

FILED
MAR 02 2016
Department of Insurance
State of Idaho

BEFORE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF
INSURANCE,

Complainant,

vs.

JIMMY ELLIS, an insurance producer holding
Idaho resident producer license no. 37482, and
TERRY SILSBY, an insurance producer
holding Idaho resident producer license no.
85655,

Respondents.

Docket No. 18-2999-14

**ORDER DENYING PETITION FOR
REVIEW**

The Director of the Idaho Department of Insurance (**Director**), having reviewed the record herein, including the Petition for Review of Hearing Officer's Amended Findings of Fact, Conclusions of Law and Preliminary Order; and Exceptions (**Petition for Review**), filed by the Department of Insurance (**Department**) on January 29, 2016, hereby issues his findings and conclusions and enters an order as follows.

BACKGROUND

1. The Department filed and served a Verified Complaint and Notice of Right to Hearing (**Complaint**) upon the respondents, Jimmy Ellis and Terry Silsby (**Respondents**), on March 4, 2015.

2. Count One of the Complaint, the only count in the Complaint, provided, in part, as follows:

21. Ellis violated Idaho Code § 41-1016(1)(h) when he knowingly authored and submitted a false affidavit to the Ada County Court, Ellis demonstrated fraudulent, coercive or dishonest practices, or incompetence in the conduct of business in the state of Idaho.

22. Silsby violated Idaho Code § 41-1016(1)(h) when he submitted Notification of Criminal Prosecution of Providing Forged, False, Counterfeit or Altered Insurance Form to the Ada County Court, while he did not have insurance coverage. Silsby demonstrated fraudulent, coercive or dishonest practices, or incompetence in the conduct of business in the state of Idaho.

3. Respondents timely requested a hearing, and the Director appointed Jean R. Uranga as Hearing Officer to preside over the hearing and issue a preliminary order.

4. A hearing was held before the Hearing Officer on July 2, 2015, at which Respondent Ellis was represented by counsel, Jon R. Cox; Respondent Silsby appeared pro se; and the Department was represented by Deputy Attorney General Brandon Karpen.

5. On July 30, 2015, the Hearing Officer issued and served on the parties the Hearing Officer's Findings of Fact, Conclusions of Law and Preliminary Order, which was received by and filed at the Department on July 31, 2015. In such order, the Hearing Officer concluded that Respondents violated the Idaho Insurance Code, and ordered that the Department has discretion to impose penalties.

6. Thereafter, the parties each filed motions for reconsideration, and the Hearing Officer set a date for a second hearing.

7. A second hearing was held before the Hearing Officer on December 29, 2015, at which Respondent Ellis was represented by counsel, Jon R. Cox; Respondent Silsby appeared pro se; and the Department was represented by Deputy Attorney General John C. Keenan.

8. On January 28, 2016, the Hearing Officer issued and served on the parties her

Hearing Officer's Amended Findings of Fact, Conclusions of Law and Preliminary Order

(**Amended Preliminary Order**), a copy of which is attached as Exhibit A. In such order, the

Hearing Officer concluded, in her Conclusions of Law at p. 10:

Idaho Code § 41-1016(1)(h) prohibits the use of fraudulent or dishonest practices or practices demonstrating untrustworthiness in the conduct of insurance business in the state of Idaho. Violations have not been established by clear and convincing evidence.

Based on this conclusion, the Hearing Officer ordered that the matter should be dismissed and no sanctions imposed against Respondents.

9. On January 29, 2016, the Department filed its Petition for Review, citing the following three issues:

- (1) whether the Hearing Officer erred in applying “clear and convincing” as the requisite standard of proof for the finding of a violation under section 41-1016(1)(h), Idaho Code;
- (2) whether the Hearing Officer erred when she failed to review the record in view of the various distinct causes and violations which are set forth in section 41-1016(1)(h), Idaho Code, and which were alleged in Count One of the [Complaint]; and
- (3) whether the Hearing Officer erred in concluding that section 41-1016(1)(h), Idaho Code, applies only to the conduct of insurance business in the state of Idaho[.]

10. Neither Respondent filed a Petition for Review on their own behalf.

REVIEW OF HEARING OFFICER'S PRELIMINARY ORDER

A. Director's Authority. The Director is granted broad discretionary authority in reviewing a preliminary order of a hearing officer. All hearings are conducted in accordance with title 67, chapter 52, Idaho Code. *See* Idaho Code § 41-232A. The Director, upon his own motion may, or, upon motion by any party shall, review a preliminary order. Idaho Code § 67-5245(2). The Director shall exercise all of the decision-making power that he would have had if he had

presided over the original hearing. Idaho Code § 67-5245(7). Hence, the Director has de novo review. Pursuant to the Idaho Rules of Administrative Procedure of the Attorney General (IRAP), the Director has the discretion to grant a petition for review of a preliminary order and to allow the parties the opportunity to file briefs in support of or taking exception to the preliminary order. IDAPA 04.11.01.730.02.d (“If the agency head (or designee) grants a petition to review...”). Conversely, the same rule permits the Director to deny a petition for review.

In the immediate matter, the Director, having reviewed the record of this action, is of the conclusion that it is not necessary to request additional evidence, briefing or oral argument from the parties. Rather, the Director concludes that he can resolve the issues based on the existing record and based on the laws of this state. In that regard, and subject to the caveats stated below, the Director concludes that it is not an efficient use of state or individual resources to pursue this matter further and therefore denies the Department’s Petition for Review.

B. Specific Points for Review under the Department’s Petition for Review.

Notwithstanding the Director’s decision to deny review of the underlying preliminary order, the Director is of the opinion that there were a number of errors in the Amended Preliminary Order. For purpose of providing guidance should these issues arise again, the Director reaches the following conclusions:

(i) The Hearing Officer erred in applying “clear and convincing” as the requisite standard of proof for the finding on the various distinct causes and violations listed under section 41-1016(1)(h), Idaho Code. In her decision the Hearing Officer stated that:

Because fraud must be proven by clear and convincing evidence, the Hearing Officer finds that violations have not been established, in part due to the inability to obtain direct testimony from Sandra Brunston or a copy of the tape of any second conversation between Ms. Brunston and Mr. Ellis or Mr. Silsby on May 23, 2013.

However, as noted above, the Department did not plead fraud per se. The Department pled that

Respondents engaged in fraudulent, coercive or dishonest practices, or were incompetent. Furthermore, in the Department's closing argument at the December 29, 2015, hearing, counsel for the Department stressed that the Department was not seeking a finding of fraud against Respondent Ellis but instead asserted that Ellis' actions demonstrated untrustworthiness, irresponsibility or some form of incompetence. *See* Hearing Transcript (December 29, 2015), at page 81-82.

The appropriate standard of proof to apply in an administrative action is the preponderance of the evidence standard. In *Van Orden v. State Department of Health and Welfare*, 102 Idaho 663, 637 P.2d 1159 (1981) the court found that the agency's reliance on reliable, probable and substantial, if controverted, evidence supported its decision to suspend, and thereby effectively terminate, a license. *Id.* 102 Idaho at 667. Use of reliable, probable and substantial evidence denotes the preponderance of the evidence standard. *Steadman v. S. E. C.*, 450 U.S. 91, 98-102, 101 S. Ct. 999, 1006-08, 67 L. Ed. 2d 69 (1981) (finding that the Federal Administrative Procedures Act, 5 U.S.C. § 556, applies a preponderance of the evidence standard). *See also Northern Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213 (1996) ("upon sufficient proof to the director" that one or more prohibited acts had been committed by the holder of the license is akin to the preponderance of the evidence standard generally applied in administrative hearings); 2 AM.JUR.2d Administrative Law § 344 (2015) (the general standard for administrative hearings is by a preponderance, that is, the greater weight of evidence). No specific standard of proof is provided for under the IRAP. However, the preponderance of evidence standard is supported by the relaxed rules of evidence under the IRAP. *See* IDAPA 04.11.01.600 ("The presiding officer is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any

order. ... All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.”) Such rules of evidence do not lend themselves to a heightened standard of proof. Nor does an allegation of fraudulent practices elevate the standard of proof. As used in § 41-1016(1)(h), fraudulent practices is synonymous to and listed together with coercive and dishonest practices. Neither these elements nor any of the other causes or violations under § 41-1016(1) require—nor should they require—an elevated standard of proof as asserted by the Hearing Officer. The Director concludes that it would be unduly burdensome on all parties to require separate standards of proof under the same statute. Hence, to the extent that the Hearing Officer applied a clear and convincing evidence standard to determine violation of § 41-1016(1)(h), this is an error. However, as discussed below, the Director is not of the opinion that this error justifies the additional cost and expense for the parties in pursuing this appeal or would necessarily lead to a different result.

(ii) The Department asserts that the Hearing Officer erred when she failed to review the record in view of the various distinct causes and violations which are set forth in section 41-1016(1)(h), Idaho Code, and which were alleged in Count One of the Complaint. The Amended Preliminary Order, however, references fraudulent or dishonest practices or practices demonstrating untrustworthiness (*see* Conclusions of Law at page 10). Although, as noted above, the Hearing Officer applied the incorrect standard of proof to the analysis of § 41-1016(1)(h), it is not clear from the Amended Preliminary Order that the Hearing Officer did not consider these distinct causes. While there is no indication in the Amended Preliminary Order that the Hearing Officer considered whether Respondents were incompetent as pled by the Department, the Director is of the conclusion that this omission is not sufficient in and of itself to grant the Department’s Petition for Review.

(iii) The Hearing Officer erred in finding that section 41-1016(1)(h), Idaho Code, applies only to the conduct of insurance business in the state of Idaho. The Hearing Officer's opinion that § 41-1016(1)(h) only applies to "insurance business" is an incorrect conclusion as a matter of law. The Director has reiterated the proper interpretation of this section of the Idaho Code on multiple occasions. In *In The Matter of Edward E. Cain*, Docket No. 18-2404-07, the Director addressed this exact issue and concluded that the reference to business in § 41-1016(1)(h) is broader than insurance business. Instead the term includes any activity carried on for profit or gain. *See Findings of Fact, Conclusions of Law and Final Order on Petition for Review of Preliminary Order, In the Matter of Edward E. Cain*, Docket No. 18-2404-07 (August 29, 2008). Section 41-1016(1)(h) is a tool for the Department to evaluate the character or ethical quality of a person and as such is not limited merely to review of insurance business activity. *Id.*, at page 8. The Director's interpretation was affirmed in *Cain v. Idaho Department of Insurance*, Case No. CV OC 08 20810 (4th Dist. - McKee 2009)(wrongfully obtaining unemployment benefits by submitting false status reports was activity carried on for gain and was, therefore, in the conduct of business). The Director recently reaffirmed this conclusion in *State of Idaho, Department of Insurance vs. Daniel G. Gutierrez*, Docket No. 18-2970-14, (*Findings of Fact, Conclusions of Law, and Final Order on Petition for Review of Preliminary Order*, July 20, 2015). Hence, the opinion of the Hearing Officer that Respondents must be engaged in the "conduct of insurance business" rewrites § 41-1016(1)(h) and is contrary to this long running interpretation and application of subsection (h) by the Director.

Nonetheless, in the context of this proceeding, determining whether Respondents were engaged in business other than insurance business is not necessary for the resolution of this matter. Without question the business Respondent Ellis was conducting was insurance business.

Therefore, the failure of the Hearing Officer to broadly interpret § 41-1016(1)(h) could not be said to affect the outcome.

The case against Respondent Silsby is more problematic. Silsby argues that he was a consumer and not involved in business at all. To the extent Silsby was engaged in business, it would also appear to be insurance business. There is no specific finding by the Hearing Officer concerning this element as it pertains to Respondent Silsby. Since the Director does not intend to disturb the ultimate conclusion of the Hearing Officer, this question does not need to be resolved at this time.

C. The Hearing Officer's Ultimate Conclusion. The crux of the matter currently before the Director is whether the Department's Petition for Review should be granted and whether the parties should brief the issues raised. As noted above, the Director is largely in agreement with the stated grounds for the Department's Petition for Review. However, having reviewed the record, the Director concludes that the final result reached by the Hearing Officer should not be disturbed.

That is not to say that Respondents' behavior was without question. The Director questions whether testimony concerning the early phone call on the morning of May 23, 2013, made from the phone of Jake Erickson, is accurate or merely a convenient after-the-fact construct. The Director questions whether Respondent Ellis did in fact try to place the insurance later that same morning. The Director notes that Progressive managed to confuse the record and placed itself in the position of honoring insurance coverage based solely on the representations of a producer without any written or otherwise recorded corroboration.

Notwithstanding, the Director finds that the following findings of fact by the Hearing Officer are at the heart of the matter and are sufficiently supported by the record:

The Hearing Officer finds that the morning of May 23, 2013, Mr. Silsby did ask Mr. Ellis to place insurance. The evidence further suggests Mr. Ellis did not follow through and place the insurance until after Mr. Silsby was ticketed. However, during the second hearing, the attorney for Progressive provided emails to both counsel which were admitted as exhibits indicating that, if an agent says he tried to place insurance on a certain day and time, Progressive will take the agent's word for it and make the insurance effective based upon what the agent tells them. In this case, Progressive issued a letter dated August 12, 2015, which was admitted as Exhibit F, stating they were "honoring coverage" for Mr. Silsby effective "May 23, 2013, at 12:01a.m."

Amended Preliminary Order, pages 9-10. The Director fully intends to hold Progressive to this position in the event it is faced, not with a municipal infraction for not having insurance coverage, but with a claim for coverage arising out of an accident or other event that triggers coverage under the policy. But for Progressive aligning itself with Respondent Ellis' version of events, this matter may well have ended differently. Nevertheless, the Director does not find any value in revisiting this matter and expending additional time, resources, and effort of any of the parties in pursuing an in-depth review.

The Department's Petition for Review is therefore DENIED.

IT IS SO ORDERED.

DATED this 2 day of March, 2016.

STATE OF IDAHO
DEPARTMENT OF INSURANCE



DEAN L. CAMERON
Director

NOTIFICATION OF RIGHTS

This is a final order of the Director. 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 I have, on this 2nd day of March, 2016, caused a true and correct copy of the foregoing **ORDER DENYING PETITION FOR REVIEW** to be served upon the following by the designated means:

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The Cox Law Firm, PLLC
P.O. Box 1828
Boise, ID 83701

☒ first class mail
☐ certified mail
☐ hand delivery

Terry Silsby
2674 N. Old Stone Way
Meridian, ID 83642-3841

☒ first class mail
☐ certified mail
☐ hand delivery

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Deputy Attorney General
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Jean R. Uranga
Hearing Officer
P.O. Box 1678
Boise, ID 83701-1678

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☐ certified mail
☐ hand delivery

Alpha Property & Casualty Insurance
Company
Attn: Agency Support & Licensing
12926 Gran Bay Parkway West
Jacksonville, FL 32258

☒ first class mail
☐ certified mail
☐ hand delivery

American Equity Investment Life
Insurance Co.
6000 Westown Parkway
West Des Moines, IA 50266-5921

☒ first class mail
☐ certified mail
☐ hand delivery

American National Insurance Company
One Moody Plaza
Galveston, TX 77550

☒ first class mail
☐ certified mail
☐ hand delivery

American Zurich Insurance Company
1400 American Lane
Schaumburg, IL 60196-1056

☒ first class mail
☐ certified mail
☐ hand delivery

Ameritas Life Insurance Corp.
5900 O Street
Lincoln, NE 68510-2234

☒ first class mail
☐ certified mail
☐ hand delivery

Auto-Owners Insurance Company
6101 Anacapri Boulevard
Lansing, MI 48917-3968

☒ first class mail
☐ certified mail
☐ hand delivery

Athene Annuity and Life Company
7700 Mills Civic Pkwy
West Des Moines, IA 50266-3862

☒ first class mail
☐ certified mail
☐ hand delivery

Banner Life Insurance Company
3275 Bennett Creek Ave
Frederick, MD 21704-7608

☒ first class mail
☐ certified mail
☐ hand delivery

Blue Cross of Idaho Health Service, Inc.
3000 E. Pine Avenue
Meridian, ID 83642

☒ first class mail
☐ certified mail
☐ hand delivery

Foremost Insurance Co. Grand Rapids,
Michigan
5600 Beech Tree Lane
Caledonia, MI 49316-0050

☒ first class mail
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☐ hand delivery

Foremost Property and Casualty
Insurance Co.
5600 Beech Tree Lane
Caledonia, MI 49316-0050

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☐ certified mail
☐ hand delivery

Foremost Signature Insurance Company
P.O. Box 2450
Grand Rapids, MI 49501-2450

☒ first class mail
☐ certified mail
☐ hand delivery

Genworth Life and Annuity Insurance
Company
6610 West Broad Street
Richmond, VA 23230

☒ first class mail
☐ certified mail
☐ hand delivery

Hartford Accident and Indemnity
Company
One Hartford Plaza
Hartford, CT 06155-0001

☒ first class mail
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Hartford Casualty Insurance Company
One Hartford Plaza
Hartford, CT 06155-0001

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Hartford Fire Insurance Company
One Hartford Plaza
Hartford, CT 06155-0001

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☐ hand delivery

Hartford Insurance Company of the
Midwest
One Hartford Plaza
Hartford, CT 06155-0001

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☐ certified mail
☐ hand delivery

Hartford Underwriters Insurance
Company
One Hartford Plaza
Hartford, CT 06155-0001

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Minnesota Life Insurance Company
400 Robert Street North
St. Paul, MN 55101-2098

☒ first class mail
☐ certified mail
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Ohio National Life Assurance
Corporation
One Financial Way
Cincinnati, OH 45242

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☐ hand delivery

Owners Insurance Company
6101 Anacapi Boulevard
Lansing, MI 48917-3968

☒ first class mail
☐ certified mail
☐ hand delivery

Pacific Life Insurance Company
700 Newport Center Drive
Newport Beach, CA 92660

☒ first class mail
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☐ hand delivery

Protective Life Insurance Company
2801 Highway 280 S.
Birmingham, AL 35223-2407

☒ first class mail
☐ certified mail
☐ hand delivery

Pruco Life Insurance Company
100 Mulberry St.
Gateway Center Three, 10th Floor
Newark, NJ 07102-4056

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☐ certified mail
☐ hand delivery

The Prudential Insurance Company of
America
100 Mulberry St.
Gateway Center Three, 10th Floor
Newark, NJ 07102-4056

☒ first class mail
☐ certified mail
☐ hand delivery

Ricketts and Associates, Inc.
13177 W. Persimmon Ln., Ste. 100
Boise, ID 83713-1986

☒ first class mail
☐ certified mail
☐ hand delivery

Sentinel Insurance Company, Ltd.
One Hartford Plaza
Hartford, CT 06155-0001

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☐ hand delivery

Sentinel Security Life Insurance
Company
1405 West 2200 South
Salt Lake City, UT 84119

☒ first class mail
☐ certified mail
☐ hand delivery

Trumbull Insurance Company
One Hartford Plaza
Hartford, CT 06155-0001


☒ first class mail
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☐ hand delivery

Twin City Fire Insurance Company
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Hartford, CT 06155-0001

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University Financial Group, LLC
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Kelly Grady

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FILED
JAN 28 2016 ✓
Department of Insurance
State of Idaho

BEFORE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT)	
OF INSURANCE,)	Docket No. 18-2999-14
)	
Petitioner,)	HEARING OFFICER'S AMENDED
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW AND
-vs-)	PRELIMINARY ORDER
)	
JIMMY ELLIS, an insurance producer)	
holding Idaho resident producer license no.)	
37482, and TERRY SILSBY, an insurance)	
producer holding Idaho resident producer)	
license no. 85655,)	
)	
Respondents.)	
)	

This matter came on for an evidentiary hearing on July 2, 2015, before Jean R. Uranga, the designated Hearing Officer. The State of Idaho, Department of Insurance, appeared by and through Deputy Attorney General, Brandon Karpen. Jimmy Ellis appeared in person and by and through his attorney of record, Jon Cox. Terry Silsby appeared representing himself. All parties submitted testimony and evidence.

On July 30, 2015, the Hearing Officer issued Findings of Fact, Conclusions of Law and

HEARING OFFICER'S AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND PRELIMINARY ORDER - 1

EXHIBIT

A

Preliminary Order. All three parties filed Motions to Reconsider. By Order dated August 21, 2015, the Hearing Officer granted the Motions to Reconsider. A second evidentiary hearing was conducted December 29, 2015, at which time additional testimony and exhibits were admitted. John Keenan represented the Department at the second hearing.

FINDINGS OF FACT

Jimmy Ellis is an insurance producer holding Idaho Resident Producer License No. 37482. Mr. Ellis sells property and casualty insurance and has worked with Ricketts and Associates for ten years.

Terry Silsby is an insurance producer holding Idaho Resident Producer License No. 85655. Mr. Silsby sells life, health and disability insurance.

Mr. Ellis and Mr. Silsby have been friends since college. Mr. Ellis handles Mr. Silsby's property and casualty insurance needs.

Mr. Silsby owned a 1993 Honda which had remained in a garage for a period of time. In this current case, Mr. Ellis was handling the purchase of car insurance for Mr. Silsby. Around May 23, 2013, Mr. Silsby contacted Mr. Ellis to obtain insurance on the vehicle. Mr. Silsby's telephone bills show calls to Mr. Ellis' telephone number at 12:00 pm and 1:14 pm on May 23, 2013. However, at the second hearing Mr. Ellis, Mr. Silsby and Jake Ericson testified that Mr. Ellis was at Mr. Ericson's place of employment the morning of May 23, 2013, and that Mr. Ellis talked to Mr. Silsby using Mr. Ericson's telephone. Mr. Silsby's telephone bills show a call between Mr. Silsby's telephone and Mr. Ericson's telephone number at 8:25 am for two minutes. Mr. Silsby and Mr. Ellis testified Mr. Silsby asked Mr. Ellis to obtain insurance on the Honda at that time.

On May 23, 2013, at 10:04 p.m., Mr. Silsby was stopped by the Idaho State Patrol and ticketed for failing to register the vehicle annually and failure to provide proof of vehicle insurance. He was driving the 1993 Honda. (Exhibit 2.)

Copies of handwritten notes prepared by Mr. Ellis were admitted as Exhibit 12. Unfortunately little credibility can be given to Exhibit 12 because there was no testimony on when those notes were prepared and no written documents were provided which supported the notes. The notes indicate that Mr. Ellis purportedly gave Mr. Silsby a quote for auto insurance on May 10, 2013. The notes further indicate that Mr. Ellis took Mr. Silsby's credit card information on May 23, 2013, but the notes claim the "system was down to access." Mr. Ellis presented no testimony or evidence that he called Progressive when he could not access the system or made any further efforts during the day to complete the insurance purchase until after Mr. Silsby was ticketed. Page 2 of Exhibit 12 indicates that the Progressive policy was paid for May 24, 2013 at 1:06 a.m. Mr. Ellis' notes claim it took one day to upload the payment.

Mr. Ellis testified at the first hearing that he attempted to make payment on the policy at 9:00 a.m. on May 23, 2013, but the payment did not get processed until May 24, 2013 at 1:06 a.m.

Copies of telephone bills for Mr. Silsby's telephone were admitted as Exhibit 1 and Exhibit 14. Mr. Ellis' telephone number is 208-██████. Those bills indicate that there were no telephone calls between the two of them from Mr. Silsby's telephone number to Mr. Ellis' telephone number from May 21, 2013 at 5:51 p.m. until May 23, 2015 at 12:00 p.m. (Exhibit 14, pp. 2 and 3.) Mr. Silsby's telephone bills indicate that Mr. Ellis and Mr. Silsby had telephone calls as follows:

Date	Time	Number	Minutes
5-23	12:00 p.m.	208-██████	2
5-23	1:14 p.m.	208-██████	2

5-23	10:16 p.m.	208-████████	4
5-23	10:22 p.m.	208-████████	2
5-23	10:24 p.m.	208-████████	2
5-23	10:36 p.m.	208-████████	10
5-23	10:46 p.m.	208-████████	2
5-23	11:12 p.m.	208-████████	21
5-24	9:27 a.m.	208-████████	30
5-24	3:15 p.m.	208-████████	14
5-24	4:16 p.m.	208-████████	1

Six of these calls occurred in the late evening hours on May 23, 2013, after Mr. Silsby was stopped by the police.

During the second hearing, an additional tape of a conversation between Mr. Ellis and Progressive Insurance was admitted. Exhibit 16 is the tape of a call occurring on May 24, 2013, at 12:34 am Eastern Time, which would be May 23, 2013, at 10:34 pm Idaho time. Mr. Ellis called Progressive and first spoke to "Tora." Mr. Ellis stated he was trying to log in to the computer to retrieve a quote, but he could not access the computer. Mr. Ellis confirmed that the insurance was "in quote status." Tora advised Mr. Ellis that Progressive was running a compute update and he could call back in 30 minutes.

Then, Tora agreed to transfer Mr. Ellis to another agent who could help place the insurance and Mr. Ellis was transferred to "Sandra", who is apparently the Sandra Brunston referred to in an email. The total time for the call with Tora and Sandra was 10 minutes. During the call, Mr. Ellis asked Sandra to hold because the insured was on the other line. Mr. Ellis then told Sandra that he had "quoted" the insurance, but could not get back into the computer. Mr. Ellis stated he wanted to

"requote" the insurance and Sandra said they could do a brand new application. Mr. Ellis also stated the insured had just called and wanted to place the insurance. Mr. Ellis was unable to produce the necessary information to complete the purchase, so Sandra offered to conference Mr. Silsby in to complete the purchase and Mr. Ellis was unable to come up with Mr. Silsby's telephone number. Instead, Sandra gave Mr. Ellis her direct line and said she was going off duty in fifteen minutes and if they called her back, she could help process the purchase. The telephone number Sandra gave Mr. Ellis was 719-██████. During that first call, Mr. Ellis did not mention anything about trying to place the insurance earlier in the day.

Interestingly, Progressive produced multiple taped telephone calls regarding this insurance, but they did not produce a tape of any second telephone call with Mr. Ellis on the late evening of May 23, 2013. However, Mr. Silsby's telephone bill shows a telephone call to "719-██████" for 21 minutes beginning at 10:50 pm Idaho time or 12:50 am Eastern time. Immediately after that call was completed, Mr. Silsby's bill shows a 21 minute call to Mr. Ellis's telephone number beginning at 11:12 pm. Further, Exhibit D, page 3, shows a note by Sandra Brunston dated May 24, 2013, at 1:24 am which states: "due to system limitations correct effective date eff 05/23/13 through 11/23/13 10:40am: fao errored out & aor." Ms. Brunston did not testify to explain her note or to explain any second telephone call with Mr. Ellis and/or Mr. Silsby. Both counsel indicated that Progressive refused to allow their employees to testify at the second hearing. In addition, Mr. Ellis never produced any of his telephone bills to show his calls that evening.

On September 18, 2014, the Department of Insurance investigator, Nate Davis, interviewed Mr. Silsby. A tape of that interview was admitted as Exhibit 24. Mr. Silsby stated he contacted Mr. Ellis during the day on May 23, 2013, and asked Mr. Ellis to obtain coverage on the vehicle. After he was stopped by the Idaho State Patrol and while the officer was checking on the registration, Mr.

Silsby called Mr. Ellis and asked Mr. Ellis to email Mr. Silsby proof of the insurance to provide to the officer. Mr. Ellis called Mr. Silsby back and told him the insurance coverage was not showing up so Mr. Silsby would just have to pay the ticket. Mr. Ellis then told Mr. Silsby that if they went ahead and purchased the insurance before midnight, the effective date would show up as May 23, 2013. Purchase of the insurance was then completed after Mr. Silsby was ticketed.

Meg Keenan testified she is a Deputy Court Clerk who has worked for the Ada County Clerk's Office for five years. She processes tickets related to no proof of insurance. Ms. Keenan has the authority to dismiss the ticket if the individual provides proof of insurance. She testified that, on June 14, 2013, Mr. Silsby came in with his citation, Exhibit 2. He presented Exhibit 5 as proof he had insurance on May 23, 2013. That document shows that Policy number 901270759 had an effective date of May 23, 2013 and an expiration date of November 23, 2013, covering the 1993 Honda Accord. The agent listed on the insurance identification card was Ricketts and Associates. Ms. Keenan testified that she called Progressive Insurance to verify the effective date and time of the coverage. Progressive Insurance advised her the effective date of the coverage was May 23, 2013 at 11:06 p.m. The handwritten notes on Exhibit 5 are in Ms. Keenan's handwriting indicting that she spoke to Estevan. Ms. Keenan then specifically advised Mr. Silsby that the insurance was not effective prior to the time of the ticket.

Ms. Keenan further testified that Exhibit 6 is a document filled out and signed by Terry Silsby on June 14, 2013. (Exhibit 6.) That document was filled out by Mr. Silsby **before** Ms. Keenan made the telephone call to Progressive Insurance. In that document, Mr. Silsby personally attested that he obtained the insurance policy on the 1993 Honda and that the policy was in place at the time of his receipt of the traffic citation. The document states: "The same will be confirmed by the Insurance company named on the attached proof of liability insurance." That form notified Mr.

Silsby that he could be prosecuted for providing a false or forged certificate of liability if the information was forged or false. His form was signed under penalty of perjury. After her telephone call, she told Mr. Silsby that Progressive insurance reported that the insurance was not effective prior to 11:06 p.m. on May 23, 2013.

Sherry Boucher also testified she works for the Ada County Court Clerk's Office. She has been a supervisor in the criminal side for 21½ years. On July 16, 2013, she had a conversation with Mr. Silsby. At that time, she helped Meg Keenan explain the process to Mr. Silsby. On July 16, 2013, Mr. Silsby brought Exhibit 7 which was an Affidavit signed by Jimmy Ellis. That Affidavit was file stamped in by the Clerk's Office on July 16, 2013 at 8:15 a.m. Mr. Ellis signed the Affidavit before a notary swearing under oath that the information was true and correct. Paragraph 3 of that document swears under oath as follows:

3. That the Insured Terry L. Silsby did have liability insurance which was in full force and effect on the 23 day of May, 2013, 9:00 o'clock A.M., through the 23 day of November, 2013, 12:01 o'clock A.M.

Mr. Ellis swore under oath that the information was true and correct and that the policy was in full force and effect on the date and time that Mr. Silsby was cited for failing to carry a Certificate of Proof of Liability Insurance.

The handwriting on the left side of the document is Ms. Boucher's handwriting. When Mr. Silsby presented that document. Ms. Boucher again called Progressive Insurance to confirm whether coverage was in effect at the time of the ticket. Progressive Insurance told her the insurance coverage started May 24, 2013 at 1:06 Eastern Time which would be May 23, 2013 at 11:06 p.m. Mountain Time. She spoke to Audrey at Progressive Insurance.

Following her call to Progressive Insurance, Ms. Boucher then called Mr. Ellis directly. She advised Mr. Ellis that both Meg Keenan and herself had been told by Progressive Insurance the

insurance was not effective until 11:06 p.m. Ms. Boucher advised Mr. Ellis she would need to follow through with the Department of Insurance. Mr. Ellis advised her he needed to make a phone call then called her back. Mr. Ellis then said he wanted to get rid of this and stated Mr. Silsby's Honda was not covered by insurance at the time of the ticket. Ms. Boucher entered a handwritten note related to that conversation. Her notes states: "Not covered per Jimmy 7-16-13."

Exhibit 3 is the Progressive Insurance policy number 901270759 indicating the 1993 Honda Accord was covered from May 23, 2013 to November 23, 2013. Page 1 of Exhibit 3 states: "Your coverage began on May 23, 2013, at the later of 12:01 a.m. or the effective time shown on your application. This policy period ends on November 23, 2013 at 12:01 a.m." (Emphasis added.) Exhibit 3 also includes statements for May 24, 2013; June 25, 2013; July 1, 2013; and August 30, 2013 for policy number 901270759. Those documents indicate that only the 1993 Honda Accord was covered by the policy from May 23, 2013 until a 1990 Chevrolet was added August 30, 2013.

The Department of Insurance admitted an email dated September 23, 2014, from Danita Ward from Progressive Insurance as Exhibit 13. This email was provided to the Department of Insurance investigator in response to his inquiry. The email states that there were no known outages for quoting/selling via the Progressive agent's dedicated website on May 23, 2013.

Mr. Ellis also admitted Exhibit E which is a Policy Summary related to the 1993 Honda Accord. The bottom of the Policy Summary indicates that it was printed June 10, 2013. Unfortunately, that document does not indicate what time the payment was processed. The last page of Exhibit E is the payment summary which indicates that \$67.80 was paid May 24, 2013 and set the remaining payment schedule. It indicates the payment was made with a credit card.

Also admitted into evidence were three taped conversations Mr. Ellis had with Progressive Insurance. He spoke to Progressive Insurance on May 24, 2013; June 21, 2013; and June 27, 2013.

He called the first time on May 24, 2013, to change the effective date of the insurance to May 23, 2013. (Exhibits 4 and 17.) The evidence indicates that, because the insurance payment was processed on the East Coast, it initially showed the policy as effective May 24, 2013 because the payment was received after midnight when it should have been May 23, 2013 Mountain time. The exact time the policy was effective did not come up in that call. Progressive emailed both Mr. Silsby and Mr. Ellis proof of the insurance.

After Mr. Silsby was specifically advised by the Ada County Clerk on June 14, 2013, that the insurance was not effective until 11:06 p.m. on May 23, 2013, Mr. Ellis made two more calls to Progressive Insurance on June 21 and 27, 2013. (Exhibits 8 and 21 and 9 and 22.) During the June 21, 2013, call Mr. Ellis asked if the proof of insurance would show the time the insurance would be effective and was told "No." During the June 27, 2013, call Mr. Ellis was clearly told the policy was effective 11:06 p.m. on May 23, 2013. After that telephone call, Mr. Ellis signed the Affidavit which was submitted to Ada County stating Mr. Silsby had insurance coverage at 9:00 am on May 23, 2013 even though he knew that is not what Progressive's records indicated.

In support of their defense, Mr. Ellis testified that he has no written or printed documentation to support his defense that the policy was issued the morning of May 23, 2013. Mr. Ellis did not produce any written documentation in the form of emails from Progressive Insurance, quotes, error messages, his own telephone bills or anything to support his contention that he contacted Progressive Insurance the morning of May 23, 2013, to obtain the coverage or contacted them when the credit card purportedly had not gone through because of a Progressive system error.

The Hearing Officer finds that the morning of May 23, 2013, Mr. Silsby did ask Mr. Ellis to place the insurance. The evidence further suggests Mr. Ellis did not follow through and place the insurance until after Mr. Silsby was ticketed. However, during the second hearing, the attorney for

Progressive provided emails to both counsel which were admitted as exhibits indicating that, if an agent says he tried to place insurance on a certain day and time, Progressive will take the agent's word for it and make the insurance effective based upon what the agent tells them. In this case, Progressive issued a letter dated August 12, 2015, which was admitted as Exhibit F, stating they were "honoring coverage" for Mr. Silsby effective "May 23, 2013, at 12:01 am."

Because fraud must be proven by clear and convincing evidence, the Hearing Officer finds that violations have not been established, in part due to the inability to obtain direct testimony from Sandra Brunston or a copy of the tape of any second conversation between Ms. Brunston and Mr. Ellis or Mr. Silsby on May 23, 2013.

CONCLUSIONS OF LAW

Pursuant to the Idaho Insurance Code, Idaho Code §41-101 et. seq., the Department of Insurance has jurisdiction and authority to institute disciplinary action against Idaho licensed insurance producers.

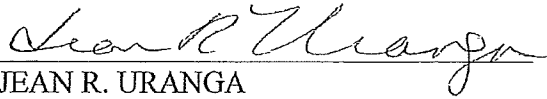
Idaho Code §41-1016 grants the Department authority to impose discipline on any license issued by the Department of Insurance, with authority to issue fines up to \$1000, suspend for not more than 12 months or revoke licenses for violations of the Idaho Insurance Code.

Idaho Code §41-1016(1)(h) prohibits the use of fraudulent or dishonest practices or practices demonstrating untrustworthiness in the conduct of insurance business in the State of Idaho. Violations have not been established by clear and convincing evidence.

PRELIMINARY ORDER

Based upon the foregoing, this matter should be dismissed and no disciplinary sanctions should be imposed. Both parties proceeded with a reasonable basis in fact and law and no attorney's fees should be awarded to any parties.

DATED This 18th day of January, 2016.


JEAN R. URANGA
Hearing Officer

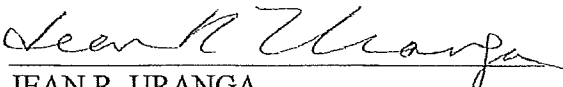
CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 18th day of January, 2016, I served true and correct copies of the foregoing HEARING OFFICER'S AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER by emailing and by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to:

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