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Hearings Unit, DIC  
Patricia D. Petersen  
Chief Hearing Officer

STATE OF WASHINGTON  
OFFICE OF  
INSURANCE COMMISSIONER

In the Matter of

ABILITY INSURANCE COMPANY,

Respondent.

Docket No. 11-0088

ABILITY HEARING BRIEF

**I. INTRODUCTION**

This case is about the interpretation of the termination date of an insurance policy. The date is determined by a clear reading of the policy, regulations, common sense and established law.

OIC seeks severe sanctions against Respondent Ability Insurance Company ("Ability" or "Company"). OIC has the burden in this hearing of establishing the proper grounds for those orders. These sanctions are all based on OIC's demand that Ability reinstate Gladys White's policy. This underlying demand was without proper foundation for at least two reasons: (1) it was based on a legally incorrect reading of her policy and the WACs; (2) it overlooks the lack of any timely submission of medical evidence to qualify for the reinstatement provision in the policy.

OIC issued a Cease and Desist, stating violation of WAC 284-54-253, and Order of Suspension against Ability because Ability did not agree with OIC's incorrect determinations

ABILITY HEARING BRIEF - 1

**ORIGINAL**

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1 regarding a reinstatement period. The dispute in this matter is whether, upon non-payment of  
2 premium by the end of the grace period, the policy termination date is 1) the termination date  
3 as defined in the policy or 2) the end of the extended grace period. OIC's demand  
4 overlooked the lack of qualifying information provided, a requirement for the right to  
5 reinstate the policy. But, to the extent this case is about the order, not about Gladys White,  
6 the policy language is clear that the termination date is not variable. It is not changed by the  
7 grace period, and Ability correctly interpreted its policy.

9 Despite initially agreeing with Ability's reading of the policy and regulations, OIC  
10 took specific pains to find a "loophole" in an effort to obtain coverage at all costs. OIC  
11 created an arbitrary interpretation in order to find coverage and in the process fabricated new  
12 requirements not reflected in the plain language of the regulations or the policy.

13 Ability has requested a hearing on the OIC orders. OIC has also requested entry of  
14 another order, penalizing Ability \$10,000 for resisting OIC's demand. All three of OIC's  
15 orders should be reversed and/or denied.

## 16 **II. STATEMENT OF FACTS**

17 Ability issued a long-term care policy to Gladys E. White in 1999. The policy  
18 contains the following definitions:  
19

20 (3) Grace Period: Your premium must be paid on or before the date it is due  
21 or during the 31-day grace period that follows. Your policy stays in force  
22 during your grace period.

23 (12) Term of Coverage: Your coverage starts on the Policy Date at 12:01 a.m.  
24 standard time where you live. It ends at 12:01 a.m. on the same standard time  
25 on the first renewal date. Each time you renew your policy, the new term  
26 begins when the old term ends.

The policy contains the following reinstatement provision as Part M:

1 RESTORATION OF BENEFITS IN THE EVENT OF POLICY LAPSE DUE  
2 TO COGNITIVE IMPAIRMENT OR LOSS OF FUNCTIONAL  
3 CAPACITY. If coverage under this policy ends due to nonpayment of  
4 premium, you or any person acting on your behalf will have 5 months to  
5 request reinstatement of the policy on the grounds that you suffered from  
6 Cognitive Impairment or loss of functional capacity at the time of lapse. We  
7 will require the same evidence of Cognitive Impairment or loss of functional  
8 capacity that is require for eligibility for benefits under this policy. We also  
9 must receive the back premium from the date of default. If these conditions  
10 are met, we will reinstate the policy without evidence of insurability. The  
11 coverage will be at the same level that existed prior to the date of the lapse.  
12 This provision does not apply to a policy that terminated because you  
13 requested cancellation or because we paid the maximum dollar amount.

14 Exhibit 8, Gladys White policy, stamped ABILITY\_00001-16.

15 On August 27, 2007, Ms. White designated her daughter, Cheryl Silvernail, to receive  
16 notice of lapse or termination of the insurance policy for nonpayment of premium. Exhibit 8,  
17 Ability\_000088. In November of 2007, Ms. White had been specifically determined not to  
18 suffer cognitive impairment for purpose of eligibility. Exhibit 8, Ability\_00227-28.

19 Ms. White failed to pay her premium when it was due on February 7, 2009.  
20 According to her policy, Ms. White was granted a 31-day grace period. Ms. White received  
21 a Premium Notice, a Past Due Premium Notice, and a Final Premium Notice. Exhibit 8,  
22 Ability\_00017, 00018, and 00020. Pursuant to WAC 284-54-253, Ms. Silvernail was sent a  
23 third Party Advisor Notice on March 20, 2009. Ability\_00019. As reflected in the notice to  
24 Ms. Silvernail, Ability allowed a 35-day grace period, pursuant to WAC 284-54-253(1)(a) to  
25 pay the premium. *Id.* Both Ms. White and Ms. Silvernail were properly sent notices of non-  
26 payment

No payment was received for Ms. White's policy by the end of the extended grace  
period, April 24, 2009. Ability received no notice or submission of any kind during this time  
frame regarding possible cognitive impairment. Ms. White's policy was cancelled for non-

1 payment with the termination considered effective on the date the premium was due,  
2 February 7, 2009.

3         On August 6, 2009, Ms. Silvernail attempted to submit a claim for Gladys White.  
4 Ms. Silvernail was informed that Ms. White's policy had been cancelled for non-payment as  
5 of February 7, 2009.  
6

7         On August 9, 2010, Jack White, son of Gladys White, submitted an insurance  
8 question via the OIC online "Ask Mike" form. He pointed out in his submission that he had  
9 attended high school with Mike Kreidler.

10         OIC contacted Ability on August 12, 2010, requesting a response to the "Ask Mike"  
11 form sent by Jack White. There were several communications between Ability and OIC.  
12 OIC initially concluded Ability had acted appropriately and followed the regulations. *See*  
13 Exhibit 5.  
14

15         On September 24, 2010, OIC demanded that Ability reinstate Ms. White's policy,  
16 asserting the extended grace period did not end until April 19, 2009 (this date is based on a  
17 required grace period of 30 days; Ms. White was actually granted a 35 day grace period on  
18 March 20, 2009), the five month reinstatement period would start *after* April 19, 2009. This  
19 was the first time that anyone at OIC mentioned the five month reinstatement period to  
20 Ability which is triggered by cognitive impairment. WAC 284-54-210(2). No documents or  
21 other information were ever provided to Ability to adequately establish cognitive  
22 impairment. OIC's demand made no mention of that missing element for reinstatement.  
23

24         On October 4, 2010, Ability responded to OIC, stating its position that the extended  
25 grace period does not affect the termination date, the date from which the reinstatement  
26

1 period is calculated.

2 Ability did not reinstate the policy. OIC issued a Cease and Desist Order No. 11-  
3 0088 and Order No. 11-0089 Suspending Certificate of Authority on April 27, 2011. OIC  
4 now seeks another order imposing a \$10,000 fine. Ability timely requested this hearing.

5 **A. Timelines**

6 1. Dates and Notices

7  
8 1-9-2009 Premium notice sent.  
9 2-07-2009 Effective date of termination for non-payment. 5 month period begins.  
10 2-19-2009 Final premium notice sent.  
11 2-19-2009 Past due premium notice sent. 30-day lapse period begins.  
12 3-20-2009 Notice to alternate, Cheryl Silvernail sent. 35 day grace period begins.  
13 4-19-2009 *OIC claims lapse date.*  
14 4-24-2009 35 day grace period ends, policy terminated as of February 7, 2009 for  
15 non payment.  
16 7-07-2009 5 month period ends.  
17 7-25-2009 Gladys White receives care.  
18 8-04-2009 Cheryl Silvernail contacts Ability.  
19 8-06-2009 Primary claim for Gladys received; no documentation to satisfy  
20 requirements for reinstatement.  
21 8-31-2009 Letter of no coverage sent.  
22 9-08-2009 Primary claim sent again, still without any needed documentation to  
23 satisfy requirement for reinstatement.  
24 9-19-2009 *OIC claims 5 month period ends.*  
25 10-2-2009 Medical records received, documents do not establish cognitive  
26 impairment as required for reinstatement.  
10-31-2009 Ms. Silvernail informed of decision not to reinstate.

20 2. OIC Decision Making Excerpts

21 8-12-2010 Case assigned to Bianca Stoner, OIC compliance analyst.  
22 8-27-2010 Ms. Stoner discusses case with Dan, a compliance analyst with OIC  
23 for 20 years. Dan Halpin explained to her that the Ability policy  
24 restates WAC 284-54-253(2) which is not favorable to OIC's position.  
25 Dan suggests politely asking Ability to make an exception and  
26 reinstate the policy. Bianca notes that the Consumer (Jack White, Ms.  
White's son) went to high school with Mike Kreidler, so Mr. Halpin  
suggests discussing the case with Mary Childers, their supervisor.  
9-14-2010 Ability informed Ms. Stoner that a reinstatement and third party  
advisor notice was sent to Ms. Silvernail on 3-20-2009 and the notice

1 was not returned to the Company as undeliverable.  
2 9-15-2010 Ms. Stoner discussed the response with Ms. Childers. She noted "the  
3 Company did all that they were required to do. Ms. Childers asked for  
4 an email summary and that Ms. Childers would contact Sue Hedrick  
5 (Mike Kreidler's Assistant) "that this is a contract issue, the company  
6 has done all that they are required to do."  
7 9-15-2010 Ms. Stoner prepared a closing letter and closed the file.  
8 9-17-2010 Ms. Hedrick emailed Ms. Stoner and said she would mention the  
9 outcome to Mike.  
10 9-20-2010 Carol Sureau, attorney in the legal department, informed Ms. Stoner  
11 she would look into the case.  
12 9-20-2010 Ms Stoner reviewed the documents again as she was preparing to send  
13 them to Ms. Sureau. Ms. Stoner noted she "discovered a loophole: the  
14 lapse date should not have been before 4/20/09 because the company  
15 did not send the lapse notice to Ms. Silvernail until 3/30/09 and the  
16 WAC says that the policy cannot lapse until 30 days after the company  
17 says (sic) the notice to the designee." Ms. Stoner chose 4/20/09 as the  
18 start of the five month reinstatement period.  
19 10-04-2010 Ms. Stoner noted that Ms. Sureau was involved because the consumer  
20 went to high school with Mike.  
21 11-13-2010 The case was assigned to Alan Singer.

### 22 III. ARGUMENT

23 OIC has the burden to prove, by a preponderance of the evidence, the alleged factual  
24 basis for the orders issued. WAC 246-10-606. To meet this burden, OIC must establish that  
25 Ms. White, or her representative, timely provided adequate documentation from a health care  
26 provider to qualify for reinstatement. OIC cannot do this. First, the request to reinstate was  
not timely by a correct reading of the policy and applicable WACs. Second, the required  
documentation was never provided.

#### 27 A. Ability's Policy Complies With The Regulations

28 Ability's policy clearly stated the termination date. The Company followed the State  
29 regulations in interpreting the notice and termination provisions. OIC initially agreed with  
30 Ability's reading of the policy and the regulations. Only after several layers of reviews and a  
31 result oriented interpretation did OIC disagree. Ability's interpretation is reasonable and  
32 proper in light of its policy and the Washington Administrative Code ("WAC").

1 The purpose of WAC 284-54-283 is to help protect insureds from unintentional lapse  
2 by (1) establishing standards for notification of a designee to receive notice of lapse for  
3 nonpayment of premiums at least thirty days prior to the termination of coverage and (2) to  
4 provide for a limited right to reinstatement of coverage unintentionally lapsed by a person  
5 with a cognitive impairment or loss of functional capacity. See WAC 284-54-283. The  
6 notice requirement allows for an alternate to receive past due notice prior to cancellation.  
7 WAC 284-54-283(1)(a).

8 The regulation provides a five month period for reinstatement with proof of cognitive  
9 impairment:

10 Every insurer shall provide a limited right to reinstate coverage in the event of  
11 lapse or termination for nonpayment of premium, if the insurer is provided  
12 proof of the insured's cognitive impairment or loss of functional capacity and  
13 reinstatement is requested within the five months after the policy lapsed or  
terminated due to nonpayment of premium.

14 WAC 284-54-283(2) (emphasis added).

15 Ms. White was provided the proper notices pursuant to the regulation. The Company  
16 mailed the notice to the insured's designee, following the regulatory requirements, on March  
17 20, 2009. The reinstatement period ended July 7, 2009. Ms. Silvernail did not contact  
18 Ability until early August, 2009.

19 OIC's strained interpretation that the reinstatement period did not begin until after the  
20 extended grace period ran out is result-oriented and unsupported by the WAC or the policy  
21 language.

22 **B. Ability's Interpretation Is Correct; Gladys White's Policy Terminated**  
23 **On February 7, 2009 For Non-Payment**

24 The five month reinstatement period on Gladys White's policy lapsed before any  
25 request for reinstatement was made. This is determined as follows:  
26

- 1 • Under the terms of the policy it terminated on February 7th, pursuant to the
- 2 term of coverage, Section 12 under Part S, Policy Provisions.
- 3 • The grace period allowed under Section 3 of Part S does not change the
- 4 termination date of the policy.
- 5 • The policy provides for reinstatement in one of two methods, either under
- 6 Section S, Part 4 or under Section M if related to cognitive impairment.
- 7 Under Part M, Ms. White or someone acting on her behalf has five months to
- 8 request reinstatement of the policy. Evidence of cognitive impairment
- 9 sufficient to qualify for coverage under the policy is required for
- 10 reinstatement.
- 11 • All dates in the policy run from the policy date.
- 12 • WAC 284-54-253 allows the five month reinstatement period to run from
- 13 either the date of lapse or the date of termination. The WAC does not use
- 14 “and” nor does it include the language “the later of.”
- 15 • Gladys White and her representatives had five months within which to request
- 16 reinstatement. They did not do so.
- 17 • Even when they did request reinstatement, they did not request reinstatement
- 18 with the required evidence of cognitive impairment that would have been
- 19 sufficient for eligibility for benefits under the policy pursuant to Part M of the
- 20 policy.

21 The plain language of Gladys White’s policy is clear. The Term of Coverage  
22 definition states that coverage ends at 12:01 a.m. on the same standard time on the first  
23 renewal date. This date does not vary by grace period or unintentional lapse provisions. The  
24 date is constant and defined. When Gladys White failed to pay her premiums after the  
25 extended grace period, her policy was cancelled for non-payment effective on the renewal  
26 date, February 7, 2009. Ms. White’s reinstatement provision has no effect on the Term of  
Coverage.

The grace period begins on the Term of Coverage date. It is logical, consistent and  
reproducible to interpret the five month unintended lapse period to begin on the Term of  
Coverage date. Consistency is key; it is important that the insurers, the insureds, and OIC  
should all have the same understanding of when the five-month reinstatement period begins.

OIC’s interpretation makes calculation of the five month reinstatement period  
inconsistent and arbitrary, as illustrated by the facts of this case. OIC contends that the five

1 month period began on April 19, 2009. This is presumably based upon the regulation  
2 requirement of a 30 day grace period in the Final Notice, sent on March 20, 2009. But  
3 Ability granted Ms. White a 35 day grace period in the Final Notice. OIC's date of April 19,  
4 2009 is *unrelated to any policy or notice date*. OIC's interpretation would make it  
5 impossible for a consumer to determine the start date of the five-month reinstatement period.  
6 Calculation from the Term of Coverage date, however, is clear and consistent with the policy  
7 and the WAC.

8 OIC's interpretation would require Ability to grant a limited right of reinstatement to  
9 Ms. White or to another in her position if she requested reinstatement seven months and six  
10 days after her policy was terminated for non-payment. This modification was not bargained  
11 for and is not allowable under Washington case law. An insurer cannot be compelled to  
12 extend coverage beyond the insurance contract. *See, e.g., Coventry Assocs. v. Am. States*  
13 *Ins.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998) (stating that "[A]n insurer is [not] required to  
14 pay claims which are not covered by the contract or take other actions inconsistent with the  
15 contract"). "The underlying rationale is that an insurance company should not be required to  
16 pay for a loss for which it received no premium." *Saunders v. Lloyd's of London*, 113 Wn.2d  
17 330, 336, 779 P.2d 249 (1989).

18 **C. Ability's Interpretation Is Reasonable And Rational**

19 The reinstatement clause permits a limited right to reinstate coverage if proper proof  
20 is provided "within the five months after the policy lapsed or terminated due to nonpayment  
21 of premium." The regulation does not require both lapse or termination, or the later of the  
22 two. It clearly states "lapse or termination." The language is unambiguous. Either of the  
23 two events suffices as the trigger for the reinstatement period.

24 Ability has consistently stated that that Ms. White's policy terminated as of February  
25 7, 2009, once the grace period ended without further notification from the insured or her  
26 designee. It cannot have terminated on any other date because the Company had not

1 received payment for any coverage after February 7, 2009. OIC itself was convinced that the  
2 policy interpretation was accurate and reasonable when it was acknowledged by several  
3 people in the agency that there was nothing else to be done to find coverage other than to  
4 politely ask Ability to reinstate.

5 It took several reviews and interventions to find the “loophole” that allowed coverage  
6 and that occurred only after the file would have been closed had Mr. Kreidler not known the  
7 family.

8 At best OIC’s interpretation is strained. If it were accepted, then it would not be a  
9 five month limited right to reinstatement—depending on the situation, it would be a five  
10 month and some other unsubstantiated amount of time that would vary in each situation.  
11 This causes difficulties beyond Ms. White’s policy, and is unsupported by Washington law.  
12 If the termination date was any date other than February 7, 2009, OIC would be requiring  
13 insurers to provide coverage for which they have not received any premium, contrary to  
14 Washington law. *See Coventry, supra* and *Saunders, supra*.

15 Ability’s interpretation is clear and based on the plain language of the policy. OIC is  
16 wrong.

17 **D. The Five Month Reinstatement Period Was Never Triggered Here**

18 The Regulations require that:

19 Every insurer shall provide a limited right to reinstate coverage in the event of lapse  
20 or termination for nonpayment of premium, if the insurer is provided proof of the  
21 insured’s cognitive impairment or loss of functional capacity... WAC 284-54-254(2)

22 The limited right to reinstate coverage depends on receipt of 1) proof of cognitive  
23 impairment 2) within five months after the policy lapsed or terminated due to non payment.

24 *Id.*

25 OIC seemingly accepted the family’s representations and moved ahead acting as if  
26 Ms. White was cognitively impaired during this time period. At no time, under either time

1 line scenario, was Ability provided proof of Ms. White's cognitive impairment.

2 "The standard of proof of cognitive impairment or functional capacity shall be no  
3 more restrictive than the benefit eligibility criteria" for the same in the policy. WAC 284-54-  
4 254(2).

5 Payment of benefits eligibility under the policy requires a Doctor's showing of  
6 chronic illness. A chronically ill person has been certified by a Licensed Health Care  
7 Practitioner as:

- 8
- 9 (1) Being unable to perform (without Substantial Assistance from another  
10 individual) at least two Activities of Daily Living for a period of at  
11 least 90 days due to loss of functional capacity;
  - 12 (2) Having a level of disability similar (as determined under regulations  
13 prescribed by the Secretary in consultation with the Secretary of  
14 Health and Human Services) to the level of disability described in  
15 clause (1); or
  - 16 (3) Requiring substantial supervision to protect such individual from  
17 threats to health and safety due to severe Cognitive Impairment.

18 Part G, Policy.

19 Neither Ms. White nor her family ever provided any such evidence during the five  
20 month reinstatement period ending on July 7, 2009 or even by September 29, 2009 (the date  
21 OIC claims the reinstatement period ends). Indeed, even today, OIC has not provided and  
22 does not have adequate proof. The most OIC has is a letter from Dr. Mihali, dated March 21,  
23 2011 and it only states Ms. White demonstrated "mild cognitive impairment" in June 2009,  
24 which is inadequate proof. Regardless, this information was never conveyed to Ability. This  
25 establishes that as of April 24, 2009 the policy had terminated on February 7, 2009.

26 The five month reinstatement analysis should never have been part of this claim by  
OIC because the insured failed to meet the requisite criteria. Anecdotal information and/or

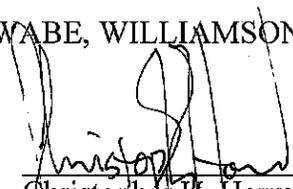
1 testimony provided by the family are insufficient to establish proof required by the policy  
2 and the legislation.

3 **IV. CONCLUSION**

4 The policy complies with the State regulations. The direct interpretation of the policy  
5 determines that the termination date is the date the policy expired. The termination date is  
6 not extended by any grace period. Even when late documents were submitted for  
7 consideration of cognitive impairment, they were insufficient to meet the requirements under  
8 the terms of the policy and the regulations.

9 Dated this 2nd day of August, 2011.

10 SCHWABE, WILLIAMSON & WYATT, P.C.

11  
12 By: 

13 Christopher M. Howard, WSBA #11074  
14 Virginia R. Nicholson, WSBA #39601  
15 Attorneys for Respondent  
16 Ability Insurance Company  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of August, 2011, I caused to be served the foregoing ABILITY HEARING BRIEF on the following party at the following address:

Alan Michael Singer  
Staff Attorney, Legal Affairs Division  
Office of the Insurance Commissioner  
State of Washington  
PO Box 40255  
Olympia WA 98504-0255

by:

- U.S. Postal Service, ordinary first class mail
- U.S. Postal Service, certified or registered mail, return receipt requested
- hand delivery
- facsimile
- electronic service
- other (specify) \_\_\_\_\_

Chante Tayler  
Chante Tayler