

FILED 

JAN 17 2012

Department of Insurance
State of Idaho

BEFORE THE DEPARTMENT OF INSURANCE

STATE OF IDAHO

In the Matter of:

ROGER E. MACKEY,

Resident Producer No. 10691,

Respondent.

)
)
)
)
)
)
)
)
)
)

Docket No. 18-2676-11

FINAL ORDER

PROCEDURAL BACKGROUND

On March 17, 2011, the State of Idaho, Department of Insurance (“Department”), filed an administrative complaint and notice of the right to a hearing against Idaho-licensed insurance producer Roger E. Mackey (“Mackey”), alleging that Mackey violated title 41, Idaho Code (“the Idaho Insurance Code”). The Department’s administrative complaint sought revocation of the Idaho insurance producer license issued to Mackey, and the imposition of a \$7,000 fine due and payable prior to Mackey applying for a new Idaho insurance producer license or upon his seeking reinstatement of his Idaho insurance producer license should it be revoked in that proceeding.

On April 6, 2011, Mackey filed an answer to the Department’s administrative complaint, seeking a hearing before the Department to contest the matters raised in the Department’s administrative complaint.

On April 8, 2011, the Director of the Department of Insurance (“Director”) appointed Brad D. Goodsell (“Hearing Officer”) to act as hearing officer in the matter.

On June 10, 2011, a hearing presided over by the Hearing Officer was held at the Department's Boise offices, concerning the allegations of Idaho Insurance Code violations set forth in the Department's administrative complaint and Mackey's defenses thereto. Both the Department and Mackey were represented by counsel at the hearing.

On August 17, 2011, the Hearing Officer issued his Findings of Fact, Conclusions of Law and Preliminary Order ("Preliminary Order"). In the Preliminary Order, the Hearing Officer found that Mackey had violated §§ 41-113, 41-247, and 41-1016(1)(h) of the Idaho Insurance Code, but that Mackey had not violated § 41-293 of the Code. In the Preliminary Order, the Hearing Officer found that revocation of Mackey's Idaho insurance producer's license and imposition of a \$3,000 administrative penalty were the appropriate remedies for such violations pursuant to the evidence presented.

On August 26, 2011, Mackey filed a petition with the Department seeking the Director's review of the Hearing Officer's Preliminary Order.

On September 6, 2011, the Director issued an order granting Mackey's petition for review and setting a schedule for briefing and oral argument in the matter. In such order, the Director named Thomas A. Donovan, the Department's Deputy Director ("Director's Designee"), as his designee for all purposes in the conduct of the review of the Preliminary Order. Both Mackey and the Department timely filed briefs in support of their positions in the matter prior to the hearing set for the presentation of oral argument pursuant to the review process.

On November 29, 2011, a hearing took place before the Director's Designee, wherein both the Department and Mackey presented oral argument in support of their respective positions regarding the Hearing Officer's Preliminary Order. Both the Department and Mackey were

represented by counsel at the hearing.

This matter is now fully submitted to the Director's Designee, and he HEREBY ISSUES this FINAL ORDER upon review of the Preliminary Order.

FINDINGS OF FACT

The findings of fact set forth by the Hearing Officer in the Preliminary Order are HEREBY ADOPTED in full and quoted below.

1. Mr. Mackey was a licensed producer during the period relevant to this matter and therefore was subject to the provisions of Title 41.
2. Mr. Mackey was engaged by Jason Sprute (hereinafter "Jason") and/or Gwen Sprute (hereinafter "Gwen") to assist them in obtaining life insurance for Gwen.
3. At the time of the application, both Jason and Mr. Mackey knew that Gwen resided in an assisted living center and either knew or should have known that Gwen required assistance with some of the activities of daily living (hereinafter "ADLs") that were listed in Question 2 of Section A.
4. Mr. Mackey would have known that Question 2 of Section A was answered incorrectly had he consulted the instructions for completing the application - no interpretation was required.
5. The fact that Gwen was residing in an assisted living facility would have placed a reasonable person, certainly a licensed producer, on notice that Gwen needed assistance with some of the ADLs that were listed in Question 2 of Section A.
6. In addition to knowing that Gwen was living in an assisted living facility, Mr. Mackey also knew that she previously had a brain tumor, and that she was on certain medications. Mr. Mackey knew that these factors would affect Gwen's insurability.

7. Despite this knowledge, Mr. Mackey answered Question 2.c. of the Field Underwriter's Statement "No", indicating that he wasn't aware of anything about the health, habits, hobbies or mode of living" that might affect her insurability. This answer directly conflicts with his stated knowledge.
8. Had Mr. Mackey reviewed the product guides for the products he was offering, he would have known that neither the Graded product, nor the Simplified product, was available to Gwen.
9. There is no evidence or even assertion that National influenced how questions were answered on the application.
10. Mr. Mackey knew that Assurity would not accept the application, but hoped that it would respond with an alternate offer.
11. Assurity denied the application because they found out through Jason that Gwen resided in an assisted living facility.
12. Jason's complaint was not limited in scope to Assurity, but related to the transaction as a whole.
13. The Department directed at least six (6) inquiries to Mr. Mackey during the investigation, all of which he received.
14. Mr. Mackey substantially provided what was requested in the Department's first request for information.
15. With respect to the Department's second request, when viewed most favorably to Mr. Mackey, his responses to item Nos. 1 and 3 are, at best, marginally responsive; his response to item No. 2 is not really responsive at all - instead he attempted to answer a different question, raising more issues; and he failed to respond at all to item No. 4.

16. With respect to the Department's third request, Mr. Mackey failed to respond whatsoever to the Department's follow-up request related to his previous response, and failed to respond at all to follow-up efforts of the Department thereafter.
17. Mr. Mackey has demonstrated a high degree of incompetence, which is the main cause of this entire episode, and Mr. Mackey largely ignored his responsibilities as a licensed producer and instead attempted to rely on a third party.
18. The evidence does support the Department's claims that Mr. Mackey submitted deceptive information, was incompetent, and did not act with honesty and in good faith.
19. The evidence also demonstrates that Mr. Mackey failed to promptly and completely respond to the Department's inquiries.
20. While Mr. Mackey's incompetence, irresponsibility and inattention to detail caused him to submit deceptive information and ignore requests from the Department, the evidence as a whole does not support claims that Mr. Mackey acted with intent to defraud or deceive.

The Director's Designee HEREBY makes the following ADDITIONAL FINDINGS OF FACT:

21. Official notice is taken that Mackey has been a licensed producer since 2003. The record reflects no evidence of other complaints or allegations of wrongdoing or violations of the Idaho Insurance Code by Mackey in the past.

22. There is additional evidence in the record that Assurity denied the application for insurance for Gwen or refused to consider her for another product not solely based on the misrepresentations but also because Jason was rude on the telephone. The Department did not

appear to dispute this evidence but has relied upon the Assurity letter, set forth in Exhibit 5, as support for its view that Assurity denied the application based on the misrepresentation. The Director's Designee finds that Assurity also denied the application or alternatively refused to consider Gwen for other insurance based on Jason's behavior. This finding is not inconsistent with finding number 11, adopted above, but rather is supplemental thereto. There is additional evidence in the form of Department notes that Jason was rude to Department staff on the telephone. The finding that Assurity denied Gwen's application or refused to consider her for a different product because of Jason's rudeness is relevant only to the issue of the appropriate sanctions but does not impact or alter the conclusions of law set forth below.

23. Mackey relied on Carl Ruplinger and National Brokerage, LLC, for guidance in the process of applying for insurance for Gwen. The record implies and official notice is taken that Mr. Ruplinger and National Brokerage, LLC, are licensed producers. Mackey disclosed Gwen's health history and that she was living in an assisted living facility to National Brokerage, LLC. Mackey submitted the application to National Brokerage, LLC, not to Assurity directly.

24. The insurance policy was never issued, and thus it follows that the record fails to show that Mackey gained from his misrepresentations. The record does not reflect to what extent either Mackey, Mr. Ruplinger, or National Brokerage, LLC, would have gained financially had Assurity accepted the application and issued the policy applied for or one of similar value. However, it is reasonable to infer that both Mackey and National Brokerage, LLC, would have gained financially had Assurity issued a policy arising from the application set forth in Exhibit 5.

CONCLUSIONS OF LAW

The Conclusions of Law set forth by the Hearing Officer in the Preliminary Order quoted below are HEREBY ADOPTED, with certain exceptions and additions as follows:

1. Idaho Code § 41-210 gives the Director broad powers to investigate any insurance matters “to determine whether any person has violated any provision of [Title 41] or to secure information useful in the lawful administration of any such provision.”
2. The Department’s investigation of Mackey was proper, and the validity of the Department’s action is determined by the applicable procedures of Title 41 and [the Idaho Administrative Procedure Act], which govern the procedure giving rise to this decision.
3. Idaho Code § 41-213 authorizes the Director to enforce the provisions of Title 41 by both revoking licenses and imposing administrative penalties.
4. Idaho Code § 41-117 authorizes the Director to impose an administrative penalty of not more one thousand dollars (\$1,000) for each violation of Title 41, in addition to imposition of the sanction of denial, suspension or revocation of a license.
5. Idaho Code § 41-247 permits the Director to direct inquiries in writing, to any person subject [to] Title 41, and requires the person to promptly reply and furnish all requested information in his possession or under his control.
6. Mackey failed both to promptly respond and to fully respond to Department requests, in violation of Idaho Code § 41-247.
7. Idaho Code § 41-113 requires all persons transacting insurance to comply with applicable provisions of Title 41, and to, (i) act in good faith, (ii) abstain from deception, and (iii) practice honesty and equity in all insurance matters.
8. It was Mackey’s responsibility to make sure that the application was made in good faith and without deception -- not National [Brokerage]’s responsibility.

While National Brokerage, LLC, certainly did not have such a duty to make sure the

application was made in good faith and without exception so as to relieve Mackey of his duty in that regard, it is a reasonable conclusion that National Brokerage, LLC, would have had at least some duty to ascertain that the information included on the application was true and correct, given Mackey's reliance on National Brokerage, LLC, and given that Mackey had shared salient facts regarding the applicant with National Brokerage, LLC. A further consideration is that it was National Brokerage, LLC, that submitted the application to Assurity, and not Mackey. For these reasons, conclusion number 8 is modified. As set forth below, this conclusion has no bearing on the conclusions that Mackey engaged in violations of the Idaho Insurance Code, and, obviously, the conduct of National Brokerage, LLC, or Mr. Ruplinger in this matter is not before the Director's Designee. However, these facts are considerations in determining the appropriate sanctions to be imposed on Mackey for such violations.

The conclusion of law set forth in paragraph 9, located on page 7 of the Preliminary Order, *i.e.*, that Mackey violated Idaho Code § 41-113, is repudiated. This section of the Idaho Insurance Code is more of a guiding principle or a statement of public policy than a specified standard that is subject to sanction if not followed. In any event, more specific legal authority applicable to the same violative conduct exists in the Idaho Insurance Code and is adopted herein, namely, Idaho Code §§ 41-1016(1)(e) and 41-1016(1)(h). For these reasons, the Director's Designee concludes that Mackey did not violate Idaho Code § 41-113 in the sense of constituting a separate violation for which additional sanction can be imposed.

Mackey violated §§ 41-1016(1)(e) and 41-1016(1)(h) of the Idaho Insurance Code by completing and signing the Assurity application for Gwen (Exhibit 5) with a "No" answer to 6. Health Section, Section A, question 2, based on responses from Jason and Gwen, and for answering question 2.c. of the Field Underwriter's Statement in Exhibit 5, in the negative, the

latter of which was false, according to Mackey's testimony at the hearing.

The violation of Idaho Code § 41-247 also constitutes a violation of Idaho Code § 41-1016(1)(b).

APPROPRIATE SANCTIONS

That Mackey misrepresented material information in an insurance application is clear. It is also abundantly clear that Mackey ignored requests that he had a legal duty to respond to fully and completely. That the necessary responses would be burdensome or painful is not a basis to ignore the Department's requests. Normally, these violations would result in an unequivocal order of revocation. However, additional facts have tempered the analysis.

The Director's Designee relies upon the following as extenuating circumstances supporting the modification of sanctions to be imposed against Mackey for his violations:

- (a) Mackey was working with an insurance brokerage and relying on the brokerage to guide and assist him in insurance transactions he engaged in through that brokerage. Mackey fully disclosed to the brokerage the facts underlying Gwen's health and living situation. Mackey submitted Gwen's application for a life policy to such brokerage, and was not told by the brokerage that the information regarding Gwen's health and living situation should be corrected or changed on the application. There is evidence in the record that National Brokerage, LLC, was surprised that Assurity did not issue Gwen Sprute a policy.
- (b) Assurity Life Insurance Company, the insurance company that received the application filled out by Mackey seeking a life policy for Gwen, refused to issue a life insurance policy to Gwen. The record reflects that the misrepresentation on the application regarding Gwen's health status and living arrangements was made initially by Jason to

Mackey. The record is not clear that the only reason for the company's failure to issue the policy was misrepresentation by Mackey, based on the Sprutes' statement of what information Gwen and Jason wanted to be included on the application and Mackey's failure to correct that information. It appears that Jason's conduct on the telephone with the company affected the company's decision on the application or whether to offer alternative coverage. The Sprutes' premium check was fully refunded by Assurity, so they were not monetarily damaged due to the insurance transaction involving Mackey and his misrepresentations associated with the application, although they obviously lost time and energy in the process.

- (c) There is no evidence in the record indicating that Mackey received any personal gain from the transaction with the Sprutes, although he likely would have received some financial gain had Assurity issued Gwen a policy.
- (d) The Director's Designee takes official notice from records maintained by or accessible to the Department that Mackey has been licensed by the Department as an insurance producer since October 24, 2003, and that this proceeding is the first disciplinary action brought against him during the time period from his original licensure to the present date. The record does not reflect any other allegations of wrongdoing by Mackey either in this case, or in any other disciplinary proceeding by the Department against Mackey.
- (e) Mackey's violations of Idaho Code §§ 41-1016(1)(e) and 41-1016(1)(h) appear from the evidence in the record to be not simply knowing misrepresentations but also a result of sloppiness, misplaced reliance on others, and failure to take the initiative in making certain that correct factual information was submitted to Assurity Insurance Company on Gwen's application for a life insurance policy. The record reflects that Mackey was

acting with the intent of finding insurance for Gwen and that he had reason to believe, based on reliance on National Brokerage, LLC, that Assurity would issue Gwen a life insurance policy despite her health status and living arrangements.

NOW THEREFORE, after considering the evidence in the record, the Preliminary Order, and the mitigating factors set forth above, as well as taking official notice of the Department's licensing records, the Director's Designee finds that the appropriate sanctions for Mackey's violations of §§ 41-247, 41-1016(1)(b), 41-1016(1)(e), and 41-1016(1)(h) are the suspension of Mackey's Idaho insurance producer license for a period of twelve (12) months and the imposition of an administrative penalty in the total amount of \$2,000, consisting of \$1,000 for the violations of §§ 41-247 and 41-1016(1)(b) and \$1,000 for the violations of Idaho Code §§ 41-1016(1)(e) and 41-1016(1)(h). The administrative penalty shall be paid in full on or before the expiration of twelve (12) months from the date of this order and as a prerequisite for the reinstatement of Mackey's insurance producer license.

IT IS SO ORDERED.

DATED and EFFECTIVE this 17th day of January, 2012.

STATE OF IDAHO
DEPARTMENT OF INSURANCE



THOMAS A. DONOVAN, Deputy Director
and Director's Designee in this Proceeding

NOTIFICATION OF RIGHTS

This is a final order of the agency. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code § 67-5246(4).

Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or
- iv. The real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of (a) the service date of this final order, (b) an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2012, I caused a true and correct copy of the foregoing FINAL ORDER to be served upon the following by the designated means:

Kimbell D. Gourley
TROUT, JONES, GLEDHILL,
FUHRMAN & GOURLEY, P.A.
The 9th & Idaho Center
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, ID 83701
kgourley@idalaw.com

☒ U.S. mail, postage prepaid
☐ Certified mail
☐ Hand-delivery
☒ email

Richard B. Burleigh
Deputy Attorney General
Idaho Department of Insurance
700 W. State Street, 3rd Floor
Boise, ID 83720-0043
Richard.burleigh@doi.idaho.gov

☐ U.S. mail, postage prepaid
☐ Certified mail
☒ Hand-delivery
☒ email



TERESA JONES
Assistant to the Director