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OFFICE OF  
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BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER

In the Matter of	)	<b>Docket No. 11-0088 and 11-0089</b>
	)	
Ability Insurance Company,	)	<b>FINDINGS OF FACT, CONCLUSIONS</b>
	)	<b>OF LAW AND FINAL ORDER</b>
An Authorized Insurer and Respondent.	)	

**TO:** Ability Insurance Company  
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**COPY TO:** Mike Kreidler, Insurance Commissioner  
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Pursuant to RCW 34.04.090, 34.04.120, 48.04.010 and WAC 10-08-210, and after notice to all interested parties and persons, the above-entitled matter came on regularly for hearing before the Insurance Commissioner for the state of Washington (OIC) on August 3, 4 and 5, 2011, in Tumwater, Washington (August 3) and Seattle, Washington (August 4 and 5). All persons to be affected by the above-entitled matter were given the right to be present at such hearing during the giving of testimony, and had reasonable opportunity to inspect all documentary evidence. The Insurance Commissioner was represented by Alan Michael Singer, Esq., OIC Staff Attorney.



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Christopher H. Howard, Esq. and Virginia R. Nicholson, Esq. of Schwabe, Williamson & Wyatt, P.C. of Seattle, appeared representing Ability Insurance Company. After the hearing, additional motions and evidence were offered, closing briefs were filed through September 29, closing arguments were presented on September 30, 2012 and the final exhibit in this matter was filed, by agreement of the parties, on December 14, 2012.

**NATURE OF PROCEEDING**

The purpose of the hearing was to take testimony and evidence and hear arguments as to whether Ability Insurance Company violated provisions of RCW 48.84 (the Long Term Care Insurance Act), and regulations promulgated thereunder including WAC 284-54, warranting the disciplinary action imposed by the Insurance Commissioner. Specifically, First, on April 27, 2011, the Insurance Commissioner issued an Order to Cease and Desist, No. 11-0088, against Ability Insurance Company, its officers, directors, trustees, employees, agents, and affiliates, to immediately cease and desist from what the Insurance Commissioner alleges are violations of the Insurance Code. Specifically, the Insurance Commissioner asserts that Ability Insurance Company has been violating WAC 284-54-253, which requires insurers to reinstate long term care policies which have lapsed for nonpayment of premium when the insured (or designee) makes a request for reinstatement within five months after the policy has lapsed and provides proof of the insured's severe cognitive impairment or loss of functional capacity at the time of lapse. Second, on April 27, 2011, based upon the above allegation, the Insurance Commissioner issued an Order Suspending License, No. 11-0089, suspending the Washington Certificate of Authority of Ability Insurance Company for six months pursuant to terms specified therein. Ability Insurance Company and its affiliates filed their Demand for Hearing to contest both Orders, arguing that they have not been violating WAC 284-54-253 because, briefly, they are not required to reinstate their policies in the situation presented by the Insurance Commissioner. Subsequently, the Insurance Commissioner filed a Notice of Intent to Impose a Fine against Ability Insurance Company in the amount of at least \$10,000. By agreement of the parties, the undersigned consolidated these three actions based upon her determination that all three involve the same facts and legal issues.

**FINDINGS OF FACTS**

Having considered the evidence and arguments presented at the hearing, and the documents on file herein, the undersigned presiding officer designated to hear and determine this matter finds as follows:

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. The undersigned granted an extension of the time to file the Findings of Facts, Conclusions of Law and Final Order herein, pursuant to RCW 34.05.458(8), for good cause shown, most specifically based upon the significant number of motions and exhibits presented before, during and after the hearing, the number of facts involved and the complexity of the legal issues presented.

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2. Ability Insurance Company is a Nebraska domestic life and disability insurer, which has held a Certificate of Authority to act as a life and disability insurer in the state of Washington since 1972, WAOIC 796. Ability is wholly owned by Ability Resources, Inc., a U.S. holding company/U.S. service company. In turn, Ability Resources, Inc. is wholly owned by Ability Reinsurance Holdings Limited, a Bermuda holding company.

3. As background, Mutual Protective Insurance Company had a wholly owned subsidiary, Medico Life Insurance Company. Mutual Protective changed its name to Medico Insurance Company ("Medico") in 2003 and filed an endorsement changing the insurer's name on Gladys White's long term care insurance policy to Medico Insurance Company. [OIC Ex. 1.] In September 2007 Medico sold its subsidiary, Medico Life Insurance Company, to Ability Resources, Inc. In 2009 Medico Life Insurance Company (by then no longer affiliated with Medico) changed its name to Ability Insurance Company ("Ability"). Ability then purchased the long-term care insurance book of business from Medico. Medico no longer sells long term care policies. Although on or about 2009 Ability had purchased all of Medico's long term care policies, for some reason policyholders were allowed to choose whether to have a novation of their policies so they would reflect Ability as the insurer or (as with Gladys White) their policies could remain reflecting Medico as the insurer (although Ability had actually already bought all the policies from Medico). Since approximately 2009, however, whether they are Ability policies or "Medico" policies, Medico has virtually no financial interest in these policies and Ability collects all premiums on, pays all claims on, and otherwise administers all of the policies which it purchased from Medico. [Hearing Ex. 1, December 9, 2011 letter from Ability to the undersigned.] Therefore, while Gladys White's policy bears the name Mutual Protective, and some of the documents herein bear the sender's name as Medico Insurance Company instead of Ability, no issue was raised that all activities herein are attributable to Ability as the acquiring insurer and administrator. Further, for this reason White's policy and other documents are referred to herein as "the Ability policy" or "Ability's document." [It is noted that both 1) OIC Ex. 9, Ability's undated letter to White acknowledging receipt of her fiduciary documents and providing further instructions; and 2) OIC Ex. 10, Ability's August 31, 2009 letter advising White her policy had lapsed and she no longer had coverage, are both written on letterhead identifying the author as *Ability Insurance Company, administered on behalf of Medico Life Insurance Company* and are both unsigned (but identify the signatory as "Ability Insurance Company Customer Support" and "Claim Service Department" respectively) when in fact the insurer on White's policy was Mutual Protective which changed its name in 2003 to Medico Insurance Company. Medico Life Insurance Company has never been the insurer on White's policy.]

4. Gladys White ("White") is an 88 year old resident of Puyallup, Washington. In 1999, White purchased a long term care insurance policy from Mutual Protective Insurance Company. [OIC Ex. 1; Ability Ex. 8.] The terms of White's policy state that it is guaranteed renewable

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(subject to limited changes not pertinent herein) provided that the premium is paid within the time specified in the policy. (Although Mutual Protective changed its name to Medico in 2003, the name of the insurer on White's policy was not changed from Mutual Protective to Medico until a name change endorsement was filed on January 1, 2006; then, as above, in 2009 Medico sold White's policy to Ability.)

5. Since she bought her policy in August 1999, White's premiums for her policy were due and payable every 6 months in the amount of \$3,013.92. It is undisputed that up until the six-month premium which was due on February 8, 2009, White had always paid her premiums on time.

6. As required, on August 27, 2007 Ability sent White a designee form, which Ability had drafted, allowing White to designate one person to receive notice of lapse or termination of the policy for nonpayment of premium if the premium was not received by its due date. Even though this designee form was about what would happen in the event of unintentional lapse of the policy, e.g. due to cognitive or functional challenges, nowhere in this designee form did Ability inform White that the notice to designee must include a statement that the policy would not lapse until at least thirty days after the date the notice was mailed, and nowhere in this designee form did Ability advise White of her/designee's five-month limited right to reinstatement. Further, Ability's designee form was untitled and instead of using the accepted term "designee" used the term "Advisor" to indicate the designee (hereinafter the proper term "designee" is used). Accordingly, on September 16, 2007, White completed, signed and returned the designee form to Ability. [OIC Ex. 6.] In this designee form, White named her daughter, Cheryl Silvernail ("Silvernail") as her designee, and included Silvernail's current home address in Eatonville, WA and her telephone number. Other than including two area codes for Silvernail's telephone number - one being Silvernail's correct area code and one being White's area code - this designee form was correctly completed, signed and dated by White. [At the bottom of this designee form is included a small document entitled "Waiver of Protection Against Unintentional Lapse," which is not required to be offered. Apparently confused, White entered Silvernail's name in this section, however this small section has no significance herein.]

7. On January 9, 2009, Ability mailed White a Premium Notice to her home. This Premium Notice is undated, and stated that the due date for her next six-month premium was February 8, 2009. [Ability Ex. 8 @Ability\_00017 (hereinafter only the five-digit number of the Bates Stamp will be provided); Declaration of Mike Courtney, Ex. A to Ability's Reply to OIC's Supplemental Briefing.]

8. On February 19, 2009, Ability mailed a Past Due Premium Notice to White at her home. This Past Due Premium Notice is also undated, and advised White that *We must receive your premium within the next 30 days or your policy will lapse.* Because this Past Due Premium Notice was undated, it is unclear when the 30 days began and ended. [Ability Ex. 8 @00020; Declaration of Mike Courtney.]

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9. On March 20, 2009, Ability mailed a Final Premium Notice to White at her home. Once again, this Final Premium Notice is also undated. This Final Premium Notice advised *At this time we have not received your renewal premium and your policy is in its GRACE PERIOD. Your coverage will lapse if you don't act soon.* [Ability Ex. 8 @00018; Declaration of Mike Courtney.] Although this Final Premium Notice is undated, based on White's premium due date of February 8, one can assume that the grace period referred to in this Notice is the 31-day grace period provided for in White's policy, which means that under the terms of her policy her grace period would have run from February 9 to March 11. Therefore, as of March 20 when Ability mailed this Final Premium Notice to White she was not in her grace period because her grace period would have already terminated on March 11 under the terms of her policy.

10. On March 20, 2009, Ability also mailed a letter to Silvernail which was dated March 20, 2009. Although this letter bears no title, it is uncontested that this letter served as Ability's Notice of Lapse for Nonpayment of Premium ("March 20 Notice of Lapse") which as above is required to be sent to White's designee. Said March 20 Notice of Lapse advised Silvernail that White had named her as her designee (once again incorrectly called "Advisor") and that *the Advisor receives notice from us any time the policyholder's premium is 30 days past due.* [OIC Ex. 7; Declaration of Mike Courtney.] It is noted that as of March 20, White's premium was in fact 41 days past due and – except for a notation "Due: 02/08/2009" - from this March 20 Notice of Lapse the named designee would never have known of this potentially critical fact. This March 20 Notice of Lapse advised Silvernail that *If the premium is not received within 35 days from the date of this letter, the policy will lapse for nonpayment of premium.* [Emphasis added.] [OIC Ex. 7.] Ability included no information about the insured's/designee's 5-month limited right to reinstatement. Finally, Ability mailed this March 20 Notice of Lapse to Silvernail's Eatonville address provided on the designee form completed by White on September 16, 2007. [OIC Exs. 6, 7.]

11. Silvernail never received the March 20, 2009 Notice of Lapse which Ability mailed to her [OIC Ex. 7] because although at the time White completed the designee form in September 2007 the Eatonville, WA address provided was current, Silvernail moved to Orting, WA in July 2008. [Testimony of Silvernail.] In addition, this March 20 Notice of Lapse was not forwarded to Silvernail's new address. [Testimony of Silvernail; OIC Ex. 16.] Ability knew Silvernail was White's designee and had been given White's home, work and cellular telephone numbers fairly continuously from 2002 to 2007 because Silvernail had had extensive communications with Ability regarding a prior claim for the expenses for White's caregiver, which were initially paid by Ability until Ability after a time ceased paying these benefits. Even so, Ability did not attempt to contact Silvernail by telephone when White's premium remained unpaid. [Testimony of Silvernail; Testimony of Donald K. Lawler, J.D., M.B.A., Senior Vice President of Ability.] (In June 2007 Ability denied that prior claim based on its determination that White did not meet the criteria for coverage i.e., severe cognitive impairment or loss of functional ability.) [Testimony of Silvernail; OIC Ex. 16, Ability Ex. 8.] When Silvernail asked why Ability had not contacted her by telephone, Ability replied that they were not certain they still retained the

2002-2007 records because the insurance companies had made changes during that time. [Testimony of Silvernail; OIC Ex. 3.]

12. On or about July 23, 2009, White fell, resulting in injuries that required 2-3 days of hospitalization at Good Samaritan Hospital in Puyallup, WA, and on or about July 25 she entered a nursing home. On August 4, Silvernail telephoned Ability and spoke to Jerry in Ability's Claims Department, told Ability about White's condition, about her recent injury, about the fact that she was in a nursing home, and she asked Ability what she needed to do to start a claim. She gave Ability White's name and birth date. Ability checked White's file and gave Silvernail White's policy number. Ability did not mention to Silvernail that White's policy had lapsed and that there was no coverage. Ability also did not advise Silvernail about requesting reinstatement (presumably because Ability lead Silvernail to believe the policy was paid currently and was still in force). Therefore, in compliance with Ability's instructions, on August 6, Silvernail, as White's designee, filed a claim for the nursing home costs at the nursing home where White continued to reside, and once again provided Ability with her home, work and cellular telephone numbers along with her facsimile number. Silvernail's letter which accompanied this claim clearly included this information and the information that she was submitting the claim for White. In addition, Ability's claim form itself provides a line for "*Name of Person to Contact About this Claim:*" and Silvernail clearly entered her full name, current address in Orting, WA and current telephone number. [Testimony of Silvernail; OIC Exs. 8, 16.] Further, Ability's claim form included a question whether the insured has a diagnosis of dementia: Silvernail entered "no" but modified her answer with "symptoms." Ability's claim form then asks the claimant who has answered "yes" to the question about dementia to describe the insured's cognitive status and Silvernail stated "Doesn't remember to take medications - she is a diabetic...." [OIC Exs. 8, 16.]

13. Even though Ability 1) knew that Silvernail had filed the August 6 claim as White's designee and specifically included the information, as requested in Ability's claim form, that she was the person to contact about the claim (including her telephone numbers and current address on both her letter accompanying the claim form and in the claim form itself), and that White had not filed the claim herself; 2) knew from Silvernail's discussion with Ability (Jerry) on August 4 at least that there were issues concerning White's cognitive and functional impairment; 3) knew White had cognitive and functional impairment from the information Silvernail had written in Ability's August 6 claim form; 4) knew, at least by August 6 when she filed the claim what Silvernail's current address was; 5) had once again been given Silvernail's telephone numbers and fax number in the August 6 claim; 6) knew since September 2007 that Silvernail had been properly authorized as White's designee since that time; and 7) knew that White had entered the nursing home on July 25 and at least was still there on August 6, Ability chose to respond to Silvernail's August 6 claim by mailing its unsigned August 31 letter denying Silvernail's August 6 claim not to Silvernail, but to White - at White's home address. Said August 31 letter denied Silvernail's August 6 claim by simply stating "*This will acknowledge your recent correspondence. According to our records, your contract lapsed effective 2-7-2009; therefore, you have no benefits available. Please contact us if you have any additional questions*

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*concerning this matter. Sincerely, Claim Service Department* [unsigned]. [OIC Ex. 10; Ability Ex. 8@00135, Ability August 31, 2009 letter to White re August 6 claim.] White never received this August 31 letter because she was still in the nursing home.

14. On September 8, 2009, Silvernail filed a second claim for reimbursement for nursing home costs. [OIC Ex. 11; Ability Ex. 8@00137.] In her letter accompanying the claim, Silvernail clearly stated that White was now at an assisted living facility, and the staff there *are helping her with her prescription medications, insulin, bathing and dressing, etc.* and again provided her three current telephone numbers and address. [OIC Ex. 11, Silvernail's letter attached to her September 8 claim.] In the September 8 claim form, Silvernail, having received more detailed information about White's medical condition, specifically stated that although White could eat and transfer independently, she needed standby assistance with dressing, and toileting, and needed hands-on assistance with bathing, dementia, and help with remembering to take her medications. In answer to Ability's question whether White had dementia, Silvernail clearly responded "Yes" and when asked to describe White's cognitive status Silvernail specifically stated that White had problems with memory, judgment, ability to manage medications, safety concerns and stated that she had fallen several times at home. [OIC Ex. 11, Silvernail's September 8, 2009 claim at page 1; Ability Ex. 8@00137; Testimony of Silvernail.]

15. On September 9 or 10, 2009, while taking care of White's home because White continued to reside in the nursing home, Silvernail discovered Ability's August 31 letter which was addressed to White and mailed to White's home address. [Testimony of Silvernail; OIC Ex. 10, Ability's August 31 letter to White denying Silvernail's August 6 claim.] As found above, in this letter Ability denied the August 6 claim filed by Silvernail, and for the first time stated (although to White, not to Silvernail) that White's policy had lapsed on February 7, 2009 and therefore she had no benefits available. Ability did not provide White with any information concerning her contractual right to request reinstatement. [OIC Ex. 10.]

16. As found above, it was not until September 9 or 10, 2009, when Silvernail first discovered through happenstance that Ability had determined that White's policy had lapsed and there was no coverage, in spite of Silvernail's continuing communications with Ability apprising Ability of White's situation and cognitive and functional impairment, and in spite of Silvernail filing the August 6 claim which specifically stated – in her letter accompanying the claim form and in the claim form itself, that she was the person for Ability to contact about the claim, and providing her own address and telephone numbers. [Testimony of Silvernail; exhibits cited above.]

17. On September 11, 2009, in response to her discovery that Ability had determined White's policy had lapsed – and Ability's August 31 denial letter not including any information about White's/Silvernail's limited right to reinstatement - Silvernail contacted Ability by facsimile letter dated September 11 to inquire about the lapse. In this September 11 letter, Silvernail stated that White was *in an assisted living home because she has not been able to care for herself or her financial matters for quite some time.* [OIC Ex. 25, Silvernail's September 11 request for reinstatement; Testimony of Silvernail.]

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18. On September 15, 2009, in response to Silvernail's September 11 faxed inquiry, Ability (Sharon, in its Claims Department) telephoned Silvernail. During that conversation, Silvernail told Ability that White had not paid her premium because she had cognitive impairment, that White had been shredding bills, that she was hiding other correspondence, and other activities indicating that White had cognitive impairment. [Testimony of Silvernail; OIC Ex. 3, written statement of Jack R. White, son of White.] Because during that conversation Silvernail told Ability that White was cognitively impaired, as recorded in Ability's telephone notes [OIC Ex. 13], Ability advised Silvernail to gather and send documentation of White's cognitive impairment for review as to whether White's policy was eligible for reinstatement. [OIC Ex. 13, Ability's notes of September 15 conversation with Silvernail; Testimony of Silvernail.] Ability did not, however, tell Silvernail that Ability required her to pay the back premium by the end of the grace period in order to be considered for reinstatement even though on the date of their conversation it is arguable (see Conclusions below) that the policy was still in its grace period so she could still have done so had Ability told her this was necessary.

19. On September 30, in accordance with Ability's September 15 instructions, Silvernail faxed to Ability her letter dated September 30, with attached documentation showing evidence of cognitive and functional impairment. [OIC Ex. 14; Ability Ex. 8.] Among other documents submitted, which all pertained to White's current condition including cognitive and functional impairment, were 1) Silvernail's Written Statement documenting White's cognitive and functional impairment; 2) voluminous medical records from Good Samaritan Hospital, including certified health care personnel, stating that White had dementia and describing her condition; and 3) Written Statement from Alexandria Farmin, White's caregiver of three years. [OIC Ex. 14; Ability Ex. 8.] Ability acknowledges receiving this letter with attached documentation on October 2. [OIC Exs. 13, 27.] In addition, from 2002 to 2007 Silvernail had submitted documents documenting White's cognitive and functional impairment relative to her previous claim for costs of White's caregiver. [Ability Ex. 8.]

20. On October 12, 2009, Silvernail faxed the October nursing home bill to Ability and on October 25 contacted Ability because she had had no response to her claim. Ability responded that they had not received any correspondence. On October 27, Silvernail again faxed the bill to Ability. [Testimony of Silvernail; OIC Ex. 3.]

21. As found above, Silvernail provided evidence of White's cognitive and functional impairment 1) during her above-referenced August 4, 2009 telephone call to Ability; 2) in her August 6 claim and even more specifically in her September 8 claim; 3) in her September 15 discussion with Ability regarding her request for reinstatement; and 4) in the documents she submitted on September 30 pursuant to Ability's September 15 instructions. All of this information indicated that White had cognitive and functional impairment and was unable to take care of herself. Other specific occurrences were apparently clear to anyone observing her: e.g., White hid important letters, tax directives and bills rather than handling her business affairs carefully as had been her habit for years; White fell in the bathtub and remained there alone for

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many hours; White urinated on her floor fairly often causing danger; White urinated on the floor in Costco; White had become unable to shop or prepare meals for herself; White ordered enough consumer products from television advertising to nearly fill a room with unopened packages, yet failed to remember she had ordered them. These instances, among others, were either conveyed by Silvernail to Ability during their conversations, certainly witnessed by her caregiver during the pertinent period, and were readily observable should Ability have chosen to request further information or documentation from an outside source e.g., from the caregiver who Ability had paid to care for White in her home for a substantial period of time. [Testimony of Silvernail; Testimony of Alexandria Farmin, caregiver for White for 3 years; Testimony of Nancy Connelly, daughter of White; Testimony of Marci White, daughter-in-law of White; Testimony of Jack White, son of White; OIC Ex. 3, Declaration of Jack White; OIC Ex. 14.] However, Ability chose not to request further information and failed to ever tell Silvernail 1) that the documentation she submitted on September 30 was insufficient to show satisfactory proof of severe cognitive impairment or loss of functional capacity which is required for coverage; or 2) that Silvernail needed to submit further – or different – documentation; and 3) Ability chose not to inquire itself to verify White’s cognitive or functional impairment.

22. Instead of contacting Silvernail to ask for further, or different, documentation, on November 5, 2009, Donald K. Lawler, Senior Vice President of Ability Insurance Company (“Lawler”), who recently was made Secretary of the company [Testimony of Lawler], simply mailed a letter to Silvernail bearing what are apparently his initials. In this letter, Ability (Lawler) advised Silvernail that his letter was *in response to your letter of September 11...* [ignoring the fact that Silvernail had also submitted documentation of White’s cognitive and functional impairment on September 30 as Ability had instructed her to do], *that the [policy] had lapsed for non-payment of premium on February 7, 2009.* Ability further advised Silvernail that *Notice was given to White on three occasions at her address on file...* [and that an] (incorrectly labeled) *Third Party Advisor Notice* [correctly termed “Notice of Lapse to designee”] was sent to Silvernail at her Eatonville address. Ability (Lawler) further explained that while White’s policy *has a Restoration of Benefits provision in Part M on page 9, but the provision is limited to a five-month period in which to request reinstatement. The five-month period expired in July and we did not receive any contact from you [Silvernail] until August.* Ability never stated that a reason for Ability’s denial of Silvernail’s request for reinstatement was that she had not submitted sufficient proof of cognitive or functional impairment. [OIC Ex. 15, Ability’s November 5, 2009 letter to Silvernail.]

In response to Ability’s (Lawler) November 5, 2009 letter denying her request for reinstatement, on November 30 Silvernail mailed a letter to Ability (Lawler) asking that he reconsider his decision, advising him that that although she had moved from the Eatonville address Ability had had her three current telephone numbers on file for several years (since 2002) so she did not understand why Ability had not attempted to contact her by telephone as White’s designee; that in the past year and a half White had become even more cognitively impaired and described some events clearly indicating as much; and that she had no knowledge until September that the policy had lapsed; and she invited Ability (Lawler) to telephone her should he need any

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additional information. In addition, Silvernail specifically stated that White had not paid the premium due February 7 because she was cognitively impaired. [OIC Ex. 16, Silvernail's November 30 letter to Lawler.] Silvernail then mailed a check to Ability to pay White's premium due February 7.

On December 4, 2009, there being no evidence that Ability (Lawler) conducted any other inquiry into the situation, Ability (Lawler) denied Silvernail's request for reinstatement a second time, by simply arguing that in her November 30 request for reconsideration of his denial of reinstatement Silvernail had actually *confirm[ed] that [Ability] was not advised of your change of address* [ignoring her concern that Ability did not contact her by telephone] *and that although you were aware that Ms. White could not properly handle her affairs you did not intervene. Again, the policy has a Restoration of Benefits provision in Part M on page 9, but the provision is limited to a five-month period in which to request reinstatement. The five-month period expired in July and we did not receive any contact from you until August.* [OIC Ex. 17, Lawler's December 4 letter to Silvernail] and on January 13, 2010, Lawler returned Silvernail's undeposited check for the February 7, 2009 premium to her. [OIC Ex. 18.] Once again, Ability (Lawler) never stated that a reason for Ability's denial of Silvernail's request for reinstatement was that she had not submitted sufficient proof of cognitive or functional impairment. Further, Ability's December 4 assertion that Silvernail *was aware White could not handle her affairs and did not intervene*, is without merit; as found above, for several months up until that time Silvernail had provided Ability with substantial proof of White's cognitive and functional impairment even though Ability had never advised her that lack of proof was an issue.

23. As found above, since the beginning of this matter, and even to this date, Ability has never advised Silvernail (or White) that even part of its reason for denial of reinstatement was that Silvernail had not submitted sufficient proof of White's cognitive or functional impairment. As found above, Ability's only basis for denial of reinstatement was that it claimed that White's policy lapsed on February 8, 2009, the 5-month reinstatement period expired in July, and therefore Silvernail's September 11, 2009 request for reinstatement was filed too late. Indeed, even nearly one entire year after it denied reinstatement Ability was still not even suggesting that it had a second basis for denial, i.e. that Silvernail had submitted insufficient proof of cognitive or functional impairment: specifically, on August 9, 2010, White's son contacted the OIC for help with this situation. After the OIC contacted Ability on White's behalf, on October 4, 2010 once again Ability (Lawler) only responded solely that it had denied reinstatement on the sole basis that the policy had lapsed on February 7, 2009, the 5-month reinstatement period had expired in July, and so Silvernail's September 11 request for reinstatement was too late. [OIC Ex. 24, Ability's (Lawler) October 4, 2010 response to OIC.]

The first time Ability (Lawler) ever even suggested that it had a second reason for denial of reinstatement was on November 1, 2010, in its second letter to the OIC written when it became clear to Ability that the OIC was not satisfied with Ability's first reason for denial of reinstatement (that the request for reinstatement was filed too late). [OIC Ex. 25, OIC's October 21, 2010 letter to Ability refuting Ability's claim that the request for reinstatement was filed too

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late; OIC Ex. 26, Ability's November 1, 2010 response to OIC adding lack of proof as a second reason for denial of White's claim.] Indeed, even in Ability's November 1, 2010 letter to the OIC, Ability focused again only on its argument that the request for reinstatement was filed too late, and added a single sentence at the end: *We have never been provided proof of the insured's Cognitive Impairment or Loss of Functional Capacity either.*

24. On December 16, 2010, well over one year after it had actually denied reinstatement, was the first time Ability (Lawler) clearly asserted for the first time - and to the OIC and not Silvernail (or White) - a second reason for its denial of reinstatement: *should we accept the extended lapse date, the insured's representative was still required to provide proof of the insured's Cognitive Impairment or Loss of Functional Capacity and request reinstatement within 5 months after the policy lapsed or terminated due to nonpayment of premium. Ms. Silvernail did neither as required by WAC 284-54-253(2). Contrary to your letter, we were not told that nonpayment was because of the insured's Cognitive Impairment or Loss of Functional Capacity. Instead, we received a Claim Form for confinement due to a wrist fracture on July 28, 2009. Ms. White would not be considered a Chronically Ill individual [i.e., having severe cognitive impairment or lack of functional ability] as required by Part G of the policy for Benefit Eligibility.* [OIC Ex. 28, Ability's December 16, 2010 letter to OIC.]

25. Ability's (Lawler's) statements in its November 1, 2010 and December 16, 2010 letters to the OIC - to the effect that Ability had never been told of White's Cognitive Impairment and Loss of Functional Capacity - are simply fallacious. In fact, in summary of the above findings, on August 4, 2009 when Silvernail contacted Ability's Claims Department (Jerry) and discussed White's condition and circumstances; in her August 6 and September 9 claims where "dementia" and other directly relevant health conditions were stated; in her September 15 conversation with Ability; in her September 30 documentation from licensed health care practitioners and others submitted specifically to show proof of cognitive and functional impairment as Ability had instructed her to do; indeed even in her November 30, 2009 letter written directly to Mr. Lawler of Ability who reflected receipt of this letter and responded to it on December 4, Silvernail had continually submitted proof of White's cognitive and functional impairment. Ability first denied Silvernail's request for reinstatement on November 5, 2009, over one month after receiving substantial proof of White's severe cognitive impairment and loss of functional capacity. As also found above, after receiving all this proof, Ability literally never commented on it or told Silvernail that her proof was insufficient, that it needed more or different proof, and never advised that it denied her request due to lack of proof.

26. Toward the conclusion of the hearing herein, on August 4, 2011, the undersigned requested that Ability provide statistics on all Ability policies, both nationally and in Washington, that lapsed, and the amount of those lapsed policies 1) where no request for reinstatement was received; 2) where a request for reinstatement was received and was denied by Ability; and 3) where Ability's denial of reinstatement was challenged by the insured or the insured's designee, and the results of such challenges. At that time, Ability (Lawler) stated that Ability could produce such a report. However, on September 20, 2011, Ability sent a letter to

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the undersigned stating that *The number of policies that have lapsed nation-wide is – 17,436 policies* [the period during which these thousands of policies have lapsed it not stated], but that Ability does not independently track or tag reinstatements [even though Lawler testified that he himself (and possibly one other individual) reviews all requests for reinstatement which are challenged and possibly all requests for reinstatement all together], and that *Ability cannot pinpoint such policies and so they would have to be manually checked to prepare the requested report and Ability lacks the manpower to do this*; that Ability's IT person unfortunately *abruptly quit on September 12, 2011* just after Mr. Lawler had determined that he did not make any attempt to produce the report prior to quitting [but, apparently, after he somehow convinced Mr. Lawler that it was not possible to produce the report]. Ability's statement about providing this information is simply not credible. Further, not only is this information relevant to the issues herein, it is also the type of information which Ability must be able to provide to the OIC upon request. Further, while Ability submitted some information regarding Washington policies which it had furnished to the OIC in discovery, it failed to provide these statistics for the 5 year period the undersigned requested (and indeed failed to clearly state what period of time for which it was responding although it appears it might be for only a 2 year period); from the February 7 and 8, 2011 emails between Ability (Lawler) and counsel for the OIC on this issue which were submitted into evidence, it appears that it was difficult for the OIC to obtain adequate discovery from Ability on this issue including other reinstatement issues concerning Ability insureds Peggy Hunt and Helen Helm. Finally, the evidence submitted indicates that when providing even this information in discovery, Ability (Lawler) advised the OIC that it was possible that more than those identified by Ability to the OIC have been denied reinstatement because Ability simply is not able to identify with certainly all of those insureds (even Washington insureds, and certainly nationally) where requests for reinstatement from insureds/designees alleging cognitive and functional impairment have been denied.

27. The undersigned has carefully considered the above findings of facts, including documents and testimony submitted in this proceeding, very briefly, in Ability's handling of required notices of White's nonpayment of her February 8, 2009 premium (undated letters, unclear lapse dates); in its handling of White's/Silvernail's claims (e.g., not mailed to the designee clearly indicated in the claims); in its handling of Silvernail's request for reinstatement once she discovered that Ability had determined White's policy had lapsed; in declaring the reinstatement period to begin on a date an insured/designee would have no reasonable reason to believe be the correct date; in never informing Silvernail that a reason for denial was insufficient proof of cognitive or functional impairment (if indeed this was a reason); and in continually presenting new reasons for denial of reinstatement even over one entire year after it had actually denied reinstatement; among other actions found above. The undersigned has also observed Ability's remarkable failure to recognize the substantial injury its actions caused to this insured and her designee, and has observed how Ability's handling of its notification and reinstatement processes can only be found to be intentionally conducted in a manner which mislead White/Silvernail resulting in what Ability still insists should be a valid denial of benefits under the Ability policy. Considering the facts and Ability's response herein, as evidenced both in written evidence and in live testimony from Ability as well as White's representatives, it is

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hereby found that Ability's actions in handling White's/Silvernail's claims and requests for reinstatement were done in bad faith.

28. Kacy Scott, Administrative Regulations Analyst employed by the OIC, testified on behalf of the OIC regarding the history and purpose of WAC 284-54-253 and related matters. Ms. Scott presented her testimony in a detailed and credible manner and exhibited no apparent biases.

29. Alexandria Farmin, caregiver for White for at least three years during the pertinent period, testified on behalf of the OIC. Ms. Farmin presented her testimony in a detailed and credible manner and exhibited no apparent biases.

30. William C. White, son of White, testified on behalf of the OIC. Mr. White presented his testimony in a detailed and credible manner and exhibited no apparent biases.

31. Nancy Connelly, daughter of White, testified on behalf of the OIC. Ms. Connelly presented her testimony in a detailed and credible manner and exhibited no apparent biases.

32. Marci White, daughter-in-law of White, testified on behalf of the OIC. Ms. White presented her testimony in a detailed and credible manner and exhibited no apparent biases.

33. Cheri Silvernail, daughter of White, testified on behalf of the OIC. Ms. Silvernail presented her testimony in a detailed and credible manner and exhibited no apparent biases.

34. Donald K. Lawler, Senior Vice President of Ability Insurance Company, testified on behalf of Ability. Mr. Lawler, who as above was the individual responsible for evaluating and denying White's claims, request for reinstatement and perhaps as an afterthought determining that the documentation Silvernail submitted was insufficient, was remarkable. Mr. Lawler presented his testimony in a manner which was not credible based upon many of the facts he presented, e.g., that at the time he denied Silvernail's request for reinstatement she had only provided evidence that White had a broken wrist and Ability knew nothing about White's cognitive and functional impairments (discussed in findings above). His testimony was also not credible in his attitude toward evaluating and denying White's claims and request for reinstatement, e.g., he never recognized the lack of fairness or credibility in continuing to present new and different reasons for denial of White's claims and request for reinstatement even long past the time he denied them, and failed to recognize that Ability's process of notification and instructions to White and Silvernail was unreasonable, flawed, arguably calculated to result in denial of benefits to the elderly, cognitively and functionally impaired insured. As Mr. Lawler is responsible for overseeing this process, and indeed reviewing and denying claims/reinstatement, and because Ability informed the undersigned that it could not provide statistics on how many requests for reinstatement it received nationally and how many it denied, it is quite possible given Mr. Lawler's lack of credibility and persistence in denying White's/Silvernail's claims and request for reinstatement that there are far more requests being denied by Ability than are justified under applicable laws.

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35. Craig H. Bennion, Attorney at Law with Cozen O'Connor law firm in Seattle, testified as an expert witness on behalf of Ability. While Mr. Bennion presented his testimony in a clear and credible manner, he was not prepared for the depth of questioning presented to him, e.g., having only, by his own statement, reviewed limited case law and presenting information limited only to basic concepts related to the issues herein. Further, although he is clearly an experienced insurance attorney, perhaps because he had received limited instructions as to what information to prepare for, or for other reasons, Mr. Bennion seemed to change his own statements in certain areas of his testimony and seemed to be uncertain of his own statements in other areas. Because his testimony was limited as described, little weight was given to his testimony.

36. Based upon the above findings of facts, it is reasonable that the OIC's Order Suspending Certificate of Authority of Ability Insurance Company issued against Ability Insurance Company in this matter should be upheld. It is also reasonable that the OIC's Order to Cease and Desist issued on April 27, 2011 against Ability Insurance Company be upheld. Finally, it is reasonable that two fines should be imposed on Ability Insurance Company for its actions in twice considering and then denying Silvernail's request for reinstatement.

**CONCLUSIONS OF LAW**

Based upon the above Findings of Facts, it is hereby concluded,

1. Pursuant to Title 48 RCW, the OIC is authorized to regulate the business of insurance and enforce the insurance laws of Washington State in order to protect the public. Further, pursuant to Title 48 RCW and particularly 48.04 RCW, the Washington State Insurance Commissioner has jurisdiction over this matter, and has properly delegated to the undersigned the responsibility to conduct these proceedings and to enter the final decision herein. Pursuant to RCW 34.05.458(8), and for good cause shown, an extension of the time to file these Findings of Facts, Conclusions of Law and Final Order was granted and therefore these Findings of Facts, Conclusions of Law and Final Order are timely filed.

2. At all times pertinent hereto, Ability held a Certificate of Authority issued by the Washington State Insurance Commissioner to transact life and disability insurance business as an insurer in Washington State. As an authorized insurer, Ability is subject to Title 48 RCW, the Insurance Code of Washington, and regulations applicable thereto which are found in Chapter 284 WAC.

3. WAC 284-54-253 provides:

*The purpose of this section is to protect insureds from unintentional lapse by establishing standards for notification of a designee to receive notice of lapse for nonpayment of premiums at least thirty days prior to the termination of coverage*

*and to provide for a limited right to reinstatement of coverage unintentionally lapsed by a person with a cognitive impairment or loss of functional capacity. These are minimum standards and do not prevent an insurer from including benefits more favorable to the insured. This section applies to every insurer providing long-term care coverage to a resident of this state, which coverage is issued for delivery or renewed on or after January 1, 1996.*

*(1) Every insurer shall permit an insured to designate at least one additional person to receive notice of lapse or termination for nonpayment of premium, if the premium is not paid on or before its due date. The designation shall include the designee's full name and home address.*

*(a) The notice shall provide that the contract or certificate will not lapse until at least thirty days after the notice is mailed to the insured's designee.*

.....

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

4. The terms of White's policy pertaining to reinstatement are required to comply with WAC 284-54-253, and read as follows:

Part M: RESTORATION OF BENEFITS IN THE EVENT OF POLICY LAPSE DUE TO COGNITIVE IMPAIRMENT OR LOSS OF FUNCTIONAL CAPACITY. If coverage under this policy ends due to nonpayment of premium, you or any person acting on your behalf will have 5 months to request reinstatement of the policy on the grounds that you suffered from Cognitive Impairment or loss of functional capacity at the time of lapse. [Emphasis added.]

PART S, paragraph (3): Grace Period: Your premium must be paid on or before the date it is due or during the 31-day grace period that follows. Your policy stays in force during your grace period. [Emphasis added.]

**When did White's policy lapse?**

5. Ability asserts that the 5-month period in which to request reinstatement of White's policy ran from the date the policy lapsed, February 8, 2009, until July 8, 2009 and therefore it properly denied Silvernail's September 11, 2009 request for reinstatement on the grounds that it was filed too late. The OIC asserts that the 5-month period in which to request reinstatement of

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White's policy ran from the date the policy lapsed, April 24, 2009, until September 24, 2009 and therefore Silvernail's request for reinstatement was filed timely. The issue of whether Silvernail's request for reinstatement requires a determination of when White's policy lapsed due to nonpayment of premium:

- 1.) Ability argues that under its policy when the premium was not paid by its February 8 due date, and remained unpaid when the 31-day grace period expired on March 11, even though coverage did not end until March 11 the policy did not lapse on March 11. Instead, Ability argues, when the premium was not paid by March 11, coverage ended and the policy lapse date reverted back to the premium due date of February 8. Therefore, Ability argues, the reinstatement period ran from February 8 through July 8. Ability, however, ignores the specific terms of its own Past Due Premium Notice which Ability mailed to Silvernail on March 20, 2009.
- 2.) The OIC's argument includes the fact that, as found above, on March 20, 2009, Ability mailed a Past Due Premium Notice to Silvernail, which specifically stated that if the premium were not received within 35 days (i.e. by April 24), then the policy would lapse on that date (i.e. April 24), resulting in a 5-month reinstatement period of April 24 to September 24. Although it is incorrectly entitled "Past Due Premium Notice" and not correctly titled "Notice of Lapse to designee," this March 20 letter was the only letter which was mailed to White's designee pursuant to WAC 284-54-253 during the pertinent period; for this reason, together with Ability's own admission [OIC Ex. 27], it is hereby concluded that this March 20 letter mailed to Silvernail constituted Ability's Notice of Lapse to designee mailed to White's designee as required by WAC 284-54-253(1).

6. Ability's March 20, 2009 Notice of Lapse to designee stated:

March 20, 2009

*Dear Cheryl Silvernail,*

*You have been named as the Advisor to receive notification of this past due premium of Gladys E. White.*

*... The Advisor receives a notice from us any time the policyholder's premium is 30 days past due. ...*

*If the premium is not received within 35 days from the date of this letter, the policy will lapse for nonpayment of premium.* [Emphasis added.]

7. WAC 284-54-253(1), cited above, provides that Ability must have permitted White to designate Silvernail to receive Notice of Lapse for nonpayment of premium if the premium is not paid on or before its due date. Ability complied with this rule, and, as found above, in 2007 Ability allowed White to identify Silvernail as her designee (incorrectly designated as her "Advisor" in Ability's terminology) to receive the required Notice of Lapse. WAC 284-54-253(1) further requires that the Notice of Lapse must provide that the policy will not lapse until at least thirty days after the notice is mailed to the insured's designee. As found above, Ability did mail the required Notice of Lapse to White's designee Silvernail, and this Notice of Lapse bore a date of March 20, 2009. (While it need not be addressed herein, a concerning issue remains as to whether mailing the letter to Silvernail's old address and failing to follow up by telephoning Silvernail at one of several current telephone numbers she had provided to Ability – in this situation where Ability and Silvernail had fairly continuous communication for several years prior to this time – constituted good faith compliance with WAC 284-54-253.)

8. Ability's Notice of Lapse specifically stated that if the past due premium were not received within 35 days of the date of this letter then the policy would lapse for nonpayment of premium. Ability's Notice of Lapse is therefore in compliance with WAC 284-54-253(1), in that Ability allowed at least 30 days from the date of its Notice of Lapse to the actual date of lapse. Therefore, pursuant to the specific terms of Ability's March 20 Notice of Lapse mailed to Silvernail pursuant to WAC 284-54-253(1), if the past due premium payment were not received by April 24, 2009 (which date is 35 days after March 20, 2009, as stated in Ability's Notice of Lapse, and as authorized by WAC 284-54-253(1)), then the policy would lapse.

9. The OIC argues that, based upon applicable case law and other authorities discussed below, and also as specifically set forth in Ability's March 20, 2009 Notice of Lapse, when the premium was not paid by April 24, 2009, the policy would lapse on April 24, 2009. Ability argues, however, that if the OIC's analysis is correct (i.e., if Ability's March 20 Notice of Lapse should be considered) even though there was continuous coverage up until April 24, when the premium was not paid by April 24, the policy lapse date reverted back to the original premium due date of February 8, 2009. After careful analysis of both parties' oral arguments, briefs and case law presented on this issue of the lapse date, it is here concluded that, when the premium was not paid by April 24, 2009, the policy lapse date was April 24, 2009: the policy lapse date did not revert back to the premium due date of February 8, 2009. The most significant reasons for this conclusion are as follows:

- 1) WAC 284-54-253, which governs White's policy and this situation, provides that *The notice shall provide that the contract ... will not lapse until at least thirty days after the notice is mailed ....* Ability's March 20, 2009 letter to Silvernail states that if the premium is not paid within 35 days of March 20 then the policy will lapse .... "Will not lapse until" and "the policy will lapse" both indicate a future event and there is nothing to cause the reader to believe the time of lapse reverts to a date (February 8) which is earlier than the date coverage ends or a date which was before the Notice was even sent (March 20). Additionally, the policy itself states *Your policy stays in*

*force during your grace period and Your policy will lapse if you do not pay your premium before the end of the grace period.* Once again, this language indicates that the date of lapse will not occur until the end of the grace period (April 24). There are also two provisions in the policy concerning reinstatement, and in neither provision is there mention that the date of lapse reverts back to the date the premium was due, which would allow the insured or his/her designee to know s/he must calculate the 5-month reinstatement period from a date that is actually some 30 days prior to the date coverage ended for nonpayment of premium.

- 2) As the OIC argues, the following applicable rules of construction all support a conclusion that April 24, 2009 was the date of lapse:

(1) The terms set forth in the governing WAC 284-54-253, in White's policy and in the Notice of Lapse should be given their ordinary and common meaning;

(2) Ability argues there is no ambiguity and it is clear from its policy that the lapse date reverts back to the premium due date of February 8. However, it is here concluded that, the policy provisions are, at best, ambiguous, or are unambiguous in support of a determination that the lapse date is April 24. Considering, however, that the policy terms are ambiguous, the ambiguity must be construed against the drafter of the policy (Ability) and the contract should be given the meaning most favorable to the insured.

- 3) Case law supports a lapse date of April 24. Under Bushnell v. Medico Insurance Company, et al., cited by the OIC, 159 Wn. App. 874, 246 P.3d 856 (2011), the Court of Appeals, Div. 1 specifically construed a Medico long-term care policy, and concluded that when the contract language *unambiguously states that during the grace period 'your policy stays in force,' ... [a]ccordingly, ... coverage does not lapse until after the grace period.* Id. at 888. Contrary to Ability's argument that this language in Bushnell was simply dicta, this is not the case. Although it may not be the central holding of Bushnell, it is a critical part of the analysis made by the court in addressing an alternative argument made by Medico. Ability cites, most significantly, Safeco Ins. Co.v. Irish, 37 Wn. App. 554, 681 P.2d 1294 (1984), as the main case in support of its position. In Irish, the court does state that *the general rule is that failure of an insured to pay a renewal premium by the due date results in a lapse of coverage as of the last day of the policy period.* Id. at 558. However, Irish is easily distinguishable from the present case: it involves an automobile policy, not a long-term care policy; there is no regulation similar to WAC 284-54-253 governing a grace period and notice to a designee to protect the vulnerable such as White; there was no reinstatement provision at issue in that case; and notice was given in that case as to the exact time payment would need to be made to renew the contract, which the insured failed to meet. Even the court's citation to support its statement about "the general rule" is less than convincing. Ability also cites Hanson v. Mutual of Enumclaw Insurance Company, 1999 Wash. App. LEXIS 945 (1999) as support of its

position. Like Irish, Hanson is easily distinguishable from the present case: it involves a farmowner's policy, not a long-term care policy; there is no regulation similar to WAC 284-54-253 governing a grace period and notice to a designee; the insurer, not a statute or regulation similar to WAC 284-54-253, had the right to decide whether to reinstate policies after they had lapsed for nonpayment of premium, and it had established an internal policy not to reinstate a third time for nonpayment if the policy had lapsed for nonpayment twice before in the same year. In Hanson, the insurer decided not to reinstate because this would have been the third time it reinstated after lapse for nonpayment in the same year. After the decision not to reinstate was made, a fire damaged the insured's home and the court determined that Enumclaw had properly denied coverage.

**Did White or her representative submit a request for reinstatement prior to the end of the five-month reinstatement period?**

10. Based upon the above Findings of Fact and Conclusions of Law, including most significantly applicable case law and rules of construction, WAC 284-54-253, the specific terms of the policy Ability drafted and issued to White, and the specific terms of Ability's March 20, 2009 Notice of Lapse, it is hereby concluded that when the premium was not paid by April 24, 2009 coverage ended on April 24, 2009 and the policy lapsed on April 24, 2009. There is insufficient authority to conclude that the lapse date reverted back to the February 8, 2009 premium due date. Therefore the 5-month reinstatement period began from the date the policy lapsed for nonpayment of premium, i.e. April 24, 2009, and ran for five months, ending on September 24, 2009. Silvernail submitted her request for reinstatement on September 11, 2009. Because Silvernail submitted her request for reinstatement prior to expiration of the 5-month reinstatement period required by WAC 284-54-253, her request for reinstatement was filed timely.

**Does the WAC or the policy require that adequate proof of cognitive impairment or loss of functional capacity be submitted prior to the end of five-month period? Or does the five-month period apply only to requesting reinstatement?**

11. As found above, Ability has never asserted to White/Silvernail that a basis for its denial of reinstatement was lack of proof of cognitive impairment or loss of functional capacity. Instead, over one entire year after it actually denied reinstatement, Ability first asserted a second reason for its denial: that – even if Silvernail submitted her request for reinstatement during the proper reinstatement period – she was also required to have submitted enough proof to satisfy Ability that White was cognitively impaired enough, or had enough loss of functional capacity, to qualify for coverage. [OIC Ex. 26; OIC Ex. 28, Ability (Lawler) December 16, 2010 letter to OIC.] Ability's new, second, reason for denial of reinstatement, therefore, is that because Silvernail submitted her proof after the reinstatement period ended (pursuant to the above Conclusion, she submitted her proof just 6 days after the reinstatement period expired on September 24, 2009) Ability properly denied reinstatement. WAC 284-54-253(2) provides:

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

WAC 284-54-253(2), however, only requires that an insurer be provided 1) proof of the insured's cognitive impairment or loss of functional capacity; and 2) a request for reinstatement within the 5-months after the policy lapsed. WAC 284-54-253(2) does not require that Ability be submitted proof, to its satisfaction, within the 5-month reinstatement period; proof of the insured's cognitive impairment or loss of functional capacity may be furnished by the insured/designee within a reasonable period of time after the 5-month reinstatement period, for the following reasons:

- 1) Ability's own policy states that the insured or designee "will have 5 months to request reinstatement of the policy." However, ignoring its policy language, Ability argues that WAC 284-54-253(2) has a different meaning and requires that both the request and the proof of infirmity be provided to Ability within the 5-month period. It does not appear that either the policy language or WAC 284-54-253(2) is ambiguous, but if it is ambiguous, as above, the language set forth in the governing WAC 284-54-253(2) and in White's policy should be given their ordinary and common meaning;
- 2) While it appears that Ability's policy language is clear on this issue, if the policy terms are ambiguous, the ambiguity must be construed against the drafter of the policy (Ability) and the contract should be given the meaning most favorable to the insured.
- 3) As stated in WAC 284-54-253, the purpose of the regulation is to protect insureds from losing their long-term care coverage because they have failed to pay their premium due to their cognitive impairment or loss of functional capacity. A designee is a stranger to the contract, may well not know of the reinstatement period (e.g., indeed, in Ability's telephone discussion with Silvernail on August 4, Ability not only failed to advise Silvernail of the right to reinstatement but actually misled her into believing the policy was in force; in its sole letter to Silvernail - its March 20 Notice of Lapse required by WAC 284-54-253 - Ability failed to advise Silvernail that the right to reinstatement even existed). The designee may need time to consult with family members, doctors, and others to evaluate the facts and weigh the insured's needs and resources and find ways to acquire premium funds, funds to care for the insured in the interim, etc., all simply to determine whether a request can or should be made. The designee may also require time to consult with these individuals and gather proof from them. It is fallacious to suggest, as does Ability, that a designee will fail to secure reinstatement in the event that they timely request reinstatement but then Ability,

in its own discretion, determines that the proof submitted during the reinstatement period is somehow not sufficient. Indeed, in White's case, Ability also never told Silvernail that the proof she submitted on September 30 was insufficient and she needed to provide more proof and of what nature; the same could happen to a designee who submits proof within the reinstatement period. "The court should not construe a regulation in a manner that is strained or leads to absurd results." City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002), citing State v. Burke, 92 Wn.2d 474, 478, 598 P.2d 395 (1979).

**Did Gladys White or her representative submit adequate proof of cognitive impairment or loss of functional capacity to Ability? Alternatively, did Ability have any duty to seek out additional information concerning Ms. White's status before denying reinstatement?**

12. As to the sufficiency of the proof submitted by Silvernail as to White's cognitive and functional challenges, Part M of White's policy provides that the insured (or her designee) may request reinstatement *on the grounds that you suffered from Cognitive Impairment or loss of functional capacity at the time of lapse. We will require the same evidence of Cognitive Impairment or loss of functional capacity that is required for eligibility for benefits under this policy.*

13. Therefore, in requesting reinstatement, under the terms of her Ability policy Silvernail must have provided evidence of cognitive impairment or loss of functional capacity, which is the same evidence of cognitive impairment or loss of functional capacity that is required for eligibility for benefits under the policy. PART G of White's policy determines this required evidence to be as follows:

**PART G: ELIGIBILITY FOR THE PAYMENT OF BENEFITS.** *To be eligible for any type of benefit under this policy, your Doctor must show that you are chronically ill. A chronically ill person has been certified by a Licensed Health Care Practitioner as:*

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

*Independent Evaluation. We may, at our expense, have you examined or evaluated by independent medical experts. The studies they perform will be for the purpose of assessing and confirming that you are eligible for care as shown above, and the treatment or services prescribed in the Plan of Care meet all of the requirements of this policy.*

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Pursuant to these policy provisions, therefore, and as confirmed by Ability [Testimony of Lawler], in order to be allowed reinstatement, a licensed health care practitioner must have certified that as of the lapse date (concluded above to be April 24, 2009), 1) White was *unable to perform (without Substantial Assistance from another individual) at least two Activities of Daily Living for a period of at least 90 days due to loss of functional capacity* OR 2) White *Requir[ed] substantial supervision to protect such individual from threats to health and safety due to severe Cognitive Impairment*. [Emphases added.] As advised by Ability on September 15, 2009, on September 30, as found above, Silvernail submitted a variety of documentation to show the above evidence of loss of functional capacity or severe cognitive impairment. [OIC Ex. 14; Ability Ex. 8 @ 00135.] As found above, Ability never informed Silvernail either that the proof she submitted was insufficient and/or what additional proof Silvernail needed to submit. In fact, Ability's denial of reinstatement was based purely on Ability's assertion that Silvernail had filed her request for reinstatement too late. Now, as found above, if it were appropriate to allow Ability to now raise this new reason for denial of reinstatement over one year after it actually denied reinstatement, it does appear that the evidence submitted by Silvernail during the pertinent period does constitute adequate proof. However, in addition, now that Ability has finally articulated (at the time of the hearing in August 2011) just what it does need to be satisfied with her proof (specifically, a "licensed health care practitioner's" statement), the issue of sufficiency of those prior documents is now moot because Silvernail has now known to obtain, and has obtained and submitted a Certification of Chronically Ill Individual Under IRC Sec. 77028 from White's physician. If it were appropriate for Silvernail to now, some two years after Ability actually denied reinstatement, be required to obtain additional proof from an additional "licensed health care practitioner" then this Certification [OIC Ex. 40] very clearly, together with the documents already submitted by Silvernail, constitutes sufficient proof of White's severe cognitive impairment and of White's loss of functional capacity as required by WAC 284-54-253 and White's long term care insurance policy at issue herein.

14. Additionally, it should be noted that on September 15, 2009, Ability, presumably aware of the requirements of WAC 284-54-253 and Ability's own policy provisions, discussed White's condition with Silvernail; on September 30 Silvernail submitted documentation directly relating to White's cognitive impairment and loss of functional capacity; Ability was already well aware of a plethora of information about White's cognitive impairment and loss of functional capacity from the August 6 and September 8 claims which Silvernail filed and from documentation of White's cognitive and functional impairment which Silvernail provided to Ability through the years 2002-2007 relative to a prior claim for White. [OIC Ex. 14; Ability Ex. 8 @ 00135.] In November and again in December 2009, without even recognizing that Silvernail had submitted proof of cognitive impairment and loss of functional capacity (indeed, as found above, later in Ability's response to the OIC's inquiry, Ability (Lawler) even stated that Ability never knew that White had anything other than a broken wrist), Ability denied reinstatement, but never on the grounds that Silvernail had submitted insufficient proof of cognitive impairment or loss of functional capacity. Indeed, 1) Ability has never told Silvernail that its denial of reinstatement had anything to do with her not furnishing her proof of cognitive or functional impairment on

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time; 2) Ability has never told Silvernail that its denial of reinstatement had anything to do with her not submitting what Ability determines to be sufficient proof of cognitive or functional impairment; and 3) if Ability determines that the proof of cognitive or functional impairment Silvernail submitted was insufficient, Ability never told Silvernail just what additional evidence/proof she should submit to satisfy Ability of White's cognitive or functional impairment. Silvernail had no reason to believe she needed to gather more documentation/seek another opinion from White's doctor or another doctor/have her tested by other experts/etc. At this point, as the OIC argues, Ability is estopped from raising the issue of lack of sufficient proof of cognitive impairment or loss of functional capacity. To allow Ability to now – over one year after its denial to first raise the argument that Silvernail's proof was insufficient, and at hearing some 2.5 years after Silvernail submitted her proof, with no further requests or determinations from Ability that it was insufficient – claim that Ability is not satisfied, subjectively, that Silvernail has provided sufficient proof of White's severe cognitive impairment or loss of functional capacity would be to allow Ability to continue on its course of what can only be concluded has been bad faith throughout the process at issue herein.

15. If insufficient proof of cognitive or functional impairment were a reason for its denial of reinstatement (which at the time it denied reinstatement it was not), then based upon the evidence of White's cognitive and functional impairment that Silvernail provided to Ability from August 2009 onward Ability did have a duty to advise Silvernail her proof was insufficient, to specify to Silvernail what additional information or documentation was required, or to seek out additional information itself concerning Ms. White's status, before Ability denied reinstatement.

16. Based upon the above Findings of Facts and Conclusions of Law, which show that Ability consistently handled White's/Silvernail's request for reinstatement in a manner which is inconsistent with both the wording and intent of WAC 284-54 and general protections provided to insureds under the Insurance Code and regulations, and based upon the above Findings concerning Ability's apparent refusal to recognize the injury to White and her designee that its actions caused – and that similar actions concerning other insureds may cause - it can only be concluded that Ability handled this process, from notice of original nonpayment of the premium due February 8, 2009 to the current time, intentionally in bad faith.

17. Based upon the above Findings of Facts and Conclusions of Law, to the effect that under White's policy and WAC 284-54,253 the soonest the policy could have lapsed would have been 35 days from the date of Ability's March 20, 2009 Notice of Lapse to Silvernail regarding nonpayment of premium (i.e. April 24, 2009), the lapse date was April 24, 2009, and therefore the 5-month reinstatement period commenced on April 24, 2009. Therefore, when Silvernail submitted her request for reinstatement on September 11, 2009 it was before the reinstatement period expired on September 24, 2009. Therefore, Ability was required to allow reinstatement of White's policy. In considering and then denying her request for reinstatement on November 5, 2009, and once again on December 4, 2009, Ability violated WAC 284-54-253(2).

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18. Based upon the above Findings of Facts and Conclusions of Law, it is reasonable that the OIC's Order to Cease and Desist issued on April 27, 2011, which became effective on that date, should be upheld. By its terms, this Order applies to Ability Insurance Company and its officers, directors, trustees, employees, agents, and affiliates to immediately cease and desist from further violating the Insurance Code by not allowing reinstatement of their long term care policies within five months after the lapse date 1) which is to be determined to commence as set forth above; 2) by provision of full and adequate notice of nonpayment and the correct period of time the insured/designee is given to protect their interests; and 3) by proper handling of information concerning the requirement to furnish proof of cognitive or functional impairment within a reasonable amount of time after the expiration of the five month reinstatement period as set forth above.

19. Based upon the above Findings of Facts and Conclusions of Law, it is reasonable that the OIC's Order Suspending Certificate of Authority issued on April 27, 2011 in proper compliance with RCW 48.05.140 should be upheld. Pursuant to RCW 48.04.020(2) this Order was stayed under entry of the Final Order herein. Therefore, it is hereby concluded that Certificate of Authority WAOIC No. 796 issued to Ability Insurance Company should be suspended pursuant to the OIC's Order for a period of six months which suspension shall commence and take effect ten days from the date of entry of this Final Order. This suspension is confined to Ability's authority to write new business during the six month period of suspension and does not suspend Ability's authority to fulfill obligations under policies issued prior to the effective date of the suspension imposed herein or to Ability's authority to renew such existing policies, and does not relieve Ability from any pending or accrued reporting, filing, or fee/tax payment required by Title 48 RCW.

20. Based upon the above Findings of Facts and Conclusions of Law, and as requested by the OIC in its Notice of Intent to Impose Fine dated July 13, 2011 which was consolidated herein, it is reasonable that a fine be imposed upon Ability Insurance Company for violation of WAC 284-54-253. While a fine in the amount of \$10,000 can be imposed for each of the occasions upon which Ability denied reinstatement, and also for each occasion in which it Ability wrongfully handled its activities in providing notice and denying reinstatement in this matter, it is hereby concluded that a total fine in the amount of \$10,000 should be imposed upon Ability pursuant to RCW 48.05.185.

**ORDER**

On the basis of the foregoing Findings of Facts and Conclusions of Law,

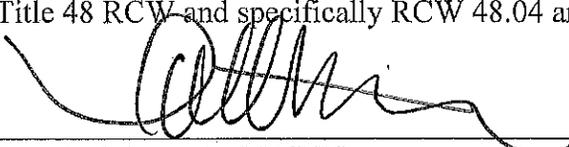
**IT IS HEREBY ORDERED** that the Insurance Commissioner's Order Suspending Certificate of Authority of Ability Insurance Company issued against Ability Insurance Company is hereby UPHeld. The Certificate of Authority of Ability Insurance Company, Certificate of Authority WAOIC796, is hereby suspended for a period of six months which

suspension shall commence and take effect ten days from the date of entry of this Final Order. This suspension is confined to Ability's authority to write new business during the six month period of suspension and does not suspend Ability's authority to fulfill obligations under policies issued prior to the effective date of the suspension imposed herein or to Ability's authority to renew such existing policies, and does not relieve Ability from any pending or accrued reporting, filing, or fee/tax payment required by Title 48 RCW. Any refusal to furnish proof of compliance as requested by the OIC shall constitute a violation of this Order;

**IT IS FURTHER ORDERED** that the Insurance Commissioner's Order to Cease and Desist issued in April 27, 2011 against Ability Insurance Company is hereby UPHeld. Ability Insurance Company and its officers, directors, trustees, employees, agents, and affiliates shall immediately cease and desist from further violating the Insurance Code by not allowing reinstatement of their long term care policies within five months after the lapse date 1) which is to be determined to commence as set forth above; 2) by provision of full and adequate notice of nonpayment and the correct period of time the insured/designee is given to protect their interests; and 3) by proper handling of information concerning the requirement to furnish proof of cognitive or functional impairment within a reasonable amount of time after the five month reinstatement period as set forth above. Any refusal to furnish proof of compliance as requested by the OIC shall constitute a violation of this Order;

**IT IS FURTHER ORDERED** that a fine is imposed on Ability Insurance Company in the amount of \$10,000 pursuant to RCW 48.05.185 for violation of WAC 284-54-253. Said fine shall be paid within 15 business days of the date of this Order to the Office of the Insurance Commissioner, by mailing payment to P.O. Box 40255, Olympia, Washington 98504-0255, or delivering to 5000 Capitol Boulevard, Tumwater, Washington 98501. Should it become necessary to take further action to collect this fine from Ability Insurance Company, the Insurance Commissioner may seek enforcement of this Order from the Thurston County Superior Court pursuant to RCW 48.02.080.

**ENTERED** AT TUMWATER, WASHINGTON, this 11<sup>th</sup> day of June, 2012, pursuant to Title 48 RCW and specifically RCW 48.04 and Title 34 RCW and regulations applicable thereto.

  
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PATRICIA D. PETERSEN  
Chief Hearing Officer  
Presiding Officer

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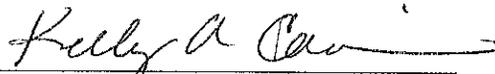
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Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the above identified individuals at their addresses listed above.

DATED this 13<sup>th</sup> day of June, 2012.

  
KELLY A. CAIRNS