

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)	
SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 09-4714PL
)	
CLYDE JANNER HOLLIDAY, III,)	
)	
Respondent.)	
)	
_____)	
DEPARTMENT OF FINANCIAL)	
SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 09-5323PL
)	
CLYDE JANNER HOLLIDAY, IV,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in these cases on January 28 and February 1 and 22, 2010, by video teleconference in Tallahassee and Lakeland, Florida, and on June 30, 2010, in Lakeland, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David J. Busch, Esquire
Melinda Hilton Butler, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondents: Sarah H. Dennis, Esquire
411 Lithia Pinecrest Road
Brandon, Florida 33511

STATEMENT OF THE ISSUES

The issues in this case are whether Respondents violated Subsections 626.611(7), 626.611(9), 626.611(10), and 626.611(13), Florida Statutes (2008),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On August 11, 2009, Petitioner, Department of Financial Services (Department), filed a six-count Administrative Complaint against Respondent, Clyde Janner Holliday, III (Mr. Holliday, III), and a six-count Administrative Complaint against Clyde Janner Holliday, IV (Mr. Holliday, IV). Both Administrative Complaints alleged that Respondents violated Subsections 626.611(7), 626.611(9), 626.611(10), and 626.611(13), Florida Statutes. Respondents requested administrative hearings, and the cases were forwarded to the Division of Administrative Hearings for assignment of an

Administrative Law Judge to conduct the final hearings. By Order dated October 15, 2009, the cases were consolidated.

The cases were scheduled for final hearing on December 9, and 10, 2009. The Department filed a motion to continue, which was granted, and the final hearing was rescheduled for January 28, 2010, but was continued because certain exhibits had been filed untimely. The final hearing reconvened but was not concluded on February 1, 2010. The final hearing was reconvened on February 22, 2010, and Petitioner's Exhibits 5 and 6 were admitted in evidence. The final hearing was not concluded on February 22, 2010, and, after several continuances, the final hearing was reconvened and concluded on June 30, 2010.

At the final hearing, the Department presented the deposition testimony of Carla Jinks, Donald Kaitz, Maria Castellanos, Joseph Valuntas, and Scott Garner. Petitioner's Exhibits 1 through 6 and 8 were admitted in evidence. Petitioner's Exhibit 7 was proffered, but not admitted. At the final hearing, Respondents testified on their own behalf. Respondents' Exhibit 1 was admitted in evidence.

The portions of the final hearing conducted on February 1, 2010, and June 30, 2010, were transcribed and were filed on February 24, 2010, and July 19, 2010. The parties requested that they be allowed to file their proposed recommended orders 45 days after the last Transcript was filed. Their request was

granted. The Department filed its Proposed Recommended Order on August 31, 2010. As of the date of this Recommended Order, Respondents have not filed a proposed recommended order.

FINDINGS OF FACT

1. At all times material to the allegations in the Administrative Complaints, Mr. Holliday, III, was a licensed Florida surplus lines (1-20) agent, a life and health (2-18) agent, a general lines (property and casualty) (2-20) agent, an independent adjuster (5-20), and agent in charge at International Brokerage and Surplus Lines, Inc. (IBSL). Mr. Holliday, III, had been associated with IBSL since its inception in 1993.

2. At all times material to the allegations in the Administrative Complaint, Mr. Holliday, IV, was licensed in Florida as a general lines (2-20) agent.

3. At all times material to the allegations in the Administrative Complaint, Mr. Holliday, III, and Mr. Holliday, IV, were officers and owners of IBSL. Most recently, Mr. Holliday, III, was the secretary of IBSL. He handled the underwriting and risk placement for the agency.

4. From approximately March 1993 to April 2009, Mr. Holliday, IV, was the president of IBSL. As president of IBSL, Mr. Holliday, IV's, duties included signing agreements which established IBSL's business function as that of a general

managing agent and signing agreements which empowered IBSL to collect premiums on behalf of insureds.

5. IBSL ceased doing business on May 1, 2009.

6. In the insurance industry, a common method of procuring insurance involves a retail producer, a wholesale broker, and a program manager. A customer desiring insurance contacts its local insurance agent, which is known as a retail producer, and applies for insurance. The retail producer has a producer agreement with a wholesale broker, who has a producer agreement with a program manager. The program manager represents insurance companies.

7. The retail producer sends the customer's application to the wholesale broker, and the wholesale broker contacts the program manager and forwards the application to the program manager. The program manager will provide a quote if the insurance company is willing to insure the customer. The quote is passed back to the customer via the wholesale broker and the retail producer. If the customer decides to take the insurance, the program manager will issue a binder to the wholesale broker, who will submit the binder to the retail producer. The wholesale broker will issue an invoice for the premium to the retail producer.

8. The program manager pays a commission to the wholesale broker pursuant to its producer agreement with the wholesale

broker, and the wholesale broker pays a commission to the retail producer pursuant to its producer agreement with the retail producer. When the retail producer sends the premium payment to the wholesale broker, the retail producer will deduct its commission. The wholesale broker sends the premium amount to the program manager less the wholesale broker's commission.

9. If the customer is unable to pay the entire amount of the premium, part of the premium may be financed through a premium finance company. The premium finance company may pay the premium to the retail producer or to the wholesale broker.

10. International Transportation & Marine Agency, Inc. (ITMA), is a program manager and is engaged in the business of selling, brokering, and servicing certain lines of policies of insurance written or issued by insurance companies. ITMA is a program manager for Pennsylvania Manufacturers Insurance Association (Pennsylvania Manufacturers), an insurance company.

11. IBSL, a wholesale broker, entered into a producer's contract with ITMA on January 4, 2008. Wimberly Agency, Incorporated (Wimberly), is a retail producer located in Ringgold, Louisiana. In 2008, Wimberly had a producer's agreement with IBSL.

12. Carla Jinks (Ms. Jinks) is the administrative manager for Wimberly. In October 2008, R.L. Carter Trucking (Carter) was a customer of Wimberly and applied for motor truck cargo

insurance with Wimberly. Wimberly submitted an application to IBSL and requested that coverage be bound effective October 28, 2008, for Carter.

13. IBSL contacted ITMA and received a binder for a policy with Pennsylvania Manufacturers. The cost of the policy was \$9,500.00 plus a policy fee of \$135.00 for a total of \$9,635.00. Carter paid Wimberly \$2,500.00 as a down payment and financed the remainder of the cost with Southern Premium Finance, LLC, who paid the financed portion directly to Wimberly. Wimberly deducted a ten percent commission of \$950.00 and sent the remainder, \$8,635.00 to IBSL. The check was deposited to IBSL's clearing account.

14. On January 22, 2009, Carter contacted Ms. Jinks and advised that he had received a notice of cancellation effective January 22, 2009, due to non-payment to Pennsylvania Manufacturers. On the same date, Ms. Jinks received a facsimile transmission from IBSL, attaching the notice of cancellation and stating: "There was some confusion with the payment we send [sic] and we are working on getting it reinstated."

15. There were some e-mails between Wimberly and Mr. Holliday, III, concerning the placement of coverage with another company. IBSL was unable to place coverage for Carter. By e-mail dated January 30, 2009, Ms. Jinks advised Mr. Holliday, III, that she had been able to place coverage for

Carter and requested a return of the premium paid on a pro rata basis. She advised Mr. Holliday, III, that the return premium should be \$7,651.35. By e-mail dated January 30, 2009, Mr. Holliday, III, stated:

We will tender the return as quickly as it is processed by accounting. I do sorely regret the loss of this account, and our inability to get the Travelers quote agreed on a timely basis.

16. By February 19, 2009, Wimberly had not received the return premium from IBSL. Ms. Jinks sent an e-mail to Mr. Holliday, III, on February 19, 2009, asking that the return premium be rushed to Wimberly so that it could be used to pay for the replacement policy. As of the date of Ms. Jinks' deposition on November 16, 2009, neither Mr. Holliday, III; Mr. Holliday, IV; nor IBSL had given the return premium to Wimberly.

17. K.V. Carrier Services, Inc. (K.V.), is a retail producer located in Medley, Florida. In 2007, K.V. and IBSL entered into a business arrangement with IBSL. Under the arrangement, K.V. was the retailer, IBSL was the wholesale broker, ITMA was the program manager, and Pennsylvania Manufacturers was the insurance company.

18. K.V. collected the down payments for the policy premiums from its customers and sent the down payments to IBSL. The remainder of the premiums were financed by financing

companies, who sent the remainder of the premiums to IBSL. IBSL was supposed to send the monies paid for the premiums to ITMA.

19. The following customers made down payments to K.V. and financed the remainder of their premiums with a financing company.

- (1) E & E Trucking Service
- (2) OD Transport, Inc.
- (3) Fermin Balzaldia
- (4) Eduardo Bravo
- (5) Carlos Ramirez
- (6) Edwin Bello
- (7) Janet Rodriguez
- (8) UTL, Inc.
- (9) Prestige Transport USA
- (10) JNL Transportation, Inc.
- (11) Valdir Santos
- (12) DJ Express
- (13) PL Fast Carrier
- (14) Ysis Transport

K.V. sent the down payments for these customers to IBSL. The financing company sent the remainder of the premiums for these customers to IBSL. The total amount of premiums sent to IBSL for these customers was \$19,768.45. IBSL did not send the premium payments for these customers to ITMA. The policies for these customers were cancelled for non-payment.

20. K.V. found another company that was willing to insure K.V.'s customers. K.V. paid the down payments for the new policies from its own funds, hoping that IBSL would repay the finance company with any unearned premiums that would be returned to IBSL as a result of the cancellations.

21. ITMA sent an invoice called an Account Current Statement to IBSL for the business conducted in the month of November 2008. The total amount owed to ITMA was listed as \$55,116.32. The invoice included the premium for the policy issued for Carter, less IBSL's commission. The premiums for the policies issued to Eduardo Bravo; Fermin Bazaldua; JNL Transportation, Inc.; Janet Rodriguez; OD Transport, Inc.; and Prestige Transport USA were also included in the Account Current Statement for the business that IBSL conducted in November. IBSL was required to pay the \$55,116.32 by December 15, 2008, but did not do so.

22. ITMA received a check from IBSL dated December 31, 2008, for \$25,000.00. A notation on the check indicated that it was a partial payment for the November business. The check was unallocated, meaning IBSL did not state to which premiums the partial payment should be applied. Mr. Holliday, III, claimed that IBSL had sent a bordereaux along with the check showing to which policies the payment applied. Mr. Holliday, III's, testimony is not credited.

23. Donald Kaitz (Mr. Kaitz), the president of ITMA, communicated with one of the Respondents, who advised Mr. Kaitz that he needed another week or so to collect some premiums from his retail producers. On January 12, 2009, ITMA received a telephone call from IBSL, stating that IBSL could not pay the

balance owed to ITMA and that ITMA should take whatever action it felt necessary.

24. As a result of the communication from IBSL, ITMA issued notices of policy cancellation on all applicable policies listed in the Account Current Statement which was to be paid on December 15, 2008. Copies of the cancellation notices were sent to the insureds and IBSL.

25. ITMA issued pro rata return premiums based on the number of days that each policy had been in effect. The return premiums were sent to IBSL by a check for \$18,790.06. Additionally, ITMA sent IBSL a list of the policies that had been cancelled, showing the earned premiums which had been deducted from the \$25,000.00.

26. IBSL received and retained a net of \$30,116.32, which was owed to ITMA. This amount is derived by deducting the \$25,000.00, which IBSL sent to ITMA, from the \$55,116.32, which was owed to ITMA.

27. By letter dated April 2, 2009, IBSL sent K.V. a check for \$524.80, which stated:

We have totaled all amounts owing to IBSL by KV Carrier Service, and we have totaled all pro rated commissions owing by IBSL to KV Carrier Services for the benefit of your clients and have included our check # 1025 in the final amount of \$524.80 to settle the account.

All net unearned premiums for other than unearned commissions which are funded herein you must contact the insurance carriers involved and request payment under the provisions of Florida Statutes #627.7283.

28. Federal Motor Carriers Risk Retention Group, Incorporated (FMC), is an insurance company, which sells commercial auto liability insurance, specifically targeted to intermediate and long-haul trucking companies. CBIP Management, Incorporated (CBIP), is a managing general underwriter for FMC.

29. FMC had an agreement effective June 1, 2008, with IBSL, allowing IBSL to act as a general agent for FMC. As a general agent for FMC, IBSL was given the authority to accept risk on behalf of FMC. IBSL was given a fiduciary responsibility to accept insurance applications, provide quotes, and bind coverage. Once IBSL binds a policy for FMC, FMC issues a policy and is responsible for the risk. IBSL would receive the down payment from the retail agency, and, in most cases, the finance company would pay the balance of the premium directly to IBSL.

30. The agreement between FMC and IBSL provided that IBSL was to provide FMC a monthly report of premiums billed and collected, less the agreed commission. The report was due by the 15th of the month following the reported month. In turn, FMC was to issue a statement for the balance due, and IBSL was required to pay the balance due within 15 days of the mailing of

the statement following the month in which the policy was written.

31. In August 2008, FMC began to notice that IBSL was selling premiums lower than FMC's rating guidelines. IBSL owed FMC approximately \$186,000.00, which was due on August 15, 2008. IBSL sent FMC a check, which was returned for insufficient funds. FMC contacted IBSL and was assured that the check was returned due to a clerical error and an error by the bank. Assurances were given to FMC that funds would be transferred to FMC the following day; however, FMC did not receive payment until five days later.

32. In September 2008, Joseph Valuntas (Mr. Valuntas), the chief operating officer for FMC, paid a visit to Mr. Holliday, III, and Mr. Holliday, IV. Mr. Valuntas expressed his concerns about the delay in receiving payment in August. He also pointed out that IBSL had taken some risks which were not rated properly and that there were some risks in which IBSL was not following the underwriting guidelines.

33. After his visit with the Hollidays, Mr. Valuntas wrote a letter to IBSL, restricting IBSL to writing in Florida and limiting the amount of gross written premium to no more than \$100,000.00 per month. IBSL did not adhere to Mr. Valuntas' instructions. An example of IBSL's conduct involved the writing of a policy for Miami Sunshine Transfer, which is a risk

category designated as public delivery. Public delivery was not a standard that FMC insured and, as such, was not covered by FMC's reinsurance.

34. Beginning on or about September 21, 2008, FMC began getting complaints from policyholders and retail agents about cancellations of policies that had been paid timely and in full. Although the retail agents had paid the premiums in full to IBSL, IBSL had not forwarded the premiums to FMC.

35. By October 2008, IBSL owed FMC approximately \$120,000.00 in past due premiums. FMC officially terminated the IBSL agreement in October 2008. IBSL sued FMC for breach of contract.

36. On December 22, 2008, FMC received a check from IBSL in the amount of \$25,122.80, but IBSL did not specify what premiums were being paid by the check.

37. From February 1, 2006, through November 20, 2008, IBSL had a business relationship with Markel International Insurance Company Limited (Markel), an entity for which IBSL was writing insurance. IBSL was a coverholder for Markel, meaning that IBSL could produce insurance business for Markel and had the authority to collect and process premiums and bind insurance on Markel's behalf.

38. Once the premiums were collected by IBSL, they were to be reported to Markel, and, within a maximum of 45 days, IBSL

was to remit to Markel the aggregate gross written premiums less IBSL's commission.

39. T. Scott Garner (Mr. Garner) is an expert auditor and financial analyst who currently works for Northshore International Insurance Services (Northshore), an insurance and reinsurance consulting firm. Markel retained Mr. Garner to determine the amount of money that IBSL should have sent to Markel for business transacted by IBSL for the period between February 1, 2006, and November 20, 2008.

40. In doing his analysis, Mr. Garner used the bordereauxs which IBSL prepared and provided to Markel. Bordereauxs are monthly billing reports or accounts receivable reports. Mr. Garner also used data from Omni, which is a software system that was used by IBSL. Mr. Garner used the following procedure to determine what IBSL owed Markel. He determined how much risk IBSL wrote during the time period, that is, the gross written premium. He identified the amount of money that Markel had received from IBSL for the time period. Next he determined the amount that should have been received from IBSL, the gross written premiums minus IBSL's commissions. He compared what should have been remitted to Markel with the amount that was actually received by Markel.

41. Based on his analysis, Mr. Garner calculated that IBSL owed Markel \$1,208,656.61. Mr. Garner's analysis is credited.

42. Respondent submitted a FLSO Compliance Review Summary, which was done by the Florida Surplus Lines Office. At the final hearing, Mr. Holliday, III, viewed the report to mean that Markel was incorrect in the amount of money that was owed to it by IBSL. The report does not indicate that the policies on which the premium variances were noted were policies issued by Markel. Additionally, in his review, Mr. Garner eliminated duplicate transactions in determining the amount owed to Markel. The report did give a long list of policies, which should have been reported to Florida Surplus Lines Office, but IBSL had failed to report the policies.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

44. The Department has the burden to establish the allegations in the Administrative Complaints by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

45. The Department alleges that Respondents violated Subsections 626.611(7), 626.611(9), 626.611(10), and 626.611(13), Florida Statutes, which provide:

The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any

applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

* * *

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

* * *

(9) Fraudulent or dishonest practices in the conduct of business under the license or appointment.

(10) Misappropriation, conversion, or unlawful withholding of moneys belonging to insurers or insureds or beneficiaries or to others and received in conduct of business under the license or appointment.

* * *

(13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.

46. Section 626.734, Florida Statutes, provides:

Any general lines insurance agent who is an officer, director, or stockholder of an incorporated general lines insurance agency shall remain personally and fully liable and accountable for any wrongful acts, misconduct, or violations of any provisions of this code committed by such licensee or by any person under his or her direct supervision and control while acting on behalf of the corporation. Nothing in this section shall be construed to render any

person criminally liable or subject to any disciplinary proceedings for any act unless such person personally committed or knew or should have known of such act and of the facts constituting a violation of this chapter.

47. Mr. Holliday, III, and Mr. Holliday, IV, are general lines agents who are officers of an incorporated insurance agency, IBSL, and were regularly engaged in the operations of the insurance agency and interacted with representatives of Wimberly, K.V., Markel, FMC, and ITMA. As such, they are responsible for violations of Section 626.611, Florida Statutes, committed by them or the staff of IBSL.

48. The Department has established by clear and convincing evidence that Respondents violated Subsections 626.611(7), 626.611(9), 626.611(10), and 626.611(13), Florida Statutes, by the following actions: collecting premiums on behalf of Markel and not forwarding the premiums to Markel; collecting premiums on behalf of FMC and not forwarding the premiums to FMC; collecting premiums from Wimberly and the financing company who financed Carter's policy premiums and not forwarding those premiums to ITMA; collecting premiums from K.V. and the finance company financing the premiums for K.V.'s clients and not forwarding the premiums to ITMA; and collecting premiums owed to ITMA and not forwarding those premiums to ITMA. These violations were willful in that Respondents knew that the

premiums should have been forwarded to the appropriate insurance company or program and failed to do so.

49. The Department has proven the allegations in Counts I through V of the Administrative Complaints by clear and convincing evidence. No evidence was presented concerning the allegations in Count VI of the Administrative Complaints. Therefore, the Department has failed to established the violations alleged in Count VI.

50. Florida Administrative Code Rule 69B-231.040 provides the method for calculating the penalty when there are multiple grounds for discipline and provides:

(1) Penalty Per Count.

(a) The Department is authorized to find that multiple grounds exist under Sections 626.611 and 626.621, F.S., for disciplinary action against the licensee based upon a single count in an administrative complaint based upon a single act of misconduct by a licensee. However, for the purpose of this rule chapter, only the violation specifying the highest stated penalty will be considered for that count. The highest stated penalty thus established for each count is referred to as the "penalty per count".

(b) The requirement for a single highest stated penalty for each count in an administrative complaint shall be applicable regardless of the number or nature of the violations established in a single count of an administrative complaint.

(2) Total Penalty. Each penalty per count shall be added together and the sum shall be referred to as the "total penalty".

(3) Final Penalty.

(a) The final penalty which will be imposed against a licensee under these rules shall be the total penalty, as adjusted to take into consideration any aggravating or mitigating factors;

(b) The Department may convert the total penalty to an administrative fine and probation if the licensee has not previously been subjected to an administrative penalty and the current action does not involve a violation of Section 626.611, F.S.;

(c) The Department will consider the factors set forth in rule subsection 69B-231.160(1), F.A.C., in determining whether to convert the total penalty to an administrative fine and probation.

(d) In the event that the final penalty would exceed a suspension of twenty-four (24) months, the final penalty shall be revocation.

51. Florida Administrative Code Rule 69B-231.080(7) provides that the penalty for violating Subsection 626.611(7), Florida Statutes, is a six-month suspension. Florida Administrative Code Rule 69B-231.080(9) provides that the penalty for a violation of Subsection 626.611(9), Florida Statutes, is a nine-month suspension. Florida Administrative Code Rule 69B-231.080(10) provides that the penalty for a violation of Subsection 626.611(10), Florida Statutes, is a 12-month suspension. Florida Administrative Code Rule 69B-

231.080(13) provides that the penalty for a violation of Subsection 626.611(13), Florida Statutes, is a six-month suspension.

52. The highest penalty per count is a 12-month suspension; thus, the penalty per count is a 12-month suspension. The Department has established the violations in five counts. The total penalty is a 60-month suspension. However, based on Florida Administrative Code Rule 69B-231.040(d), the final penalty is revocation because the suspension exceeds 24 months.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Respondents committed the violations alleged in Counts I through V of the Administrative Complaints, dismissing Count VI of the Administrative Complaints, and revoking the licenses of Respondents.

DONE AND ENTERED this 15th day of October, 2010, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of October, 2010.

ENDNOTE

1/ Unless otherwise indicated, all references to the Florida
Statutes are to the 2008 version.

COPIES FURNISHED:

Sarah H. Dennis, Esquire
411 Lithia Pinecrest Road
Brandon, Florida 33511

David J. Busch, Esquire
Melinda Hilton Butler, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

Honorable Alex Sink
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Benjamin Diamond, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0307

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.