

THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

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In the Matter of
ABILITY INSURANCE COMPANY,
An Authorized Insurer and Respondent

Docket Nos. 11-0088 and 11-0089
Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer
OIC'S HEARING BRIEF

I. SUMMARY OF THE FACTS

Not long after an 85-year old Washington insured with dementia began shredding her important mail and failed to pay a recently invoiced long-term care insurance premium, Ability Insurance Company ("Ability" or the "Company") decided to refuse to reinstate her policy. (*See, e.g.*, OIC Exhs. 15, 17; testimony Don Lawler.) Although the insured's WAC 284-54-253(1) designee promptly sought reinstatement for the insured as soon as she learned the premium due February 8, 2009 had not been paid, and even attempted to tender the past due payment, the Company still refused, initially contending that the insured failed to make a timely request for reinstatement under WAC 284-54-253, and then a year later, the insurer further contended that the insured had also failed to timely prove to Ability's satisfaction that she had either a cognitive impairment or a loss of functional capacity as required to qualify for coverage under WAC 284-54-253(2). *Id.*; *see also, e.g.*, OIC Exhs. 26, 28. After the insured's son filed an "Ask Mike" inquiry in late 2010 with the Washington State Office of the Insurance Commissioner ("OIC"), OIC staff began gathering the facts. OIC Exh. 3.

A. Washington's relevant long-term care laws and WAC 284-54-253

Washington's Long-Term Care Insurance Act (the "Act") and the rules/regulations duly promulgated under this Act govern the insured's policy. These laws and rules provide important protections for particularly vulnerable individuals who develop mental and physical deteriorations such as cognitive impairment and loss of functional capacity and fail to pay their premium.

1 The Act begins with the Legislature's declaration of intent that the "chapter shall be
2 liberally construed to promote the public interest in protecting purchasers of long-term care
3 insurance from unfair or deceptive sales, marketing, and advertising practices. The provisions
4 of this chapter shall apply in addition to other requirements of Title 48 RCW." RCW
5 48.84.010.¹ Likewise, the applicable Long-Term Care Insurance Rules ("Rules")² begin by
6 declaring that the purpose of the Rules is to "establish[] minimum standards and disclosure
7 requirements to be met by insurers [...] with respect to long-term care insurance and long-
8 term care benefit policies and contracts issued for delivery in this state before January 1,
9 2009." WAC 284-54-010.

9 Both the Act and the Rules specifically single out for protection that particular group
10 of insureds with a cognitive impairment or loss of functional capacity. At RCW 48.84.040(3),
11 for example, the Act protects these insureds by prohibiting insurers from ending their
12 coverage simply because of their "age or the deterioration of the[ir] mental or physical
13 health." Likewise, WAC 284-54-253 also applies to particularly vulnerable insureds who risk
14 losing their insurance after developing mental or physical infirmities or illnesses.

14 There are four parts of WAC 284-54-253 which are primarily at issue here: (1) the
15 introduction to WAC 284-54-253, (2) WAC 284-54-253(1), (3) WAC 284-54-253(1)(a), and
16 (4) WAC 284-54-253(2). Here are these four parts as they appear within the body of WAC
17 284-54-253:

18 The purpose of this section is to protect insureds from unintentional lapse
19 by establishing standards for notification of a designee to receive notice of lapse for
20 nonpayment of premiums at least thirty days prior to the termination of coverage and
21 to provide for a limited right to reinstatement of coverage unintentionally lapsed by a
22 person with a cognitive impairment or loss of functional capacity. These are minimum
23 standards and do not prevent an insurer from including benefits more favorable to the
insured. [...]

¹ By its terms, the Act governs contracts issued before January 1, 2009, such as the insured's contract here.

² The validity of these rules is not at issue and has not been challenged in this matter.

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

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

7 [...]

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

13 By its language, the above rule requires insurers to allow their long-term care insureds
14 the opportunity to periodically “designate at least one additional person to receive notice of
15 lapse or termination for nonpayment of premium, if the premium is not paid on or before its
16 due date.” WAC 284-54-253(1). It then goes on to require insurers to send a specific notice
17 to those designees. WAC 284-54-253(1)(a) prescribes what this notice “shall” set forth:

18 The notice shall provide that the contract or certificate **will not lapse until at least
19 thirty days after the notice is mailed** to the insured’s designee.

20 (Emphasis added.) As this indicates, the notice must inform the designee(s) that the effective
21 date of the lapse will not occur until “at least thirty days after the notice is mailed.” This
22 language was not accidental. It derived from NAIC Long Term Care Model Regulations,
23 which also tied the lapse date to the date of mailing of the designee notice letter:

No individual long-term care policy or certificate shall lapse or be terminated for
nonpayment of premium unless the insurer, at least thirty (30) days before the
effective date of the lapse or termination, has given notice to the insured and to those
persons designated pursuant to Subsection A(1), at the address provided by the insured
for purposes of receiving notice of lapse or termination.

See http://www.id.state.az.us/publications/ltc_mod_reg_641.pdf (NAIC Long Term Care
Model Regulations) and OIC Exh. 35. Finally, if (a) “the insurer is provided proof of the
insured’s cognitive impairment or loss of functional capacity” and (b) “reinstatement is

1 requested within the five months after the policy lapsed or terminated due to nonpayment of
2 premium,” then, under this rule, the insurer must reinstate the policy. WAC 284-54-253(2).

3 In sum, WAC 284-54-253 is intended to “protect insureds from unintentional lapse”
4 by making sure that insurers give designees “notice of lapse for nonpayment of premiums at
5 least thirty days prior to the termination of coverage,” WAC 284-54-253, then from that date,
6 the insurers must extend “a limited right to reinstate coverage [...] if the insurer is provided
7 proof of the insured’s cognitive impairment or loss of functional capacity and reinstatement is
8 requested within the five months after the policy lapsed or terminated due to nonpayment of
9 premium.” WAC 284-54-253(2). While this rule’s added protection was specifically
10 intended to be a “minimum standard,” nothing “prevent[s] an insurer from including benefits
11 more favorable to the insured.” WAC 284-54-253. In other words, insurers cannot shorten
12 these time periods, but they certainly may extend them beyond these periods in the name of
13 providing even more protections to this singularly vulnerable class of long-term care insureds.

12 **B. The insured and her policy**

13 The insured in this matter, Gladys White, is presently 88 years old. OIC Exh. 4. She
14 initially purchased her long-term care policy from Mutual Protective Insurance Company on
15 August 8, 1999 when she was 76. OIC Exh. 1. Over the years, the insurer changed names
16 and was eventually taken over – along with Ms. White’s policy – by its present owner, Ability
17 Insurance Company. OIC Exh. 30. Ability agrees that it is responsible for any alleged
18 violations of Washington’s insurance laws since it assumed Ms. White’s policy and has been
19 administering it (i.e., collecting her premiums) since it acquired her business in 2007. *Id.*

20 Ms. White’s policy includes a provision that, *somewhat* consistent with WAC 284-54-
21 253, promises to restore benefits within 5 month of the date the policy “ends” if, at the time of
22 “lapse,” the insured has either a “cognitive impairment” or “loss of functional capacity”
23 (*see* OIC Exh. 1 at Part M, p. 9.) The policy includes a stringent and more restrictive
definition of “cognitive impairment” which is at odds with the more liberal definition set forth

1 WAC 284-54-040(5)(a) – but it contains no definition for the term “loss of functional
2 capacity.” While various parts of this policy refer to the “time of lapse” and “date of the
3 lapse” (see page 9 Part M), and also reference that the “policy will lapse if you do not pay
4 your premium before the end of the grace period” (see page 11 Part S(4)), the policy does not
5 include a definition for the word “lapse,” or for the terms “time of lapse” or “date of lapse,”
6 nor does it refer to the “notice of lapse or termination for nonpayment of premium” that the
7 Company was required to mail to any “additional person” designated by the insured under
8 WAC 284-54-253(1)(a). The policy does include a definition of “grace period” which is
9 consistent with WAC 284-54-250. See OIC Exh. 1 at page 11 Part S(3). And like WAC 284-
10 54-253’s requirements, WAC 284-54-250 offers a protection – but one that applies to
11 help *all* insureds, regardless of whether the insured has a “cognitive impairment,” a “loss of
12 functional capacity,” or designates an additional person under WAC 284-54-253(1). While
13 WAC 284-54-250 and WAC 284-54-253 both offer protections when nonpayment happens,
14 the two provisions offer separate and distinct consumer protections – both of which separately
15 and non-interchangeably apply to companies like Ability.³

14 **C. Ability’s acts, refusal to reinstate, and asserted reasons for refusing to reinstate**

15 Sometime in 2007, the company that Ability took over provided Ms. White with a
16 form to “name an Advisor(s)” pursuant to WAC 284-54-253. OIC Exh. 6. In this form, the
17 insured named her daughter, Cheryl Silvernail, as her designee to receive a WAC 284-54-253
18 notice. *Id.* Prior to this, the Company had dealt with Ms. Silvernail on other of Ms. White’s
19 past claims, and it had Ms. Silvernail’s work/daytime telephone number in its records. See,
20 e.g., OIC Exhs. 2 and 5. Unfortunately, the Company previously knew that Ms. White would

21 _____
22 ³ The policy includes a provision entitling the Company to have the insured examined or evaluated to assess
23 whether the insured is eligible for care – payment of benefits or coverage – under the policy. See OIC Exh. 1 at
page 7, Part G. The policy also includes a “Conformity With State Statutes” provision that says: “[t]he
provisions of the policy must conform with the laws of the state in which you reside on the Policy Date. If any
do not, this clause amends them so that they do conform.” See OIC Exh. 1 at page 12, Part S(13).

1 only “progressively decline,” and would in fact never be capable of returning to independent
2 living. OIC Exh. 4.

3 Unfortunately, in 2008 Ms. White’s caregiver noted that Ms. White had cognitive
4 impairment and other problems. OIC Exh. 14. As her doctor had predicted, testimony at the
5 hearing is expected to show that, in fact, her condition did only worsen. For example, she
6 began hiding bills and destroying them. OIC Exhs. 14, 16. It was at this time that she failed
7 to pay her premium, which was due on February 8, 2009.

8 At some time after Ms. White didn’t pay her premium, the Company sent invoices to
9 Ms. White and also a WAC 284-54-253(1)(a) notice letter to Ms. Silvernail. This letter, dated
10 March 20, 2009, called Ms. Silvernail Ms. White’s “Advisor.” In it, the Company’s
11 President, Timothy J. Hall, stated:

12 You have been named as the Advisor to receive notification of this past due premium
13 for [the insured, or “policyholder.”]

14 All of our long-term care/home health care policyholders are given the opportunity to
15 name an Advisor. The Advisor receives a notice from us any time the policyholder’s
16 premium is 30 days past due. Our policyholder trusts you to contact him/her to
17 discuss the importance of paying the policy premium.

18 If the premium is not received within 35 days from the date of this letter, the policy
19 will lapse for nonpayment of premium.

20 OIC Exh. 7. Unfortunately, Ms. Silvernail never received this notice. *See*, e.g., OIC Exh. 16.

21 In July 2009 Ms. White fell and broke her wrist. OIC Exhs. 8, 14. She required
22 hospitalization followed by assisted living at Lynden Grove, a facility in Puyallup that
23 provides long-term care services. *Id.*; Decl. Silvernail. On August 4, 2009, Ms. Silvernail
called Ability to submit a claim for her mother, the insured, under her policy. OIC Exh. 8;
Decl. Silvernail. The insured’s daughter spoke with Jerry in Ability’s claims department. *Id.*
She asked him if he would be able to get her mother’s policy number because she was at work
and didn’t then have access to that information. *Id.* Jerry put her on hold, looked up her
policy, and returned with her mother’s policy number. *Id.* The two then went over some

1 information regarding the insured's long-term care insurance, and Jerry then explained to the
2 insured's daughter how to get the claim form online. *Id.* She got the form, completed it, and
3 two days later, faxed it to the Company. At no time during this conversation with Jerry did he
4 or anyone else with Ability inform the insured's daughter that her mother had not paid her last
5 premium or that there was any issue concerning the policy still being in force. *Id.*

6 Unbeknownst to either Ms. Silvernail or Ms. White, the latter of whom was by then in
7 assisted living and no longer living in her home, Ability mailed a letter to Ms. White dated
8 August 31, 2009 acknowledging her "correspondence" and telling her she had no benefits
9 because the policy had lapsed. OIC Exh. 10.

10 On September 8, 2009, Ms. Silvernail sent in a second claim. OIC Exh. 11. This
11 claim reported serious cognitive and other functional problems. *Id.* Within a few days of this,
12 Ms. Silvernail went to her mother's house to retrieve her mother's mail. When she did this
13 she discovered the Company's August 31, 2009 letter indicating that the policy had lapsed.
14 She immediately wrote to the Company via facsimile on September 11, 2009, asking for help.
15 OIC Exh. 12. A few days later, on September 15, someone from the Company finally called
16 Ms. Silvernail back. OIC Exh. 13. Ms. Silvernail explained that she wanted to know what to
17 do, how to remedy the situation, explaining that her mother had a cognitive impairment. OIC
18 Exhs. 12, 13. The Company representative invited Ms. Silvernail to try writing "a letter with
19 documentation." OIC Exh. 13. At this point, apparently, the matter was referred to Ability's
20 Don Lawler for further handling. *Id.*

21 On October 2, 2009, the Company received Ms. Silvernail's letter and documentation
22 from her mother's July 2009 injury, which records were replete with references to Ms.
23 White's "dementia," confused state, and cognitive and physical problems. OIC Exh. 14. On
November 5, 2009, Mr. Lawler wrote a letter in response to Ms. Silvernail, informing her that
the policy "lapsed for non-payment of premium on February 7, 2009." OIC Exh. 15.⁴ On

⁴ Mr. Lawler's November 5, 2009 letter to Ms. Silvernail did not assert or mention anything about proof of cognitive impairment or loss of functional capacity.

1 November 30, 2009, Ms. Silvernail wrote back to Mr. Lawler, again requesting the Company
2 to please reconsider its decision, noting that Ms. White “would never have let [her policy]
3 lapse, had she been mentally stable.” OIC Exh. 16. On December 4, 2009, Mr. Lawler wrote
4 back to Ms. Silvernail again. OIC Exh. 17. Like his prior letter, Mr. Lawler’s December 4
5 letter again denied the claims, denied the overage, and denied the right to reinstatement. OIC
6 Exh. 17.⁵ His letter also abraded Ms. Silvernail for failing to advise the Company of her
7 change of address and admonished that “although you were aware that Ms. White could not
8 properly handle her affairs you did not intervene.” *Id.* Shortly thereafter, Ms. Silvernail
9 attempted to tender the back-due premium; Mr. Lawler sent it back. OIC Exh. 18.

10 After receiving Ms. White’s son’s “Ask Mike” inquiry to OIC about the matter, on
11 August 12, 2010 OIC staff Bianca Stoner wrote an initial letter to Mr. Lawler. OIC Exh. 19.
12 Mr. Lawler responded by letter dated August 23, 2010, using some of the same language he
13 had used in his first letter to Ms. Silvernail: the “policy lapsed for non-payment of premium
14 on February 7, 2009.” OIC Exh. 20.⁶

15 Ms. Stoner wrote back to Mr. Lawler with more questions again in her letter dated
16 August 30, 2010. OIC Exh. 21. On September 8, 2010, Mr. Lawler again replied in defense
17 of the Company’s position. OIC Exh. 22.⁷

18 On September 24, 2010, Ms. Stoner wrote Mr. Lawler again, this time noting that the
19 lapse date couldn’t have been in February, but had to be no sooner than April 19, 2009, given
20 the date on the March 20, 2009 notice (OIC Exh. 7), and further noting that since Ms.
21 Silvernail did have contact with the Company and did ask the Company to reinstate no later

22 ⁵ Mr. Lawler’s December 4, 2009 letter, like his November 5 letter, did not assert or mention anything about
23 proof of cognitive impairment or loss of functional capacity.

⁶ Also like his November 5 and December 4, 2009 letters to Ms. Silvernail, Mr. Lawler’s August 23, 2010 letter
again did not assert or mention anything about proof of cognitive impairment or loss of functional capacity.

⁷ Like all his letters to Ms. Silvernail and his last letter to Ms. Stoner, Mr. Lawler’s September 8, 2010 letter
again did not assert or mention anything about proof of cognitive impairment or loss of functional capacity.

1 than September 19, 2009, that “Ability was obligated under Washington law to comply and
2 reinstate the policy.” OIC Exh. 23. In his response letter dated October 4, 2010, Mr. Lawler
3 denied this and again defended his and the Company’s earlier positions. He wrote that the
4 lapse date “reverts back” and called WAC 284-54-253 an “extended grace period” that “does
5 not affect the termination or lapse date.” OIC Exh. 24.⁸

6 On October 20, 2010, Ms. Stoner wrote Mr. Lawler one last letter, this one detailing
7 the Company’s WAC 284-54-800 violations in failing to, essentially, adequately work with
8 Ms. Silvernail in a good faith manner. OIC Exh. 25. In his response letter dated November 1,
9 2010, Mr. Lawler again reiterated his and the Company’s earlier position, but this time,
10 something new was added. OIC Exh. 26. This letter included a new position that hadn’t been
11 included in any earlier written or other communications he or the Company had previously
12 sent to Ms. White, Ms. Silvernail, or Ms. Stoner: that the Company’s denial was also
13 appropriate because the Company also had supposedly not been timely or adequately given
14 proof of cognitive impairment or loss of functional capacity. OIC Exh. 26.

15 On December 1, 2010, OIC staff advised the Company that it had violated the law and
16 would face enforcement action. OIC Exh. 27. In a letter dated December 16, 2010, Mr.
17 Lawler again denied this, this time relying for the first time on a Washington case to support
18 the Company's position, and repeating the Company’s new position that they also hadn’t been
19 provided adequate proof of cognitive impairment or loss of functional capacity within WAC
20 284-54-253(2)’s five-month window. OIC Exhs. 28, 29.⁹ On April 27, 2010, the OIC entered
21 orders sought to impose a \$10,000 fine, and the Company demanded this hearing.

22 Since her fall in July 2009, Ms. White and her family have had to use the insured’s
23 savings and retirement annuities to pay for her care after Ability refused to provide the

⁸ Like all his prior letters to Ms. Silvernail and Ms. Stoner, Mr. Lawler’s October 4 letter once again denied the claims, denied the overage, denied the right to reinstatement, and once again, did not assert or mention anything about proof of cognitive impairment or loss of functional capacity.

⁹ Mr. Lawler subsequently provided OIC with other information about the matter. See OIC Exhs. 31-34.

1 coverage. Testimony Silvernail; Decl. Silvernail. OIC staff expect to present various
2 witnesses' testimony that is expected to show that, prior to the insured's July 2009 injury, the
3 insured's daughter, siblings, caregiver Alex Farmin and others all observed that the insured
4 had cognitive impairment and loss of functional capacity. Since well before July 2009, Ms.
5 Silvernail and her siblings had been laboring under the impression that the long-term care
6 insurance which their mother purchased would cover some of her care, but Ability has refused
7 to provide the coverage. *Id.* The insured's daughter has spent countless hours working on
8 this matter, in addition to working at a full time job. *Id.* Still, Ability has refused to provide
9 the coverage. *Id.* The insured's daughter and the rest of her family have experienced an
10 inordinate amount of stress and frustration during this painful process of trying to get the
insurance company to pay the coverage for which Gladys White had contracted. *Id.*

11 II. EXHIBITS AND WITNESSES

12 The exhibits and witnesses OIC plans to present have been identified in OIC's July 29,
13 2011 witness and exhibit disclosure, and its August 1, 2011 first amended witness disclosure.
14 Consistent with these, OIC may offer additional evidence and witnesses, including but not
limited to rebuttal evidence and witnesses.

15 III. PROPOSED FINDINGS AND CONCLUSIONS OF LAW/CLOSING BRIEF

16 After the evidence has been presented on August 3 (and 4, if necessary), OIC staff will
17 request a time and schedule to file either proposed findings of fact and proposed conclusions
18 of law, or a closing brief, setting forth the agency's position about the evidence, the law, and
the findings of fact and conclusions that should be reached.

19 DATED this 2nd day of August, 2011.

20 OFFICE OF INSURANCE COMMISSIONER

21 By: 

22 Alan Michael Singer
23