ORDER NO. E18-63

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI 07444-2015
AGENCY DOCKET NO.: E15-44

MARLENE CARIDE,[1] ACTING COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	FINAL DECISION AND ORDER
Petitioner,	)	
v.	)	
CATARINA YOUNG AND ELITE BENEFITS CORP.,	)	
Respondents.	)	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -57 ("Producer Act"), the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 to -34 ("Fraud Act"), and all powers expressed or implied therein, for the purpose of reviewing the December 12, 2017 Initial Decision ("Initial Decision") of Administrative Law Judge Julio C. Morejon ("ALJ"). In the Initial Decision, the ALJ granted summary decision to the Department of Banking and Insurance ("Department") against Respondents Catarina Young ("Young") and Elite Benefits Corp. ("Elite") (collectively,

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

"Respondents"), on Count One as alleged in the Department's Amended Order to Show Cause No. E15-81 ("AOTSC"). In addition, the ALJ granted summary decision as to Respondent Young, but not Respondent Elite, on Count Two as alleged in the AOTSC. The ALJ further recommended the following penalties: the revocation of the Respondents' producer licenses; the imposition of a Fraud Act surcharge in the amount of $2,000; the assessment of reasonable attorney fees in the amount of $22,864.50; and the imposition of fines as follows - Count One (Respondents Young and Elite) in the amount of $10,000, and Count Two (Respondent Young) in the amount of $5,000.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 28, 2015, the Department issued Order to Show Cause No. E15-44 ("OTSC") against the Respondents alleging violations of the Producer Act and Fraud Act, and seeking to revoke the Respondents' insurance producer licenses, impose civil monetary penalties and costs of investigation and prosecution, and order restitution pursuant to the Producer Act. The OTSC also sought to impose civil monetary penalties, costs and attorneys' fees, and a surcharge pursuant to the Fraud Act. On May 18, 2015, Respondent Young, acting pro se,[2] filed an Answer to the OTSC and requested a hearing. The Department filed the matter as a contested case with the Office of Administrative Law ("OAL") on May 22, 2015, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On July 20, 2015, the Department issued Amended Order to Show Cause No. E15-81 ("AOTSC") against the Respondents alleging the same violations of the Producer Act and Fraud Act as set forth in the OTSC, and seeking to revoke the Respondents' insurance producer licenses, impose civil monetary penalties and costs of investigation and prosecution pursuant to the

[2] On August 14, 2015, Thomas R. Ashley, Esq., filed a Notice of Appearance for Respondent Young only. On July 13, 2017, during oral argument on the Motion for Summary Decision, Mr. Ashley consented to the representation of Respondent Elite. Initial Decision at 4.

Producer Act. Unlike the OTSC, the AOTSC did not seek that restitution be ordered pursuant to the Producer Act. The AOTSC also sought to impose civil monetary penalties, costs and attorneys' fees, and a surcharge pursuant to the Fraud Act. Unlike the OTSC, the AOTSC included statements that the Department sought the imposition of maximum civil penalties under the Producer Act (for 104 separate violations of the Producer Act, in the amount of $5,000 for the first violation, and $10,000 for each subsequent violation, for a total maximum penalty of $1,035,000) and the Fraud Act (for two violations of the Fraud Act, in the amount of $5,000 for the first violation and $10,000 for the second violation, for a total maximum penalty of $15,000). No Amended Answer to the AOTSC was filed.

In the AOTSC, the Department alleges that the Respondents engaged in the following activities in violation of the insurance laws of this State:

> Count One – Respondents Young and Elite improperly enrolled Respondent Young's mother and father into a Multi-Skilled Employees and Employers Welfare Trust Fund ("Fund"), managed and brokered by Respondent Elite, to obtain health care coverage and prescription benefits offered by the Fund to its eligible members, without the knowledge or consent of the Fund, in violation of N.J.S.A. 17:22A-40a(2), (4),[3] (8), and (16); N.J.A.C. 11:17A-4.10; and N.J.S.A. 17:33A-4a(4)(b); and
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> Count Two – Respondent Young misappropriated $462,341.78 from the Fund by means of 86 checks and 16 wire transfers from the Fund to her personal accounts, constituting 102 individual thefts, misappropriations, and/or improper conversions of monies received during the course of doing insurance business, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16); and N.J.A.C. 11:17A-4.10.

[3] In its April 13, 2017 Brief in Support of its Motion for Summary Decision, the Department states that the AOTSC mistakenly pleads a violation of N.J.S.A. 17:22A-40a(4) (an insurance producer shall not improperly withhold, misappropriate or convert any monies or properties received in the course of doing insurance business), and that this specific alleged violation should be disregarded. Thus, this provision is not addressed herein.

In her May 18, 2015 Answer, Respondent Young admitted to certain allegations and provided an explanation as to others. Regarding the allegations in Count One, Respondent Young explained that she received permission from two Fund trustees and the Fund attorney to enroll her parents and that it was standard practice for people who did not work for the union to be enrolled in the Fund; thus, she did not believe that she was violating any laws by enrolling her parents in the Fund. Regarding Count Two, Respondent Young admitted that she was convicted of the criminal offenses of Second Degree Misapplication of Entrusted Property or Property of Government or Financial Institution and Second-Degree Theft by Unlawful Taking related to the allegations, but that the criminal conviction was under appeal. Moreover, Respondent Young stated that she did not oppose the revocation of her producer license, but she did oppose the imposition of fines.

Thereafter, this matter was placed on the OAL "inactive list" for approximately one and a half years from September 2015 through February 2017 pursuant to N.J.A.C. 1:1-9.7.[4] Initial Decision at 4.

On April 17, 2017, the Department filed a Motion for Summary Decision with the OAL. On May 19, 2017, the Respondents filed opposition to the Motion for Summary Decision. On May 31, 2017, the Department filed a Letter Brief and supporting documents in reply to the Respondents' opposition. On June 29, 2017, the Respondents filed a sur-reply Letter Brief and supporting documents. On July 9, 2017, the Department filed its response to the Respondents' first sur-reply. On July 14, 2017, the ALJ conducted telephonic oral argument regarding the Motion for Summary Decision and Respondent Young filed a certification along with copies of

[4] N.J.A.C. 1:1-9.7 provides that an ALJ may place a matter on the inactive list for periods not to exceed six months upon a demonstration of good cause.

bank documents, in connection with her defense that restitution had been made, along with copies of her certified answers to propounded interrogatories.

On September 6, 2017, Young and Elite submitted a second sur-reply brief in opposition to the Department's Motion for Summary Decision. On September 11, 2017, the Department filed its response to Young and Elite's sur-reply, stating that the same is out of time, and the ALJ closed the record.[5]

On December 12, 2017, the ALJ granted summary decision to the Department against the Respondents as to Count One of the AOTSC, and against Respondent Young as to Count Two of the AOTSC. The ALJ recommended revocation of both of the Respondents' producer licenses and the imposition of civil monetary penalties in the total amount of $39,864.50 allocated as follows: as to Count One against both of the Respondents $10,000, joint and several; as to Count Two against Respondent Young $5,000; a Fraud Act statutory surcharge of $2,000; and reasonable attorneys' fees in the amount of $22,864.50.

ALJ'S FINDINGS OF FACTS, LEGAL ANALYSIS, AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), the ALJ noted that a motion for summary decision should be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Initial Decision at 6. Further, the ALJ noted that this standard mirrors the standard set forth in R. 4:46-2(c) which provides that

> the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

[5] Although the Initial Decision indicates that the record closed on September 11, 2017, the documents in the record indicate that on November 30, 2017, the ALJ requested a complete copy of the Criminal Court Restitution Hearing Transcript as Respondents' September 6, 2017 letter brief contained a copy of only select pages. On the same date, the Department's attorney provided said transcript to the ALJ, with a copy to Respondents' attorney, and the Initial Decision indicates that said transcript was relied upon by the ALJ. See Initial Decision at 13.

> issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

Ibid.

A determination as to whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 7. Pursuant to this standard, the ALJ reviewed the documents submitted by the parties and found that there were no genuine issues of material fact as to both counts in the AOTSC and that the Department was entitled to prevail as a matter of law on both counts as alleged in the AOTSC. Id. at 15. The ALJ did find, however, that there were disputed facts as to the culpability of Respondent Elite as to Count Two of the AOTSC, which alleged that Respondent Young misappropriated moneys from the Fund and did not contain specific allegations against Respondent Elite.[6] Ibid.

The ALJ found the following relevant facts in his grant of summary decision. During the years 2006, 2007, and 2008, Respondent Young was an employee, Designated Responsible Licensed Producer ("DRLP"), and part owner of Respondent Elite, a formally licensed New Jersey business entity insurance producer. Initial Decision at 1 and 9. During that time period, Respondent Elite managed and brokered the healthcare and prescription benefit plans on behalf of the Fund, a multi-employer group healthcare organization comprised of members of several unions

[6] Although not alleged in the AOTSC, in its Motion for Summary Decision, the Department argued that Respondent Elite was equally responsible for Respondent Young's crimes as set forth in Count Two of the AOTSC. See Petitioner's Brief in Support of its Motion for Summary Decision at 21 to 22. In its exceptions, the Department did not seek to modify this finding by the ALJ.

and members that had a bargaining agreement with the union. See Initial Decision at 2 and 9 and Ritardi Cert., ¶6, Exhibit 3. The ALJ found that the Respondents acted in a fiduciary capacity for the Fund. Initial Decision at 9.

Count One: The Respondents illegally enrolled two individuals in the Horizon Policy

As to Count One of the AOTSC, the ALJ found that the Fund's healthcare plan was provided by Horizon Blue Cross Blue Shield of New Jersey ("Horizon"). Initial Decision at 2. The Horizon group health insurance contract with the Fund ("Horizon Policy") provided that only employees of the Fund, and the employees' dependents are eligible for insurance coverage under the Horizon Policy. Ibid. The Horizon Policy with the Fund did not provide for coverage to non-employees of the Fund, and did not allow for any discretion or authority to enroll any person in the group health insurance plan who was not an employee or dependent. Ibid.

The ALJ found that the Respondents admit that they enrolled Respondent Young's parents into the Horizon Policy for the years 2006, 2007, and 2008, despite their not being eligible as they were not employees or dependents of employees of the Fund nor were they members of any union comprising the Fund. Initial Decision at 2, 7, and 8. The ALJ also found that Respondent Young used her position within Respondent Elite to enroll Young's parents in the Horizon Policy; thus, Respondent Elite is equally responsible for Respondent Young's conduct. Initial Decision at 9. As a result of the Respondents' conduct, the Fund paid premiums for Respondent Young's parents in the amount of $12,197.44 and Horizon paid claims in the amount of $13,893.16 on behalf of Respondent Young's parents. Initial Decision at 9.

The ALJ noted that Respondent Young states that she enrolled her parents in the Horizon Policy with the knowledge of and at the suggestion of a Fund Trustee. Initial Decision at 8. Respondent Young asserts that she did not misrepresent the status of her parents, and that enrolling

those not eligible to be enrolled was a known and accepted custom and practice by Horizon. Initial Decision at 8. However, the ALJ found that Respondent Young failed to present proof that indicates that a person who is not an "employee" as defined in the Horizon Policy may be enrolled in the Horizon Policy. Ibid. Moreover, the ALJ rejected Respondent Young's justification for enrolling her parents, characterizing it as doing it "because everyone else was doing it too," as an insufficient reason to do so when it was contrary to the Horizon Policy. Ibid.

Continuing, the ALJ stated that insurance producers are governed by the Producer Act, corresponding regulations, and the Fraud Act. Initial Decision at 7. Accordingly, the ALJ found that the Respondents' conduct in enrolling Respondent Young's parents into the Horizon Policy constitutes violations of the following provisions of the Producer Act: N.J.S.A. 17:22A-40a(8) and (16), and N.J.A.C. 11:17A-4.10. Initial Decision at 7 and 9. Further, the ALJ found that such conduct also constitutes two violations of the Fraud Act, N.J.S.A. 17:33A-4a(4)(b). Initial Decision at 8 and 14.

Count Two: Respondent Young misappropriated $462,341.78 from the Fund

Regarding Count Two of the AOTSC, the ALJ found that on October 23, 2013, Respondent Young was found guilty by jury verdict of second-degree Theft by Unlawful Taking or Disposition, in violation of N.J.S.A. 2C:20-3 and second-degree Misapplication of Entrusted Property, in violation of N.J.S.A. 2C:21-15, resulting from her conduct as an insurance producer in "taking or exercising unlawful control over the movable property of another ... [by way of] approximately 86 checks and 16 wire transfers in an amount of approximately $462,341.78" and that Respondent Young admits to the same. Id. at 9 and 10. On January 9, 2014, Respondent Young was convicted of those offenses and sentenced to seven years in State prison. Initial Decision at 3 and Ashley Cert. dated 05/15/17, Attachment of Amended Judgment of Conviction

dated 01/21/15. On February 20, 2014, a plenary restitution hearing was held in the criminal matter which resulted in a Judgment of Conviction with no restitution being issued on July 8, 2014. Ibid. On December 12, 2014, the Judgment of Conviction was amended to add restitution, ordering Respondent Young to pay $100,000 in periodic installments to the Intensive Supervision Program ("ISP"), which then would pay the Fund. Ibid. On January 16, 2015, the Judgment of Conviction was again amended and the restitution amount contained in the December 12, 2014 Judgment was vacated, and the matter was remanded to a new ISP Panel to consider Young's "qualifications to participate in said program with appropriate conditions." Ibid. Respondent Young appealed her conviction, and on May 10, 2016, the New Jersey Superior Court, Appellate Division, affirmed the conviction. Initial Decision at 3. Respondent Young's petition for certification to the New Jersey Supreme Court was denied on September 26, 2016. Id. at 3 and 9.

The ALJ found that Respondent Young cannot and does not dispute the criminal conviction, which constitutes a violation of N.J.S.A. 17:22A-40a(8) and (16).[7] Id. at 10. Further, the ALJ found that Young's criminal conviction also constitutes a violation of N.J.S.A. 17:22A-40a(6), which prohibits producers from being convicted of felony or crime of the fourth degree or higher, but was not pled in the OTSC or AOTSC. Ibid. Pursuant to N.J.A.C. 1:1-6.2,[8] the ALJ granted the Department's request to amend the AOTSC to include a violation of N.J.S.A. 17:22A-

[7] There is a typographical error in the Initial Decision, which provides that the conduct constitutes a violation of N.J.S.A. 17:22A-45a(8) and (16). N.J.S.A. 17:22A-45a concerns the Commissioner's power to conduct investigations, among other things, and does not contain any numbered subsections. The AOTSC alleges violations of N.J.S.A. 17:22A-40a(2), (4), (8), and (16) and the statutory language set forth in those provisions is set forth in the Initial Decision at 10. Thus, the correct citation is used herein.

[8] N.J.A.C. 1:1-6.2(a) provides that "[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice."

40a(6). Initial Decision at 10 – 11. The ALJ found that such an amendment does not create an undue prejudice to the Respondents as they have not raised an objection to the same and Respondent Young acknowledges that she was found guilty by jury verdict resulting in her conviction. Ibid.

Next, the ALJ rejected the Department's argument that Respondent Elite is equally liable for Respondent Young's criminal conduct, and denied summary decision against Respondent Elite as to Count Two of the AOTSC. Id. at 11. The ALJ found that Count Two of the AOTSC does not include allegations against Elite, and that Elite is a corporate entity and was not named in the criminal proceeding. Ibid. Moreover, the ALJ found that the Department failed to present any valid legal argument or other proof that indicates that Elite is equally culpable as alleged in Count Two of the AOTSC. Id. at 11 and 15.

The ALJ also found that Respondent Young committed 102 separate conversions of monies by misappropriating $462,341.78 from the Fund between November 17, 2003, and December 26, 2006, by means of 86 checks and 16 wire transfers from the Fund, in violation of the Producer Act, which conduct also formed the basis of the criminal convictions. Id. at 14.

ALJ'S FINDINGS AS TO THE PENALTY AGAINST THE RESPONDENTS

The ALJ noted that pursuant to N.J.S.A. 17:22A-40a, the Commissioner may place on probation, suspend, revoke, or refuse to issue or renew an insurance producer license or may levy a civil penalty in accordance with N.J.S.A. 17:22A-45c, if a violation of the Producer Act occurs. Initial Decision at 10. Further, the ALJ found that the Respondents' conduct constituted violations of Producer Act provisions N.J.S.A. 17:22A-40a(6), (8), (16); Fraud Act provision N.J.S.A. 17:33A-4a(4)(b); and N.J.A.C. 11:17A-4.10. Id. at 8 - 10.

Regarding the revocation of the Respondents' producer licenses, the ALJ found that as a result of Respondent Young's criminal conviction, and her admission to the same, Respondent Young's insurance producer license should be revoked as requested in the AOTSC. Id. at 16. In addition, the ALJ found that as a result of Respondent Young's criminal conviction, while an employee and the DRLP for Respondent Elite and Young's admission to the same, Respondent Elite's insurance producer license should be revoked as requested in the AOTSC. Ibid.

Regarding the appropriate monetary penalties, the ALJ noted that the Commissioner may impose the following penalties for violations of the Producer Act: $5,000 for the first offense and not exceeding $10,000 for each subsequent offense; restitution; and/or the reimbursement of costs of investigation and prosecution, as appropriate. Id. at 11. Moreover, the ALJ noted that the Commissioner may impose penalties for violations of the Fraud Act.[9] Id. at 11 - 12.

The ALJ stated that the standards for determining the appropriateness of monetary penalties imposed by a State agency are set forth in Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987). Id. at 12. Those factors include:

> (1) The good or bad faith of the producer - the Commissioner can assess how egregious the producer's conduct was and whether the producer could, have reasonably believed his conduct was legal;
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> (2) The producer's ability to pay - the greater a producer's income and financial resources, the larger a penalty will have to be in order to enter unlawful behavior;
>
> (3) Amount of profits obtained from illegal activity - the greater the profits obtained, the greater the penalty must be if penalties are to be deterrent:
>
> (4) Injury to the public - the Commissioner may assess less tangible forms of harm;

[9] For violations of the Fraud Act, N.J.S.A. 17:33A-5 provides that the Commissioner may impose the following penalties: $5,000 for the first violation, $10,000 for the second violation, $15,000 for each subsequent violation; order restitution, and costs and reasonable attorneys' fees.

(5) Duration of the illegal activity or conspiracy;

(6) Existence of criminal actions - consider whether the actions have given rise to a criminal or treble action, and whether a large civil penalty may be unduly punitive if other actions have been imposed; and

(7) Past violations - whether the producer has violated the Producer Act on prior occasions, if past penalties have been insufficient to deter violations, a greater penalty may be necessary.
Ibid.

The ALJ noted that no one Kimmelman factor is dispositive when evaluating appropriate fines and penalties. Id. citing Kimmelman, 108 N.J. at 139 ("The weight to be given to each of these factors by a trial court in determining the amount of any such penalty, will depend on the facts of each case"). Initial Decision at 12. The ALJ found that the evaluation of the Kimmelman factors in this matter supports the imposition of maximum monetary penalties.[10] Ibid.

The ALJ set forth the following analysis pursuant to the standard set forth in Kimmelman, 108 N.J. at 137-39. As to the first Kimmelman factor, the good or bad faith of the producer, the ALJ found that the Respondents did not present any proof to support their belief that it was proper to enroll Young's parents in the Horizon Policy because other Fund members do the same (Count One). Initial Decision at 13. The ALJ found that such a belief was misplaced and contrary to the Fund requirements, even if it may have been in good faith. Ibid. As to the conduct related to Count Two of the AOTSC, the ALJ found that Young's 102 acts of misappropriating monies from the Fund was egregious, and resulted in Young's criminal conviction. Ibid.

As to the second Kimmelman factor (ability to pay), the ALJ noted that Young submitted her federal income tax returns and current employment information, and the ALJ found that

[10] Despite finding that the evaluation of the Kimmelman factors supports the imposition of maximum penalties, the ALJ did not recommend the imposition of maximum penalties.

Respondent Young does not have the assets necessary to satisfy the imposition the total monetary penalties requested by the Department, i.e., $1,074,864.50. Id. at 14.

As to the third Kimmelman factor (amount of profits), the ALJ found that the Department failed to present adequate proof of profits received by Young, and found that Respondent Young did not "profit" from her taking of $462,341.78 as evidenced by no restitution being ordered in the criminal proceeding against her. Id. at 13 - 14.

As to the fourth Kimmelman factor (injury to the public), the ALJ found that the Department failed to present adequate proof of injury to the public, and that there was no injury to the public. Id. at 14. The ALJ relied upon documents related to Respondent Young's criminal conviction, wherein Young's attorney's certification that was relied upon at a hearing related to restitution in the criminal matter, stated that the State could not produce a victim who "suffered a loss." Id. at 13. The ALJ concluded that this led to the criminal court Amended Judgment of Conviction that did not order restitution. Id. at 13 - 14.

As to the fifth Kimmelman factor (duration of the illegal activity) and sixth factor (existence of criminal actions), the ALJ found that Respondent Young had been convicted for her actions in Superior Court, incarcerated, and fined. Id. at 14. As to the seventh Kimmelman factor (past violations), the ALJ found Respondent Young has no prior criminal history. Ibid.

Based upon the above analysis, the ALJ recommended total fines and penalties be imposed in the amount of $39,864.50 allocated as follows: as to Count One of the AOTSC, the Fraud Act statutory maximum of $5,000 per violation for the two violations of the Fraud Act (a total of $10,000);[11] as to Count Two, the Producer Act statutory maximum of $5,000 for all 102 violations

[11] This is not the Fraud Act statutory maximum. The Fraud Act provides that a penalty of not more than $5,000 for the first violation, $10,000 for the second violation and $15,000 for each

of the Producer Act (a total of $5,000);[12] the Fraud Act statutory surcharge of $2,000; and reasonable attorneys' fees in the amount of $22,864.50. Id. at 14 - 15.

EXCEPTIONS

By letter dated January 8, 2018, the Office of the Attorney General, on behalf of the Department, submitted Exceptions to the Initial Decision. The Respondents did not submit any Exceptions.

In its Exceptions, the Department seeks to modify findings as set forth in the Initial Decision related to the penalties to be imposed. Specifically, the Department seeks to modify findings related to the following four of the seven Kimmelman factors: factor 2 (ability to pay); factor 3 (amount of profit); factor 4 (injury to the public); and factor 5 (duration of the illegal activity). In addition, the Department seeks to modify the total amount of the civil penalty so that a penalty is imposed for each of the 102 thefts from the Fund (Count Two of the AOTSC) and for the illegal enrollment of each of Young's parents into the Horizon Policy (Count One of the AOTSC).

As to the second Kimmelman factor, the Department argues that Respondent Young has failed to demonstrate an inability to pay civil penalties, contrary to the ALJ's finding. The Department argues that the ALJ based his findings on a single tax return from 2015, which was proximate in time to when Young was incarcerated for her crimes which may have resulted in a

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subsequent violation may be imposed. See N.J.S.A. 17:33A-5b. Because Respondents committed two violations of the Fraud Act the statutory maximum fine is $15,000 for those offenses.

[12] This is not the Producer Act statutory maximum. The Producer Act provides that a penalty not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense may be imposed. See N.J.S.A. 17:22A-45. Because Respondent Young committed 104 violations of the Producer Act the statutory maximum fine is $1,035,000 for those violations.

temporary decrease in income. Additionally, the Department argues that the 2015 tax return does not indicate that Young does not still possess all or some of the stolen $462,341.78.

As to the third Kimmelman factor (amount of profit), the Department argues that the ALJ's finding that the Respondents did not profit from their wrongdoing is contrary to the facts and other findings in this matter. First, as to the allegations in Count Two of the AOTSC, the ALJ's finding that Respondent Young "did not 'profit' from her taking $462,341.78" from the Fund is contradictory to the ALJ's conclusion that Young stole money from the Fund. As to Count One of the AOTSC, the Department argues that the Respondents profited by illegally enrolling Young's parents in the Horizon Policy because Young's parents were never eligible to be enrolled in the Horizon Policy, and the Fund paid $12,197.44 in premiums and Horizon paid claims in amount of $13,893.16.

As to the fourth Kimmelman factor (injury to the public), the Department argues that the ALJ's conclusion that because Young did not "profit" from stealing $462,341.78 from the Fund, that there was no harm to the public is contrary to both the facts and the law in this matter. The Department argues that Young's thefts caused actual harm to the members of the Fund and caused harm to the public as a whole. Moreover, Young caused actual harm to Horizon by illegally enrolling her parents in the Horizon Policy.

As to the fifth Kimmelman factor (duration of the illegal activity), the Department notes that the Initial Decision does not contain a discussion of this factor. The Department argues that the duration of Young's activity was lengthy, deliberate, and extended through 102 separate thefts from the Fund, which occurred from 2003 through 2006. Moreover, Young's parents were enrolled in the Horizon Policy from 2006 through 2008.

Finally, the Department argues that a separate civil penalty should be imposed for each of the 102 thefts from the Fund and for each of Respondent Young's parents' illegal enrollments, as the ALJ erred in merging all 102 thefts into a single violation of the Producer Act. The Department requests total fines and penalties be imposed in the amount of $1,064,864.50 allocated as follows: $20,000 as to Count One of the AOTSC ($10,000 as to the two Fraud Act violations and $10,000 as to the Producer Act violations); $1,020,000 as to Count Two of the AOTSC ($10,000 for each of the 102 violations of the Producer Act); a Fraud Act surcharge of $2,000; and reasonable attorneys' fees in the amount of $22,864.50.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the AOTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975).

AOTSC – Allegations Against the Respondents

I concur with the ALJ's finding that summary decision is appropriate as to Count One against the Respondents and as to Count Two against Respondent Young as alleged in the AOTSC. The Respondents admitted the conduct underlying the charges in the AOTSC, failed to adduce evidence that creates a genuine issue as to any material fact, and their defenses to the AOTSC fail as a matter of law. I also concur with the ALJ's finding that summary decision on Count Two as to Respondent Elite should be denied.

Count One: The Respondents illegally enrolled two individuals in the Horizon Policy

Count One of the AOTSC alleges that the Respondents illegally enrolled Respondent Young's parents in the Fund's Horizon Policy, in violation of N.J.S.A. 17:22A-40a(2), (8), and (16); N.J.A.C. 11:17A-4.10, and N.J.S.A. 17:33a-4a(4)(b).[13] The ALJ found as fact that the Respondents admit that they enrolled Respondent Young's parents into the Horizon Policy for the years 2006, 2007, and 2008, despite their not being eligible for said enrollment. Initial Decision at 2, 7, and 8. The ALJ also found that Respondent Young used her position within Respondent Elite to enroll Young's parents in the Horizon Policy; thus, Respondent Elite is equally responsible for Respondent Young's conduct. Id. at 9. I concur with the ALJ that the Department proved the allegations in Count One of the AOTSC and that such conduct violates N.J.S.A. 17:22A-40a(8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility) and (16) (commit a fraudulent act), N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the course of conducting insurance business), and N.J.S.A. 17:33A-4a(4)(b) (making any written or oral statement, intended to be presented to any insurance company for the purpose of obtaining an insurance policy, knowing that the statement contains any false or misleading information concerning a material fact) as pled in the AOTSC. However, there was no specific finding as to a violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law). As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to specifically set forth that the Respondents' conduct violated insurance laws of this State, namely the Producer Act and Fraud Act. Therefore, I FIND that the

[13] As noted above, the AOTSC mistakenly pled a violation of N.J.S.A. 17:22A-40a(4), and the Department requested that the mistaken violation be disregarded.

Respondents' actions, as set forth in Count One of the AOTSC, also constitute a violation of N.J.S.A. 17:22A-40a(2).

Count Two: Respondent Young misappropriated $462,341.7 from the Fund

Count Two of the AOTSC alleges that Respondent Young knowingly misappropriated $462,341.78 from the Fund by means of 86 checks and 16 wire transfers from the Fund to her personal accounts, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16) and N.J.A.C. 11:17A-4.10. The ALJ found as fact that on October 23, 2013, Respondent Young was found guilty by jury verdict of second-degree Theft by Unlawful Taking or Disposition, in violation of N.J.S.A. 2C:20-3[14] and second-degree Misapplication of Entrusted Property, in violation of N.J.S.A. 2C:21-15,[15] resulting from her conduct as an insurance producer in "taking or exercising unlawful control over the movable property of another ... [by way of] approximately 86 checks and 16 wire transfers in an amount of approximately $462,341.78" and that Respondent Young admits to the same. Id. at 9 - 10.

The ALJ found that Respondent Young cannot and does not dispute the criminal conviction, which constitutes a violation of N.J.S.A. 17:22A-40a(8) and (16). Id. at 10. Further, the ALJ found that Young's criminal conviction also constitutes a violation of N.J.S.A. 17:22A-40a(6), which prohibits producers from being convicted of a felony or crime of the fourth degree or higher.

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[14] N.J.S.A. 2C:20-3a provides that a person is guilty of theft if he unlawfully takes, or exercises control over, movable property of another with purpose to deprive him thereof.

[15] N.J.S.A. 2C:21-15 provides in part that a person commits a crime if he applies or disposes of property that has been entrusted to him as a fiduciary, or property belonging to or required to be withheld for the benefit of a financial institution in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted whether or not the actor has derived a pecuniary benefit.

I concur with the ALJ that the Department proved the allegations in Count Two of the AOTSC and that Respondent Young's conduct violated N.J.S.A. 17:22A-40a(8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility) and (16) (commit a fraudulent act) as pled in the AOTSC, and N.J.S.A. 17:22A-40a(6). However, there are no specific findings as to a violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law) and (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the course of conducting insurance business). As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to FIND that Respondent Young's actions, as set forth in Count Two of the AOTSC and found by the ALJ, also constitute a violation of N.J.S.A. 17:22A-40a(2) and (4), and N.J.A.C. 11:17A-4.10.

Revocation of the Respondents' Producer Licenses

With respect to the appropriate action to take against the Respondents' insurance producer licenses, I find that record is more than sufficient to support the ALJ's recommendation of license revocation and, in fact, compels the revocation of both of the Respondents' producer licenses. However, I MODIFY the Initial Decision as to the reasoning for the revocation of the Respondents' producer licenses as set forth below.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing Commissioner v. Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). In view of the fact that an insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent, the public's confidence in a licensee's honesty,

trustworthiness, and integrity are of paramount concern. Ibid. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Parkwood, 98 N.J. Super. at 268; Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). Additionally, a licensed producer is better placed than a member of the public to defraud an insurer. Strawbridge v. New York Life Ins. Co., 504 F.Supp. 824 (1980). As such, a producer is held to a high standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public.

As 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 and it has a particularly strong public policy against the proliferation of insurance fraud. Palisades Safety and Ins. Ass'n v. Bastien, 175 N.J. 144, 150 (2003). Revocation of a producer license has consistently been imposed upon licensees who have personally engaged in fraudulent acts, as both insureds and insurers must place their trust in the insurance producers to convey accurate information and appropriately handle all funds. See Commissioner v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13). Moreover, misconduct involving "misappropriation of premium monies, bad faith and dishonestly compels license revocation." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09).

Only the existence of extraordinary mitigating factors can form a basis for withholding the sanction of license revocation in cases involving direct personal conduct on the part of a licensee that constitutes fraud. See Commissioner v. Goncalves, OAL Dkt. No. BKI 31188-03, Initial Decision (12/03/03), Final Decision and Order (05/24/04), OAL Dkt. No. BKI 3301-05, On Remand, Initial Decision (11/17/05), Final Decision and Order (02/15/06); Commissioner v.

Nicolo, OAL Dkt. No. BKI 10722-04, Initial Decision, (05/31/06), Final Decision and Order (10/12/06); and 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 (03/26/07).

Here, the ALJ recommended the revocation of both of the Respondents' licenses as a result of Respondent Young's criminal conviction, and her admission to the same. Initial Decision at 15. However, this reasoning is too narrow because it does not take into account the role of Elite or the full scope of the Respondents' misconduct, which goes beyond the criminal conviction. I agree that Respondent Young – on the basis of the criminal conviction alone – should be revoked. Nevertheless, the full scope of her misconduct through Elite and her role at Elite must also be set forth as a basis for the revocations. The Respondents enrolled Young's parents, who were not eligible to be enrolled, in the Horizon Policy by providing false information to Horizon (i.e., that Young's parents were eligible to be enrolled in the Horizon Policy), in violation of the Fraud Act and the Producer Act. Initial Decision at 8. Moreover, Respondent Young while an employee, part-owner and DLRP of Elite misappropriated $462,341.78 from the Fund and was criminally convicted for her conduct. Id. at 10. Thus, in light of the foregoing and based upon my review of the record, I am compelled to find that the revocation of Respondent Young and Respondent Elite's producer licenses is both necessary and appropriate. I CONCUR with the ALJ's recommendation that the insurance producer licenses of Respondents Young and Elite be revoked and I MODIFY the reasoning as set forth above.

Civil Monetary Penalties against the Respondents

The Commissioner has broad discretion in determining sanctions for violations of the laws she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The penalties set forth in the Producer Act "are expressions by the Legislature that serve a distinct

remedial purpose." Commissioner v. Strandskov. The Producer Act provides that a penalty not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense may be imposed. N.J.S.A. 17:22A-45.

The Fraud Act provides that a penalty of not more than $5,000 for the first violation, $10,000 for the second violation and $15,000 for each subsequent violation may be imposed. N.J.S.A. 17:33A-5b. The New Jersey Supreme Court held that when it comes to penalties under the Fraud Act "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas such as reasonable liquidated damages . . . without being deemed to have imposed a second penalty for the purpose of double jeopardy analysis." Merin v. Maglaki, 126 N.J. 430, 445 (1992), citing United States v. Halper, 490 U.S. 435 (1989), and United States ex rel Marcus v. Hess, 317 U.S. 537, 548-49 (1943).

Under both the Fraud Act and the Producer Act, the Commissioner may impose larger subsequent fines when multiple offenses have been found in a single civil action. State v. Nasir, 355 N.J. Super. 96, 107 (App. Div. 2002) (citing Merin, 126 N.J. 430 (1992)); see also Commissioner v. Prime Insurance Syndicate, OAL Dkt. No. BKI 1168-05, First Initial Decision (01/31/06), Second Initial Decision (03/09/06), Final Decision and Order (05/24/06) (Ordering additional civil penalties, for among other reasons, for each policy involving the solicitation of insurance from an unauthorized carrier); Commissioner v. Uribe, OAL Dkt. No. BKI 7363-07, Initial Decision (03/31/11), Final Decision and Order (09/28/11), Goldman v. Uribe, Dkt. No. A-1285-11T1 App. Div. 03/07/13) (assessing separate penalties for each of 13 violations of the Producer Act).

"[I]nsurance producers who commit insurance fraud will face civil penalties under both the Fraud Act and the Producer Act." Commissioner v. Hohn; See also Commissioner v. Furman,

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

In the instant matter, as to Count One of the AOTSC, the Respondents committed two violations of the Fraud Act and two violations of the Producer Act for enrolling Young's parents in the Fund's health care program. Initial Decision at 9. For the two violations of the Fraud Act, the ALJ recommended the imposition of a total fine of $10,000. Initial Decision at 14 – 15. However, penalties for the violations of the Producer Act were not recommended. Because the Respondents violated both the Producer Act and the Fraud Act, and consistent with the decisions in Hohn, Furman, and Goncalvas, it is appropriate to impose penalties pursuant to both the Producer Act and the Fraud Act for the violations in Count One of the AOTSC.

As to Count Two of the AOTSC, Respondent Young committed 102 separate violations of the Producer Act by misappropriating $462,341.78 from the Fund by means of 86 checks and 16 wire transfers from the Fund to Young's personal accounts. Id. at 10. Each of the checks and each of the wire transfers are a separate misappropriation; and thus, a separate violation of the Producer

Act. Separate civil penalties should be assessed for each act, namely each of the 102 separate acts of misappropriation in violation of the Producer Act. Commissioner v. Strandskov (Respondent criminally convicted of theft of insurance premium totaling over $660,000 from nineteen insureds, revoked and fined $60,000 plus costs of investigation); Commissioner v. Robert Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (6/16/08); Final Decision and Order (9/15/08) (Respondent criminally convicted of theft of insurance premiums totaling approximately $20,000, and each individual misappropriation of the eighteen insurance premiums held to constitute a violation of the Producer Act); Nasir, 355 N.J. Super. at 107-08; see also State v. Fleischman, 189 N.J. 539 (2007); Maglaki, 126 N.J. at 439 (imposition of a penalty for each false statement submitted by the defendant was appropriate).

In instances of the misappropriation of monies, significant monetary penalties – including maximum per violation amounts - have been imposed upon insurance producers engaging in such conduct. See Commissioner v. Capital Bonding Corp., OAL Dkt. No. BKI 6790-01, Initial Decision, (07/02/04), Final Decision and Order (11/17/04), aff'd No. A-1903-04T3 (App. Div. August 1, 2006) (imposed a $240,000 fine for failure to satisfy 747 bail forfeiture judgments totaling over $9.9 million); Commissioner v. Cenneno, Jr, et al., OAL Dkt. No. BKI 14942-15, Initial Decision (10/26/16), Final Decision and Order (01/26/17) (imposed a civil monetary penalty of $5,000 for each of the first two instances where the respondents misappropriated client funds and $10,000 for the third instance where the respondents misappropriated client funds); Commissioner v. Hagaman, et al., OAL Dkt. No. BKI 08087-14, Order for Partial Summary Decision (08/11/15), Initial Decision (11/02/15), Final Decision and Order (03/17/16) (imposed the maximum civil monetary penalty of $10,000 for each of five instances where the respondents misappropriated client funds); Commissioner v. Brown, et al., OAL Dkt. No. BKI 10377-13, Initial

Decision (09/15/15), Final Decision and Order (12/14/15) (imposed the maximum civil monetary penalty of $10,000 for each of two instances where the respondents misappropriated client funds); and Commissioner v. Strandskov (Respondent criminally convicted of theft of insurance premium totaling over $660,000 from nineteen insureds, revoked and fined $60,000 plus costs of investigation).

Furthermore, 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 (03/26/07) (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); and Commissioner v. Martini, OAL Dkt. No. INS 1874-96, Initial Decision (04/18/97), Final Decision and Order (06/10/97) (revoking the producer license and imposing a $15,000 fine for Producer Act violations for committing insurance fraud by submitting a false claim to his insurance company).

As discussed by the ALJ, under Kimmelman, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act and imposed pursuant to the Fraud Act.

Regarding the first Kimmelman factor (good or bad faith), the ALJ found that as to Count One of the AOTSC, Respondent "Young may have had a good faith belief" in enrolling her parents in the Horizon Policy, however, "such belief was misplaced and contrary to the Fund's requirements." Initial Decision at 13. In considering this factor, "[t]he Court should assess how egregious [the] conduct was and whether [the Respondents] could have reasonably believed [their] conduct was legal." Kimmelman, 108 N.J. at 137. "Fraud is in and of itself wrongful conduct."

Fonseca at 11. Here, the Respondents committed two instances of insurance fraud by enrolling Respondent Young's parents in the Horizon Policy. As noted by the ALJ, the Respondents' justification of their actions that "everyone else was doing it too" is not a sufficient reason and it was contrary to the Horizon Policy maintained with the Fund. Initial Decision at 8. The Respondents knew that Young's parents did not qualify to be so enrolled. Ibid. Contrary to the ALJ's finding, as licensed insurance producers acting in a fiduciary capacity, the Respondents could not reasonably have believed their conduct was legal, and therefore I find that the Respondents' conduct was fraudulent, egregious, and demonstrates bad faith.

As to Count Two of the AOTSC, the ALJ correctly found that Respondent Young's conduct in 102 acts of misappropriating monies from the Fund was egregious and it resulted in Respondent Young's criminal conviction. Id. at 13. As repeatedly held by former Commissioners, misappropriations of insurance premiums by licensed insurance producers are egregious violations of the insurance laws and demonstrate bad faith because they breach the fiduciary responsibilities of the producer to both the insureds and the insurers. Stone, Final Decision and Order at 8. Especially here where the Respondent Young has been criminally convicted for the thefts of insurance funds, it is illogical to question the mens rea of the Respondent, and therefore this conduct also demonstrates bad faith. Accordingly, the first Kimmelman factor aggravates in favor of significant penalties.

As to the second Kimmelman factor (ability to pay), the ALJ found that Respondent Young does not have the assets necessary to satisfy the imposition of total penalty of $1,074,864.50 sought by the Department. Id. at 14. The ALJ based this finding on a single tax return from 2015, and "current employment information." Ibid. In its Exceptions, the Department argues that the record is devoid of any competent proof regarding Young's current employment. On the other hand, the

Respondents argue that "there has been no proof filed that [Respondent] Young's admission of working only part-time and annually earning only $10,000 is untrue or that she has hidden assets from which she would be able to pay a civil penalty." Respondents' Sur-Reply Letter Brief at 17.

The Respondents have the burden of setting forth their inability to pay a substantial fine. Commissioner v. First Jersey Ins. Agency, et al., OAL Dkt. No. BKI 13160-15, Initial Decision (05/06/17), Final Decision and Order (07/19/17), at 37. Here, some information relevant to Respondent Young's ability to pay was provided in the Respondents' Answers to Interrogatories and included Respondent Young's statement that she does "clerical work as an independent contractor ... [and] earn[s] about $10,000 per year." See Respondents' Answers to Interrogatories, Answer to #8. Respondent Young's Response to Request to Produce indicates that she was "in the process of trying to obtain [her] tax returns prior to 2015 from [her] ex husband. 2015 taxes attached. Will forward 2016 as soon as it is completed." As noted by the Department, the 2015 tax return is proximate to the time when Young was incarcerated for her crimes which may have resulted in a temporary decrease in income. The record does not contain further information concerning her ability to pay. Accordingly, the record contains some dated indications that Respondent Young has a limited ability to pay the maximum fines as sought by the Department.

Nevertheless, this is only one Kimmelman factor, and substantial fines have been issued against insurance producers despite their arguments of inability to pay. Fonseca at 12-13 (issuing a $100,500 civil penalty despite the producer's argument that he was unable to pay); see also Commissioner v. Malek, OAL Dkt. No. BKI 4520-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (Commissioner increased the fines recommended in the Initial Decision from $2,500 to $20,000 even though the producer argued an inability to pay fines in addition to restitution.) In light of this, I hold that the second Kimmelman factor provides limited mitigation

as to the quantum of penalties necessary to deter similar conduct by the Respondents and other licensed insurance producers.

As to the third and fourth Kimmelman factors, I disagree with the ALJ's findings that Respondent Young did not profit from her illegal conduct (factor three) and that there was no injury to the public (factor four). As to Count Two of the AOTSC (misappropriation), the ALJ found that the criminal matter against Respondent Young resulted in a "no restitution" ruling because the State failed to provide the Criminal Court with proof of loss to the Fund; thus, Young did not profit and that there was injury to the public. Initial Decision at 13 to 14.

I disagree with this conclusion for several reasons. First, the "no restitution" order is not conclusive evidence that the Fund did not have a loss. While throughout this matter, the Respondents have argued that the Criminal Court found as a matter of fact that there was no loss to the Fund, that all money allegedly taken by respondent had been returned to the Fund prior to her being arrested, and therefore, no restitution was ordered, the Respondents do not provide sufficient credible evidence to support these assertions. See, Ashley Cert. dated 05/15/17, ¶ 25 and Respondents' Second Sur-Reply Brief at 2. In the last document the Respondents filed with the OAL in this matter, the Respondents attach a portion of the transcript (a total of four pages) of Ron Tobia, Esq, an attorney for the Fund, to support the assertion that the Fund was not missing money. See Respondents Second Sur-Reply Brief. However, a complete transcript was not provided, and within those pages, in response to various questions, Mr. Tobia states: "There wasn't money – I believe there was money missing," that he believed money was missing, and that he did not know if there was money missing from the Fund. These contradictory statements, taken out of context and without the benefit of reviewing the entire transcript, are not conclusive proof. Respondent Young also fails to provide evidence, including bank records such as cancelled checks,

to support her argument that she repaid the misappropriated money to the Fund.[16] Moreover, regardless of whether the Fund was missing money at the time of the trial, the jury found that Respondent Young misappropriated $462,341.78.

In addition, during the Criminal Court Restitution Hearing, the Court requested additional documents from the Prosecution, namely, certification(s) from individual(s) as to the amount of money they were out because of Respondent Young's misdeeds. See Restitution Hearing Transcript at 40-41, and 45. The record is devoid as to further documents related to this issue, and while it orders "no restitution," the Amended Judgment of Conviction does not contain the reasoning for the "no restitution" order.

In this matter, the Department has not sought an order of restitution against Respondent Young; thus, it is not necessary to determine the exact amount of monies still owed to the Fund by Respondent Young because of her illegal conduct. The amount of restitution outstanding is also not determinative as to whether Respondent Young profited from her illegal conduct (factor three). Under Kimmelman, the analysis of whether there is illegal profit is not limited to actual pecuniary profit and can take into potential profits from a licensee's misconduct, even if it is not successful. Kimmelman, 108 N.J. at 138; and, Merin, 126 at N.J. 445-46 (the lack of success of a fraudulent scheme is not decisive and civil penalties may be imposed for detected and consequently unsuccessful insurance fraud). Moreover, whether or not restitution has been made, "the greater

[16] By submission dated July 14, 2017, Respondent Young provides copies of documents to show that she made loans to the Fund in 2002. See 07/14/17 Young Cert. and seven pages of attachments. Respondent Young admits that it is not a complete record, and that after she was indicted she attempted to obtain copies of the bank statements and cancelled checks but was unable to do so. Ibid. However, this does not explain why between November 2003 and December 2006, Respondent Young misappropriated $462,341.78 by means of 86 checks and 16 wire transfers. Young has not provided any loan documents or other audit or accounting documents to support her claims.

the profits a defendant is likely to obtain . . . the greater the penalty must be if penalties are to be a deterrent." I FIND that Young's criminal misappropriation of $462,341.78 from the Fund for her own purposes demonstrates that she had – at least the potential – to profit from her illegal activity by $462,341.78, regardless of whether the monies were ultimately paid back to the Fund.

In addition, as to Count One of the AOTSC, I FIND that the Respondents profited by illegally enrolling Young's parents in the Horizon Policy, for which they were never eligible to be enrolled in. Moreover, it is undisputed and I FIND that the Respondents profited because the Fund paid $12,197.44 in premiums and Horizon paid claims in amount of $13,893.16 for Young's parents because of the illegal conduct of the Respondents. Accordingly, I FIND that the third Kimmelman factor, profits from illegal activity, weighs heavily in favor of significant civil penalties.

Likewise, the fourth Kimmelman factor, harm to the public, aggravates in favor of significant civil penalties. As to Count One of the AOTSC, the Respondents caused actual harm to the Fund and Horizon by illegally enrolling Respondent Young's parents in the Horizon Policy. As to Count Two of the AOTSC, Respondent Young caused actual harm to the Fund and therefore also to the unions and members who comprised the Fund by misappropriating $462,341.78. Initial Decision at 2.

Moreover, under Kimmelman, the Commissioner may consider "less tangible forms of harm." Kimmelman, 208 N.J. at 138. "The costs of insurance fraud - including losses and insurance companies' investigations - are passed on to the insurance buying public. In addition, an erosion of the continued confidence of the public in the integrity of insurance producers occurs." 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, OAL Dkt. No. BKI 7629-95, Initial Decision (12/18/96), Final Decision and Order (04/18/97). As noted above, the Commissioner is charged with the duty to protect public welfare and to instill public confidence in both insurance producers and the industry as a whole. In view of the fact that an insurance producer collects money from insureds, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Parkwood, 98 N.J. Super. at 268; Fonseca at 17. Therefore, I FIND that in addition to the direct harm to the Fund and its members as described above, the Respondents have also harmed the public by committing multiple misappropriations and acts of insurance fraud, breaching their fiduciary duty, and completely disregarding the consequences of their frauds. This factor weighs heavily in favor of significant penalties.

The fifth Kimmelman factor addresses the duration of the illegal activity and the sixth Kimmelman factor addresses the existence of criminal actions. Kimmelman, 108 N.J. at 139. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Ibid. The longer the illegal conduct, more significant civil penalties should be assessed. Ibid. As to this factor, the ALJ stated that Respondent Young has been convicted for her actions in Superior Court, incarcerated, and fined. Initial Decision at 14. However, the ALJ also found that the Respondents fraudulently enrolled Respondent Young's parents in the Horizon Policy for years 2006, 2007, and 2008 (Count One) and that Respondent Young misappropriated monies from the Fund between 2003 and 2006 (Count Two). Id. at 7 and 14. Thus, the illegal conduct was not a one time event and it did not occur over a short period of time; rather, it occurred over a period of years and demonstrated a pattern and practice of misconduct through 102 separate invasions of the Trust's funds. This factor weighs strongly in favor of a significant penalty.

As to the sixth Kimmelman factor (existence of criminal actions), the Respondents have not been held criminally accountable for their fraudulent conduct as set forth in Count One of the AOTSC. Id. at 13. The lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139 ("A large civil penalty may be unduly punitive if other sanctions have been imposed for the same violation. . . ."). However, Respondent Young has been criminally convicted for her thefts as set forth in Count Two of the AOTSC. Ibid. In the criminal matter, the Judgment of Conviction imposed the following penalties: no restitution was ultimately ordered; court fines totaling $280 were imposed; and seven years incarceration, with 73 days jail credit, and in December 2014 Young was admitted into the Intensive Supervision Program. Id. at 13 – 14; Ashley Cert. dated 05/15/17, Exhibit (Amended Judgment of Conviction, 01/16/15). The criminal sanctions for Respondent Young's misappropriations in the course of her transaction of the business of an insurance producer are the same as those underlying Count 2 and weigh in favor of mitigating the severity of the sanctions imposed in this matter.

Regarding the last Kimmelman factor (past violations), the ALJ found that Respondent Young has no prior criminal history. Initial Decision at 14. This factor, however, addresses whether the producer has previously violated the Producer Act or Fraud Act and if past penalties have been insufficient to deter future violations. Cenneno at 36. Here, no evidence has been presented demonstrating that the Respondents have committed a previous violation of the Producer Act or the Fraud Act.

In light of the above Kimmelman analysis, consistent with prior decisions, and based upon the violations I have concluded that the Respondents committed, I FIND that a separate civil penalty of $2,500 for each violation of the Producer Act should be imposed for each of the 102

thefts from the Fund (Count Two), for a total fine of $255,000 as to Count Two of the AOTSC. Moreover, I FIND that a separate civil penalty for violations of the Fraud Act and for violations of the Producer Act should also be imposed for each of the two fraudulent enrollments in the Horizon Policy (Count One). The Respondents engaged in fraudulent activities in enrolling Respondent Young's parents into the Horizon Policy, and as insurance producers in this State, those violations are such that there is no basis upon which to find that they believed the conduct was legal. This defrauded Horizon, violated their fiduciary duties to the Fund and Horizon, and illegally obtained benefits for her parents to which they were not entitled. Additionally, the Respondents engaged in 102 separate and distinct acts to misappropriate over $460,000 from their clients, the Fund, over the course of three years. This demonstrates an extended pattern and practice of misconduct that displays a blatant disregard for the duties of an insurance producer in this State, specifically honesty, trustworthiness, and integrity. Parkwood, 98 N.J. Super. at 268; Fonseca at 17.

Accordingly, a total fine is imposed in the amount of $275,000 allocated as follows: $20,000 as to Count One of the AOTSC ($10,000 as to the two Fraud Act violations and $10,000 as to the Producer Act violations) against both of the Respondents, jointly and severally; and $255,000 for the 102 violations in Count Two of the AOTSC against Respondent Young. These penalties are fully warranted, not excessive or unduly punitive as the criminal matter imposed no monetary sanctions and did not order restitution, and are necessary to demonstrate the appropriate level of opprobrium for such egregious and extended misconduct by a licensed producer in this State. Moreover, these penalties take into consideration the limited proofs of an inability to pay and Respondent Young's criminal conviction for 102 misappropriations. Here, Respondent Young's misconduct was egregious because it involved 102 separate invasions of the Funds'

monies and therefore warrants imposition of a significant fine. This is significantly less than the maximum fine of $1,015,000 for these 102 misappropriations under N.J.S.A. 17:22A-45c.

Pursuant to N.J.S.A. 17:33A-5b, costs and reasonable attorneys' fees shall also be awarded to the Commissioner. As such, I ADOPT the ALJ's recommendation that the Respondents pay costs and attorneys' fees in the amount of $22,864.50, jointly and severally.

Moreover, pursuant to N.J.S.A. 17:33A-5.1, in addition to any other penalty, fine, or charge imposed, a person who is found to have committed insurance fraud shall be subject to a surcharge in the amount of $1,000. I agree with the ALJ that such a surcharge is appropriate here. However, I MODIFY the Initial Decision to reflect that a surcharge of $1,000 is imposed against Respondent Young, individually, and a surcharge of $1,000 is imposed against Respondent Elite, individually.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions, and the entire record herein, I hereby ADOPT the findings and conclusions as set forth in the Initial Decision except as modified herein. Specifically, I ADOPT the conclusion that the Department's Motion for Summary Decision should be granted as to the allegations set forth in the AOTSC with the modifications and amplification contained herein. I further ADOPT the ALJ's recommendation as to the revocation of Respondent Young's and Respondent Elite's insurance producer licenses, but MODIFY the reasoning for the revocation as set forth herein.

I MODIFY the monetary penalty as follows. Regarding Count One of the AOTSC, I CONCUR that a civil penalty for two violations of the Fraud Act should be imposed and I FIND that a separate civil penalty for the two violations of the Producer Act should also be imposed. Regarding Count Two of the AOTSC, I FIND that a separate civil penalty for violations of the Producer Act should be imposed for each of the 102 thefts from the Fund. I ORDER that a total

fine is imposed in the amount of $275,000 allocated as follows: $20,000 as to Count One of the AOTSC ($10,000 as to the two Fraud Act violations and $10,000 as to the two Producer Act violations) against both of the Respondents, jointly and severally; and $255,000 as to Count Two of the AOTSC (for the 102 violations of the Producer Act) against Respondent Young.

I FURTHER ADOPT the ALJ's recommendation that the Respondents pay costs and attorneys' fees in the amount of $22,864.50, jointly and severally. Lastly, I ADOPT the finding that a Fraud Act surcharge is appropriate here. However, I MODIFY the Initial Decision to reflect that a surcharge of $1,000 is imposed against Respondent Young, individually, and a surcharge of $1,000 is imposed against Respondent Elite, individually.

It is so ORDERED on this 11th day of June, 2018.

Marlene Caride
Acting Commissioner

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