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THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of ABILITY INSURANCE COMPANY, An Authorized Insurer and Respondent	Docket Nos. 11-0088 and 11-0089 OIC'S RESPONSE AND OPPOSITION TO ABILITY'S MOTION FOR RECONSIDERATION

Ability Insurance Company's ("Ability" or the "Company") June 22, 2012 motion for reconsideration ("Motion") asks to reconsider the June 11, 2012 final order ("Order") based on three "areas of concern." The first repastinates the Company's previously stated view about what it thinks WAC 284-54-253 says. The second re-argues the Company's previously stated view that two Washington state appellate decisions should govern here. The third argues that portions of Dr. Mihali's June 8, 2012 deposition testimony should be added to the record, and the Order re-written to re-calibrate the weight given to it and to other evidence in the case. In presenting its third concern, the Company also indicates that it thinks claims for reinstatement under WAC 284-54-253 "correctly" require not "cognitive impairment" but "*severe* cognitive impairment."

The Company's first two "concerns" merely re-hash versions of old arguments previously made. The third proffers evidence the Company could have presented long ago, but it doesn't make a difference here, anyway. Since the Motion presents insufficient and inappropriate grounds for reconsideration, the Motion should be denied.

However, since the Motion also suggests the Company still misapprehends its duties to its insureds, the Company should also be reminded of its obligations going forward to ensure that the Company abides by its obligations under the law and abides by the orders entered, including the Order to Cease and Desist.

A. Standard of review.

As a preliminary matter, the Motion should be reviewed under the legal standards that govern such motions.[1] While Washington's Administrative Procedures Act ("APA") authorizes "a petition for reconsideration, stating the specific grounds upon which relief is requested," it demurs to the standard of review established by an agency through rulemaking. RCW 34.05.470(1). But the APA doesn't indicate the standard of review in the absence of agency rules on the matter, nor has OIC adopted any such rules of its own. Given this dearth, OIC staff believes state and federal rules and standards governing motions for reconsideration should provide guidance here.[2]

Washington's state courts follow CR 59 when considering such motions. CR 59 provides a list of specific grounds for granting such motions.[3] Whether one of these grounds is met is "addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Washington state courts also caution that a motion for reconsideration should not be used as a vehicle to get a 'second bite at the apple.' "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox*, 130 Wn. App. at 241, *citing JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999).

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[1] The Company's Motion fails to reference the standard of review it believes governs here.

[2] Washington's state court rule governing civil matters filed in the Superior Courts is Civil Rule (or "CR") CR 59; Washington's federal courts hearing civil matters look to Fed. R. Civ. P. 59 and Local Rule ("LR") 7(h). Copies of these three rules are attached as Exhibits J, K, and L to the Declaration of Alan Michael Singer Regarding Ability Motion for Reconsideration ("Decl. Rec. Singer"), filed herewith in support of this response and opposition. Washington courts often look to other court decisions for the persuasiveness of their reasoning when trying to decide identical matters. *See*, e.g., *Am. Mobile Homes of Wash. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1276 (1990) (Washington courts look to a federal analysis of federal rules similar to state rules for their persuasive effect) and *Matter of Welfare of Green*, 14 Wn. App. 939, 942, 546 P.2d 1230 (1976), *citing Eberle v. Sutor*, 3 Wn. App. 387, 475 P.2d 564 (1970) (how federal courts have construed a federal rule may be pertinent to the construction of a similar state rule); *Hodge v. Dev. Svcs. of Am.*, 65 Wn. App. 576, 579-80, 828 P.2d 1175 (1992) (in the absence of state authority, Washington courts may look to the federal interpretation of the equivalent rule).

[3] *See* Singer Rec. Decl. Exh. K, CR 59(a)(1) through (9).

Washington federal courts view reconsideration motions similarly, but the federal court standard more clearly emphasizes that such motions seek an "extraordinary" remedy that should normally be denied. This standard was recently set forth in a June 20, 2012 order by Judge Robert J. Bryan in the civil action, *White v. Ability Ins. Co.*, No. 11-5737-RJB (W. D. Wash.):

> Pursuant to Local Rules W.D. Wash. CR 7(h)(1), motions for reconsideration are disfavored, and will ordinarily be denied unless there is a showing of (a) manifest error in the ruling, or (b) facts or legal authority which could not have been brought to the attention of the court earlier, through reasonable diligence. The term "manifest error" is "an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *Black's Law Dictionary* 622 (9th ed. 2009).
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> Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Marlyn Natraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). Neither the Local Civil Rules nor the Federal Rule of Civil Procedure, which allow for a motion for reconsideration, is intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through – rightly or wrongly. *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D. Ariz. 1995). Mere disagreement with a previous order is an insufficient basis for reconsideration, and reconsideration may not be based on evidence and legal arguments that could have been presented at the time of the challenged decision. *Haw. Stevedores, Inc. v. HT & T Co.*, 363 F.Supp.2d 1253, 1269 (D. Haw. 2005). "Whether or not to grant reconsideration is committed to the sound discretion of the court." *Navajo Nation v. Confederated Tribes & Bands of the Yakima Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

Decl. Rec. Singer at Exh. I. If considered here, these standards should guide the conclusion that the Company's Motion should be denied.

B. The Order properly and correctly interpreted WAC 284-54-253.

The Motion's first plaint presents no highly unusual circumstances, newly discovered evidence, clear error, intervening change in the controlling law, or other reason why

reconsideration would be appropriate. Beginning by only vaguely suggesting that "The June 13 Order Conclusion of Law" should be reconsidered as "inconsistent with Washington regulations," the Motion's first "area of concern" includes almost nothing but re-hashed debate points about WAC 284-54-253 that were previously made and properly rejected:

- At page 2 of the Motion, Ability claims the context needs to be considered. The Order reflects that the context was considered, and the parties briefs and arguments already raised this.

- Also at page 2, Ability claims the word "lapse" in the rule was misinterpreted. This was discussed already. It was extensively and repeatedly briefed and argued.

- Also at page 2, Ability again discusses the word "lapse" and its varying uses -- just as it did, for example, at page 5 of its September 19, 2011 supplemental briefing. This was discussed already. It was extensively and repeatedly briefed and argued.

- Also at page 2, toward the bottom, Ability again quotes rules of construction. These rules have already been cited, in some cases, the same ones by both parties. This topic, too, was discussed already. It, too, was extensively and repeatedly briefed and argued.

- At the bottom of page 2, top and bottom of page 3, and top of page 4, Ability again quotes from WAC 284-54-253. This rule has, too, already been discussed, and was also previously briefed and argued.

But as Judge Bryan observed, *supra*, a motion for reconsideration must avoid déjà vu all over, because such a motion is not "intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through — rightly or wrongly. [...] Mere disagreement with a previous order is an insufficient basis for reconsideration."[4]

Little else remains in this first section of the Company's Motion. One part includes assertions that "[t]he [O]rder reflects a genuine confusion," [5] and that "Ability never argued

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[4] While Judge Bryan was discussing the federal standard, the state standards are no different. *Cf*, e.g., CR 59(a)(3) and (4), attached at Singer Rec. Decl. Exh. K.

[5] *See* Ability Insurance Company's June 22, 2012 Motion for Reconsideration at page 4, line 12.

that the policy lapse date "reverted back." That was the OIC's argument," [6] but both of these assertions lack merit. Another part argues that the Order is inconsistent with WAC 284-83-025 and versions of NAIC's model regulations, but these arguments also fail. As was explained and discussed at the hearing and in briefing, OIC promulgated WAC 284-54-253 having considered an earlier version of the "unintentional lapse" portion of the NAIC model. For reasons OIC previously explained, the NAIC model assists in understanding WAC 284-54-253's intent. But as the Order correctly recognizes, the NAIC model does not and cannot supplant the language in WAC 284-54-253. What matters most, as the Order correctly recognizes, is that the words in the enacted rule – WAC 284-54-253 – are what count. And while the Company will be bound to follow the requirements of WAC 284-83-025 in cases where that rule applies, that rule does not govern in this case, either. In any event, the Company's citation to WAC 284-83-025 makes no difference. Both WAC 284-54-253 and WAC 284-83-025 require the same thing: insurers must ensure that third party designees receive a proper notice at least 30 days before the date when coverage actually expires.

While the above provides reasons why the Motion's attack on the Order should be rejected, it is also relevant that United States District Court Judge Bryan also rejected the Company's same arguments about what it thinks WAC 284-54-253 says. In the September 15, 2011 civil action, *White v. Ability Ins. Co.*, No. 11-5737-RJB (W. D. Wash.), the same insured sued Ability based on the same facts and the same laws at issue here. [7] About a half year after that, summary judgment motions were made by both the plaintiff [8] and the

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[6] *See* Ability Insurance Company's June 22, 2012 Motion for Reconsideration at page 4, lines 7-8. It is nose-on-the-face plan that OIC didn't write Donald Lawler's October 4, 2009 letter reiterating that the sole reason the Company was denying the insured's claim was because "the policy termination date reverts back to the paid date." *See* Third Decl. Singer at Exh. 24. Nor did OIC write Mr. Lawler's December 16, 2010 letter arguing the Company's position that "if payment is not received the lapse date reverts back to the termination date." *Id.* at Exh. 28. This is the Company's argument. The Company's attempt to rewrite history cannot survive scrutiny.

[7] *See* Decl. Rec. Singer at Exh. M.

[8] *See* Decl. Rec. Singer at Exh. B.

Company,[9] each setting forth its own view of what it believed WAC 284-54-253 says, and each filed briefs supporting and opposing these views.[10] On June 1, 2012, Judge Bryan entered his ruling accepting the plaintiff's arguments and rejecting the Company's.[11] Judge Bryan's June 1 order set forth reasoning and conclusions *identical* to those in the Order as to what WAC 284-54-253 requires. For as esteemed of a jurist as Judge Bryan to have reached the *very* same conclusions as in the Order, independently, and to have even felt that *summary judgment* was warranted, serves as a compelling indication that the Order is correct and that the Company is wrong as to what it claims WAC 284-54-253 says. This compelling indication grew even stronger after the Company next moved for reconsideration,[12] as it has done here, and Judge Bryan rejected it.[13] Citing a lack of issues of fact, a lack of "manifest error," and a lack of any other basis under LR 7(h)(1) for reconsideration, Judge Bryan simply ruled "Defendant's Motion for Reconsideration [...] is **DENIED**." Thus, while the Company's Motion should be rejected under state or federal standards for reconsideration, theories of *res judicata* or *collateral estoppel* may also equally support the same conclusion.

C. The Order properly distinguished *Irish* and *Hanson*.

The Company's second "area of concern" argues, that two cases, *Irish* and *Hanson*, should govern. The Company's Motion simply re-hashes arguments of the past, and offers nothing new. The Company claims these cases should not have been rejected by the Order, but its scanty briefing provides nothing to dissuade that the cases have no relevance to this matter. For the reasons OIC staff has already argued, the cases are still inapposite and thus, the Order correctly distinguished them. The Company's second area of concern should be rejected, for several reasons.

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[9] *See* Decl. Rec. Singer at Exh. D.
[10] *See* Decl. Rec. Singer at Exhs. C and E.
[11] *See* Decl. Rec. Singer at Exh. F.
[12] *See* Decl. Rec. Singer at Exhs. G and H.
[13] *See* Decl. Rec. Singer at Exh. I.

First, under the principles governing similar motions in state and federal courts, this second "area of concern" is nothing more than an attempted second bite at the same apple. Ability argued about the applicability of *Irish* several times before already. In Exhibit 28, Donald Lawler pointed to the unpublished *Hanson* case in his letter to OIC to set forth the Company's views. The Company's Motion merely re-hashes those views. As Judge Bryan noted, a motion for reconsideration is not "intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through — rightly or wrongly. [...] Mere disagreement with a previous order is an insufficient basis for reconsideration." For this basis, the Company's second ground should be rejected.

Second, *Irish* and *Hanson* were correctly distinguished. For example, in response to the Company's mention of these cases, OIC staff submitted briefs and argument that correctly explained why these two cases have no application here. Pages 9-11 of OIC's Second Supplemental Hearing Brief correctly addressed why *Irish* is irrelevant and should be distinguished. As shown in Exhibit 28, Donald Lawler attempted to persuade OIC that the *Hanson* case was supposedly reliable authority for the Company's views, but he then went on to mischaracterize the case. To show this, a copy of the *Hanson* case was offered as OIC's Exhibit 29, highlighted, to illustrate Mr. Lawler's error. Plainly, a reading of *Hanson* evinces that it has no application here – though its status as an unpublished decision lends it no credence, either. OIC staff also presented argument about *Hanson* in footnote 22 of OIC's Supplemental Hearing Brief. The Company has had ample chance to address this already. It has repeatedly briefed the issue, at least with respect to *Irish*. The Order correctly distinguished both cases, and committed no error, manifest or otherwise, in doing so.

Finally, a number of courts have simply ignored the Company's arguments with respect to *Irish*. For example, in the *Bushnell* case, Ability affiliate Medico urged the Court of Appeals to adopt *Irish*'s holding for the same reason it argues here: it claimed the case

supported the Company's 'lapse reverts back' contention. In ruling against the Company, the Court of Appeals published a decision that failed to even mention the case.[14] The Company's lawyers – the same ones representing Ability here – moved the Court of Appeals to reconsider, again citing *Irish*. Again, the court ruled against the Company, denying reconsideration, and *again* ignoring *Irish*. The Company's lawyers next tried this same argument a third time, in their petition for review to the Washington Supreme Court. The Supreme Court too ruled against the Company, denying review, and like the Court of Appeals, the Supreme Court also entered an order that made nary a mention of *Irish*.[15] And again, in the related federal suit before Judge Bryan, the Company tried *yet again* making the *same* thrice-rejected argument about *Irish*. For the fourth time, Judge Bryan joined the chorus rejecting *Irish*.[16] And like the Court of Appeals and the Washington Supreme Court, Judge Bryan's orders of June 1, 2012 and June 20, 2012 each gave no credence to the notion, and each failed to even mention *Irish*.[17] This supports that the Order properly rejected the Company's arguments about *Irish* here, too. The Company's Motion should be denied.

D. Evidence of cognitive impairment and the Company's erroneous views.

The Company's "third area of concern" claims that "new evidence" regarding the insured's "severe cognitive impairment" warrants re-writing the Order. This evidence is portions of a transcript from the recent deposition of Dr. Mihali, taken on June 8, 2012 by the

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[14] *See Bushnell v. Medico Ins. Co.*, 159 Wn. App. 874, 246 P.3d 856 (2011) and OIC Hearing Exhibits 36-39.

[15] *See* OIC Hearing Exhibits 36-39. Although the *Bushnell* case technically dealt with a different corporate entity, Medico, it is clear that Medico is simply an affiliate of Ability within the meaning of the words "affiliate" and "affiliates" as those words are used in both the Order and the OIC's underlying Order to Cease and Desist. In fact, the two are one in the same. For example, the Company admits it "administers" Medico's same policies (see December 9, 2011 letter to OIC's Kelly Cairns in this matter), and OIC records publicly available on the OIC website show that both Medico and Ability even share the same registered address and mailing address. The insured's policy in this case began as a Mutual Protective Policy, but without explanation to the insured, the legal name of the company the insured dealt with mysteriously transformed into Medico, and then later, into Ability. The record in this case is replete with examples of the Company's changing legal name, even within a short period of time. *See*, e.g., OIC Hearing Exhs. 5 through 10.

[16] *See* Decl. Rec. Singer at Exh. C., e.g., at pps. 11-12.

[17] *See* Decl. Rec. Singer at Exhs. F and I.

Company's lawyers. The deposition was attended by the insured's personal counsel, but OIC staff was not informed of the deposition, did not know about the deposition, was not invited to the deposition, and, consequently, did not attend or participate in the deposition. In any event, this supposedly "new" evidence could have been brought forth long ago, but it was not. Nor does it make a difference today. As explained in section D(1) below, this "new evidence" and the circumstances surrounding it should be rejected as not constituting proper or sufficient grounds to grant reconsideration.

But the Motion's third espoused "area of concern" also raises a separate concern. Citing page 2 of the Order, the Company states that it believes the Order "correctly lists the requirements of benefits, and of reinstatement of a policy: 'when the insured (or designee) … provides proof of the insured's severe cognitive impairment or loss of functional capacity ….'" This suggests the Company believes WAC 284-54-253's words, "cognitive impairment," mean "*severe* cognitive impairment." In other words, the Company appears to believe that only insureds who happen to also be eligible for payments for covered claims qualify for reinstatement under WAC 284-54-253. The Company is wrong.

WAC 284-54-253 governs *reinstatement*, not payments for valid claims. Limiting eligibility for reinstatement to only those who happen to also meet other, separate requirements for payments or coverage promised by the Company under the terms of its policies is *not* the standard that WAC 284-54-253 envisions. To even suggest such makes no sense, and defeats the very purpose of this important consumer protection rule. If this is the Company's view, and if this is the way the Company will transact its insurance with its and its affiliates' Washington insureds in the future, the Company will misapprehend its duties to its insureds, violate the law, violate the Order, violate the Order to Cease and Desist, and pose serious risk of harm to all of its insureds, a harm no different than the harm suffered by the insured in the instant matter. This is addressed in section D(2) below.

1. The proffer of parts of Dr. Mihali's deposition transcript does not meet the standards for reconsideration, is contrary to the APA and OIC rules, and makes no difference.

For several reasons, Dr. Mihali's June 8, 2012 deposition testimony should not warrant reconsideration.

First, the Company's proffer of this portion of Dr. Mihali's testimony comes too late. Under the state and federal standards governing motions for reconsideration cited *supra*, such motions should *not* be granted to get a 'second bite at the apple' or allow facts or theories that should have been brought forth sooner. But as with the rest of its Motion, this third part, too, tries to do exactly this. Here, the Company knew of Dr. Mihali's March 21, 2011 letter (OIC Hearing Exhibit 4) and statement dated August 24, 2011, no later than September 2, 2011 when OIC's "Motion to Supplement the Record – Certification of Dr. Mihali" was filed. The Company had, by then, already conducted depositions of OIC staff members Bianca Stoner and Dan Halpin, so the Company knew it could take depositions. Though it knew it could then have taken Dr. Mihali's deposition too, it chose not to. The Company also called its own witnesses at the hearing, including its expert Craig Bennion, so the Company also knew it could call its own witnesses. Though it knew it could have also called Dr. Mihali as a witness at the hearing, the Company chose not to do this, either. Instead, Ability decided to wait to depose Dr. Mihali. It waited until June of 2012, *after* Judge Bryan's adverse ruling on summary judgment, and over *half a year* after the hearings concluded in this matter. This evidence clearly could have been offered long ago. Ability could have at least asked for permission to offer it long ago. This all flies in the face of LR 7(h)(1), which expressly disapproves of motions offering evidence ***which could have been brought to the attention of the court earlier with reasonable diligence***. Likewise, CR 59(a)(3) and (4) require new evidence not be something that "ordinary prudence" or "reasonable diligence" could have brought forward sooner. With ordinary prudence or reasonable diligence, Dr. Mihali could have been deposed or called as a witness long ago. The Company's Motion should be denied.

Second, the Company's proffered portions of Dr. Mihali's deposition run afoul of APA and OIC rules emphasizing the need for fairness. The APA allows testimony to be taken in a variety of forms, but "where the rights of the parties will not be prejudiced thereby." RCW 34.05.449(3). "Each party in the hearing ***must*** have an opportunity ***to participate effectively*** in, to hear, and, if technically and economically feasible, to see the entire proceeding while it is taking place." (Emphasis added.) *Id.* Here, the Company gave OIC *no* opportunity to participate in Dr. Mihali's deposition – let alone a chance to "participate effectively." Here, the Company decided to not invite OIC to the deposition. The Company decided to not give OIC any advance notice of Dr. Mihali's deposition. If the Company's aim was to exclude OIC to prevent facts harmful to its erroneous views from coming to light, the Company accomplished this. OIC did not participate in the deposition squarely because the Company denied OIC that chance. But the Company should not have done that if it wished to later consider offering any part of the deposition transcript into this proceeding.

The Company's decision to exclude OIC from participating in the deposition also contradicted other rules. OIC's WAC 284-02-070(2)(c)(iii) requires that "[a]ny person heard must make full disclosure of the facts pertinent to the inquiry." The APA also requires that "[t]o the extent necessary for full disclosure of all relevant facts and issues, the presiding officer ***shall*** afford to all parties the opportunity to respond, present evidence and argument, ***conduct cross-examination,*** and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order." (Emphasis added.) RCW 34.05.449(2). Here, the Company's decision to bar OIC from the deposition ensured OIC would have no chance to ask follow-up questions or cross-examine Dr. Mihali. If the Company's aim was to prevent "full disclosure" of Dr. Mihali's knowledge, their choice to exclude OIC accomplished this as well. Since the selections of testimony now being proffered resulted largely from a plethora of unchallenged leading questions asked by the Company's lawyers, the testimony should not be considered. While only portions of the full transcript are being

offered, even offering the whole transcript makes no difference: OIC was prevented from asking questions, and denied the opportunity to participate. The Motion should be denied.

Yet another reason why the Motion should fail is that, regardless of all the other reasons above, Dr. Mihali's proffered deposition transcript just doesn't make any difference. As the Order makes clear, ***all*** of the evidence offered in this matter meets WAC 284-54-253's standards of cognitive impairment ***and*** loss of functional capacity. Dr. Mihali's March 2011 letter and his later, August 2011 certification are simply two pieces of that evidence. These two pieces of evidence are just two pieces within a much larger body of evidence. The proffered deposition snippets do not alter this corpus of evidence – which meets WAC 284-54-253's standards. Despite the Company's heavily gerrymandered quotation from the Order,[18] cognitive impairment wasn't the only WAC 284-54-253 issue here: "loss of functional capacity" was, too. And nothing in the proffered deposition testimony from Dr. Mihali alters or impeaches his August 2011 certificate's statement regarding the insured's "Activities of Daily Living Test" performance – which exceeds the proof of "loss of functional capacity" required under WAC 284-54-253(2). Beside, for the reasons correctly set forth in the Order (and Judge Bryan's orders),[19] the Company is also estopped from raising the issue of evidence of cognitive impairment, so any deposition testimony from any person on the topic is irrelevant. In fact, when the Company tried to offer this same deposition testimony excerpt to Judge Bryan in its recent motion for reconsideration in the related federal court civil matter, Judge Bryan denied it by reminding the Company of this estoppel.[20] For all these reasons, the Motion should be denied.

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[18] A portion of Ability's Motion quoted from the Order, but it heavily redacts out the Order's reference to "loss of functional capacity." *See* Ability Insurance Company's June 22, 2012 Motion for Reconsideration at page 6, lines 5-9. Obviously, the Order concerned "cognitive impairment," as the Company suggests; but it also dealt with "loss of functional capacity," which the Motion redacts through its selective quotation of the Order.

[19] *See* Decl. Rec. Singer at Exhs. F and I.

[20] Judge Bryan's Order Denying Reconsideration affirmed that the Company was estopped from even debating what weight to give, if any, to any of Dr. Mihali's statements. He affirmed his June 1, 2012 ruling that the

2. To ensure that the Company does not continue to misunderstand its reinstatement obligations to its insureds under Washington's long-term care unintentional lapse rules, it should be reminded of them here.

At page 5 lines 23-24 of Ability's Motion, citing part of the Order, the Company comments that it believes the Order "correctly lists the requirements of [sic] benefits, and of reinstatement of a policy: 'when the insured (or designee) . . . provides proof of the insured's severe cognitive impairment or loss of functional capacity . . .'" This suggests that the Company believes that, as an alternative to "loss of functional capacity," WAC 284-54-253's use of the words "cognitive impairment" actually means "*severe* cognitive impairment." If the Company were to take that incorrect view, it would threaten all of its Washington insureds with the very same risk of serious harm that was actually suffered by the insured in the instant matter. It would also violate the Company's obligations to its insureds, the Order, and the Order to Cease and Desist. To ensure that the Company does not continue to fail to understand its obligations and what needs be shown to qualify for reinstatement under Washington's unintentional lapse long-term care rules, OIC now suggests the Company be reminded of its obligations going forward, to protect Washington's long-term care insureds from the harm the subject insured already suffered at the Company's hands here.

a. Only "a cognitive impairment," not "severe" cognitive impairment, need be shown.

With regard to WAC 284-54-253, its use of the words "cognitive impairment" is clear. And it says that four times. If reinstatement is requested within five months after the policy lapsed or terminated, WAC 284-54-253(2) only requires proof of "cognitive impairment" for the Company to become obligated to grant the insured the right of reinstatement set forth in the rule. It does not require proof of "severe cognitive impairment." The words "severe cognitive impairment" appear nowhere in the rule. If the rule intended "cognitive impairment" to not be the standard, other words would have been chosen.

Company was estopped from arguing about whether "adequate documentation of cognitive impairment or loss of functional capacity" was submitted, let alone timely submitted. *See* Decl. Rec. Singer Exh. I.

WAC 284-54-253 is not radical in its choice of the words "cognitive impairment." The NAIC's model "unintentional lapse" model – from which WAC 284-54-253 derived – also uses the words "cognitive impairment" as the standard for granting reinstatement. Like WAC 284-54-253, the NAIC's model unintentional lapse rule also does not use the words "severe cognitive impairment." Nor do the words "severe cognitive impairment" appear in WAC 284-83-025, the other long-term care unintentional lapse reinstatement section that Ability cites in its Motion.

Washington's long-term care rules define what is meant by "cognitive impairment." While "cognitive impairment" is not defined in section WAC 284-54-253, it is defined in a different section within that same Chapter of Title 284 WAC, and that definition appears in a consistent manner throughout Washington's long-term care rules. WAC 284-54-040(5)(a) defines "cognitive impairment" as follows:

> "Cognitive impairment" means a deficiency in a person's short-term or long-term memory; orientation as to person, place, and time; deductive or abstract reasoning; or judgment as it relates to safety awareness.

This definition is preceded by the words "[f]or purposes of this section the following definitions apply," but a virtually verbatim definition is included again later in Washington's other chapter of long term care insurance rules, at WAC 284-83-015(5), which defines "cognitive impairment" as follows:

> "Cognitive impairment" means a deficiency in a person's short or long-term memory; orientation as to person, place and time; deductive or abstract reasoning; or judgment as it relates to safety awareness.

This near mirror image definition is preceded by the words "A long-term care insurance policy or certificate delivered or issued for delivery in this state must not use the following terms unless the terms are defined in the policy or certificate and the definitions satisfy the following standards. This section specifies minimum standards for several terms commonly found in long-term care insurance policies, while allowing some flexibility in the definitions

themselves." This definition makes clear that it should guide the Company in addressing reinstatement requests going forward.

As it has done in its prior briefs, the Company again cites in its Motion the same federal laws and rules that it has pointed to before, which make clear that tax-qualified, long-term care policies must meet Internal Revenue Code and federal requirements ***for the payment of benefits under such policies***. But as OIC has already correctly pointed out at page 27 of its Second Supplemental Hearing Brief, for example, these federal requirements only apply to "'amounts [...] received' under the policy, not to the granting of reinstatement under WAC 284-54-253." The Company's Motion suggests that it would mistakenly and wrongly equate the act of making payments with the act of extending WAC 284-54-253's limited right of reinstatement. One is a potential taxable event; the other is not. One is money going from insurer to insured; the other is allowing a vulnerable insured to tender back payment to the insurer for a policy the insured did not really intend to let lapse. As OIC pointed out, e.g., at pages 26-27 of its Second Supplemental Hearing Brief, these acts are distinct. WAC 284-54-253's reinstatement rights are not governed, controlled, modified or influenced in any way by federal requirements for payments. As OIC previously pointed out, in fact these same federal regulations cited by the Company expressly contemplate "more stringent consumer protection provisions" exactly like the very ones established in WAC 284-54-253.

Nor may the Company transmogrify WAC 284-54-253's "cognitive impairment" into "severe cognitive impairment" by any language in its contracts. As OIC already explained at page 9 of its Supplemental Hearing Brief, citing OIC Hearing Exhibit 1 at page 13, "[a]ll of WAC 284-54-253 has essentially been made a part of the policy here. The policy has a provision at Part S(13) that provides '[t]he provisions of this 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.'" Its brief indicated that Professor Appleman also noted:

> As the insurance business is affected with a public interest and subject to legislative regulation, an insurer cannot complain of valid statutes governing its contract at the time it was made. The statutory law in force and effect at the time of the issuance of a policy becomes a part of the contract as though expressly written therein, and a policy must be considered to contain those requirements. [...] The parties are chargeable with knowledge of statutes and with the fact that insurance policies cannot be issued in conflict with them. And thus missing terms required by statute will be read into the policy and terms in conflict with statute will be amended to conform to them, and this is the result even though increased liability not reflected in original premium is the consequence.

4-22 Appleman on Insurance § 22.1. The Insurance Code, too, requires policies to only contain terms that are not be inconsistent with the Insurance Code. *Cf.*, RCW 48.18.150.

While the Company's Motion confidently asseverates that it thinks the Order "correctly" defined "cognitive impairment" as "severe cognitive impairment," the Company's Donald Lawler earlier testified that the term "cognitive impairment" is "vague and undefined." (*See* Decl. Rec. Singer Exh. A, Company's answer/objections to interrogatory ROG 12 and response/objections to request for production number 2, stating "Ability objects to this request as vague and undefined; *e.g.*, use of the term 'cognitive impairment.'")[21] Of course, if the Company truly believes the term is "vague," then it is bound, as OIC pointed out at pages 33-34 of its Supplemental Hearing Brief, to give it "a meaning and construction most favorable to the insured [...]." *Kaplan v. Northwest Mutual Life Ins. Co.*,115 Wn. App. 791, 804-05, 65 P.3d 16 (2003) (cites omitted.) Clearly, this principle would dictate against reading "cognitive impairment" as "severe cognitive impairment," since doing so would result in a construction *less* favorable to the insured. And this principle may indeed be especially pertinent here if the Company intended "cognitive impairment" to have a different meaning than what the rule's requirements provide. In any event, even if this, and other, rules of

[21] As indicated, the term "cognitive impairment" *is* defined, and in virtually the exact same way, throughout Washington's long-term care rules. *See* WAC 284-54-040(5)(a) and WAC 284-83-015(5). This definition is what "cognitive impairment" in WAC 284-54-253 means.

construction are considered, they all yield the same conclusion – that "cognitive impairment" does not mean "severe cognitive impairment."

Applicable rules of construction require that WAC 284-54-253's "cognitive impairment," like any term, must be given its plain meaning if the meaning is plain on its face, that the context of the scheme as a whole in which it appears must also be considered, and that the term must be construed in a way that will not lead to strained or absurd results:

> If a rule's meaning is plain on its face, then the court must give effect to that plain meaning. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Under the 'plain meaning' rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002); *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999). A term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole. *ITT Ravonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). The court should not construe a regulation in a manner that is strained or leads to absurd results. [*State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979)].

City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). As OIC pointed out at page 2 lines 13 -14 of its Second Supplemental Hearing Brief, and as the Company has also agreed, it is also axiomatic that the court's "paramount concern is to ensure that the regulation is interpreted in a manner that is consistent with the underlying policy of the statute."

Given its omission of the word "severe," and the virtually identical definitions of "cognitive impairment" in WAC 284-54-040(5)(a) and WAC 284-83-015(5), WAC 284-54-253 cannot be read to include "severe" without ignoring and defeating the rule's expressly stated purpose. Looking at this purpose to glean the overall context of the regulatory scheme as a whole, as rules of construction say we must, the Chapter that contains WAC 284-54-253 starts by indicating that the Chapter's purpose is to "establish [...] minimum standards and disclosure requirements to be met by insurers." WAC 284-54-010. Likewise, WAC 284-54-253 begins by indicating that "[t]he purpose of this section is to protect insureds from unintentional lapse by [...] provid[ing] for a limited right to reinstatement of coverage unintentionally lapsed by a person with a cognitive impairment or loss of functional

capacity." It also makes clear that the section only establishes "minimum standards and do[es] not prevent an insurer from including benefits more favorable to the insured."

As OIC has also already explained in its earlier briefing and arguments, WAC 284-54-253's purpose is not only to protect *insureds*, but to protect *singularly vulnerable* insureds. As OIC's briefing indicated, and without any opposition or disagreement from Ability, not only do most long-term care insureds whose policies lapse have the worst physical and mental health condition and are the most in need of the coverage they have lost, as the Company knows, "most policies expire inadvertently."[22] Especially given the singularly vulnerable insureds this rule is designed to protect, and the tragically ironic but not uncommon problem it is designed to solve, it would be unreasonable and improper for the Company to defeat the rule's purpose by insisting, contrary to the rule's language, that these insureds or their designees must meet a different, higher standard not included or intended to have been included in the words of the rule. The rule even makes it uncontrovertibly clear that it only establishes "minimum" protections, which the insurer can build upon to establish more generous protections that are even "more favorable to the insured." WAC 284-54-253. So while the rule would allow the Company to turn "cognitive impairment" into something lesser, or easier to satisfy and even more favorable to insureds so as to enhance the protections afforded to these singularly vulnerable insureds, the Company cannot do the opposite and turn "cognitive impairment" into something far more difficult to meet and far less favorable to the insured, like "severe" cognitive impairment.

Incorrectly construing WAC 284-54-253's "cognitive impairment" to mean "severe cognitive impairment" would also yield absurd results. If tax-qualified, long-term care policies require insureds to prove at least "severe cognitive impairment" to receive payments, and if "severe cognitive impairment" was also required to become eligible for reinstatement under WAC 284-54-253, then only those insureds who happen to already qualify for

[22] *See* OIC's Second Supplemental Hearing Brief at page 8, fn. 7.

payments would even be eligible to seek reinstatement. In other words, if "severe cognitive impairment" was also required to become eligible for reinstatement under WAC 284-54-253, then insureds who unintentionally allowed their policies to lapse and have "a cognitive impairment" would *not* qualify for reinstatement. This makes no sense, as it flies in the face of the rule's plain words indicating that the rule's purpose is to extend reinstatement to an insured person with "a cognitive impairment," not a *severe* cognitive impairment. Again, the rule's plain purpose is "to protect insureds from unintentional lapse [...] by provid[ing] [...] a limited right to reinstatement of coverage unintentionally lapsed by a person with a cognitive impairment or loss of functional capacity." WAC 284-54-253. The fact that the purpose states it is to protect "a person with a cognitive impairment" necessarily means what it says: "a" cognitive impairment, or one kind of cognitive impairment – not "severe" cognitive impairment. There is nothing in the Insurance Code, the NAIC model, federal law, or anywhere else that suggests that WAC 284-54-253 was intended to narrow reinstatement protection eligibility to only those insureds whose cognitive impairments have so worsened to the point that they are "severe" and thus also qualify them for payments. As indicated, regulations like WAC 284-54-253 should not be construed "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). They should be construed in "a rational, sensible" manner, giving meaning to the underlying policy and intent. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 70 P.3d 931 (2003) (citing *Cannon v. Dep't. of Licensing*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002)).

b. Alternatively, "loss of functional capacity" may also be shown.

Alternatively, insureds may also qualify for reinstatement by showing "loss of functional capacity." What "loss of functional capacity" means is informed by WAC 284-54-040(3)(a)-(b), which provides criteria for how insurers may "measure [...] functional incapacity." These standards may guide whether the insured has a "loss of functional

capacity," since WAC 284-54-040(3)(a)-(b) specifies that it helps measure "functional incapacity," similar to "loss of functional capacity."

Interestingly, while WAC 284-54-040(3)(a)-(b) includes similar "functional incapacity" language, the policy's definition for "activities of daily living" does not define "loss of functional capacity." The policy here uses the term "loss of functional capacity" in page 3, (definition for "Assisted Living Care Facility") page 6 (Part G), and in Part M on page 9. But the policy's use of this undefined "loss of functional capacity" term is, however, somewhat circular. Part G provides that one way to qualify for benefits is to meet at least two activities of daily living for a period of 90 days, but this must be "due to loss of functional capacity." Of course, in the absence of a definition for "loss of functional capacity," the term must receive its common, ordinary meaning as a consumer would appreciate it. Undefined terms are given their plain, ordinary, and popular meaning given to them by an ordinary purchaser of insurance. *See*, e.g., *Kitsap County v. Allstate Ins. Co.*,136 Wn.2d 567, 575, 964 P.2d 1173 (1998). Again, since the term is undefined, its ordinary meaning prevails, guided by WAC 284-54-040(3)(a)-(b).

The Order correctly concluded that the insured presented sufficient proof of "loss of functional capacity." Going forward, OIC staff suggests the Company be reminded of these obligations to ensure it does not fail to fulfill its duties to its Washington insureds under the law and under the orders entered.

E. Conclusion

The Company's Motion should be denied, and the Company reminded of its obligations to protect its insureds going forward.

DATED this 9th day of July, 2012.

OFFICE OF INSURANCE COMMISSIONER

By: _____
Alan Michael Singer