

No. **2020-6494**

**Official Order
of the
Texas Commissioner of Insurance**

Date: 09/30/2020

Subject Considered:

Texas Department of Insurance

v.

Robert Duff Bourassa

SOAH Docket No. 454-19-6470.C

General remarks and official action taken:

The subject of this order is the general lines insurance agent license with qualifications for property and casualty lines and life and health lines held by Robert Duff Bourassa.

Background

After proper notice was given, the above styled case was heard by an administrative law judge for the State Office of Administrative Hearings. The administrative law judge made and filed a proposal for decision containing a recommendation that the department revoke the general lines insurance agent license held by Robert Duff Bourassa. A copy of the proposal for decision is attached as Exhibit A.

Counsel for Mr. Bourassa filed exceptions to the administrative law judge's proposal for decision. Counsel for TDI filed a reply to the exceptions. The administrative law judge did not propose any revisions to the findings of fact and conclusions of law contained in his proposal for decision in response to the exceptions and reply.

COMMISSIONER'S ORDER
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Findings of Fact

The findings of fact contained in Exhibit A are adopted by TDI and incorporated by reference into this order.

Conclusions of Law

The conclusions of law contained in Exhibit A are adopted by TDI and incorporated by reference into this order.

Order

It is ordered that the general lines insurance agent license with qualifications for property and casualty lines and life and health lines held by Robert Duff Bourassa is revoked.

Kent C. Sullivan
Commissioner of Insurance

DocuSigned by:
B. Doug Slape
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Doug Slape
Chief Deputy Commissioner
Commissioner's Order No. 2018-5528

Recommended and reviewed by:

DocuSigned by:
James Person
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James Person, General Counsel

DocuSigned by:
Justin Beam
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Justin Beam, Assistant General Counsel

SOAH DOCKET NO. 454-19-6470.C

TEXAS DEPARTMENT OF
INSURANCE,
Petitioner

v.

ROBERT DUFF BOURASSA,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

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SOAH DOCKET NO. 454-19-6470.C

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Petitioner**

v.

**ROBERT DUFF BOURASSA,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Department of Insurance (Department or TDI) seeks to revoke the general lines insurance agent license held by Robert Duff Bourassa (Respondent) alleging that Respondent violated provisions in the Texas Insurance Code that prohibit fraudulent or dishonest acts, material misrepresentations of an insurance policy, and willful violations of the insurance laws of this state. Based on the preponderance of credible evidence and the applicable law, the Administrative Law Judge (ALJ) recommends that the Department revoke Respondent’s insurance agent license.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing on this case was convened on February 10, 2020, at the State Office of Administrative Hearings (SOAH) in Austin, Texas before ALJ Steven Neinast. Staff attorney Casey Seeboth represented the Department. Attorney Frank King represented Respondent. The record closed on March 23, 2020, when the parties filed reply briefs. Notice and jurisdiction were not disputed and are set forth in the Findings of Fact and Conclusions of Law below without further discussion here.

II. DISCUSSION

A. Background

Respondent holds a general lines license issued by the Department with qualifications for property and casualty lines and life and health lines. Between July 2009 and June 2017, Respondent was appointed as an insurance agent by a number of insurance companies under the umbrella of State Farm General Insurance Company (State Farm). Respondent's appointments were terminated in June 2017 based on allegations that he made misrepresentations about insurance coverage to five of his clients.

The Department's case focuses on five Certificates of Insurance (COIs), Declarations of Insurance (also referred to as insurance policies), various email communications involving Respondent, and an internal audit investigation report prepared by State Farm in the spring of 2017.¹ A COI is typically a one-page summation of the coverage provided by a more detailed insurance policy.² An insurance agent may issue a COI for two reasons relevant to this case. First, a COI can be provided to a client to show the coverage that the client has requested—either when the coverage is initiated, or as the coverage is renewed annually. Second, a client may request that a COI be provided to the client's business partner to assure the partner that the client has certain insurance coverage. For example, a client's landlord may require that the client—the landlord's tenant—hold workers compensation insurance coverage before the client renovates a business unit. In this example, the insurance agent would issue a COI to the landlord showing the various types of insurance held by the client, including workers compensation coverage.

This proceeding involves inconsistencies between the five COIs and their underlying insurance policies. In four of the five cases, it is undisputed that the COIs listed insurance coverage that was not provided through the related insurance policies. In these instances, Respondent's

¹ The Report is TDI Ex. 31.

² For example, TDI Ex. 3 is a one-page COI, while TDI Ex. 5 is a seven-page declaration that pertains to the same insured and time period covered by TDI Ex. 3.

clients assumed that they were covered by various types of insurance, and they typically paid premiums based on those assumptions, but the coverage was not available. In two of the cases, the discrepancies were discovered when third parties made claims against the insureds. There are also instances in which the type of insurance listed in the COI matched the coverage listed in the insurance policies, but the monetary level of coverage listed on the COI did not match the level of coverage stated in the corresponding insurance policy.

Another factor relevant to this case is the concept of “binding” insurance acceptance. As a State Farm agent, Respondent was authorized to bind certain types of insurance at the request of a client. For example, if a client requested General Liability coverage for its business, Respondent could essentially guarantee that State Farm would issue a policy, at a specified annual premium, for that type of insurance. But Respondent was not authorized to bind coverage for workers compensation or Professional Liability, also referred to as Errors and Omissions (E&O) insurance. Respondent could apply to State Farm for workers compensation or E&O coverage, but such coverage could not be presumed to be in place until State Farm had reviewed and agreed to underwrite the insurance policy application. In four instances, the COIs in evidence show that the client was covered by some form of insurance (e.g., workers compensation and/or E&O) even though State Farm had declined to underwrite those coverages and in some cases had specifically notified Respondent that those types of coverage would not be underwritten.

Respondent argues that the COIs do not override the underlying insurance policies and his clients should have reviewed their insurance policies to determine that they were not covered by certain types of insurance noted on their COIs. He argues that his clients did not suffer harm because of the inconsistencies, even when claims were filed. In all cases, Respondent argues that the reason the inconsistencies developed is that State Farm took an inordinate amount of time to confirm whether or not insurance that he had requested for his clients was, in fact, underwritten by the insurance company.

B. Applicable Law

Texas Insurance Code (Insurance Code) § 4005.101 is the primary basis for Staff's action in this case. Insurance Code § 4005.101(b) states:

The department may deny a license application or discipline a license holder under this subchapter if the department determines that the applicant or license holder, individually or through an officer, director or shareholder:

- (1) has wilfully [sic] violated an insurance law of this state;
- ...
- (5) has engaged in fraudulent or dishonest acts or practices; [or]
- (6) has materially misrepresented the terms and conditions of an insurance policy or contract

Staff further relies on Insurance Code § 541.003, which states that a “person may not engage in this state in a trade practice that is defined in this chapter as or determined under this chapter to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.” An “unfair method of competition or an unfair or deceptive act or practice” is described in Insurance Code § 541.061 as follows:

It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to misrepresent an insurance policy by:

- (1) making an untrue statement of material fact;
- (2) failing to state a material fact necessary to make other statements made not misleading, considering the circumstances under which the statements were made; [or]
- (3) making a statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact;

In their post-hearing briefs, the parties argued whether the elements of common-law fraud applied to this case. Because there is a dispute as to whether those elements apply here, those legal

arguments, and the ALJ's conclusion, are addressed in the Analysis section of this Proposal for Decision.

C. Testimony and Exhibits

1. Respondent Robert Bourassa

Respondent testified for over four hours. All of the exhibits in evidence were addressed in some form through the course of Respondent's examination. This section of the Proposal for Decision first sets out Respondent's examination by the Department, and follows with his responses elicited by his attorney.

Respondent was first appointed as an insurance agent of State Farm in 2009. Five of Respondent's commercial business clients who are central to the Department's allegations were brought to State Farm by Respondent, rather than being assigned to Respondent from State Farm. They are: First Assured Quality Systems (FAQS), Conrad Realty, Intangent USA (Intangent), Nails Natura, and Williams Design. Respondent received commissions on the insurance policies held by these clients. Of these five clients, FAQS and Conrad Realty filed complaints against Respondent with State Farm.

Respondent had bind authority to issue home and auto, general liability, and umbrella life insurance but, as noted, he did not have bind authority to issue workers compensation or E&O coverage. Respondent explained that the primary information shown on a COI is the type of insurance, the policy number, the effective date of the policy, and the limits applicable to the policy. TDI Exhibit 1, for example, is a COI listing FAQS as the insured.³ This COI shows that FAQS was covered by commercial general liability insurance for the period June 6, 2013, through June 6, 2014, with various limits ranging from \$5000 to \$6,000,000. This COI also shows that FAQS was covered by workers compensation insurance for the same time period with a limit of

³ TDI Ex. 1 at 762. As noted in some exhibits, e.g., TDI Ex. 5, FAQS also went by the name Assured Quality Systems. This PFD uses the acronym FAQS to describe either First Assured Quality Systems or Assured Quality Systems.

\$1,000,000 for each accident and disease. This COI lists separate policy numbers for the commercial general liability and the workers compensation insurance. Respondent explained, however, that the policy number columns in the COIs do not necessarily list the actual underlying insurance policy number underwritten by State Farm. In some cases, and particularly with regard to workers compensation and E&O coverage, the policy numbers were instead what Respondent referred to as “quote numbers.” According to Respondent, when he would prepare an application and COI for a client, the State Farm application that he would use to prepare the COI, referred to as the “NECHO” system, would generate a quote number to fill in the policy number column on the COI. If State Farm had already approved a type of policy for the client that was being renewed by State Farm, the policy number typically was the actual State Farm policy number. But if State Farm had not yet approved the application, the quote number was, according to Respondent, essentially a place holder pending final action by State Farm.

Respondent testified that State Farm audited his business in 2016-2017 and first focused on FAQs. All of the COIs in evidence related to FAQs listed both commercial general liability and workers compensation insurance coverage.⁴ The related underlying actual insurance policies, however, covered only commercial general liability situations—not workers compensation.⁵ Referring to the FAQs COI, Respondent conceded that he could understand why his client would think it was covered by workers compensation insurance when it was not.

Respondent testified that another client—Conrad Realty—requested commercial general liability and E&O insurance. Respondent prepared a COI that listed both coverages and submitted an application to State Farm, but State Farm declined to provide E&O coverage.⁶ Respondent stated that State Farm did not respond with its denial of E&O coverage for Conrad Realty for approximately 90 days after Respondent submitted the application. He testified that this delay, and many others, became a “huge problem” for all agents because State Farm was taking so long

⁴ TDI Exs. 1 at 762, 2 at 780, 3 at 682, 6 at 690, 7 at 776, and 9 at 758.

⁵ *E.g.*, TDI Exs. 4, 5, and 8.

⁶ TDI Ex. 12. During the hearing, Respondent conceded that the policy number for the E&O coverage listed on this COI was instead a “quote number,” and agreed that it is an “incorrect” policy number.

to respond its agents' applications. Ultimately, he testified that State Farm was taking on average about 45 days to respond to insurance applications during this time period, whereas in prior years the response time was two days. Respondent conceded that he was not communicating with Conrad Realty while waiting for State Farm to respond. He also did not inform Conrad Realty that State Farm had declined to underwrite the E&O insurance. Instead, he told Conrad Realty that it was covered by E&O insurance.

Respondent testified that he issued a number of COIs to Conrad Realty showing that it was covered by E&O insurance. He explained that this happened because if the original base template used to prepare the COI was wrong, the mistake could be carried forward into subsequent years. Respondent did not inform Conrad Realty that the policy number listed on the COI was not an actual policy number. Respondent testified that he thought Conrad Realty was covered for E&O because Respondent's office manager had not told him that State Farm had declined to underwrite his request for E&O coverage. But Respondent also conceded that he did not verify that E&O coverage was, or was not, in place. Conrad Realty paid all of its premiums for the coverages shown on the COI, including the E&O coverage.

In 2016, Conrad Realty submitted an E&O claim to State Farm based on a lawsuit filed against it involving a real estate transaction. But because State Farm had not underwritten E&O coverage for Conrad Realty, State Farm refused to back the claim. In this case, Respondent testified that when he realized that Conrad Realty was not covered for E&O, he submitted a claim under his own E&O policy to cover Conrad Realty's claim. Accordingly, Respondent thought that Conrad Realty had not suffered any monetary loss as a result of the client not having E&O coverage.

Commencing in 2014, Intangent requested that Respondent issue a policy that would include, among other things, E&O coverage and a commercial bond that would cover liability for criminal activity committed by the insured or its employees.⁷ In April 2015, at Intangent's request,

⁷ TDI Ex. 15, which lists "State Farm Fire and Casualty Company" as the sole insurer.

Respondent issued a COI to Flagstar Bank indicating that Intangent was covered for E&O and held a commercial bond.⁸ Respondent testified that he collected premiums for these coverages, and that Intangent would have reason to believe, based on the COIs issued in 2014 and 2015, that State Farm had underwritten these policies. Respondent conceded, however, that the information on the COIs was not correct because State Farm had declined both the E&O coverage and the commercial bond.

By 2017, Intangent realized that it was not covered by State Farm for all of the insurance policies stated on the COIs, that Respondent may have brokered some of the coverage through other insurance agencies, and that it had been paying premiums to State Farm for coverage that State Farm was not providing. State Farm, after investigating Intangent's inquiries, determined that Intangent had paid \$9,018 in premiums to Respondent (presumably for State Farm), but that State Farm had only appropriately "earned" \$1,928.83 in premiums for its actual coverage. State Farm responded to Intangent that "[s]ince there were no State Farm policies to which the remaining amount would apply, we will be returning the \$7,090.17 with interest."⁹ Documentary evidence confirms that Intangent was not covered by State Farm for some of the policies listed in its COIs.¹⁰

Nails Natura is a hair salon and day spa. There is confusion in both testimony and documentary evidence over some facts tangential to this case, but the core issue is whether Nails Natura was covered by workers compensation insurance at any time during its relationship with Respondent. Respondent explained that Nails Natura's owner, Mr. Vu, requested that Respondent provide workers compensation insurance while Mr. Vu had his leased business property painted. On the morning of that request, Respondent issued a COI to Mr. Vu's landlord showing that Nails Natura was covered by workers compensation and commercial general liability

⁸ TDI Ex. 17, which lists "State Farm Fire and Casualty Company" and "State Farm Mutual Insurance Company" as the sole insurers. This exhibit shows coverage for commercial general liability, including E&O liability, umbrella liability, workers compensation, and a commercial bond with coverage up to \$3 million.

⁹ TDI Ex. 19 at 1303.

¹⁰ TDI Ex. 19 at 1304-05, showing, among other things, that State Farm concluded that "[t]here has never been a professional liability [E&O policy] in force for Intangent USA Inc. with State Farm Specialty Products . . ." and "[t]here has never been a Commercial bond in force for Intangent USA Inc. with State Farm."

insurance.¹¹ But that afternoon, Mr. Vu called Respondent to tell him to cancel the workers compensation insurance because he had completed the painting without incident and no longer needed that type of insurance. Respondent called State Farm to cancel the workers compensation request, but was told that State Farm would not underwrite a one-day policy in any event so he would need to either cancel the request or pay for a 30-day policy. Respondent testified that, in this case, he was informed by someone at State Farm that State Farm would approve a workers compensation policy for Nails Natura, although Respondent did not have binding authority to issue workers compensation coverage. In subsequent communications with the landlord's property manager, Respondent stated that he had "removed the Workers Comp policy as it was recently cancelled since the construction work is finished."¹² Respondent conceded at the hearing that workers compensation had not been in place for Nails Natura, despite a COI issued to the landlord indicating that such insurance was in place.¹³ Respondent also conceded that informing the property manager that the workers compensation policy was "recently cancelled" was an incorrect statement because the policy had never been issued in the first place.

Testimony involving Williams Design and its COIs centered in part on whether the business personal property coverage for the client should have been \$100,000 as stated in the declaration, rather than \$300,000 as stated in the COI.¹⁴ Respondent testified that this was a typographical error. He agreed that it is dishonest to knowingly make false statements, although he stated that he did not knowingly make false statements. Respondent also testified that he did not consider the policy number listed in a COI to be a material term because that number could change from year-to-year as the policy was renewed, and an agent would not need the policy

¹¹ TDI Ex. 23 at 1523.

¹² TDI Ex. 25 at 1535.

¹³ TDI Ex. 23 at 1523.

¹⁴ Compare TDI Ex. 26 (the declaration) at 179 with TDI Ex. 27 (the related COI) at 413. Although not addressed above, the same situation applied to FAQs (in addition to the misrepresentations of types of insurance coverage) wherein the FAQs COIs indicated that FAQs had \$3,000,000 in liability coverage when in fact it only had \$2,000,000 in liability coverage. Compare TDI Ex. 1 at 762 to TDI Ex. 5 at 432.

number to locate the correct declaration. He placed responsibility on the insured to ensure that the declaration stated the correct type and amount of insurance, even if the COI listed coverage that was different than found in the declaration. He also agreed that: (1) if an agent delivers a COI with incorrect information, it should be corrected as soon as the error is realized; (2) it is unfair to fail to communicate to an insured who has received a COI that information on the COI is not correct; and (3) he made mistakes in issuing COIs, but he did not believe that he knowingly made false statements.

On examination by his attorney, Respondent quoted the generic language at the top of each COI, which reads (in capital letters):

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder.¹⁵

Respondent emphasized that a COI “does not affirmatively or negatively amend, extend or alter the coverage” and that this language indicates that the COI is for information only and is not a contract. He testified that the COI is a “high level snap shot,” and he always advised his clients to review the insurance policy to make sure that they are covered by the insurance they requested. He explained that, commencing in 2012, State Farm began to consolidate all of its 45 Texas-wide offices into one office in Richardson, Texas. This consolidation led to long delays in informing agents whether their applications for insurance had been approved. Respondent stated that what had been a two-day response process began to take 40 to 60 days, and these delays made it more difficult for agents to determine whether there was a discrepancy between a COI and a related declaration. He described these years as “haywire.” By 2016, State Farm’s response time was down to about two weeks, but at no time had State Farm trained him or his employees on how to prepare a COI. Using his client FAQs as an example, Respondent testified that he might have issued 50 COIs in one year alone and, for all of his clients, he would have 400-500 COI requests

¹⁵ *E.g.*, TDI Ex. 1 at 762.

in a year. He estimated that between 2013 and 2016 he issued approximately 1500 COIs, but noted that the Department had found errors in only five COIs issued during that time period.

Regarding the Conrad Realty E&O situation, Respondent stated that confusion over whether Conrad Realty was covered by E&O arose because Conrad Realty was associated with a company referred to as “Hard Money Loans.” After Respondent requested E&O coverage for Conrad Realty, State Farm responded 45-days later indicating that it would not underwrite E&O coverage for Hard Money Loans, but Respondent did not know who Hard Money Loans was and thereby failed to make the connection that State Farm had declined to underwrite E&O for Conrad Realty. Subsequently, Conrad Realty was sued and attempted to invoke its E&O coverage, but because it was not covered for E&O, Respondent used his own E&O coverage to fund Conrad Realty’s defense. Respondent testified that he did not know that Conrad Realty was out any money as a result of these arrangements.

Similarly, State Farm took about 50 days to decline Respondent’s application for E&O coverage for Intangent. Because of the delay, Respondent placed the E&O policy with another underwriter, although the COIs indicate that Intangent had E&O coverage provided by State Farm.¹⁶ Respondent testified that he did not make any money off of this transaction.

As a result of the internal investigation conducted by Mr. John McDowall on behalf of State Farm, Respondent resigned from State Farm on May 8, 2017.¹⁷ State Farm officially notified the Department that it had terminated its relationship with Respondent in July 2017.¹⁸

¹⁶ *E.g.*, TDI Exs. 15 at 1308 and 17 at 1328.

¹⁷ Respondents Ex. 3.

¹⁸ TDI Ex. 32.

2. Testimony of John McDowall (State Farm)

Mr. McDowall has been conducting investigations as a certified fraud investigator for 26 years. He has worked at State Farm for six years as an audit consultant, where he oversees investigations. He interviewed Respondent in March of 2017 based on complaints from FAQS and Conrad Realty that the insureds did not have the insurance coverage they thought they had. The other three of the five insureds did not file complaints, but Mr. McDowall and his team discovered the discrepancies between their COIs and insurance policy applications while reviewing Respondent's information in the State Farm repository. Mr. McDowall's testimony does not differ materially from Respondent's regarding the discrepancies between the COIs and the insurance policies. He described his investigation and supported his Internal Audit Investigation Report.¹⁹

Mr. McDowall noted that not all of the numbers listed in the "policy number" columns of the COIs in evidence were State Farm policy numbers. He testified that Respondent told him that Respondent "made up" those numbers, and that Respondent had not referred to them as "quote numbers" during his investigation.

Mr. McDowall also testified that he could not find an application from Respondent to State Farm asking that State Farm underwrite workers compensation insurance for FAQS. He stated that it would be "unusual" for State Farm to not have retained a copy of an application that Respondent states he had submitted. Mr. McDowall testified that Respondent told him he was not sure he had submitted the application. Respondent stated that he had intended to submit an application but may not have done so, and he intended to let FAQS know that they did not have workers compensation coverage, but they might not have known that they did not have such coverage.

¹⁹ TDI Ex. 31.

As to Conrad Realty, Mr. McDowall testified that State Farm data showed that State Farm declined to provide E&O coverage because of Conrad Realty's business operations, and that this coverage was declined within a day after the application was submitted. Mr. McDowall stated that Respondent answered that he made up the policy number stated in the Conrad Realty COI because he was busy and "churning and burning." Respondent attributed his action as a need to provide good customer service. Respondent told Mr. McDowall that he was aware that Conrad Realty did not have E&O coverage, but he was too embarrassed to inform his client that they were not covered and he somehow "got in his mind" that Conrad Realty had E&O coverage through some other means.

Regarding the E&O issue with Intangent, Respondent admitted to Mr. McDowall that he had made mistakes, but he did not want the client to leave. Mr. McDowall confirmed that Respondent did not have bind authority for E&O coverage. As with Conrad Realty, Mr. McDowall testified that the State Farm records showed that it had declined Respondent's application for E&O coverage for Intangent within a day of the date the application was filed.

Regarding the workers compensation issues with Nails Natura, Respondent told Mr. McDowall that "Mr. Vu understood there was no workers compensation coverage so Nails Natura could not make a claim." Respondent informed Mr. Vu's landlord that Nails Natura had workers compensation coverage as a "customer service" to his client, but conceded to Mr. McDowall that the landlord probably relied on the COI indicating that workers compensation coverage was in effect.

Regarding Williams Design, Respondent told Mr. McDowall that he had made up the policy number, and it had "become a habit out of customer service." Mr. McDowall testified that it is acceptable to inform a party that certain types of insurance are or will be in effect if the agent is authorized to bind coverage, but it is not acceptable to provide such assurances if the agent does not have bind authority and the coverage does not exist. Respondent acknowledged to Mr. McDowall that "it had become a habit – giving certificates for policies that were not in place." Respondent also informed Mr. McDowall that the profitability of his business was not meeting his expectations.

Mr. McDowall testified that Respondent estimated that 30 to 40 percent of his commercial line of business had fictitious or incorrect information. Mr. McDowall did not investigate every policy issued on behalf of Respondent because to do so, in his words, would have been too time consuming and not an effective use of resources.

When asked whether the disclaimer at the top of each COI was clear, Mr. McDowall responded that it is clear and these COIs are relied on by third parties and the insureds during the course of business. Mr. McDowall conceded that he did not record his interviews during investigations and that his report (TDI Exhibit 31) was prepared for State Farm and not for the Department.

Mr. McDowall testified that Respondent's answers changed during the course of his investigation: at first he made excuses for the errors and discrepancies, like the fast pace of business and challenges he faced, but as the investigation progressed, Respondent simply re-stated that he made up the policy numbers. Mr. McDowall agreed that the actual insurance policy will prevail over a COI.

3. Testimony of Brittany Stovall (FAQS)

Ms. Stovall is the FAQS Chief Executive Officer. FAQS started using Respondent as its insurance agent in 2013 or 2014, and requested multiple insurance policies. Ms. Stovall testified that she believed FAQS had workers compensation coverage from State Farm based on documentation from Respondent, who confirmed to her that FAQS was covered. She stated that she relied on the information in the COIs and provided them to her customers who requested them. She paid her premiums monthly from 2013 through 2016. In December 2016, a FAQS employee filed a workers compensation claim in the range of \$1000 to \$5000. Ms. Stovall became aware of the claim after normal work hours so, rather than calling Respondent, she called the State Farm 1-800 telephone number to initiate a policy claim. On that call, Ms. Stovall testified that she was informed that FAQS did not have workers compensation coverage with State Farm.

Ms. Stovall then contacted Respondent, who informed her that she did have workers compensation coverage and provided her with information to confirm with State Farm. Ms. Stovall called State Farm with the information provided by Respondent but was told by State Farm, again, that the policy she referenced did not exist and the policy number was not in the State Farm system. FAQS's company attorney contacted State Farm to discuss the situation. FAQS ultimately concluded that there was no workers compensation policy although it had been making annual premium payments for such a policy. As a result of this situation, Ms. Stovall testified that FAQS had to pay about \$3200 in attorney's fees, and was not able to reach a monetary settlement with State Farm, although State Farm apparently agreed to issue a temporary workers compensation policy to FAQS going forward while FAQS searched for an insurance company that would provide workers compensation coverage. Ms. Stovall testified that: FAQS had to pay the workers compensation claim out of pocket; she never told Respondent that FAQS did not want workers compensation coverage; she never told Respondent that FAQS wanted to cancel workers compensation coverage; and Respondent never communicated to FAQS that FAQS did not have workers compensation coverage. She also stated that FAQS would not have purchased insurance through Respondent if she had known that State Farm would not cover workers compensation. During the hearing, the Department stipulated that the State Farm insurance policies issued to FAQS did not list workers compensation coverage, although the COIs do.²⁰ Regarding two of the COIs (TDI Exhibits 6 and 9), Ms. Stovall testified that she did not rely on these COIs as proof of workers compensation coverage (although they both list workers compensation) and she instead relied on the documents she sent to State Farm. She stated that she did not rely on these COIs because workers compensation was vital to her business, so she made sure "they went through this requirement with [Respondent]." At the conclusion of her testimony she stated that she relied on documents from Respondent.

4. Testimony of Brent Conrad (Conrad Realty)

Brent Conrad was the owner of Conrad Realty when the incidents relevant to this case took place. Mr. Conrad testified that he requested general liability and E&O coverage for his real estate

²⁰ See TDI Exs. 4 through 9.

brokerage company. He believed he had obtained E&O coverage from State Farm based on documents he had signed and emails between him and Respondent indicating that he was covered, and on premiums he paid for all the coverage he thought he had. He recalled receiving a COI from Respondent, but may not have reviewed it in detail.

In October 2016, a hacker pretending to be a party on a real estate title company account sent money wiring instructions to a Conrad Realty agent. The agent authorized the money in the account to be forwarded to an account set up by the hacker. The actual seller to the transaction sued Conrad Realty for loss of the funds. Mr. Conrad testified that he contacted Respondent to file a claim, but someone affiliated with State Farm informed him that Conrad Realty did not have E&O coverage, which “was a shock to me.” Mr. Conrad stated that Respondent “went dark on us” by not returning voice mails or emails, so he began to communicate directly with State Farm regarding this matter. He testified that someone at State Farm told him something about “a box not being checked” and, in any event, there was no E&O coverage. As a result, Conrad Realty had to write a check for \$30,000 to resolve the lawsuit. He had counted on the E&O coverage because he considered his agent to have made an error by allowing a hacker to steal from the account. Mr. Conrad also testified that he had to hire a lawyer to handle his claim against State Farm. He stated he was not able to reach a resolution with Respondent, but that State Farm agreed to reimburse him for about 97% of his out-of-pocket costs.

Mr. Conrad testified that he was required by law to have E&O coverage and he never communicated to Respondent that he did not want that type of coverage. He also testified that Respondent never told him that he did not have E&O coverage and he was “led to believe” that he had that coverage at all times. Mr. Conrad stated that he would not have purchased insurance from Respondent if he knew he would not receive E&O coverage as part of the arrangement. He concluded that he does not know why he was not covered, but that he wrote checks for the coverage.

D. Analysis**1. Common-Law Fraud**

In its initial brief, Respondent argues that the legal standard to determine whether the Respondent engaged in “fraudulent . . . acts or practices” is to apply each element of common-law fraud.²¹ Relying on *Meyer v. Texas Dept. of Insurance (Meyer)*,²² Respondent states that those elements are:

- (1) a “material” representation was made;
- (2) the representation was false;
- (3) scienter as to the falsity of the representation at the time it was made, which may be satisfied with proof either that the speaker (a) had knowledge of the falsity, or (b) acted recklessly without knowledge of the truth and as a positive assertion;
- (4) the speaker made the representation with the intent that the other party should act upon it;
- (5) the party acted in reliance on the representation; and
- (6) the party thereby suffered injury.

Staff argues that the Department is not limited to the elements of common-law fraud; instead, when the Legislature revised the Insurance Code to its current language in 2001, it repealed previous authority that allowed for disciplinary action if an agent “has knowingly deceived or defrauded a policyholder.”²³ Staff argues that, among other things, the *scienter* requirement was removed and the Department is not confined to standards for fraud established in civil tort or criminal law. According to Staff:

²¹ Respondent Initial Brief at 2.

²² *Meyer v. Tex. Dep’t of Ins.*, No. 03–10–00642–CV, 2011 WL 5865240 at *2-3 (Tex. App. Nov. 23, 2011), *citing Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011).

²³ Staff Closing Argument (Initial Brief) at 8.

The commissioner is authorized to discipline an agent who makes untruthful statements, even if the agent did not knowingly do so or intend for anyone to rely on those statements. Likewise, there is no need to prove that anyone was harmed by relying on an agent's untrue statement or for the commissioner to exercise this disciplinary authority. Rather, the commissioner's authority is appropriately broad to align with the principle that honesty, trustworthiness, and reliability are the key characteristics upon which an insurance agent's qualifications are based.²⁴

To support these arguments, Staff relies on 28 Texas Administrative Code § 1.502(a) and (c), which provide:

(a) The special nature of the relationship between licensees, insurance companies . . . and the public with respect to insurance and related businesses regulated by the department requires that the public place trust in and reliance upon such persons due to the complex and varied nature of insurance, [and] insurance-related products

(c) The department considers it very important that license and authorization holders and applicants . . . be honest, trustworthy, and reliable.

The flaw with Staff's argument is that it is predicated on rule revisions that were adopted in 2001, whereas the *Meyer* case was decided ten years later in 2011. While Staff may be correct in what some legislators or the Department intended when the Insurance Code was amended in 2001, that intent is not reflected in *Meyer*. Notably, however, the text in *Meyer* immediately preceding the six elements of fraud listed above states: "The Commissioner [of Insurance] concluded, and the parties do not dispute, that 'fraudulent . . . acts or practices' *could be* established with proof of each element of common-law fraud."²⁵ The use of the words "could be" indicates that "fraudulent or [dishonest] acts or practices" can also be established by other less strict elements or analyses. If different facts applied in this case, the ALJ might find that "fraudulent or dishonest acts or practices" could be shown under the broader analysis proposed by Staff. In this case, however, it is not necessary to apply a less strict standard because the evidence shows that the Department has shown each of the six *Meyer* fraud elements in at least two of the five cases. Aside from "fraudulent or dishonest acts or practices," Staff has shown that Respondent willfully

²⁴ Staff Initial Brief at 9.

²⁵ *Meyer* at *2 (emphasis added).

violated an insurance law of this state, and materially misrepresented the terms and conditions of an insurance policy or contract.

2. Applying the Law to the Facts

Under Insurance Code § 4005.101(b), the Department may deny an application or discipline a license holder if the Department determines that the license holder has: willfully violated an insurance law of the state; engaged in fraudulent or dishonest acts or practices; or materially misrepresented the terms and conditions of an insurance policy or contract.

With regard to FAQs and Conrad Realty and the “fraudulent or dishonest acts or practices” proscription,²⁶ the evidence shows Respondent: (1) made a material representation that the client had either workers compensation or E&O coverage; (2) this representation was false because the clients did not have the types of insurance the COIs indicated that they had; (3) knew that the representation was false (or acted recklessly with regard to the representation because he did not have bind authorization for those types of insurance); (4) intended FAQs and Conrad Realty to rely on his representations because they made clear to him that they needed that type of coverage; (5) FAQs and Conrad Realty relied on the COIs and/or representations from Respondent;²⁷ and (6) FAQs and Conrad Realty suffered injury when claims were filed against them that were not initially and fully covered by State Farm. In addition to the fraud/dishonest practice proscription, in the FAQs and Conrad Realty situation, Respondent also materially misrepresented the terms and conditions of an insurance policy or contract.²⁸

The *Meyers* fraud elements also apply to the Intangent and Nails Natura situations, except that the insureds did not suffer monetary injury as a result of not having coverage they thought

²⁶ Insurance Code § 4005.101(b)(5).

²⁷ It must logically be presumed that the clients’ business partners relied on the COIs because they requested the COIs for proof that the clients held the requisite insurance coverages.

²⁸ Insurance Code § 4005.101(b)(6).

they had. Regardless, Respondent materially misrepresented coverage to these two clients even if no injury occurred.²⁹

The Williams Design situation does not appear to involve fraud or a dishonest practice. Respondent explained that the differences in the amount of coverage was simply a typographical error that was not caught and corrected. Although the stated amounts were different, this does not appear to be a situation in which Respondent knowingly misrepresented coverage amounts to a client and the record does not show that the clients were harmed by these discrepancies. In light of the more serious misrepresentations involving the other four clients, it is not necessary to address the Williams Design case in more detail.³⁰

The ALJ is not persuaded by Respondent's arguments that the disclaimer at the top of each COI absolves him of responsibility to provide accurate information, or that it was up to his clients to ensure that the insurance policy, when it arrived, matched coverage shown on the related COI. As stated in the disclaimer, a COI is not a contract. But it is a representation of what should be in the actual insurance policy, and Respondent's clients and their business partners clearly relied on the information contained in a COI as a "snapshot" of what is covered. Respondent also places too much reliance on the second sentence in the disclaimer: "This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below." The ALJ agrees—the COI does not amend or alter the actual policy; but it nevertheless is expected to be an accurate representation of what is in the more detailed policy. Respondent's arguments regarding the non-binding, or no-reliance, effect of the COIs renders them essentially meaningless. The COIs are not meaningless because they were provided, upon request, to show what coverages apply so that the client or its business partner can be assured that the client is covered. The evidence shows that the insureds and their business partners relied on COIs.

²⁹ *Id.*

³⁰ This conclusion also applies to FAQs where COI listed the general liability coverage limit at \$3,000,000, but the actual insurance policy listed this limit as \$2,000,000.

Shifting blame to the clients for not ensuring that the underlying policy matches the snapshot statements in the COI is similarly unpersuasive. Testimony by FAQs and Conrad Realty shows that they relied on what they were told by Respondent, as represented in the COIs. Respondent, as the insurance agent, was equally, if not more so, expected to ensure that the documents he provided to his clients and their partners were accurate. Respondent did not exercise this diligence in the cases in evidence. The evidence shows that Respondent knew that representations on the COIs were not accurate, because he knew that he did not have authority to bind workers compensation or E&O insurance, and he knew or should have known that State Farm had denied such coverages in the cases addressed in evidence.

In addition to the fraud/dishonest practices and misrepresentation proscriptions contained in Insurance Code § 4005.101(b), the evidence shows, as set out above, that Respondent also violated Insurance Code §§ 541.003 and .061 by misleading reasonably prudent persons with untrue statements of material fact leading them to false conclusions, and failing to correct those untrue statements.

The ALJ concludes that Staff has met its burden of proof by showing, by a preponderance of evidence, that Respondent violated the provisions of the Insurance Code set out above with regard to the discrepancies between the COIs and the underlying insurance policies in four of the five situations addressed at the hearing and in evidence. In those four situations, Respondent misrepresented material facts by providing to clients (or their business partners) COIs that did not reflect actual insurance coverage. The fifth situation, involving a difference between the amount of coverage stated on a COI as compared to its underlying insurance policy, may have been an inadvertent typographical error that does not reflect an intentional misrepresentation of a material fact, unlike the other four situations. For these reasons, Staff has met its burden to show that Respondent's insurance agent license should be revoked.

III. FINDINGS OF FACT

1. Robert Duff Bourassa (Respondent) holds a general lines agent license issued by the Texas Department of Insurance (Department) with qualifications for both property and casualty lines and life and health lines.
2. Between July 2009 and June 2017, Respondent was appointed as an insurance agent by State Farm General Insurance Company, State Farm Mutual Automobile Insurance Company of Texas, State Farm Fire and Casualty Company, State Farm Life Insurance Company, State Farm Lloyds, and State Farm Mutual Automobile Insurance Company (collectively State Farm).
3. State Farm canceled Respondent's appointment for cause in 2017 after Respondent admitted issuing false certificates of insurance.
4. Among other concerns, State Farm identified five business policy holders to whom and with whom Respondent made misrepresentations about the insurance coverages Respondent had bound.

First Assured Quality Systems

5. In 2013, Respondent delivered a premium quote to First Assured Quality Systems, LLC (FAQS) and issued a certificate of insurance (COI) with three separate policy numbers for general liability, workers compensation, and umbrella coverages.
6. At about the time Respondent delivered the premium quote to FAQS, including workers compensation, Respondent submitted an application to State Farm on behalf of FAQS, but the application only requested general liability coverage.
7. State Farm issued a policy to FAQS for general liability coverage only; State Farm did not issue either workers compensation or umbrella coverages to FAQS.
8. The policy numbers Respondent presented on the FAQS COIs were not the actual State Farm policy numbers, they instead were "quote numbers." Respondent listed these same quote numbers on each subsequent COI he issued to FAQS through May 2015, which indicated coverage through May 2016 that FAQS did not actually have.
9. In 2016, FAQS made a claim against the workers compensation coverage and learned that it did not have coverage.
10. FAQS relied on the COIs.
11. FAQS spent approximately \$3,200 in attorney's fees addressing the workers compensation claim, which was not reimbursed by State Farm.

12. The COIs Respondent delivered to FAQs also misrepresented that FAQs had \$3,000,000 of liability coverage, when FAQs was only insured up to \$2,000,000 for liability.

Conrad Realty

13. In January 2013, Respondent submitted an application to State Farm for both general liability and errors and omissions (E&O) coverages for Conrad Realty.
14. State Farm declined to offer E&O coverage to Conrad Realty because of an underwriting concern and communicated the denial to Respondent.
15. Respondent did not inform Conrad Realty that State Farm refused to issue E&O coverage. Instead, Respondent issued a COI showing that Conrad Realty had both general liability and E&O coverages, including a fictitious policy number (instead, referred to by Respondent as a “quote number,” which is not an actual policy number) for the E&O coverage.
16. Respondent issued another COI to Conrad Realty in 2016 misrepresenting that E&O coverage was in place.
17. Conrad Realty relied on the COIs.
18. After Conrad Realty submitted an E&O claim to State Farm in 2016, Conrad Realty discovered that it did not have E&O coverage. Respondent then made a claim against his own professional liability insurance, asserting that he made an error because he believed the general liability policy provided Conrad Realty with E&O coverage
19. Respondent, however, had separately applied for the E&O coverage for Conrad Realty, indicating on the COI that Conrad Realty was covered for E&O, and included a fictitious policy number for the E&O coverage on the COI.
20. Conrad Realty did not fully recover its monetary losses after resolution of the E&O claim with State Farm, and had to hire an attorney to negotiate resolution of the claim with State Farm

Intangent

21. In July 2014, Respondent submitted an application to State Farm for E&O coverage for Intangent USA, Inc. (Intangent). State Farm declined to provide the coverage because of the nature of the applicant’s potential liability.
22. Respondent did not inform Intangent that the E&O coverage was denied, and instead issued a COI showing that Intangent had E&O coverage with a fictitious policy number.
23. Intangent’s secured lender required Intangent to have E&O coverage. Respondent

delivered to the lender COIs indicating E&O coverage that Respondent knew or should have known would be relied on by the lender.

24. Respondent also misrepresented to Intangent that State Farm had issued Intangent a commercial bond, and provided a fictitious policy number on a COI for the commercial bond, although State Farm had declined to underwrite the bond.
25. In August 2017, Intangent asked State Farm to provide a loss run for all of the State Farm policies it believed it had purchased from Respondent since August 2014.
26. The loss run documentation revealed that Intangent did not have all of the coverages listed on the COIs provided to Intangent by Respondent.
27. In December 2017, State Farm returned \$7,122.17 to Intangent after concluding that Intangent had paid premiums to State Farm in that amount that were not covered by State Farm.

Nails Natura

28. In March 2015, Respondent communicated with a client, Nails Natura, Inc., and the client's landlord. Respondent understood that the landlord required Nails Natura to hold workers compensation coverage.
29. Respondent provided to the landlord a COI indicating that Nails Natura had workers compensation coverage, although State Farm had not, at that time, agreed to underwrite workers compensation for Nails Natura.
30. Respondent knew or should have known that the landlord would rely on the inaccurate COI.

Williams Design

31. In February 2016, Respondent delivered a COI to the secured lender of a customer, Williams Design, Inc., (Williams Design) representing that Williams Design had hazard insurance for the secured property.
32. The COI delivered to the lender misrepresented that Williams Design had \$300,000 of personal property coverage. In fact, Williams Design had only \$100,000 of personal property coverage.

Procedural History

33. On July 30, 2019, the Department filed its original Notice of Hearing against Respondent.

34. The Notice of Hearing stated a time, date, and location for the commencement of a hearing on the merits in this docket.
35. In addition to the time, date, and location, the Notice of Hearing contained a statement of the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the Notice of Hearing or petition filed by the state agency.
36. On September 11, 2019, State Office of Administrative Hearings (SOAH) Order No. 1 continued the hearing on the merits to February 10, 2020.
37. The hearing on the merits commenced on February 10, 2020. Administrative Law Judge Steven Neinast convened the hearing at SOAH's hearing facilities in Austin, Texas. Department staff attorney Casey Seeboth represented the Department. Attorney Frank King represented the Respondent.
38. On March 10, 2020, the Department and Respondent filed initial briefs (also referred to as closing arguments). On March 24, 2020, the Department and Respondent filed reply briefs (also referred to as responses to closing arguments). The record closed on March 24, 2020.

IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Ins. Code (Insurance Code) §§ 4001.002, .105 and 4005.101, 102.
2. SOAH has authority to hear this matter and issue a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003; Insurance Code § 4005.104.
3. Respondent received timely and sufficient notice of the hearing. Tex. Gov't Code ch. 2001; Tex. Ins. Code § 4005.104(b).
4. The Department may deny a license application or discipline a license holder if the license holder violates, among other provisions, Insurance Code § 4005.101(b)(1), (5), or (6).
5. Respondent violated Insurance Code § 4005.101(b) by: willfully violating an insurance law of this state; engaging in fraudulent or dishonest acts or practices; and materially misrepresenting the terms and conditions of an insurance policy or contract.
6. Respondent violated Insurance Code §§ 541.003 and .061 by, respectively, misleading reasonably prudent persons with untrue statements of material fact leading them to false conclusions, and by failing to correct those untrue statements.

7. Based on his violations of the Insurance Code, the Department should revoke Respondent's insurance agent license.

SIGNED April 9, 2020.



**STEVEN H. NEINAST
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

2020-6494

ACCEPTED
454-19-6470
6/17/2020 9:44 AM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Donnie Roland, CLERK

Exhibit B



FILED
454-19-6470
6/16/2020 4:45 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Donnie Roland, CLERK

State Office of Administrative Hearings

Kristofer Monson
Chief Administrative Law Judge

June 16, 2020

Kent Sullivan
Commissioner of Insurance
Texas Department of Insurance
333 Guadalupe, Tower 1, 13th Floor, Mail Code 113-2A
Austin, Texas 78714

VIA E-FILE TEXAS

RE: Docket No. 454-19-6470.C; *Texas Department of Insurance v. Robert Duff Bourassa*

Dear Commissioner Sullivan:

The undersigned Administrative Law Judge (ALJ) has reviewed the Exceptions to the Proposal for Decision (PFD) filed by Robert Bourassa (Respondent) on May 29, 2020, and the Reply to Respondent's Exceptions (Reply) filed by the Texas Department of Insurance Staff (Staff) on June 11, 2020. Respondent's Exceptions contend that Respondent did not commit fraud or violate Texas insurance laws and requests, in the alternative to license revocation, that Respondent be reprimanded and prohibited from issuing Certificates of Insurance (COIs). Staff's Reply disputes Respondent's Exceptions and accurately recounts the facts of this case. Neither Respondent's Exceptions nor Staff's Reply offer additional considerations that were not already considered and addressed in the PFD. Based on a review of these two pleadings, the ALJ does not propose any revisions to the PFD issued on April 9, 2020.

On May 29, 2020, Respondent also filed a letter from his current employer, Hotchkiss Insurance, which addresses Respondent's character, family life and community involvement, and requests an alternative punishment of a reprimand and prohibition from issuing COIs. Staff correctly notes that it did

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not have the opportunity to cross-examine the author of the letter. Respondent filed the letter over two months after the record closed in this docket; it is not in the record of this case.

SIGNED June 16, 2020.



**STEVEN H. NEINAST
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

SN/lc

cc: Casey Seeboth, Staff Attorney, Texas Department of Insurance, 333 Guadalupe, Tower 1, 13th Floor, Austin, Texas 78701 **VIA E-FILE TEXAS**
Tony Bertolino, 3101 Bee Cave Road, Suite 270, Austin, TX - **VIA E-FILE TEXAS**

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