ORDER NO. E15-77

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

COMMISSIONER OF BANKING AND INSURANCE,	)	OAL DKT. NOs.: BKI 07451-2013 and BKI 07566-2013N
	)	AGENCY DKT. NO.: OTSC E13-28
Petitioner	)	
v.	)	FINAL DECISION AND ORDER
RICHARD FISCHER, PERSONALIZED INSURANCE PLANNING, LLC and CHRISTINE DIX	)	
Respondents.	)	

This matter comes before the Commissioner of the Department of Banking and Insurance ("the Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1, et seq., N.J.S.A. 17:1-15, the Insurance Producer Licensing Act of 2001 (N.J.S.A. 17:22A-26, et seq.) ("the Producer Act"), the Insurance Fraud Prevention Act (N.J.S.A. 17:33A-1 et seq.) ("the Fraud Act"), the Small Employer Health Insurance Act (N.J.S.A. 17B:27A-17 et seq.) ("the SEH Act") and all powers expressed or implied therein, for the purpose of reviewing the Initial Decision of Administrative Law Judge Tiffany M. Williams ("ALJ") decided on February 10, 2015 ("Initial Decision").

In that Decision, following a hearing, the ALJ determined that Christine Dix ("Respondent Dix") committed the violations as alleged in the Department of Banking and Insurance's ("Department") Order to Show Cause No. E13-28, ("OTSC") with respect to violations of the Producer Act and the Fraud Act. Accordingly, the ALJ recommended the

suspension of her New Jersey insurance producer license for two years, imposition of a civil monetary penalty totaling $5,000, and reimbursement of attorney's fees of $6,327.

The ALJ also ruled in favor of the Department against Richard Fischer ("Respondent Fischer"), who did not dispute the facts, and Personalized Insurance Planning, LLC ("Respondent Personalized Insurance") as to the allegations in the OTSC with respect to violations of the Producer Act and the Fraud Act. As a result, the ALJ recommended that a total monetary fine of $10,000 be assessed, jointly and severally, against Respondents Fischer and Personalized Insurance and that their insurance producer licenses be suspended for two years.

PROCEDURAL HISTORY

The Department issued a four count OTSC on March 20, 2013, seeking to revoke the insurance producer licenses of the Respondents, to impose monetary fines, to impose a surcharge, restitution, and assess the costs incurred by the Department in the investigation and prosecution of this matter, including attorney fees. The Department alleged that Respondents engaged in multiple violations of the Producer Act, the Fraud Act and the SEH Act.

In Count One of the OTSC, the Department alleged that Respondent Fischer knowingly prepared and Respondents knowingly submitted falsified employee information to Horizon Blue Cross Blue Shield of New Jersey ("Horizon") as part of an application for a small employer health benefits plan submitted by DRM Consulting ("DRM"). Specifically, the Department alleged that the Application and Certification for a Small Employer Health Benefits Policy falsely stated that DRM had two employees located in New Jersey, and an Enrollment/Change Request for one employee, Linda Miller, falsely stated that Linda Miller resided in New Jersey. The Department further alleged that Respondent Fischer informed Respondent Dix that Linda Miller actually resided in Colorado and Respondent Dix suggested that Respondent Fischer

misrepresent to Horizon that Linda Miller's address was in New Jersey. The Department alleged that Respondents engaged in these deceptive actions in order to improperly secure a group health plan for DRM with Horizon and, by doing so, violated the Producer Act and the SEH Act, specifically N.J.S.A. 17:22A-40a(2), (5), (8), (16) and (17); N.J.S.A. 17B:27A-17; N.J.S.A. 17B:27A-18; N.J.A.C. 11:21-1.2; N.J.A.C. 11:21-6.1 and N.J.A.C. 11:21-7.5.

In Count Two of the OTSC, the Department alleged that Respondent Fischer knowingly withheld the correct address for Linda Miller from Horizon's investigators and advised health insurance applicant Daniel Miller to falsely tell Horizon's investigators that employee Linda Miller resided at his address. As a result, the Department alleged that Respondents Fischer and Personalized Insurance violated the Producer Act and the SEH Act, specifically N.J.S.A. 17:22A-40a(2), (5), (8), (16) and (17); N.J.S.A. 17B:27A-17; N.J.S.A. 17B:27A-18; N.J.A.C. 11:21-1.2; N.J.A.C. 11:21-6.1 and N.J.A.C. 11:21-7.5.

The Department further alleged, in Count Three of the OTSC, that Respondent Dix violated the Fraud Act by permitting Respondent Fischer and Dix's employer, Martin Insurance Services a/k/a Martin Financial Group ("Martin Financial"), to provide the aforementioned false and/or misleading statements to Horizon and then concealing Respondents' actions, in violation of N.J.S.A. 17:33A-4a(3), N.J.S.A. 17:33A-4a(4)(b), N.J.S.A. 17:33A-4a(5) and N.J.S.A. 17:33A-4b.

Lastly, in Count Four of the OTSC, the Department alleged that on May 31, 2012, Respondent Fischer entered into a Consent Order with the Department's Bureau of Fraud Deterrence that resolved allegations that he violated the Fraud Act and admitted that Fischer knowingly submitted the aforementioned false information to Horizon, and that such admitted

conduct in violation of the Fraud Act also constitutes violations of the Producer Act, specifically N.J.S.A. 17:22A-40a(2), (4) and (8).

On or about April 15, 2013, Respondent Dix, who then appeared pro se, filed an Answer to the OTSC denying the allegations. Respondent Fischer also answered the OTSC via his attorney Robert B. Woodruff, Esq.[1] In the answer, with the exception of one alleged fact, Respondent Fischer did not contest the allegations, but opposed the relief sought by the Department. On that basis, Respondent Fischer requested a hearing in this matter as to penalty only. The matter was transferred to the Office of Administrative Law ("the OAL") on May 28, 2013, pursuant to N.J.S.A. 52:14B-1et seq. and N.J.S.A. 52:14F-1 et seq.

On or about November 15, 2013, the Department filed a Motion for Summary Decision against all Respondents. Respondent Fischer filed opposition to the Department's Motion on or about November 26, 2013, wherein he opposed the proposed penalties requested by the Department. Moreover, on or about December 3, 2013, Respondent Fischer filed an addendum to the prior opposition wherein he enclosed an article from NJBIZ.com entitled "Bad Business: Morris County man gets 5 years for stealing $1.3 million from his parents."

On or about December 10, 2013, Respondent Dix submitted a Certification, and on or about December 19, 2013, submitted a Supplemental Certification in Opposition to the Department's Motion for Summary Decision. Oral argument with respect to the Department's Motion for Summary Decision was conducted on January 14, 2014. The motion was denied with respect to Respondent Dix and the parties agreed that since Respondent Fischer did not contest

[1]Although there is no formal statement in the record as to whether or not Mr. Woodruff also represents Respondent Personalized Insurance, correspondence received during and after the hearing confirm that he in fact represents both Respondents Fischer and Personalized Insurance. In Respondents' Exceptions filed February 19, 2015, Mr. Woodruff states unequivocally that he represents both Respondents Fischer and Personalized Insurance.

the undisputed facts, a summary decision regarding his penalty would be included in the Initial Decision following the hearing on Respondent Dix's contested facts.

On or about April 8, 2014, Chad N. Cagan, Esq. of Sonnenblick, Parker & Selvers, P.C., entered his appearance as attorney for Respondent Dix.

The hearing was conducted on April 22 and August 4, 2014, at which time all testimony concluded in this matter.

Following the hearings, the record remained open at the parties' request for the submission of closing summation and was re-opened to receive additional copies of exhibits and a supplemental certification regarding attorney's fees. On or about October 6, 2014, and October 3, 2014, respectively, the Deputy Attorney General and counsel for Respondent Dix submitted post-hearing briefs. On or about October 14, 2014, counsel for Respondents Fischer and Personalized Insurance sent in a brief letter addressing his position.

On or about January 20, 2015, the Department filed a supplemental submission in response to ALJ Williams' request for a review of the attorneys' fees.

On February 10, 2015, the ALJ issued an Initial Decision. ALJ Williams found that Respondent Fischer violated the public's trust by altering application information and instructing the insureds to conceal information. Moreover, the ALJ found that Respondent Fischer colluded with Respondent Dix to submit an application to Horizon that they knew contained inaccurate information and impacted coverage eligibility. She determined that both Respondent Dix and Respondent Fischer violated their obligations under the Producer Act and the Fraud Act. In the Initial Decision, the ALJ recommended fines against Respondent Fischer and Personalized Insurance, jointly and severally, of $2,500 as to Count 1; $5,000 as to Count 2; and $2,500 as to Count 4. ALJ Williams recommended fines against Respondent Dix of $2,500 as to Count 1;

$2,500 as to Count 3; and reimbursement of attorney's fees of $6,327. She also recommended that the insurance producer licenses of the Respondents be suspended for two years.

On February 24, 2015, the Department requested an extension to file Exceptions to the Initial Decision, which request was granted. Respondent Fischer filed Exceptions on February 19, 2015. On March 9, 2015, the Department submitted Exceptions to the Initial Decision. On March 17, 2015, Respondent Fischer submitted a reply to the Department's Exceptions. No Exceptions were filed on behalf of Respondent Dix.

TESTIMONY AT THE OAL HEARING

Respondent Fischer

Respondent Fischer testified at the hearing in this matter. He has been an insurance producer for the past fifteen years and operated Respondent Personalized Insurance. (Initial Decision at 2). In the general course of business, Respondent Fischer submitted applications for small employer group health benefits plans to Martin Financial. Martin Financial then reviewed the applications and submitted them directly to Horizon. (Id. at 2-3).

Respondent Fischer attempted to set up a group health benefits plan for DRM. (Id. at 3). He admitted that he was aware that New Jersey requires an employer to have two or more full time employees and that 51 percent of these employees must reside in New Jersey when procuring group health insurance. (Ibid.) He also admitted that he was aware that DRM had three employees, but that only two employees were on payroll. (Ibid.) Moreover, he was aware that Lisa Miller was not eligible for coverage and, therefore, the remaining two employees had to reside in New Jersey to qualify for coverage. (Ibid.)

Respondent Fischer submitted DRM's application to Martin Financial on October 31, 2006, which listed one employee with a New Jersey address and a second employee, Linda

Miller, with a Colorado home address. (Ibid.) However, Respondent Dix, Martin Financial's manager of broker services, called Respondent Fischer several days later to question why he had submitted an application that listed only one New Jersey resident. (Ibid.) Respondent Fischer claims he had personal problems at that time, but realized he made a mistake. (Ibid.) Respondent Fischer contacted Respondent Dix who advised him to alter the document by changing the Colorado address to a New Jersey address and to resubmit the application as such. (Ibid.) Respondent Fischer also testified that Dix advised him to forward this application directly to her fax number because she did not want anyone else in her office to become aware of it. (Ibid.) According to his testimony, Respondent Dix further advised him to submit a change form a few weeks later reflecting the correct Colorado address. Respondent Fischer submitted the application as directed. (Ibid.)

Respondent Fischer later contacted Respondent Dix via email seeking direction on submitting the Certificate of Credible Coverage ("COCC") form for the DRM employee with the Colorado address. (Ibid.) In his email, Respondent Fischer stated the following:

> This is the group where I changed the home address to NJ to get the group approved. I have received her Certificate of Group Health Insurance. Her COBRA ended on 11/01/06 but the Cert has her Colorado address. I also attached in the same file the enrollment form to change her address back to Colorado. How should we handle these two forms? Which one should go first? Should both be submitted together? Do you know someone at Horizon that is not to [sic] sharp that you can send these forms to? [sic]
>
> (Id. at 3-4).

Respondent Dix then replied to Respondent Fischer that he "wirte[sic] out her home address [and] then submit it." (Id. at 4). Respondent Fischer assumed that Respondent Dix wanted him to "white out" the Colorado address. (Ibid.) He then did just that. (Ibid.)

Respondent Fischer admitted that he altered the enrollment form and COCC forms to indicate a New Jersey address instead of the correct Colorado address. (Ibid.)

Respondent Dix

Respondent Dix was a licensed insurance producer and was the sole employee at Martin Financial who worked with health insurance policies. (Ibid.) Her job duties included developing relationships with brokers and processing additions or deletions to existing policies. (Ibid.) She was a licensed insurance producer since 1997, worked at Martin Financial for ten years, and was never the subject of any actions against her license prior to this matter. (Ibid.) Respondent Dix denied speaking with Respondent Fischer on the phone regarding the DRM policy and she further denied directing him to alter the form to reflect a New Jersey address instead of a Colorado address. (Ibid.) She explained that she thought the employee with the Colorado address had moved to New Jersey and that the COCC reflected the outdated address from her prior coverage location. (Ibid.)

Regarding the November 28, 2006 email exchange with Respondent Fischer, Respondent Dix stated that she was intending to advise Respondent Fischer to "write out" the New Jersey home address of the employee on the COCC as opposed to the alleged "white out." (Id. at 4-5). Respondent Dix also denied advising Respondent Fischer to fax her the form and she denied receiving the fax. (Id. at 5). She stated that the only fax machine was located centrally in the main corridor of the office. (Ibid.) She also stated that she was not involved in the initial application and that another underwriter by the name of Ms. Lormer handled the review of the application. (Ibid.)

Respondent Dix denied being involved in the scheme to falsify the application materials. She also did not remember having a conversation about the investigation with her boss, Mr. Martin. (Ibid.)

Tracy Martin

Tracy Martin ("Martin") is the owner of Martin Financial where Respondent Dix worked until her dismissal in May 2007. (Ibid.) He described Respondent Dix as a very good and efficient employee and stated that he met her in 1983. (Ibid.)

Martin found out about the investigation by Horizon in April 2011. (Ibid.) When Martin spoke with Respondent Dix about the investigation, she denied any knowledge of the situation. (Ibid.) When Martin eventually became aware of an email exchange between Respondent Fischer and Respondent Dix, he again questioned Respondent Dix about the situation. (Ibid.) She became upset and still did not remember the details. (Ibid.) However, in an email dated April 20, 2007, she admitted to Martin that she knew that Respondent Fischer had changed the address, but she still maintained that she never told him to do so. (Ibid.)

Martin then conducted an internal investigation wherein Respondent Dix admitted that she was aware that the address on the COCC had been changed in order to bring it into compliance, but denied participating in changing it. (Ibid.) Martin subsequently fired Respondent Dix. (Ibid.)

Susan Epstein

Susan Epstein has been employed as the lead investigator of the Special Investigations Unit for Horizon for the past ten years where her job was to investigate insurance fraud. (Id. at 6). She frequently conducted audits of small group health insurance enrollments. (Ibid.) She conducted an employee verification audit of DRM because the COCC appeared altered.

Through her investigation, Epstein learned that Linda Miller always lived in Colorado, and Epstein determined that Miller's address had been changed by Respondent Fischer by reviewing documents obtained during the investigation, including emails. (Ibid.) During Horizon's investigation, Respondent Fischer admitted changing the application, but could not recall the manner in which he had changed it. (Ibid.) He further implicated Respondent Dix by saying she suggested that he change the address to ensure approval. (Ibid.)

Epstein indicated that she interviewed Respondent Dix during the course of the investigation and pointedly asked her "why she had done it." (Ibid.) While Respondent Dix did not have an answer to that question, she further stated that this was "the only one that she had done." (Ibid.)

During the course of her investigation, Epstein also reviewed an email exchange between Respondent Fischer and Daniel Miller in which Respondent Fischer suggested that he lie to Epstein. He specifically states that, "I would strongly recommend that you tell her that Linda was staying with you for a couple of weeks at the end of October through the beginning of November while she decided whether she was going to stay in NJ or move back to Colorado." (Id. at 6-7). He further states, "I would really appreciate it if you would not tell or send [Epstein] the information above. The Martin Financial Group and I were only trying to help you get set up as a group plan. I know that we had discussed individual plans and the minimal coverage they offer including a maximum of 50% coverage for prescriptions." (Id. at 7).

Ellena Herbert

Ellena Herbert ("Herbert") has been an investigator for the Department in the Enforcement Unit for the past three years and has investigated about 100 matters involving insurance producer violations. (Ibid.) She began her investigation on behalf of the Department

in 2012 and contacted both Respondent Fischer and Respondent Dix to obtain statements. (Ibid.) Respondent Fischer provided a written statement in which he admitted that he altered the Colorado address to a New Jersey address on the COCC and that he took such steps pursuant to Respondent Dix's advice to "white out" the address on the form. (Ibid.) Respondent Dix submitted a statement to her denying altering documents and further explaining that she meant to write "write out" not "white out" in the subject email. (Ibid.)

THE ALJ'S FINDINGS AS TO CREDIBILITY

The ALJ noted the inconsistencies between each of the Respondents' version of the facts and further acknowledged a need to assess the credibility of the witnesses. The ALJ further noted that a credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

After weighing the testimony of all of the witnesses and the documentary evidence, ALJ Williams found Respondent Fischer's version of the facts, upon which the Department based the underlying allegations in the OTSC, to be credible and, accordingly, determined that Respondent Dix's versions of the facts were not persuasive. ALJ Williams found that, not only was Respondent Dix aware of Respondent Fischer's intent to alter the forms to give the impression that a non-resident of New Jersey actually lived in New Jersey, but Respondent Dix further directed Respondent Fischer to make the change to reflect the accurate address at a later date. ALJ Williams specifically stated, "Having evaluated [Respondent Dix]'s demeanor and self-interest in the outcome, I reject her assertions that she was not complicit in the scheme." (Id. at 8). ALJ Williams observed that Respondent Dix's role was limited, but that the email correspondence and the conversations relayed by her former employer corroborated the

Department's contention that she was aware of Respondent Fischer's intent to submit altered forms. (Ibid.) Moreover, ALJ Williams emphasized the email exchange wherein Respondent Fischer inquired of Respondent Dix "do you know someone at Horizon that is not to[sic] sharp that you can send the forms." (Ibid.) ALJ Williams determined that regardless of whether or not Respondent Dix intended to write "white out the address" or "write out the address" in her email response to Respondent Fischer, she was clearly aware of the situation and did not react with the appropriate sense of alarm. (Ibid.)

ALJ Williams further emphasized that Respondent Fischer "acknowledged many facts that were against his self-interest" and was credible with respect to several points. (Id. at 9). She found that Fischer's version of events was corroborated by the email he sent to Miller where he described a conversation he presumably had with Respondent Dix "about the 51% requirement and that they (Respondent Dix and Respondent Fischer) had agreed to submit Linda Miller's application with the same address as the business (New Jersey address) and submit a change of address form a few weeks later after the group was approved." (Ibid.) She also determined that Respondent Fischer's acknowledgment that he inadvertently sent in the application and forgot about the "51%" requirement was corroborated by the fact that the forms were originally submitted with the correct Colorado address and later changed." (Ibid.) ALJ Williams further determined that Respondent Fischer gave consistent time frames, which further bolstered his credibility. (Ibid.)

THE ALJ'S FINDINGS OF FACTS

Having considered the testimony of the witnesses and reviewed the documentary evidence, the ALJ found the following as facts.

1. On October 31, 2006, Respondent Fischer submitted an application for a group insurance plan to Martin Financial, on behalf of DRM. (Id. at 9).

2. The DRM application listed two employees, including one with a New Jersey address and the other, Linda Miller, with a Colorado address. (Id. at 10).

3. On or about November 2, 2006, Respondent Dix contacted Respondent Fischer to inquire about the application's designation of only one New Jersey employee. (Ibid.)

4. Respondent Fischer, contending with personal problems, realized he had made a mistake in submitting an application with only one New Jersey employee and unsuccessfully attempted to reach Daniel Miller. (Ibid.)

5. Respondent Fischer called Respondent Dix again and she advised that he should change the Colorado address to the New Jersey business address and, at a later date, submit an address change. (Ibid.)

6. Respondent Fischer altered the enrollment form and submitted it to Martin Financial. (Ibid.)

7. On or about November 28, 2006, Respondent Fischer contacted Respondent Dix by email inquiring how he should handle submitting the COCC form for the enrollment application involving the DRM employee with the Colorado address. (Ibid.)

8. In the same email, Respondent Fischer asked Respondent Dix whether she knew of a Horizon employee "that is not to[sic] sharp that you can send the forms to." (Ibid.)

9. Respondent Dix's reply was that Respondent Fischer should "wirte out" Linda Miller's Colorado address and then submit it. (Ibid.)

10. In response, Respondent Fischer deleted the Colorado address with "white out" and inserted a New Jersey address for Linda Miller. He then submitted the revised form to Martin Financial. (Ibid.)

11. DRM subsequently received group coverage through Horizon. (Ibid.)

12. In 2007, Horizon Special Investigator Epstein conducted an audit of DRM's enrollment. During her investigation, Epstein obtained a statement from Respondent Fischer, admitting that he had changed an employee's Colorado address to a New Jersey address in order to facilitate obtaining coverage for the company. (Id. at 11).

13. In speaking with Respondent Dix, Epstein inquired as to why Respondent Dix replied that this was "the only one that she had done." (Ibid.)

14. In or around April 2011, Respondent Fischer contacted the owner of Martin Financial, Tracy Martin, to advise him of the investigation. Respondent Fischer specifically advised Martin of Respondent Dix's role in instructing him to alter the Colorado address, and forwarded the trail of their email correspondence. (Ibid.)

15. Martin confronted Respondent Dix, who initially denied any knowledge of the facts surrounding the DRM application. Upon being confronted with her email exchange with Respondent Fischer, Respondent Dix admitted to Martin that she knew Respondent Fischer had changed the Colorado address. However, Respondent Dix denied having counseled Respondent Fischer to do so. (Ibid.)

16. Martin subsequently fired Respondent Dix because he believed that he should have been made aware of the situation earlier. (Ibid.)

ALJ'S LEGAL ANALYSIS AND CONCLUSIONS

ALJ Williams noted that the conduct of insurance producers in New Jersey is governed by the Producer Act. Under N.J.S.A. 17:22A-40a, the Commissioner may revoke or refuse to renew an insurance producer's license and/or levy a civil penalty. Insurance producers have a duty to their insured entity to act with reasonable skill and diligence in performing the services of an insurance broker. Rider v. Lynch, 42 N.J. 465 (1964).

ALJ's Findings as to the Allegations against Respondents

ALJ Williams determined that the actions of Respondent Dix and Respondent Fischer were deceptive and violated their ethical obligations as insurance producers. As Respondent Fischer did not contest his culpability, ALJ Williams concluded that he "violated the public's trust by altering application information and scheming to instruct the insure[d]s[2] to conceal information." (Id. at 12). ALJ Williams further concluded that, "by colluding with [Respondent Dix] to submit an application to Horizon that they knew contained inaccurate information and impacted coverage eligibility, both [Respondent Dix] and [Respondent Fischer] violated their obligations under the [Producer Act] and the [Fraud Act.]" (Ibid.)

ALJ's Findings as to the Penalty against Respondents

In determining the appropriate remedies and monetary penalties, ALJ Williams weighed the mitigating factors. Both Respondents Fischer and Respondent Dix had unblemished histories as insurance producers. Moreover, Respondent Fischer had personal issues during the time period in question and he also cooperated with the investigation. However, Respondent Dix was not contrite and disavowed her role in the overall scheme. ALJ Williams observed that, "[e]ven though [Respondent Dix's] role was more limited than [Respondent Fischer's] in the overall scheme, [Respondent Dix] was nonetheless negligent in failing to report [Respondent Fischer's]

[2] The ALJ mistakenly refers to insurers instead of insureds.

deception and in giving him instruction on how to continue to perpetrate the address-change deception." (Id. at 12-13).

Ultimately, ALJ Williams recommended two year suspensions of the producer licenses of both Respondent Dix and Respondent Fischer as they were "joint venturers in a deceptive and unethical scheme to defraud." (Id. at 13). ALJ Williams also recommended a two year suspension of Respondent Personalized Insurance's producer license. (Ibid.)

However, ALJ Williams concluded that a moderate monetary penalty was warranted. To determine appropriate penalties under the Producer Act, the Commissioner has consistently applied the factors enumerated by Kimmelman v. Henkels & McCoy, 108 N.J. 123, 137-39 (1987), which established seven factors to evaluate when imposing administrative fines. (Ibid.) They are: (1) the good or bad faith of the defendant; (2) the defendant's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) the duration of the illegal activity; (6) the existence of criminal actions; and (7) past violations. (Ibid.) With respect to the Kimmelman factors, ALJ Williams found that, "[i]t is undisputed that the parties acted in bad faith and committed a fraud, which inevitably harmed the trust. While the respondents have not specifically indicated an inability to pay, nonetheless a moderate penalty is warranted where [Respondent Dix] and [Respondent Fischer] are individuals rather than corporations, and there was no evidence of large profits having been obtained by their actions." (Ibid.)

Based upon the foregoing analysis, ALJ Williams recommended the following fines, jointly and severally, against Respondents Fischer and Personalized Insurance: Count 1: $2,500; Count 2: $5,000; Count 4: $2,500. (Ibid.) ALJ Williams further recommended the

following fines and costs against Respondent Dix: Count 1: $2,500; Count 3: $2,500 and reimbursement of attorney's fees of $6,327. (Ibid.)

RESPONDENT FISCHER'S EXCEPTIONS

On or about February 19, 2015, Respondent Fischer submitted exceptions to the Initial Decision and contested the penalty only. Respondent Fischer took exception to the ALJ's recommendation that his insurance producer license be suspended for two years and that he pay a $10,000 fine, joint and severally, with Personalized Insurance. (Exceptions Letter at 1). He incorporated by reference the arguments made in his prior submission from November 26, 2013, wherein he contested the penalty portion of the Department's Motion for Summary Decision. (Ibid.)

Contrary to the Department's contention that the maximum fines and penalties be imposed upon Respondent Fischer, including license revocation, Respondent Fischer averred that the facts surrounding this matter were distinguishable from the cases cited by the Department and that these factual circumstances warranted that a more moderate penalty be imposed against Respondent Fischer. (Fischer Brief in Reply to Summary Decision at 2).

He also evaluated the Kimmelman factors. First, with respect to the good or bad faith of the defendant, "[Respondent Fischer] acknowledges that he harbors no reasonable belief that his conduct was legal and, in fact, subsequent thereto has consistently admitted that it was not." (Id. at 4). With respect to his ability to pay, Respondent Fischer is the sole provider for his family and has already paid a $5,000 fine to the Department, but would be able to pay a reasonable fine. (Ibid.) As to the amount of profits obtained from the illegal activity, Respondent Fischer averred that, "it is suggested that such were negligible since if they were not, there is no doubt the Commissioner would be stressing same before the Court. The injured party did receive

compensation through a civil action." (Id. at 5). Regarding the injury to the public, Respondent Fischer acknowledged breaching the public trust. (Ibid.) Respondent Fischer took further issue with respect to Department's contentions that his actions took place over a long period of time. (Ibid.) Lastly, with respect to the existence of criminal actions or any past violations, Respondent Fischer denied being the subject of any criminal penalties but he admitted paying the sum of $5,000 to the Department. (Ibid.)

PETITIONER'S EXCEPTIONS

The Department submitted timely Exceptions following one 13-day extension. The Department concurs with the ALJ's overall findings, but seeks to clarify several factual issues, and urges the Commissioner to order license revocation upon Respondents instead of the two-year license suspensions and to impose higher fines. (Department Exceptions Brief at 2).

The Department urges that, although the ALJ correctly determined that Respondents conspired in a scheme to falsify and submit an insurance application for a small employer group health plan for DRM to Horizon in violation of the Producer Act and the Fraud Act, the Commissioner should augment the factual findings as presented during the course of the OAL proceeding that demonstrated the Respondent's violations resulted in severe consequences for DRM, Horizon, and Martin Financial as follows. (Id. at 4). First, Horizon eventually rescinded DRM's health insurance policy and the owners of DRM were without insurance coverage for their disabled child for a significant period of time. (Ibid.) As a result, the owners of DRM incurred substantial healthcare expenses and filed suit against Horizon, Martin Financial and Respondents for unpaid medical bills. (Ibid.) The suit settled after Martin Financial agreed to pay a substantial amount of money. (Ibid.) The Department urges the Commissioner to conclude

that "Respondents' fraudulent actions had far-reaching effects that require significant penalties." (Ibid.)

The Department also requested revocation of Respondents' insurance producer licenses as opposed to a two year suspension. (Id. at 5). The Department argued that the Commissioner has found that license "revocation is the appropriate sanction in all cases where producer licensees are found to have committed insurance fraud, but for those in which truly extraordinary mitigating factors are present." Id. at 5-6; See Commissioner v. Bellisima, OAL Dkt No. BKI 10040-04, Initial Decision (1/13/04), Final Decision and Order (5/26/04), Initial Decision on remand (8/3/05), Final Decision and Order (8/30/05); Commissioner v. Ayodeji, 97 N.J.A.R. 23 (INS) 13, Initial Decision (12/18/96), Final Decision and Order (4/18/97).

The Department also noted that the Commissioner has consistently held that "producer misconduct involving fraud, misappropriation of premium monies, bad faith and dishonesty compels license revocation." Ibid.; Commissioner v. Strandskov, OAL Dkt. Nos. BKI 03451-07, BKI 3452-07, Initial Decision (9/25/08), Final Decision and Order (2/4/09). The Department further averred that license revocation has consistently been imposed in similar matters on licensees who engage in fraudulent acts in their capacity as insurance producers. See, e.g., Commissioner v. Goncalves, OAL Dkt. Nos. BKI 3188-03, BKI 3301-05, Initial Decision (12/3/03), Final Decision and Order (5/24/04), On Remand (2/15/06); Commissioner v. Winograd, OAL Dkt. No. BKI 7702-97, Initial Decision (10/26/00), Final Decision and Order (7/26/01); Commissioner v. Del Mauro, OAL Dkt. No. BKI 8377-91, Initial Decision (5/5/93), Final Decision and Order (6/23/93); Commissioner v. Benner, OAL Dkt. No. BKI 2077-91, Initial Decision (6/22/92), Final Decision and Order (9/21/92).

The Department further averred that only the rarest of mitigating factors will preclude license revocation for licensed producers who directly committed fraud. Ibid. The Department pointed to Commissioner v. Ladas, to refute Respondent Fischer's assertions that his family and personal problems mitigate the fraudulent conduct even though Respondent Fischer claims these problems were a major distraction and the primary reason he committed the fraud. OAL Dkt. No. BKI 0947-02, Initial Decision (2/5/04), Final Decision and Order (6/22/04), Amended Final Decision and Order (6/22/04). In Ladas, where the licensee claimed that revocation was too harsh a penalty to impose for his failure to review documents which ultimately contained material misrepresentations because he was distracted by personal issues, the Commissioner rejected this argument and noted that unique personal circumstances do not necessarily mitigate acts of impropriety. Ladas, supra at 14-16.

Moreover, the Department argued that Respondents' conduct demands the imposition of a significant penalty and averred that the Commissioner has consistently imposed significant penalties upon insurance producers who engage in fraudulent conduct. See Commissioner v. Thomas Dobrek and Mr. Lucky Bail Bonds, Inc., OAL Dkt. No. BKI 00361-05, Initial Decision (12/26/06), Final Decision and Order (3/26/07); Commissioner v. Martini OAL Dkt. No. INS 1874-96, Initial Decision (4/18/97), Final Decision and Order (6/10/97); Commissioner v. Furman, OAL Dkt. No. BKI 3891-06, Initial Decision (6/21/07), Final Decision and Order (9/17/07).

The Department requested that a $15,000 civil penalty be assessed against Respondents Fischer and Personalized Insurance, jointly and severally, under the Producer Act, as follows: $5,000 for Counts 1 and 4; and $10,000 for Count 2. Further, the Department requested that the Commissioner assess $17,327 in civil penalties, surcharges and attorneys' fees against

Respondent Dix pursuant to both the Producer Act and the Fraud Act, as follows: $5,000 civil penalty for Count 1; for Count 3, $5,000 civil penalty, $1,000 surcharge and $6,327 in attorneys' fees.

The Department also requested that the occasional misspelling of Respondent Fischer be corrected.

RESPONDENT FISCHER'S REPLY EXCEPTIONS

On March 17, 2015, Respondent Fischer submitted a reply to the Department's Exceptions. In this brief letter, he addressed the Department's references to the impact that Respondents' conduct had upon DRM. Respondent Fischer argued that he was cooperative, consistently accepting of his culpability and he thought it was appropriate to note that there was a "substantial insurance settlement which addressed the needs of the ill-served 'insureds.'"

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant and credible evidence. In re Polk, 90 N.J. 550 (1982); See also Atkinson v. Parsekian, 37 N.J. 143 (1962). 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, 67 N.J. 47 (1975).

OTSC – Allegations Against Respondents

The OTSC charges Respondents with violations of the Producer Act, which governs the licensure and conduct of New Jersey insurance producers, and empowers the Commissioner to suspend or revoke the license of, and to fine, an insurance producer for violations of its

provisions, and the SEH Act which imposes liability upon a carrier for a penalty of not less than $2,000 and not greater than $5,000 for each violation. The OTSC also charges Respondent Dix with violations of the Fraud Act, which empowers the Commissioner to impose a civil penalty of up to $5,000 for the first offense, $10,000 for the second offense, a surcharge of $1,000 and to impose the costs of prosecution, including attorney's fees. Although the ALJ generally found that the Respondents' conduct violated the insurance laws of this State, including the Fraud Act, the ALJ did not state the specific provisions violated or if the findings were that the Respondents violated all of the provisions as charged in the OTSC. I find that the factual record as found by the ALJ is clear, and that I have the discretion to review the legal conclusions of the ALJ. The following will evaluate, count by count, the charges of the OTSC under the factual record created during the OAL proceeding.

Count One – Violations of the Producer Act and the SEH Act by Respondents Dix, Fischer and Personalized Insurance

Count One of the OTSC alleges that Respondents prepared and submitted an application for a Small Employer Health Benefits Plan and an Enrollment Change Request Form on behalf of DRM that falsely stated that DRM had two employees who were located in New Jersey, in violation of the following provisions of N.J.S.A. 17:22A-40a:

> (2) Violating any insurance laws, or violating any regulation, subpoena or order of the commissioner or of another state's insurance regulator;
>
> (5) Intentionally misrepresenting the terms of an actual or proposed insurance contract, policy or application for insurance;
>
> (8) Using any fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere;
>
> (16) Committing any fraudulent act; and

(17) Knowingly facilitating or assisting another person in violating any insurance laws.

Count One also alleges that Respondents' conduct was in violation of the following provisions of the SEH Act: N.J.S.A. 17B:27A-17 and N.J.A.C. 11:21-1.2 (a small employer is defined as any business that employs an average of at least 2, but no more than 50, eligible employees during the preceding calendar year and the majority of employees are employed in New Jersey); N.J.S.A. 17B:27A-18 (every health insurer, health service corporation, medical service corporation, hospital service corporation, and health maintenance organization licensed or authorized to provide health benefits or services and offers health insurance policies or coverage to small employers shall be subject to the provisions of the SEH Act); N.J.A.C. 11:21-7.5 (small employers are required to have a minimum participation under the small employer's health benefits plan of 75 percent of eligible employees); and N.J.A.C. 11:21-6.1 (the small employer certification form must include, among other items of information, the status as small employer and work locations).

ALJ Williams concluded, and I agree, that "by colluding with [Respondent Dix] to submit an application to Horizon that they knew contained inaccurate information and impacted coverage eligibility, both [Respondent Dix] and [Respondent Fischer] violated their obligations under the [Producer Act] and the [Fraud Act]." (Initial Decision at 12). In addition to these general findings, I also find that Respondent Personalized Insurance, through the actions of Respondent Fischer, committed the violations as alleged in Count One.

The Initial Decision failed to find any specific statutory or regulatory violations. Thus, I MODIFY the Initial Decision to reflect that the credible evidence demonstrates that the Respondents intentionally misrepresented the terms of an insurance or application in violation of

N.J.S.A. 17:22A-40a(5) and, by doing so, violated the insurance laws and regulations, engaged in fraudulent and dishonest practices in the insurance business and committed a fraudulent act in violation of N.J.S.A. 17:22A-40a(2), N.J.S.A. 17:22A-40a(8) and N.J.S.A. 17:22A-40a(16). Moreover, Respondents assisted and facilitated one another in violating insurance laws in contravention of N.J.S.A. 17:22A-40a(17.)

Furthermore, Respondents' preparation and submission of both the Enrollment Form and a COCC form knowing that it contained false information as to a DRM employee's address violated the SEH Act as charged in the OTSC. Not only does the SEH Act define a small employer as any business that employs an average of at least 2, but no more than 50, eligible employees during the preceding calendar year and the majority of employees are employed in New Jersey, but small employers are required to have a minimum participation under the small employer's health benefits plan of 75 percent of eligible employees. See N.J.S.A. 17B:27A-17, N.J.A.C. 11:21-1.2 and N.J.A.C. 11:21-7.5. When Respondents submitted the two forms to Horizon in an attempt to get coverage for DRM through the small employer market, DRM clearly did not qualify for health coverage under the SEH Act.

Although the SEH Act empowers the Commissioner to impose monetary penalties upon only the carriers for violations of this Act, the Commissioner can impose penalties upon insurance producers and revoke or suspend the licenses of insurance producers for a violation of any insurance laws or regulations under the Producer Act. See N.J.S.A. 17:22A-40a(2). Therefore, I MODIFY the Initial Decision to reflect that Respondents, as insurance producers, were obligated to know the terms of the insurance contract they were advancing for DRM, to advise DRM accordingly and to thereby conduct their business with honesty and integrity. I find that Respondents' deceptive behavior regarding DRM's application for health coverage through

the small employer market violated multiple provisions of the SEH Act, specifically N.J.S.A. 17B:27A-17, N.J.A.C. 11:21-1.2, N.J.A.C. 11:21-6.1 and N.J.A.C. 11:21-7.5 which empowers the Commissioner to impose penalties upon them for such violations pursuant to N.J.S.A. 17:22A-40a(2) of the Producer Act. I do not find a violation of N.J.S.A. 17B:27A-18 as alleged in the OTSC as that provision provides that every health insurer, health service corporation, medical service corporation, hospital service corporation, and health maintenance organization licensed or authorized to provide health benefits or services and offers health insurance policies or coverage to small employers shall be subject to the provisions of the SEH Act.

Count Two – Violations of the Producer Act and the SEH Act by Respondents Fischer and Personalized Insurance

Count Two of the OTSC charges Respondents Fischer and Personalized Insurance with violations of the Producer Act and SEH Act for knowingly withholding the correct address for employee Linda Miller during a Horizon investigation and for advising the insured's employee Daniel Miller, via email, to falsely tell Horizon's investigators that Linda Miller resided at his address in New Jersey in violation of the following provisions of N.J.S.A. 17:22A-40a:

> (2) Violating any insurance laws, or violating any regulation, subpoena or order of the commissioner or of another state's insurance regulator;
>
> (5) Intentionally misrepresenting the terms of an actual or proposed insurance contract, policy or application for insurance;
>
> (8) Using any fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere;
>
> (16) Committing any fraudulent act; and
>
> (17) Knowingly facilitating or assisting another person in violating any insurance laws.

Count Two also alleges that Respondents' conduct was in violation of the following provisions of the SEH Act: N.J.S.A. 17B:27A-17 and N.J.A.C. 11:21-1.2 (a small employer is defined as any business that employs an average of at least 2, but no more than 50, eligible employees during the preceding calendar year and the majority of employees are employed in New Jersey); N.J.S.A. 17B:27A-18 (every health insurer, health service corporation, medical service corporation, hospital service corporation, and health maintenance organization licensed or authorized to provide health benefits or services and offers health insurance policies or coverage to small employers shall be subject to the provisions of the SEH Act); N.J.A.C. 11:21-7.5 (small employers are required to have a minimum participation under the small employer's health benefits plan of 75 percent of eligible employees); and N.J.A.C. 11:21-6.1 (the small employer certification form must include, among other items of information, the status as small employer and work locations).

Respondents Fischer and Personalized Insurance admit that they instructed Daniel Miller to falsely represent to Horizon's investigators that Linda Miller resided in New Jersey in an effort to conceal their fraud. These allegations were not disputed. ALJ Williams correctly determined that Respondent Fischer "violated the public's trust by altering application information and scheming to instruct the insure[d]s[3] to conceal information."

The Initial Decision, however, made no specific findings regarding violations of the Producer Act. Therefore, I MODIFY the Initial Decision to reflect that these actions violate the Producer Act. Specifically, Respondents Fischer and Personalized Insurance violated the Producer Act by misrepresenting the terms of an insurance or application in violation of N.J.S.A. 17:22A-40a(5) and by engaging in fraudulent, coercive and dishonest practices in the insurance

[3] As noted earlier, the ALJ incorrectly refers to insurer whereas Respondent Fischer attempted to instruct the insureds to conceal information.

business and committing a fraudulent act in violation of N.J.S.A. 17:22A-40a(8) and N.J.S.A. 17:22A-40a(16). Moreover, by engaging in this deceptive behavior, Respondents Fischer and Personalized Insurance violated the insurance laws. See N.J.S.A. 17:22A-40a(2). By encouraging Daniel Miller to lie to a Horizon investigator about Linda Miller's residence, Respondents Fischer and Personalized Insurance attempted to obstruct the Horizon investigation and thereby avoid detection of the intentional misrepresentation of material terms on DRM's application for insurance through the small employer market, in violation of N.J.S.A. 17:22A-40a(17).

Respondents Fischer and Personalized Insurance were ultimately trying to circumvent the requirements established pursuant to the SEH Act, and their conduct was also in violation of the following provisions of that Act: N.J.S.A. 17B:27A-17, N.J.A.C. 11:21-1.2, N.J.A.C. 11:21-6.1 and N.J.A.C. 11:21-7.5. This constitutes a violation pursuant to N.J.S.A. 17:22A-40a(2) of the Producer Act since Respondent Fischer violated those insurance laws and regulations. I do not find a violation of N.J.S.A. 17B:27A-18 as alleged in the OTSC as that provision provides that every health insurer, health service corporation, medical service corporation, hospital service corporation, and health maintenance organization licensed or authorized to provide health benefits or services and offers health insurance policies or coverage to small employers shall be subject to the provisions of the SEH Act.

Count Three – Violations of the Fraud Act by Respondent Dix

Count Three alleges that Respondent Dix violated the Fraud Act by permitting Respondents Fischer and Martin Financial to provide false and misleading statements to Horizon and then by concealing Respondents' actions in violation of the following provisions of N.J.S.A. 17:33A-4:

> a(3) Conceals or knowingly fails to disclose the occurrence of an event which affects any person's initial or continued right or entitlement to (a) an insurance benefit or payment or (b) the amount of any benefit or payment to which the person is entitled;
>
> a(4)(b) Prepares 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 the statement contains any false or misleading information concerning any fact or thing material to an insurance application or contract;
>
> a(5) Conceals or knowingly fails to disclose any evidence, written or oral, which may be relevant to a finding that a violation of [a(4)] has or has not occurred;
>
> b. Knowingly assists, conspires with, or urges any person or practitioner to violate any of the provisions of [the Fraud Act].

The ALJ found that "by colluding with [Respondent Dix] to submit an application to Horizon that they knew contained inaccurate information and impacted coverage eligibility, both [Respondent Dix] and [Respondent Fischer] violated their obligations under the [Producer Act] and the [Fraud Act]." (Initial Decision at 12). I ADOPT this finding. However, I MODIFY the Initial Decision to reflect that Respondent Dix's conduct constitutes a violation of N.J.S.A. 17:33A-4a(3), N.J.S.A. 17:33A-4a(4)(b), N.J.S.A. 17:33A-4a(5) and N.J.S.A. 17:33A-4b.

Count 4 – Violations of the Producer Act by Respondent Fischer

Count Four charges Respondent Fischer with violations of the Producer Act because, on May 31, 2012, he entered into a Consent Order with the Department to resolve allegations that he violated the Fraud Act, which is conduct in violation of the Producer Act. Specifically, Count Four alleges violations of the following provisions of N.J.S.A. 17:22A-40a:

> (2) Violating any insurance laws, or violating any regulation, subpoena or order of the commissioner or of another state's insurance regulator;

> (4) Improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business; and
>
> (8) Using any fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere.

The Initial Decision did not make specific findings as to Respondent Fischer's admissions to Fraud Act violations in the Consent Order as alleged in this Count.

In the Consent Order, Respondent Fischer admitted that he knowingly submitted false and misleading information to Horizon by listing a New Jersey address for Linda Miller when, in fact, she lived in Colorado. He further admitted that this conduct constituted a violation of the Fraud Act. I find that Respondent Fischer's conduct constitutes a violation of insurance laws and regulations in contravention of N.J.S.A. 17:22A-40a(2); and the use of fraudulent, coercive or dishonest practices and demonstrates untrustworthiness in the conduct of insurance business in violation of N.J.S.A. 17:22A-40a(8). I do not find that this conduct was a violation of N.J.S.A. 17:22A-40a(4) in that no monies or properties received in the course of doing insurance business were improperly withheld, misappropriated or converted.

Penalty

With respect to the appropriate action to take against Respondents' insurance producer licenses, I agree with the Department that the record is more than sufficient to support a substantial monetary penalty and license revocation, rather than the two year license suspension recommended by the ALJ. The Initial Decision is therefore MODIFIED as follows.

In its Exceptions, the Department argues that Respondents' producer licenses should be revoked. In his Exceptions, Respondent Fischer argues that no suspension or revocation be imposed. Respondent Fischer explained that his family and personal decisions were in turmoil at

the time that this egregious conduct occurred and avers that this should mitigate the penalty that is imposed. I disagree.

The public in general is adversely affected in a significant way by insurance fraud. New Jersey views insurance fraud as a serious problem to be confronted aggressively. Liberty Mutual v. Land, 2010 N.J. Super. Unpub. LEXIS 89, at *15 (App. Div. 2010); State v. Sailor, 355 N.J. Super. 315, 319 (App. Div. 2001). Courts have recognized that the insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company Inc., 80 N.J. 548 (1979). The Producer Act "is designed not only to impose penalties and provide restitution but more importantly to protect the public from the illegal and unethical actions by insurance agents and brokers." Commissioner v. Ayodeji, 97 N.J.A.R. 2D (INS) 13, Initial Decision (12/18/96), Final Decision and Order (4/18/97). Furthermore, the sanction for fraud by producers must be significant because insurance producers are better placed than a member of the public to defraud an insurer. Bakke v. Bellissima, OAL Dkt. No. BKI 4057-03, Initial Decision (1/13/04), Final Decision and Order (5/26/04), Initial Decision on Remand (8/3/05), Final Decision and Order (8/30/05).

In decisions by prior Commissioners in similar cases, revocation has consistently been imposed upon licensees who engage in fraudulent acts in their capacity as insurance producers. See, e.g., Commissioner v. Goncalves, OAL Dkt. Nos. BKI 3188-03 and BKI 3301-05, Initial Decision (12/3/03), Final Decision and Order (5/24/04) On Remand (2/15/06); Commissioner v. Winograd, OAL Dkt. No. BKI 7702-97, Initial Decision (10/26/00), Final Decision and Order (7/26/01); Commissioner v. Del Mauro, OAL Dkt. No. BKI 8377-91, Initial Decision (5/5/93), Final Decision and Order (6/23/93); Commissioner v. Benner, OAL Dkt. No. BKI 2077-91,

Initial Decision (6/22/92), Final Decision and Order (9/21/92). Both insureds and insurers must place their trust in the information insurance producers convey to them. There can be no compromise in the level of honesty and integrity required of these professionals.

"Revocation is the appropriate sanction in all cases where producer licensees are found to have personally committed insurance fraud, but for those in which truly extraordinary mitigating factors are present." See Commissioner v. Bellisima, supra. Commissioner v. Ayodeji, 97 N.J.A.R. 23 (INS) 13, Initial Decision (12/18/96), Final Decision (4/18/97). For example, in Commissioner v. Ladas, the licensee claimed that revocation was too harsh a penalty to invoke for his failure to review documents which ultimately contained material misrepresentations because he was distracted by personal issues. There, the Commissioner rejected this argument and upheld the ALJ's decision to revoke the producer's license. In doing so, the Commissioner cited to In re Greenberg, 155 N.J. 138 (1998), where the Court revoked an attorney's license after holding that the attorney's depression did not mitigate his acts of impropriety. Ladas, supra, Final Decision and Order at 22. See also Commissioner v. Pino, OAL Dkt. No. BKI 8070-02, Initial Decision (9/11/03), Final Decision and Order (10/30/03) (producer's personality disorder and major depressive episode were insufficient to justify anything less than revocation of producer license for violations related to fraudulent conduct).

Similarly, Respondent Fischer's personal turmoil does not mitigate the fact that he willingly engaged in a scheme to submit fraudulent documents to Horizon without the insureds' knowledge or consent. Respondent Fischer attempts to distinguish his conduct from that described in Ladas, stating that Ladas continued to perpetuate the fraud whereas Respondent Fischer accepted responsibility. However, although Respondent Fischer eventually admitted his conduct and cooperated with the Department, Respondent Fischer initially attempted to conceal

his fraudulent conduct by requesting insured Daniel Miller to lie to Horizon investigators. Respondent Fischer's subsequent cooperation with the Department's investigation does not mitigate his prior, blatant fraudulent conduct or his attempt to thwart Horizon's investigation.

Moreover, Respondent Fischer attempts to distinguish his actions from those in Winograd where there was a "tortuous history of multiple misrepresentations on applications for E&O coverage." However, the Commissioner is empowered to impose revocation on any insurance producer who commits even a single fraudulent act. In this case, Respondent Fischer committed several violations of the Producer Act and the Fraud Act and, therefore, revocation is appropriate.

Lastly, although Respondent Fischer averred that the more moderate fines imposed upon insurance producers in multiple settlements should be considered in relation to the underlying facts, I find the facts in the multiple consent orders to be inapplicable as those matters were resolved by agreement and prior to a hearing. With the facts and precedent set forth above, I hereby MODIFY the ALJ's finding which recommended a two year suspension upon Respondent Fischer and Respondent Personalized Insurance, and instead order license revocation.

Likewise, the ALJ's finding of a two year suspension upon Respondent Dix is also MODIFIED to reflect revocation. Respondent Dix failed to disclose Respondent Fischer's fraudulent actions and instructed him on how to perpetuate the fraud. Her actions and omissions constitute clear violations of the Producer Act and Fraud Act, and there are no mitigating circumstances to justify a penalty less than license revocation.

Respondents' actions also warrant a substantial monetary penalty. Significant fines have consistently been imposed upon insurance producers that engage in fraudulent acts. See

Commissioner v. Thomas Dobrek and Mr. Lucky Bail Bonds, Inc., OAL Dkt. No. BKI 00361-05, Initial Decision (12/26/06), Final Decision and Order (3/26/07) (revoking insurance producer's license and imposing monetary penalties totaling $20,000 for violations of the Producer Act for, among other things, making materially false statements in an application to an insurance company); Commissioner v. Martini, OAL Dkt. No. INS 1874-96, Initial Decision (4/18/97), Final Decision and Order (6/10/97) (revoking the producer's license and imposing a $15,000 fine for Producer Act violations for committing insurance fraud by submitting a false claim to his insurance company).

Under Kimmelman, supra, certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed pursuant to N.J.S.A. 17:22A-45 upon insurance producers. The factors include: (1) the good faith or bad of the violator; (2) the violator's ability to pay; (3) the amount of profit obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal conduct; (6) existence of criminal actions and whether a large civil penalty may be unduly punitive if other sanctions have been imposed; and (7) past violations. Kimmelman, supra, 108 N.J. at 137-139.

I agree with the ALJ that Respondents acted in bad faith. Respondents were licensed producers that demonstrated bad faith through their submission of false and misleading documents in support of an application to an insurer. Respondents failed to live up to the high standards required of an insurance producer. Moreover, as noted by the ALJ, although Respondent Fischer asserts that the loss of his license will be a hardship, he failed to provide specific evidence of his inability to pay civil penalties aside from his assertion that he is the sole provider for his family. Furthermore, the record is unclear as to whether profits were obtained through Respondents' actions.

Regarding the fourth Kimmelman factor, I agree with the ALJ's determination that this conduct constituted injury to the public. (Initial Decision at 13). First, Respondents' actions resulted in tangible injury to DRM, Horizon, and Martin Financial. Horizon eventually rescinded DRM's health insurance policy. As a result, they incurred substantial healthcare expenses and filed suit against Horizon, Martin Financial and Respondents for unpaid medical bills. The suit settled after Martin Financial agreed to pay a substantial amount of money. Moreover, 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. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). Here, Respondents have eroded the confidence of New Jersey consumers in insurance producers and in the insurance business and this harm is cognizable when assessing the appropriate penalty.

With regard to the other Kimmelman factors, Respondents' actions occurred over a six month period between October 2006 and April 2007. I further find that there was no criminal involvement for Respondents which ultimately weighs in favor of a heavier civil penalty. See Kimmelman, supra, which states that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he had already paid a price for unlawful conduct. 108 N.J. at 139. Respondent Fischer, however, agreed to pay a $5,000 fine through the Consent Order he entered into with the Department's Bureau of Fraud Deterrence to resolve the Fraud Act violations. Lastly, I find, as it is undisputed, that there is no evidence that Respondents committed previous violations of this State's insurance laws.

In light of the above Kimmelman analysis and based on the violations I have concluded that they committed, pursuant to N.J.S.A. 17:22A-26 et seq., I disagree with the ALJ's recommendation for moderate fines.

In this case, I have determined that substantial fines against Respondents Fischer and Personalized Insurance are warranted as follows:

> Count One - $5,000 fine imposed upon Respondents Fischer and Personalized Insurance, jointly and severally, for violations of the Producer Act; and
>
> Count Two - $10,000 fine imposed upon Respondent Fischer and Personalized Insurance, jointly and severally, for violations of the Producer Act.

However, with respect to count Four, no additional fine is imposed upon Respondent Fischer for violations of the Producer Act. The conduct underlying Counts One and Four of the OTSC is the same. Count One alleges violations of the Producer Act and the SEH Act against all three Respondents for their role in submitting falsified employee information to Horizon on behalf of DRM to secure a small employer health insurance policy. Count Four alleges violations of the Producer Act against only Respondent Fischer for entering into a Consent Order wherein he admitted that he knowingly submitted the aforementioned false information and that such conduct violated the Fraud Act. The underlying fraudulent conduct as it relates to Respondent Fischer is the same in Counts 1 and 4. Respondent Fischer has already been penalized for this conduct under the Fraud Act when he entered into a Consent Order and paid a $5,000 penalty, and through the Producer Act by being ordered in this Final Order, to pay $5,000, jointly and severally, as to Count 1. As such, Respondent Fischer will not be assessed additional fines as to Count 4 through the Producer Act for this same conduct. In total, I hereby MODIFY the Initial Decision to order the payment of a total of $15,000 in civil penalties upon Respondents Fischer and Personalized Insurance, joint and severally, for their violations of the Producer Act.

I further MODIFY the Initial Decision to assess the significant fines against Respondent Dix:

Count One - $5,000 fine imposed upon Respondent Dix for violations of the Producer Act; and

Count Three - $5,000 fine imposed upon Respondent Dix for violations of the Fraud Act.

I also further MODIFY the Initial Decision to impose a surcharge of $1,000 upon Respondent Dix as required under N.J.S.A. 17:33A-5.1. I further ADOPT the ALJ's recommended imposition of $6,732 in attorneys' fees against Respondent Dix pursuant to the Fraud Act, N.J.S.A. 17:33A-5c.

I further MODIFY the Initial Decision to impose costs of investigation and prosecution of $262.50 upon all Respondents, jointly and severally, pursuant to N.J.S.A. 17:22A-45c.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions and the entire record herein, I hereby ADOPT the Factual Findings as set forth in the Initial Decision.

I also ADOPT the ALJ's legal conclusion that by colluding to submit an application to Horizon that they knew contained inaccurate information and impacted coverage eligibility, Respondents violated their obligations under the Producer Act and the Fraud Act. I further ADOPT the ALJ's determination that, Respondent Fischer violated the public's trust by altering application information and scheming to instruct the insured to conceal information. However, I MODIFY the Initial Decision to specifically hold that the Respondents violated the following provisions of the Producer Act, the Fraud Act and the SEH Act and the regulations promulgated therein, as follows:

Count One: Respondents violated N.J.S.A. 17:22A-40a(2), (5), (8), (16) and (17); N.J.S.A. 17B:27A-17, N.J.A.C. 11:21-1.2, N.J.A.C. 11:21-6.1 and N.J.A.C. 11:21-7.5;

Count Two: Respondent Fischer and Personalized Insurance violated N.J.S.A. 17:22A-40a(2), (5), (8), (16) and (17); N.J.S.A.

17B:27A-17, N.J.A.C. 11:21-1.2, N.J.A.C. 11:21-6.1 and N.J.A.C. 11:21-7.5;

Count Three: Respondent Dix violated N.J.S.A.17:33A-4a(3), N.J.S.A. 17:33A-4a(4)(b), N.J.S.A. 17:33A-4a(5), and N.J.S.A. 17:33A-4b; and

Count Four: Respondent Fischer violated N.J.S.A. 17:22A-40a(2) and (8).

I also MODIFY the recommendations in the Initial Decision as to penalty. Total fines under the Producer Act of $15,000 are hereby imposed, jointly and severally, against Respondents Fischer and Personalized Insurance in the following manner: Count One - $5,000 and Count Two - $10,000. I also MODIFY the Initial Decision to hereby order the payment total fines and assessments under the Producer and Fraud Acts of $17,237 upon Respondent Dix, as follows: Count One - $5,000; and, Count Three - $5,000, a $1,000 surcharge pursuant to N.J.S.A. 17:33A-5.1, and attorneys' fees of $6,732 pursuant to N.J.S.A. 17:33A-5c. I also MODIFY the Initial Decision to impose, jointly and severally, upon all Respondents, the Department's costs of investigation and prosecution of $262.50 pursuant to N.J.S.A. 17:22A-45c. Lastly, I MODIFY the Initial Decision to correct any misspelling of the name "Fischer."

IT IS HEREBY ORDERED on this 17th day of July, 2015 that the Initial Decision is ACCEPTED in part and MODIFIED in part as set forth herein.

Peter L. Hartt
Acting Commissioner

Crm fischer dix final order 071615/inoord