

OCT 26 2001

DEPT. OF INSURANCE
BY Kath

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

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In the Matter of:)
)
BRENT DURFEE WILCOCK, dba)
CHILD CARE INSURANCE SPECIALISTS,)
)
Petitioner.)
_____)

Docket No. 01A-167-INS

ORDER

On October 10, 2001, the Office of Administrative Hearings, through Administrative Law Judge Gregory L. Hanchett, issued a Recommended Decision of Administrative Law Judge (“Recommended Decision”), a copy of which is attached and incorporated by this reference. Pursuant to A.R.S. § 41-1092.08(B), the Director of the Department of Insurance declines to review the Recommended Decision. Under A.R.S. § 41-1092.08(F)(1), the Recommended Decision is the final administrative decision in this matter.

NOTIFICATION OF RIGHTS

Pursuant to A.R.S. § 41-1092.09, the aggrieved party may request a rehearing with respect to this order by filing a written motion with the Director of the Department of Insurance within 30 days of the date of this Order, setting forth the basis for relief under A.A.C. R20-6-114(B). Pursuant to A.R.S. § 41-1092.09, it is not necessary to request a rehearing before filing an appeal to Superior Court.

The final decision of the Director may be appealed to the Superior Court of Maricopa County for judicial review pursuant to A.R.S. § 20-166. A party filing an appeal must notify the Office

1 of Administrative Hearings of the appeal within ten days after filing the complaint commencing the
2 appeal, pursuant to A.R.S. § 12-904(B).

3 DATED this 25th of October, 2001

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6
7 Charles R. Cohen
Director of Insurance

8
9 A copy of the foregoing mailed
10 this 26th day of October, 2001

11 Sara M. Begley, Deputy Director
12 Gerrie L. Marks, Executive Assistant for Regulatory Affairs
13 Mary Butterfield, Assistant Director
14 Catherine O'Neil, Legal Affairs Officer
15 Arnold Sniegowski, Investigations Supervisor
16 Bob Hill, Investigator
17 Arizona Department of Insurance
18 2910 N. 44th Street, Suite 210
19 Phoenix, AZ 85018

20 Office of Administrative Hearings
21 1400 W. Washington, Suite 101
22 Phoenix, AZ 85007

23 Brent Durfee Wilcock
24 416 N. Shaylee Lane
Gilbert, AZ 85234

Child Care Insurance Specialists
540 W. Iron Avenue, #104
Mesa, AZ 85210

Shelby Cuevas
Michael Denious
Office of the Attorney General
1275 W. Washington
Phoenix, AZ 85007

1 Seneca Insurance Company, Inc.
160 Water Street, 16th Floor
2 New York, NY 10038

3 Capitol Indemnity Corp.
P.O. Box 5900
4 Madison, WI 53705-0900

5 Progressive Casualty Insurance Company
Box E61
6 6400 Wilson Mills Road
Mayfield Village, OH 44143-2128

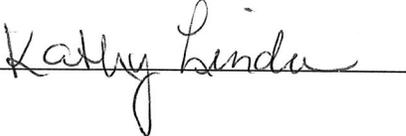
7 Statewide Insurance Company
8 P.O. Box 799
Waukegan, IL 60079

9 Foremost Property & Casualty
10 P.O. Box 2450
Grand Rapids, MI 49501-2450

11 North American Company for Life & Health Insurance
12 P.O. Box 466
Chicago, IL 60690-0466

13 Hartford Insurance Company of the Midwest
14 Hartford Plaza
Hartford, CT 06115

15 Security Continental Insurance Company
16 2001 Butterfield Road, Suite 900
Downers Grove, IL 60515-1050

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1 evidence adduced at the hearing, the following findings of fact, conclusions of law, and
2 recommended decision are made.

3 **FINDINGS OF FACT**

4 *COUNT ALLEGING THE CHARGING OF FICTITIOUS FEES*

5 1. At all times pertinent to the allegations contained in the petition, Respondent
6 has been licensed in Arizona to transact property and casualty and life and disability
7 insurance business as an agent under Arizona license number 125054.

8 2. In 1997, Respondent was an insurance agent for the Arizona Child Care
9 Association (hereinafter ACCA). The ACCA maintained a "self insurance retention
10 fund" in order to provide otherwise difficult to obtain liability insurance for member child
11 care centers that belonged to ACCA. Respondent was the administrator for that
12 program.

13 3. In 1997, the dollar amount of the fund had dwindled to the point that the fund
14 could no longer adequately insure against current or projected losses.

15 4. In order to replenish the fund, Respondent, between the months of February
16 and March, 1997, charged a fee of \$1.50 per policy for 68 different policies. The total
17 amount of money respondent collected as a result of imposing the fee was \$6,884.00.

18 5. Though the funds generated through the fee were to be used for replenishing
19 the depleted fund, Respondent did not disclose this to the policy holders. Respondent
20 instead labeled the fee a "policy and inspection fee" on both quotation sheets as well
21 as premium invoice sheets. The testimony of the investigator as well as the
22 Respondent's affidavit (admitted into evidence at the hearing as exhibit # 78)
23 demonstrate that labeling the fee as a "policy and inspection fee" was fictitious as the
24 additional money was in fact to be used to replenish the depleted self-insurance fund.

25 6. Respondent does not dispute that he never deposited the funds into the self
26 insurance fund. Instead, he deposited the funds into Child Care Insurance's bank
27 account.

28 7. It is undisputed that in March, 1997, Respondent discontinued charging the
29 fee. It is also undisputed that Respondent then proceeded to refund the fee to those
30

1 policy holders who renewed their policies with Respondent by crediting against the
2 1998 premiums the amount that had earlier been charged for the policy and inspection
3 fee.

4 8. The parties hotly contested what precipitated the refund of the fees to those
5 policy holders who did not renew their policies with Respondent. According to the
6 Department's investigator who investigated this complaint, Mr. Arnold Sniegowski,
7 Respondent had no intention of refunding the fees to policy holders who did not renew
8 their policies until he was told that the failure to do so could be construed as
9 misappropriation by the Department. According to Respondent, he had every intention
10 of refunding the fees. In this regard, the Department's investigator insisted at the
11 hearing on August 17, 2001 that he had heard Respondent state, under oath during a
12 taped interview, that Respondent had no intention of refunding the money to those
13 persons who did not renew their policies. Subsequently, in an affidavit filed after the
14 close of the first day of hearing, the investigator admitted that the interview had neither
15 been taped nor taken under oath. With respect to the issue of whether Respondent
16 had intended to refund the money, the undersigned finds the investigator's testimony to
17 not be credible.

18 9. In any event, all funds generated through the inspection and policy fee were
19 eventually refunded. It is undisputed that for almost a full year, the policy holders who
20 had been charged the "policy and inspection fee" were without the use of that money. It
21 is also undisputed that Respondent never disclosed the true purpose of the fee and the
22 moniker "policy and inspection fee" was fictitious. In addition, the undersigned finds
23 that there were no inspections conducted on the facilities that would merit the
24 imposition of the fee.

25 *COUNT ALLEGING FAILURE TO FILE ASSUMED BUSINESS NAME*

26 10. In April, 1998, Respondent formed an entity known as ISCS. ISCS was
27 owned and operated by Respondent. ISCS has never obtained a certificate of authority
28 from the director of the Department to transact insurance in this state.
29
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1 11. ISCS advertised in publications circulated in the White Mountains area of
2 Arizona. ISCS advertised that it would assist consumers in finding low insurance rates
3 at no charge by shopping "several top rated insurance companies for the lowest cost
4 available." Exhibit 79a. The modus operandi for the services was as follows: a person
5 would call the number looking for an insurance quote and leave a message. Someone
6 from Respondent's insurance firm would then call the person back and obtain
7 information that included the person's social security number. Someone from
8 Respondent's insurance firm would then check rate quotes from insurance companies
9 whom Respondent represented as an agent. Someone from Respondent's insurance
10 company would then contact the person to inform them of the quotes.

11 12. In May, 1999, the Department received a complaint from a person who had
12 used the service, James Hopkins. Hopkins complaint centered in part on the fact that
13 the person representing ISCS had requested a social security number from Hopkins.

14 13. This complaint lead to the Department's investigation of ISCS. Mr. Bob Hill,
15 an investigator with the department, conducted the investigation. Mr. Hill learned that
16 Respondent had formed ISCS and that Respondent controlled the entity. Hill also
17 checked the Department's records and learned that there was no certificate of assumed
18 business name for ISCS on file with the Department.

19 14. When Hill called the telephone number listed in the ISCS advertisement, he
20 reached Respondent. Hill advised Respondent that there was no certificate of
21 assumed business name for ISCS on file with the Department and that to avoid being
22 cited for a violation, Respondent would have to apply for such a certificate.
23 Respondent during that conversation and in a subsequent letter to the Hill, conceded
24 he had not filed for a certificate of assumed business name. Respondent refused,
25 however, to obtain a certificate of assumed name as requested by Hill. Respondent
26 contended, however, that he was not required to do so as the services offered by ISCS
27 did not, in Respondent's opinion, amount to the transaction of business that would
28 require obtaining the certificate of assumed name required by Department regulations.
29
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CONCLUSIONS OF LAW

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2 1. The Department has the burden of proof in this matter, and the standard of
3 proof on all issues is by a preponderance of the evidence. Culpepper v. State, 187 Ariz.
4 431, 930 P.2d 508 (App. 1996). A "preponderance of the evidence is such proof as
5 convinces the trier of fact that the contention is more probably true than not." Morris K.
6 Udall, *Arizona Law of Evidence*, §5 (1960). It "is evidence which is of greater weight or
7 more convincing than the evidence which is offered in opposition to it; that is, evidence
8 which as a whole shows that the fact sought to be proved is more probable than not."
9 *Black's Law Dictionary*, 1182 (6th ed. 1990).

10 2. Arizona Revised Statute §20-316(A) provides in pertinent part:

11 A. The director may suspend for not more than twelve months or may
12 revoke or refuse to renew any license issued under this article if . . . the director
13 finds that any one or more of the following applies to the licensee:

14 * * *

15 (2). Willful violation of, or willful noncompliance with, any provision of this
16 title or any lawful rule or order of the director.

17 * * *

18 (4). Misappropriation or conversion or illegal withholding of monies
19 belonging to policyholders . . . received during the conduct of business
20 under the license or through its use.

21 * * *

22 (7). Conduct of affairs under the license showing the licensee to be
23 incompetent or a source of injury and loss to, or repeated complaint by,
24 the public or any insurer.

25 3. Arizona Revised Statute §20-318 provides that "[a] licensee shall not transact
26 insurance in this state under an assumed name . . . unless such person shall file in
27 the office of the director a certificate setting forth the name under which the insurance
28 is or is to be transacted and the true real full name or names of the person or persons
29 owning, conducting or transacting the same . . ."

1 Arizona Revised Statute §20-106(A)(1) defines the term “transact” with respect
2 to insurance to include “solicitation and inducement.”

3 4. Arizona Revised Statute §20-443(1) states that “[a] person shall not make,
4 issue or circulate, or cause to be made, issued, or circulated , any estimate, illustration,
5 circular, sales material or statement:

6 (1). Misrepresenting the terms of any policy issued or to be issued or the
7 benefits or advantages promised or the dividends to be received.”

8 * * *

9 5. Arizona Revised Statutes §20-401.01 provides that it is “unlawful for any
10 insurer to transact business, as provided by §20-106 without a certificate of authority
11 from the director.”

12 6. The Department has carried its burden with respect to proving a violation of
13 A.R.S. §20-316(A)(2) and (A)(7) and a violation of A.R.S. §20-443(1) as demonstrated
14 in Findings of Fact paragraph numbers Five and Nine above.

15 7. The department has failed to demonstrate by a preponderance of the
16 evidence Respondent misappropriated funds in violation of A.R.S. §20-316(A)(4). On
17 this point, the Department failed to carry its burden of proof because Investigator
18 Sniegowski's testimony, for the reasons stated above in Finding of Fact Paragraph 8,
19 with respect to Respondent's intent not to return monies generated by the fee, was not
20 found to be credible.

21 8. The Department has carried its burden with respect to the allegation that
22 Respondent violated A.R.S. §20-318. Here, Respondent admitted that he began ISCS
23 in order to move his business activities into the Show Low area. Respondent placed
24 advertisements in local media which specifically sought to induce persons to call
25 regarding insurance rates. Once persons called inquiring about insurance rates,
26 Respondent obtained personal identifying information from those persons, shopped
27 insurers with whom Respondent was contracted to obtain rate quotations, and then
28 provided that rate quotation information to those persons. This conduct constituted
29 “solicitation or inducement” as those terms are used within Title 20. To hold otherwise
30

1 in this case would be to permit an exception to the very broad scope of conduct that
2 Title 20 seeks to regulate in order to protect insureds within this state.

3 9. Likewise, for the reasons stated in Paragraph 8 of the Conclusions of Law,
4 ISCS engaged in transacting insurance business. ISCS was not authorized to transact
5 insurance since it had no certificate of authority from the Director. Therefore, a
6 violation of A.R.S. § 20-401.1 has been established.

7 10. The undersigned finds, in mitigation, that Respondent returned all incorrectly
8 charged funds to policy holders and in fact began returning those funds prior to any
9 intervention by the Department. In aggravation, the undersigned finds that
10 Respondent acknowledged that he intentionally misstated the character of the "policy
11 and inspection fee." This conduct, while not meriting suspension based on the facts of
12 this case, certainly merits a strong civil penalty in order to impress upon the
13 Respondent that he should never again engage in such conduct.

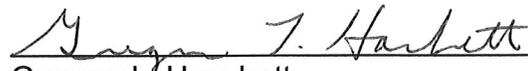
14 **RECOMMENDED DECISION**

15 Based on the foregoing the undersigned recommends to the Director of the
16 Department of Insurance that Respondent be ordered to pay a civil penalty pursuant to
17 A.R.S. §20-316 (C) in the amount of \$2,500 dollars for the violation of A.R.S. § 20-316
18 (A)(2).

19 It is further recommended that Respondent be ordered to pay a civil penalty
20 pursuant to A.R.S. §20-316 (C) in the amount of \$250.00 for the violation of A.R.S.
21 §20-318.

22 It is further recommended that Respondent be ordered to pay the above
23 mentioned penalties to the Director within forty-five (45) days of the effective date of
24 the final order entered in this matter.

25 Done this day, October 10, 2001.

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27 _____
28 Gregory L. Hanchett
29 Administrative Law Judge
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Original transmitted by ^{FAX} ~~mail~~ this
10 day of October, 2001, to:

Department of Insurance
Charles R. Cohen
ATTN: Curvey Burton
2910 North 44th Street, Ste. 210
Phoenix, AZ, 85018

By Chris Crawford Thomas