Ibid. Brown states that she withdrew the Lexington Ring Claim before she completed the Application. Brown testified that she did not consider the Lexington Ring Claim a "loss" because she had found the diamond ring at issue, and had the Application asked if she had filed any claims, she would have answered affirmatively. Id. at 11 (citing T[5] 19:10-17).

Brown states that in 2012 she completed an insurance application that asked if she had any losses within the last five years, and she answered affirmatively because she had lost a ring for which she filed a claim and was paid $7,500. Ibid. In contrast, she answered no to the similar

[5] T refers to the transcript of the hearing conducted on May 21, 2024.

question on the Application because she had found the ring, the claim was closed, and she received no payment. Ibid. In further evidence of good faith, Brown found the ring referred to in the 2012 application six years later when her home was being renovated and returned the insurance proceeds. Ibid. (citing T 22:4-16).

The Department argues that Brown hid her history of making expensive jewelry claims on the Application. Department Reply at 9. As a licensee, Brown should have been more attuned to her duty to provide honest and accurate information when filling out the Application. Ibid. Instead of doing so, she lied and obfuscated her history of making claims for lost jewelry. Id. at 10.

The Department points to another question on the Application to which Brown also provided false information. Id. at 10-11. Specifically, the Application asked: "Has any coverage been declined, cancelled or non-renewed during the last three (3) years?" Id. at 10 (citing Penalty Hearing Exhibit R-1 at p. 3.) Her answer, "N" was also false because Lexington had sent her notice of nonrenewal of her insurance by letter dated May 10, 2016. Ibid. (citing Penalty Hearing Exhibit P-3). On May 25, 2016, Farmers sent Brown an email stating that they did not want to renew the coverage for Brown's jewelry. Ibid. (citing Penalty Hearing Exhibit R-2). When Brown answered "no" to the question regarding if she had any coverage that bad been cancelled or non-renewed, she provided false information as she had two policies that were not renewed just weeks before filling out the Application. Id. at 11. The Department contends that this also shows her bad faith and Brown, as a licensee, could not reasonably have believed that her responses were truthful. Ibid.[6]

[6] On December 11, 2024 Brown wrote a letter objecting to this argument. Brown requested that this argument be stricken, because this is unrelated to the charge in the OTSC, which only charged her with violations in relation to the question on the Application regarding prior losses. Brown letter at 1. Further, the Department raised the issue of this question for the first time during the penalty phase of the hearing, thereby not allowing Brown a reasonable opportunity to respond.

As to the third Kimmelman factor, the amount of profits, Brown states that the ALJ found that this factor was neutral. Brown Exceptions at 11. Brown argues that because no profits were realized, this factor mitigates against a penalty. Ibid. The Department counters that even if this factor weighed in Brown's favor, the outcome should not change, considering her bad faith and the other factors. Department Reply at 11.

As to the fourth Kimmelman factor, the injury to the public, Brown argues that there is no evidence that the public was harmed. Brown Exceptions at 11. Brown acknowledges that the Department has "used this bootstrapping construct in past cases" but argues that this would weigh in favor of a higher penalty in every case, which would contravene the Kimmelman Court's intention. Ibid. Brown argues that mistakenly answering a question on the Application did not harm the public and this factor should mitigate against a higher penalty. Ibid. The Department argues that Brown is a licensee and her conduct harmed the reputation of insurance licensees and the insurance industry, and necessitated investigations by Preferred Mutual and the Department. Department Reply at 11.

As to the sixth factor, the existence of any criminal or treble damage actions, Brown argues that the ALJ incorrectly found that this factor was neutral. Brown Exceptions at 11. However, Brown argues that the lack of any associated criminal conduct should mitigate against a higher

---

Brown states that considering this uncharged allegation would violate her due process rights. Id. at 2.

The Department wrote a letter in reply on December 16, 2024. The Department responded that Brown produced the document in discovery, and it had been part of the record of the summary decision motions. Department Letter at 2. The Department argues that it is using Brown's answer to this question on the Application in support of its argument that Brown acted in bad faith, not to seek an additional penalty. Ibid. Further, Brown had a chance to respond in her penalty brief and Exceptions. Ibid. The Department argues that it is permissible to discuss documents in the record. Id. at 4.

penalty. Ibid. The Department counters that even if this factor weighed in Brown's favor, the outcome should not change, considering her bad faith and the other factors. Department Reply at 11.

Brown argues the most important factor should be the lack of any previous disciplinary history in her career of over 36 years. Brown Exceptions at 12. Brown argues that revoking her license "is not only manifestly unfair, it undermines the integrity of the entire administrative framework." Ibid. Brown compares her conduct, of checking a single box in an insurance application, with those producers who have engaged in misconduct for years, who are a threat to the public and deserve to lose their licenses. Ibid.

Brown's proposed alternative findings are that she didn't violate any statutes, and that even if she had, the proper penalty for mistakenly answering one question on the Application incorrectly should have been a monetary penalty or license suspension, not revocation. Brown Exceptions at 12. The Department argues that Brown's deception and lack of trustworthiness is not negated by her prior career because she violated the Fraud Act and Producer Act, and can longer be trusted as a licensee. Department Reply at 12.

LEGAL DISCUSSION

As noted by the ALJ, 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. PSD at 5. In addition, 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 Brown had 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.

The undisputed material facts support the ALJ's conclusion that Summary Decision is appropriate. On June 2, 2015, Brown submitted a claim to Farmers for a Cartier watch and Farmers paid $6,000 on the claim. PSD at 3, Initial Decision at 3. On May 2, 2016, Brown submitted the Lexington Ring Claim, which was denied. Ibid.

On June 29, 2016, Brown applied for a homeowners insurance policy with Preferred Mutual. PSD at 3; Initial Decision at 4. Brown submitted the Application, which asked if the applicant has had "[a]ny losses, whether or not paid by insurance, during the last three years, at this or at any other location?" PSD at 4; Initial Decision at 4. Brown denied that she had any losses within the last three years. Ibid.

Brown argues that her defense that she had withdrawn the Lexington Ring Claim and it was therefore not a "loss" presents a material issue of fact. Brown Exceptions at 4-5. To support this contention, she refers to an e-mail with Farmers on May 26, 2016. Id. at 5. However, informing Farmers that she had withdrawn the Lexington Ring Claim in insufficient to present a genuine issue of material fact because she cannot show that she withdrew the Lexington Ring Claim with Lexington.

Allegations Against Brown

The OTSC alleges that Brown provided false information on an application for homeowners insurance by answering no to a question regarding if she had any losses in the last three years in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16), and N.J.S.A. 17:33A-4(a)(4)(b).

Counts One and Two –Producer and Fraud Act Violations

Count One of the OTSC alleges that Respondent provided false information on an application for homeowners insurance, in violation of the Producer Act, specifically N.J.S.A. 17:22A-40(a)(2), (8), and (16), which prohibit violating any insurance law or regulation; fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility; and any fraudulent act. Count Two of the OTSC is based on the same facts as Count One and alleges that Brown violated the Fraud Act, specifically N.J.S.A. 17:33A-4(a)(4)(b), which prohibits making any written or oral statement, intended to be presented to any insurance company for the purpose of obtaining an insurance policy, knowing that the statement contains any false or misleading information concerning a material fact.

The ALJ concluded that that the Department proved that Brown violated N.J.S.A. 17:22A-40(a)(2), (8), and (16) in Count One and N.J.S.A. 17:33A-4(a)(4)(b) in Count Two, that the Department's motion for summary decision should be granted, and Brown's should be denied. PSD at 12, 16.

Brown's claim regarding her lost Cartier watch

In her Exceptions, Brown admits that she made a mistake when she answered "no" on the Application in response to the question that asked if she had "[a]ny losses, whether or not paid by insurance, during the last 3 years, at this or at any other location?" Brown Exceptions at 2. Brown acknowledged that in 2015 she lost her Cartier watch, filed a claim, and recovered $6,000. Ibid. However, Brown denies that she purposefully omitted this claim; rather, she had

forgotten it at the time she filled out the Application. Ibid. The Department counters that Brown's claim that she had forgotten about her watch when filling out the Application is immaterial. Department Reply at 3. Brown's claim for a lost Cartier watch was within her knowledge, and she should have answered affirmatively to the question on the Application, which read: "Any losses, whether or not paid by insurance, during the last three years, at this or any other location?" Id. at 3-4.

There is not a genuine issue of material fact as to the Cartier watch. Brown acknowledges that this should have been disclosed on the Application, but she mistakenly did not disclose it because she had not remembered it at the time she filled out the Application. Brown Exceptions at 2.

Brown argues that there argues that there is a genuine issue of fact as to whether she did not recall the Cartier claim when she filled out the application, which has never been disputed and her credibility on this issue has never been assessed. Brown Exceptions at 2-3. However, the Department does not need proof of Brown's intent to deceive. PSD at 9.

The Lexington Ring Claim and meaning of "Loss"

Brown also argued that her Lexington Ring Claim that she filed in May 2016 was not a "loss" because she found the ring and withdrew the claim before any money was paid. Brown Exceptions at 3.

The Application asks if the applicant had "any losses, whether or not paid by insurance, during the last 3 years, at this or at any other location." PSD at 7. Brown lost her diamond ring and filed the Lexington Ring Claim on May 2, 2016. PSD at 3, Initial Decision at 3. On May 10, 2016, Lexington sent a Notice of Nonrenewal of Insurance to Brown because the "sole item insured had been reported for a claim, which is currently open and in the process of being settled." Ibid.

On May 18, 2016, Lexington sent Brown a letter denying Brown's Lexington Ring Claim. As a licensed insurance producer, Brown should have realized that the question required her to answer affirmatively as to her ring because the question specifically asked about losses "whether or not paid by insurance." That she later found the ring does not negate that she had lost her ring and submitted a claim that was not paid by insurance.

Materiality of Misrepresentation in the Application

Brown argues that the Department failed to prove that Brown's misrepresentation was material. Brown Exceptions at 8-9. However, I find that the Department proved that the misrepresentation was material. An insured's misstatement is material if when made a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action. Longobardi v. Chubb Ins. Co., 121 N.J. 530, 542 (1990). Here, as part of its response brief in support of its motion for summary decision, the Department submitted the Certification of Duane Meszler ("Meszler") an Underwriter Manager at Preferred Mutual.[7] Meszler has been the Underwriter Manager at Preferred Mutual since 2018 and in that capacity has personal knowledge about Preferred Mutual's policies and guidelines for underwriting policies for homeowners insurance. Meszler Cert. ¶¶ 2, 3. If Brown had disclosed the $6,000 Cartier watch and the $47,500 ring as losses within the last three years on the

[7] In its Reply, the Department cites to the Emmerich e-mail to argue that Brown's misrepresentation was material. Department Reply at 8. In that e-mail, Emmerich states that he "had checked with our underwriting department in August, 2018 and was advised that, had the application been correctly completed, they would have declined to write the risk." This e-mail contains hearsay within hearsay. N.J.R.E. 805. While hearsay is admissible in administrative proceedings, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Emmerich's representation that he had talked to the "underwriting department" two years before composing this e-mail would not have been sufficient to prove that Brown's misrepresentation was material.

Application, Preferred Mutual would not have accepted the risk. Id. ¶6. Accordingly, Brown's misrepresentation was material, as Preferred Mutual would have considered Brown's loss history relevant and important in making its determination whether to accept the risk and offer Brown an insurance policy.

Brown argues that the Department submitted a certification to prove materiality, which was improper since Meszler was never deposed. Brown Exceptions at 8. However, a certification will support the grant of summary judgment if the material facts alleged therein are based on personal knowledge. R. 1:1-6; Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 599 (App. Div. 2011). Meszler has the requisite personal knowledge as to Preferred Mutual's policies and guidelines in his role as an underwriter manager at Preferred Mutual.

Intent under the Producer and Fraud Acts

Whether or not Brown intended to deceive Preferred Mutual when she indicated on the Application that she had not had any losses within the last three years is irrelevant. The Producer Act does not require proof of intent. 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, Docket No. A-2990-14 (App. Div. June 30, 2016). See also, 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). It is sufficient that she answered the question which asked about her loss history incorrectly.

Proof of fraud under the Fraud Act does not require proof of an intent to deceive. Open MRI of Morris & Essex, L.P. v. Frieri, 405 N.J. Super. 576, 583 (App. Div. 2009) (citing State v.

Nasir, 355 N.J. Super. at 106). Brown knowingly presented false information to Preferred Mutual on the Application. Brown was aware that she had a loss of her diamond ring and filed the Lexington Ring Claim only a few months before she completed the Application. Accordingly, it is irrelevant whether Brown intended to deceive Preferred Mutual about her loss history.

I ADOPT the ALJ's findings and conclusions. Both the ring at issue in the Lexington Ring Claim and Cartier watch were losses that occurred within three years of Brown's submission of the Application to Preferred Mutual and therefore should have been disclosed. The question on the Application asks if the applicant has had "[a]ny losses, whether or not paid by insurance, during the last three years, at this or at any other location?" PSD at 4; Initial Decision at 4. Brown had two losses that should have been disclosed on the Application--her Cartier watch and the Lexington Ring Claim. She failed to disclose either. As a licensed insurance producer, she is held to a high standard and if she was unclear about the meaning of "loss" on the Application could have followed up with Preferred Mutual, or erred on the side of caution and disclosed to Preferred Mutual that she had filed a claim that was closed without payment, as she did to Farmers.

Accordingly, I ADOPT the ALJ's findings and find that Brown violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act). I further ADOPT the ALJ's findings and find that the Respondent violated N.J.S.A. 17:33A-4(a)(4)(b) (makes any written or oral statement, intended to be presented to any insurance company for the purpose of obtaining an insurance policy, knowing that the statement contains any false or misleading information concerning a material fact). Brown made a written statement presented to Preferred Mutual to obtain an insurance policy that contained misleading information concerning a material fact.

PENALTIES

Brown's Producer License

The ALJ also recommended revocation of Brown's insurance producer license. Initial Decision at 12. I find that the record is sufficient to support license revocation and compels the revocation of Brown's license. Accordingly, I ADOPT the ALJ's recommendation that Brown's insurance producer license be revoked due to violations of the Producer and Fraud Acts.

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.

I find that revocation of Brown's insurance producer license is warranted. Brown filled out the Application and omitted material information. Brown's excuses that she had forgotten she had made a claim for the Cartier watch and did not believe the Lexington Ring claim was a "loss" do not mitigate against revoking her license. As an insurance producer, Brown is held to a high standard and is expected to present truthful information on applications for insurance. Brown did not meet this standard, and instead obfuscated her history of losses of jewelry. Withholding material information from Preferred Mutual constituted fraud under the Fraud Act. The public is

harmed by insurance fraud. There is a strong public policy in New Jersey to curb and deter insurance fraud to reduce premiums. Selective Ins. Co. of America v. Hudson East Pain Management Osteopathic Medicine and Physical Therapy, 416 N.J. Super. 418, 432 (App. Div. 2010). Revoking Brown's insurance producer license will deter other producers from repeating her conduct.

Further, revocation has been imposed on producers who have misrepresented loss history on applications for personal insurance. Commissioner v. Clendenny, OAL Dkt. No. BKI 13102-15, Initial Decision (01/07/15), Final Decision and Order (04/01/16). Accordingly, I ADOPT the ALJ's recommendation that revocation of Brown's insurance producer license is warranted.

Monetary Penalties

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 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.

The Fraud Act provides that a penalty of not more than $5,000 for the first violation, $10,000 for the second violation, and $15,000 for each subsequent violation may be imposed. N.J.S.A. 17:33A-5b. The New Jersey Supreme Court held that when it comes to penalties under the Fraud Act "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas such as reasonable liquidated damages . . . without being deemed to have imposed a second penalty for the purpose of double jeopardy

analysis." Merin, 126 N.J. at 445 (citing United States v. Halper, 490 U.S. 435 (1989), and United States ex rel Marcus v. Hess, 317 U.S. 537, 548-49 (1943)).

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. 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. 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").

The first Kimmelman factor addresses the good faith or bad faith of the violator. The Court should assess how egregious respondent's conduct was and whether she could have reasonably believed her conduct was legal. Kimmelman, 108 N.J. at 137. Brown argues that the meaning of the word "loss" as used in the Application is not objective in the context of insurance law and "as applied to the circumstances of Brown's ring claim." Brown Exceptions at 9. The Department argues that as a licensee, Brown should have been more attuned to her duty to provide honest and accurate information when filling out the Application. Department Reply at 9. Instead of doing so, she lied and obfuscated her history of her losses of jewelry. Id. at 10. I find that Brown acted in bad faith when she completed the Application. She did not disclose two prior losses totaling over $50,000 in jewelry to Preferred Mutual. Instead, she denied having any losses in the previous three years. Had she truthfully disclosed this history, Preferred Mutual would have declined to offer her a policy. I find that this factor weighs in favor of a higher 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 the evidence in the record, including Brown's jewelry collection, showed that she had the ability to pay a monetary penalty. Initial Decision at 9. Brown did not take exception to this finding, nor did she provide any evidence that she in unable to pay a monetary penalty. I ADOPT the ALJ's finding that this factor weighs in favor of a higher monetary penalty.

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 found that this factor was neutral. Initial Decision at 9-10. Brown argues that because no profits were realized, this factor mitigates against a penalty. Brown Exceptions at 11. The Department counters that even if this factor weighed in Brown's favor, the outcome should not change, considering her bad faith and the other factors. Department Reply at 11. No evidence was presented regarding profits Brown may have obtained from misrepresenting her loss history on the Application. Accordingly, I ADOPT the ALJ's finding that this factor is neutral.

The fourth Kimmelman factor addresses the injury to the public. While injury to the public may sometimes be equivalent to the profits obtained by the respondent through its illegal conduct, less tangible forms of harm can also be considered. Kimmelman, 108 N.J. at 138. The ALJ found that the time and resources the State spent investigating Brown's false statements and her lack of compliance with laws designed to protect the public constitute a significant public injury. Initial Decision at 10. Brown argues that there is no evidence that the public was harmed. Brown

Exceptions at 11. The Department argues that Brown is a licensee and her conduct harmed the reputation of insurance licensees and the insurance industry, and necessitated investigations by Preferred Mutual and the Department. Department Reply at 11. The public is harmed by insurance fraud. There is a strong public policy in New Jersey to curb and deter insurance fraud to reduce premiums. Selective Ins. Co. of America, 416 N.J. Super. at 432. The public is subjected to increased insurance rates because of insurance fraud. Merin v. Maglaki, 126 N.J. 430, 436 (1992). Accordingly, I find that the public was harmed by Brown's conduct and 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 was a single occurrence in a long career and weighed in favor of a lower penalty. The Department did not take exception to this finding. I agree with the ALJ that this factor weighs in favor of a lower 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 there were no criminal or treble damage actions and this factor was neutral. Initial Decision at 10. Brown argues that the ALJ incorrectly found that this factor was neutral and instead argues that the lack of any associated criminal conduct should mitigate against a higher penalty. Brown Exceptions at 11. The Department counters that even if this factor weighed in Brown's favor, the outcome should not change, considering her bad

faith and the other factors. Department Reply at 11. I find that because no other sanctions have been imposed related to the Respondent's conduct, a civil penalty would not be unduly punitive.

The final factor examined in Kimmelman is previous relevant regulatory and statutory violations of the respondent, and if past penalties have been insufficient to deter future violations. Kimmelman, 108 N.J. at 139. The ALJ found that Brown had not previously violated the Fraud Act or the Producer Act. Initial Decision at 10. Brown argues that this should be considered the most important factor, as there is no other disciplinary history in her career of over 36 years. Brown Exceptions at 12. I find that this factor weighs in favor of a lower penalty.

"[I]nsurance producers who commit insurance fraud will face civil penalties under both the Fraud Act and the Producer Act." Commissioner v. Hohn; see also, Commissioner v. Furman, OAL Dkt. No. BKI 3891-06, Initial Decision (6/21/07), Final Decision and Order (9/17/07) (fining the producer $5,000, plus $1,200 in costs, and revoking the producer's license where the producer previously settled an insurance fraud lawsuit, paid a $5,000 civil penalty and admitted that he committed fraud by making false statements in connection with a life insurance application); Commissioner v. Goncalves (issuing a $5,000 civil penalty under the Producer Act, plus $312.50 in costs, against each producer where they had previously paid civil penalties under the Fraud Act); Commissioner v. Nasir, OAL Dkt. No BKI 2335-03, Order on Motion for Reconsideration of Penalties (9/9/08) (issuing a penalty of $14,000 plus $700 in costs, and revoking the producer's license where the producer had already been assessed $43,710 in penalties and attorneys' fees in a separate action under the Fraud Act where the producer made misrepresentations on his disability application).

Weighing all of the Kimmelman factors, and based upon the violations of the Producer Act and the Fraud Act as set forth above, I MODIFY the ALJ's recommendation that Brown be fined

of $5,000 for violations of the Producer Act and $5,000 for the violation of the Fraud Act and instead find that $2,500 under the Producer Act and $2,500 under the Fraud Act are appropriate monetary penalties given Brown's extensive license history without any other violations, and the short duration of the conduct at issue. Brown was not forthcoming on her Application for homeowners insurance with Preferred Mutual. She omitted a significant loss history and was offered a policy she would not have otherwise been offered.

The Fraud Act also provides that a person who is found in any legal proceeding to have committed insurance fraud shall be subject to a surcharge in the amount of $1,000. N.J.S.A. 17:33A-5.1. This surcharge is in addition to any other fines and penalties. I ADOPT the ALJ's recommendation that Brown pay a $1,000 surcharge pursuant to the Fraud Act. Lastly, I ADOPT the ALJ's recommendation that Brown pay $350 in investigation costs and $15,000 in attorney fees. N.J.A.C. 11:16-7.9(c). These are consistent with the parties' stipulation as to reasonable costs and attorneys fees.

CONCLUSION

Having reviewed the Initial Decision, the parties' exceptions, and the entire record herein, I hereby ADOPT the ALJ's Findings and Conclusions as set forth herein. Specifically, I ADOPT the ALJ's conclusions and hold that the Department proved that Brown violated N.J.S.A. 17:22A-40(a)(2), (8), and (16) in Count One and N.J.S.A. 17:33A-4(a)(4)(b) in Count Two when she did not truthfully disclose her loss history on a homeowners insurance application. I MODIFY the ALJ's recommendation as to the amount of fines and impose fines of $2,500 under the Producer Act and $2,500 under the Fraud Act. I ADOPT the ALJ's recommendation that Brown be assessed a Fraud Act surcharge in the amount of $1,000; $350 in investigation costs; and $15,000 in attorney

fees. Finally, I ADOPT the ALJ's recommendation that Brown's insurance producer license be revoked.

It is so ORDERED on this 19th day of February 2025.

Justin Zimmerman
Commissioner

Jd Brown FO/Final Orders/Insurance