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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of)	Docket No. 11-0088 and 11-0089
)	
Ability Insurance Company,)	ORDER DENYING ABILITY
)	INSURANCE COMPANY'S MOTION
An authorized insurer.)	FOR RECONSIDERATION
)	

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NATURE OF PROCEEDING

On June 22, 2012, Ability Insurance Company ("Ability") filed a Motion for Reconsideration in Matter Nos. 11-0088 and No. 11-0089 ("Motion"), together with Declaration of Virginia R. Nicholson in Support of Ability's Motion with attached Exhibit 1 (portions of Deposition of Dr.

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Mihali taken June 8, 2012). In its Motion, Ability asks for reconsideration of the Findings of Facts, Conclusions of Law and Final Order entered by the undersigned on June 13, 2012 ("Final Order") based upon its arguments set forth therein. On July 9, 2012, the Office of the Insurance Commissioner (OIC) filed its OIC's Response and Opposition to Ability's Motion for Reconsideration, together with Declaration of Alan Michael Singer Regarding Ability Motion for Reconsideration with attached Exhibit 1 (Order Denying [Ability's] Motion for Reconsideration entered June 20, 2012 in Case No. C11-5737 RJB, U.S. Dist. Ct.). The undersigned has carefully considered Ability's Motion for Reconsideration and Declaration in this matter; the OIC's Response and Declaration; the record of this proceeding and the entire hearing file in entering this Order.

As bases for its Motion, Ability presents three arguments, which are addressed in detail in Analysis below. Briefly, Ability argues:

- 1) That in her Final Order the undersigned misinterpreted the meaning of WAC 284-54-253 and should have interpreted it in the way Ability argued at hearing;
- 2) That in her Final Order the undersigned failed to give proper consideration to two cases (*Irish* and *Hanson*) which Ability presented at hearing; and
- 3) That because an issue at hearing was White's cognitive status in 2008 and the OIC submitted evidence from White's physician on this issue at hearing, the undersigned should now consider "new evidence" that (over 10 months after the hearing was concluded and some 7 months after the record was closed) it believes White's physician revised his opinion (in a deposition in another case in another forum).

ANALYSIS

Standard of review. In its Motion for Reconsideration, Ability does not identify the legal standards that govern motions for reconsideration. However, while Washington's Administrative Procedures Act, at RCW 34.05.470(1), authorizes "a petition for reconsideration, stating the specific grounds upon which relief is requested," it defers to the standard of review established by an agency through rulemaking. The APA does not indicate the standard of review in the absence of agency rules on the matter, nor has the OIC adopted any such rules of its own. Given this dearth, state rules and standards governing motions for reconsideration should provide guidance here, particularly 1) Washington Civil Rule 59. Additionally, Washington courts often look to the decisions of other courts, even federal courts, for the persuasiveness of their reasoning when trying to decide similar matters, and for that reason it is also helpful to look for guidance to the federal law used by federal courts in Washington hearing civil matters, particularly 2) Fed. R. Civ. P. 59 and Local Rule 7(h).

- 1) Washington's state courts follow Civil Rule (CR) 59 when considering motions for reconsideration. CR 59(a) provides a list of nine specific grounds for granting motions for reconsideration, briefly: 1) irregularity in the proceedings; 2) misconduct; 3) accident or surprise; 4) newly discovered evidence that the moving party could not with reasonable diligence have discovered and produced at the trial; 5) passion or prejudice; 6) error in assessment of recovery; 7) that there is no evidence or reasonable inference from the evidence to justify the decision or that it is contrary to law; 8) error in law occurring at the trial and objected to at the time by the moving party; or 9) that substantial justice has not been done. 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 proposed 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).
- 2) Washington federal courts view motions for reconsideration 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)(a), 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).

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 Nutraceuticals, 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 motions 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

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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 1042, 1046 (9th Cir. 2003).

Ability's three arguments. Ability's three arguments in support of its Motion for Reconsideration are identified and discussed below:

I. First, Ability argues that in her Final Order the undersigned misinterprets WAC 284-54-253, and had this regulation been properly interpreted Ability would have been found to have complied with this regulation in denying reinstatement to White (and therefore the OIC's disciplinary orders which Ability challenged at hearing would have been found to be without basis). In response, both parties presented thorough written and oral analyses and arguments at hearing regarding the proper interpretation of WAC 284-54-253, and after careful review and consideration the undersigned detailed her interpretation of this regulation and its application to the facts at issue, with reasons for her interpretation, in her Final Order. Ability's argument here is the same as previously made at hearing and properly rejected. Ability presents no highly unusual circumstances, newly discovered evidence, clear error, intervening change in the controlling law, or other reason why reconsideration would be appropriate. In addition, as the federal court in *White v. Ability Ins. Co.*, *supra*, observed, 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.”

The above reasoning provides reasons why this Motion for Reconsideration should be rejected. However, it is also relevant that United States District Court Judge Bryan also rejected Ability's same arguments about what it thinks WAC 284-54-253 says: in the September 15, 2011 civil action, *White v. Ability Ins. Co.*, cited above, this same insured (White) sued Ability based on the same facts and the same laws at issue here. Following summary judgment motions made by both parties specifically concerning the same issue in the undersigned's Final Order – i.e., the proper interpretation of WAC 284-54-253 – on June 1, 2012 Judge Bryan entered his ruling accepting White's arguments and rejecting Ability's. While the undersigned was unaware of even the existence of *White v. Ability Ins. Co.* in the U.S. District Court until it was raised by the OIC in its Response to Ability's Motion for Reconsideration herein, Judge Bryan's June 1 Order on Summary Judgment sets forth reasoning and conclusions identical to those of the undersigned in her Final Order as to the proper interpretation of WAC 284-54-253. Ability then moved for

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reconsideration in that court and Judge Bryan denied reconsideration, citing, as here, a lack of issues of fact, a lack of "manifest error" and a lack of any other basis under Local Rule 7(h)(a).

For the above reasons, reconsideration based on Ability's argument that the undersigned improperly interpreted WAC 284-54-253 is not appropriate: Ability has failed to show any basis upon which reconsideration should be granted, and the undersigned correctly interpreted WAC 284-54-253 and committed no error, manifest or otherwise, in doing so.

II. Second, Ability argues that in her Final Order the undersigned failed to give proper consideration to Washington case law, and specifically the *Irish* and *Hanson* cases. In response, both parties presented thorough written and oral analysis and argument at hearing regarding Washington case law, specifically including the *Irish* and *Hanson* cases. The undersigned carefully reviewed the *Irish* and *Hanson* cases and other Washington case law and the arguments of both Ability and the OIC relative to this case law, and detailed her proper consideration of them in her Final Order. Ability's argument here is the same as was previously made at hearing and properly rejected. Just as in I. above, Ability presents no highly unusual circumstances, newly discovered evidence, clear error, intervening change in the controlling law, or other reason why reconsideration would be appropriate. In addition, under the above principles governing similar motions in state and federal courts, Ability's argument is merely an attempt to get a second bite at the same apple. As Judge Bryan noted in *White v. Ability Ins. Co., supra*, 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."

Further, a number of courts have simply ignored Ability's arguments with respect to *Irish*. For example, in *Bushnell v. Medico Ins. Co.*, 159 Wn. App. 874, 246 P.3d 856 (2011) and OIC Hearing Exs. 36-39, 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 Medico's "lapse reverts back" contention. In ruling against Medico in *Bushnell*, the Court of Appeals published a decision that failed to even mention *Irish*. Medico's lawyers (the same attorneys as have represented Ability herein) moved the Court of Appeals to reconsider, *again* citing *Irish*. *Again* the court ruled against Medico, denying reconsideration and *again* ignoring *Irish*. Medico's lawyers next tried this same argument a *third* time, in their petition for review to the Washington State Supreme Court. The Supreme Court too ruled against Medico, denying review, and like the Court of Appeals, the Supreme Court also entered an order that made no mention of *Irish*. And *again*, in the related federal suit before Judge Bryan cited above, Ability tried *yet again* to make the same thrice-rejected argument about *Irish*. For the fourth time, Judge Bryan joined the chorus rejecting *Irish*. And like the Court of Appeals and the Washington State 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*. This supports that the undersigned's Final Order herein properly rejected Ability's arguments about *Irish* here, too.

For the above reasons, reconsideration based on Ability's argument that the undersigned failed to give proper consideration to Washington case law, and specifically the *Irish* and *Hanson* cases, is not appropriate: Ability has failed to show any basis upon which reconsideration should be granted, and the undersigned correctly distinguished both the *Irish* and *Hanson* cases and committed no error, manifest or otherwise, in doing so.

III. Third, Ability recognizes, correctly, that an issue in this proceeding was White's cognitive status in 2008, and states that - because the OIC submitted evidence from White's physician during the hearing on this issue - the undersigned should now consider "new evidence" that on June 8, 2012 (which was over 10 months after the hearing before the undersigned was concluded) White's physician revised his opinion in a deposition in another case in a different forum. The OIC did submit evidence from White's physician of nearly 20 years, Dr. Mihali of Allenmore Clinic in Tacoma, as follows: 1) shortly before the hearing commenced, the OIC filed what was marked as OIC Ex. 4 and it was admitted at hearing without objection from Ability. Ex. 4 was a March 21, 2011 statement of Mihali that *Mrs. White was demonstrating mild cognitive impairment on the June 2009 office visit, and on a more probable than not basis this was present in November, 2008.* Also, 2) the OIC offered additional evidence on this issue in the form of Dr. Mihali's August 24, 2011 Certification which states that *White is a chronically ill individual, and has been a chronically ill individual since at least 2008, ... due to severe cognitive impairment.* In its Motion for Reconsideration, 1) Ability advises that on June 22, 2012 (in a deposition in another case in a different forum, and over 10 months after the hearing concluded and some 8 months after the hearing record was closed) Dr. Mihali revised his opinion on whether White suffered from severe cognitive impairment in 2008; and 2) Ability argues that the undersigned should now admit this "new evidence" on the issue of White's cognitive status and consider it in deciding this Motion for Reconsideration. [Ability attaches relevant portions of Dr. Mihali's June 8, 2012 deposition to Declaration of Virginia Nicholson in support of its Motion for Reconsideration, although some pages are omitted where the questioning is still indicated as being relevant, e.g., continuing questioning on this issue is continued on page 65 which is omitted; answer to relevant question posed on page 75 is omitted because page 76 is omitted.]

In response, the deposition was attended by White's personal counsel, but the OIC was not informed of the deposition, did not know about it and consequently did not attend or participate in it. Further, Washington CR 59 (a)(3) and (4) require that to be considered on reconsideration, "new evidence" should be "newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial" and evidence that a person with "reasonable prudence" could not have guarded against. Further, the federal LR 7(h)(1) expressly disapproves of motions offering evidence "which could have been brought to the attention of the court earlier with reasonable diligence." As Ability recognizes in its Motion for Reconsideration, the issue of White's cognitive status in 2008 was a central issue in this proceeding, and it was clearly a central issue even months before the hearing commenced on August 3, 2011. Because this was a central issue, both Ability and the OIC presented both oral testimony and written evidence relative to White's cognitive status before,

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during and after the hearing: e.g., the OIC filed OIC Ex. 4 prior to the hearing and during the hearing it was admitted without objection from Ability; Ability's Donald Lawler testified that, in his view, a review of all the other testimony and evidence, White had neither "cognitive impairment" nor a "loss of functional capacity" under the standards for reinstatement that he believed apply under WAC 284-54-253. It was known long before the hearing that Dr. Mihali has been White's physician since 1983 and had over the years made statements about her cognitive status and abilities. With ordinary prudence or reasonable diligence, Ability could clearly have deposed Dr. Mihali long before the hearing (just as it deposed OIC staff members Stoner and Halpin prior to the hearing) but it chose not to do so. Ability could also have called Dr. Mihali as a witness at hearing just like it called its other witnesses including its expert witness Craig Bennion (and should Dr. Mihali have been unwilling to appear and testify, Title 34 RCW is clear that witnesses may be subpoenaed either by an attorney representing a party in an adjudicative proceeding such as this or by the undersigned upon request of a party). Or, Ability could have requested that the undersigned leave the record open to allow additional evidence from Dr. Mihali just as the parties did regarding other issues, but it did not ask for this permission. [Finally, it is noted that, even if Dr. Mihali's deposition testimony were to be considered now, his testimony is vague and somewhat contradictory, and it appears clear from his statements that he failed to spend adequate time or necessary careful attention to his patient (White). Also because his statements are vague, somewhat contradictory and rambling, it is also unclear that he "retracted" his prior evidence relative to White's cognitive capacity. For these reasons, even if consideration of Dr. Mihali's "new evidence" were allowed, the likelihood of a materially different result in the Final Order is questionable.]

For the above reasons, Ability's argument that reconsideration should be granted based upon "new evidence" in the form of portions of a June 8, 2012 deposition of Dr. Mihali is not "new evidence" which either state or federal law allows as a basis for reconsideration. Finally, the undersigned correctly determined White's cognitive status based upon the proper evidence presented by the parties during the appropriate times in the proceeding and committed no error, manifest or otherwise, in doing so.

Clarification/Response to Ability's assumption in language of Final Order. In its Motion for Reconsideration, within its third argument above, Ability also cites the language of two sections of the Final Order and uses the wording to assume that it can write and administer its contracts in violation of the clear rules set forth in WAC 284-54-253. Its two "assumptions" are without basis, but are addressed below:

1. The Nature of Proceedings language is neither a Finding of Fact or a Conclusion of Law, and the language of WAC 284-54-253 is clear. In her Nature of Proceedings section which is simply a preface to the Findings of Facts, the Conclusions of Law and the Final Order, the undersigned stated:

....the Insurance Commissioner asserts that Ability Insurance Company has been violating WAC 284-54-253, which requires insurers to reinstate long term care

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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. ...

In its Motion, however, Ability incorrectly states:

The [Final Order] correctly lists the requirements of benefits, and or reinstatement of a policy: "when the insured (or designee) ... provides proof of the insured's severe cognitive impairment or loss of functional capacity ..." Order of 6/13/12 at 2, Nature of Proceeding.

As should be clear to any reader of Final Orders in administrative hearings, the "Nature of Proceedings" section included at the beginning of every Final Order is merely intended to give the reader a quick way, as accurately as possible, to 1) learn the nature of the particular proceeding; and 2) learn what some of the parties' arguments in the proceedings were. The language included in the "Nature of Proceedings" section is clearly separated from the Findings of Facts section and the Conclusions of Law section. The language included in the "Nature of Proceedings" section is certainly not a Finding of Fact. It is certainly not a Conclusion of Law. It represents a summary of what some of the parties' positions were; it certainly does not represent the opinion of the undersigned. To consider the language in any "Nature of Proceedings" section of a Final Order to be anything other than merely an attempt to briefly state the nature of the proceeding and what some of the parties' arguments were, such as Ability has done in its "assumption" here, is fallacious.

2. Ability next points to the final one and one-half pages of Conclusion of Law No. 13 of the Final Order to, once again, wrongly assume that "severe cognitive impairment" is required for reinstatement. Those sentences state: *... the issue of sufficiency of those prior documents is now moot because Silvernail has now ... obtained and submitted a Certification of Chronically Ill Individual Under IRC Sec. 77028 ... from White's physician ... this Certification very clearly, together with the documents already submitted by Silvernail, constitutes sufficient proof of White's severe cognitive impairment...* Read together with the first half of the sentence which was not cited by Ability, the entire Conclusion of Law No. 13 and the entire Final Order, this language simply states that WAC 284-54-253 requires proof of "cognitive impairment" to be eligible for reinstatement, and because Dr. Mihali had actually completed a Certification of Chronically Ill Individual Under IRC Sec. 77028 which certified that White suffered from "severe cognitive impairment" (as well as loss of functional capacity) White had thus submitted not only sufficient proof for reinstatement (the lower "cognitive impairment" or loss of functional capacity) but also the higher proof ("severe cognitive impairment" or loss of functional capacity) required for another purpose (e.g. eligibility for payment of benefits under the terms of the Ability contract). In other words, the issue at hearing regarding whether White's other medical documents showed that she suffered from "cognitive impairment" for reinstatement eligibility was moot, because by that time White had actually obtained the

document being discussed (the Certification of Chronically Ill Individual) which certified that White met not only the lower standard of "cognitive impairment" but also the higher standard of "severe cognitive impairment" as well.

3. To be entirely clear: 1) it is the opinion of the undersigned, and as set forth in her Final Order many times (e.g., Final Order pgs. 19-22), **WAC 284-54-253 clearly only requires proof of "cognitive impairment" (or loss of functional capacity) to be eligible for reinstatement.** The insured or designee is not required to provide proof of "severe cognitive impairment" or loss of functional capacity. WAC 284-54-253 reads:

The 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....

(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....

2) As also clearly stated in the Final Order, **Ability's contract must conform to WAC 284-54-253 in both its wording and its administration. The wording of Ability's contract must require only proof of "cognitive impairment"** (or loss of functional capacity) for eligibility for reinstatement; Ability's contract may not incorporate the higher standards of proof for eligibility for payment of benefits as it currently does. **Further, Ability's contract may not be administered to require proof of "severe cognitive impairment"** (or loss of functional capacity), or administered in any other way such as to unreasonably restrict the insured's right to reinstatement such as failing to advise the insured that more proof of "cognitive impairment or loss of functional capacity" was necessary, failing to send the proper notices to the proper addresses, failing to properly calculate the period of reinstatement using the correct date of lapse as interpreted in the Final Order, and other actions taken by Ability to unreasonably restrict Ability's insureds' right to reinstatement.

The Final Order is clear on the above issues. However, in the process of review, while Ability did not identify or argue about the language in Conclusion of Law No. 12 or anything but the last one and one-half sentences of Conclusion of Law No. 13, a single typographical error was discovered. Therefore, in order to correct this typographical error and to make Conclusion of Law Nos. 12 and 13 even more clear, the undersigned has amended the Final Order as attached.

Reasons for concern re Ability's compliance. Ability's constrained assumptions set forth above are without reasonable basis, and indicate reason for concern about Ability's future compliance with OIC's Orders and WAC 284-54-253. Ability's above two "assumptions" contained within the third argument in its Motion for Reconsideration are so clearly a misuse of the language in the Final Order and are so clearly a misreading of the plain language of WAC 284-54-253 that it suggests that Ability may be posturing itself to continue to violate the important protections of WAC 284-54-253. Ability's "assumptions" above, and indeed its three main arguments which form the bases for its Motion for Reconsideration, lack any reasonable

basis and also ignore the facts found in the Final Order unrelated to the proper interpretation of WAC 284-54-253 - such as Ability's not even advising Silvernail that she needed to submit more proof of White's cognitive status until some two years after it had already denied reinstatement - to the degree that they exhibit a continuing lack of good faith in its insurance practices.

CONCLUSION

Based upon the above authorities and analysis, Ability has not persuaded the undersigned that there are any issues of fact or law that warrant reconsideration of the Findings of Facts, Conclusions of Law and Final Order entered by the undersigned on June 11, 2012. Further, Ability has not persuaded the undersigned that she committed error, manifest or otherwise, in entering her Findings of Facts, Conclusions of Law and Final Order in this matter. Therefore, Ability has not made the requisite showing for reconsideration pursuant to state and federal rules and case law, and thus Ability's Motion for Reconsideration should be denied.

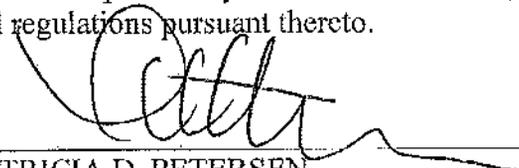
Further, because pursuant to Title 34 RCW Ability's Motion for Reconsideration did not stay the effectiveness of the Final Order herein, beginning June 21, 2012 Ability's Certificate of Authority should have been suspended for six months pursuant to the terms of the OIC's order and the Final Order herein; by June 11, 2012 Ability and its affiliates should have complied in full with the OIC's April 27, 2011 Order to Cease and Desist and the undersigned's Final Order (including the requirement specifically stated in the OIC's Order to Cease and Desist and the undersigned's Final Order to administer its contracts in conformance with WAC 284-54-253 including "proper handling of information concerning the requirement to furnish proof of cognitive or functional impairment ..."); and by June 26, 2012 Ability should have paid the fine imposed by the OIC and upheld in the undersigned's Final Order.

ORDER

On the basis of the foregoing,

IT IS HEREBY ORDERED that Ability's Motion for Reconsideration is **DENIED**.

ENTERED at Tumwater, Washington, this 4th day of October, 2012, pursuant to Title 34 RCW and specifically RCW 34.05.470 and, for good cause shown, 34.05.461(8); Title 48 RCW; and regulations pursuant thereto.



PATRICIA D. PETERSEN
Chief Presiding Officer

Attachment: Amended Findings of Fact, Conclusions of Law and Final Order

Pursuant to RCW 34.05.461(3), 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 5th day of October, 2012.


KELLY A. CAIRNS



OFFICE OF
INSURANCE COMMISSIONER
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2011-05-17 10:22

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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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

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The first purpose of this Amended Findings of Facts, Conclusions of Law and Final Order is solely to correct a single typographical error contained in Conclusion of Law No. 13 (the word "not" having been unintentionally omitted). In addition, while the undersigned believes the Findings of Facts, Conclusions of Law and Final Order as written are clear, in response to Ability's Motion for Reconsideration and the OIC's Response and Opposition to Motion for Reconsideration, the second purpose is to make Conclusion of Law Nos. 12 and 13 more clear.

AMENDED FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER

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The original Findings of Facts, Conclusions of Law and Final Order are set forth in their entirety below: the only additions made to the original language are indicated by being underlined, and the only deletions made to the original language are indicated by strikethroughs. All other language of the final Findings of Facts, Conclusions of Law and Final Order remain unchanged.

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. 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.

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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.

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*

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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 (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.]

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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.]

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.]

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(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 Oiling, 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

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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 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

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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.]

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

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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 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

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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 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

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21, 2010 letter to Ability refuting Ability's claim that the request for reinstatement was filed too 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 the

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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 docs 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.

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 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

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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

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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 284-54253(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 insureds 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*

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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

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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 OTC.] 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:

(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 (c.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.

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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 Advisor) 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, i~~In requesting reinstatement, Silvernail must have provided evidence of cognitive impairment or loss of functional capacity, which is not 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, which clearly only applies to eligibility for benefits 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.

Pursuant to these policy provisions, therefore, and as confirmed by Ability [Testimony of Lawler], in order to be allowed reinstatement, Ability, in violation of WAC 284-54-253, required that 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 had a level of disability ... Requiring substantial

supervision to protect such individual from threats to health and safety due to severe Cognitive Impairment. [Underlines in original Conclusion.] [Emphases added.] Even though Ability was prohibited from requiring White to show "severe" cognitive impairment (or loss of functional capacity) for reinstatement, A[a]s advised by Ability on September 15, 2009, 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 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 or 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 document already submitted by Silvernail, constitutes sufficient proof of White's severe cognitive impairment and of White's loss of functional capacity to qualify for policy benefits, and was more than sufficient proof of White's "cognitive impairment (as well as loss of functional capacity)" to qualify for reinstatement as required by WAC 284-54-253 and as should have been what Ability required in White's long term care insurance policy at issue herein. It is noted that based upon the Conclusions herein, Ability's contract at Part M which states *We will require the same evidence of Cognitive Impairment or loss of functional capacity that is required for eligibility for benefits under this policy* is in violation of WAC 284-54-253; this requirement might be permissible for eligibility for benefits (whether Ability's contract provision setting forth the requirements for benefits is in compliance with law was not an issue in this proceeding and is not determined herein) but is not in compliance with WAC 284-54-253 for eligibility for reinstatement because, as above, WAC 284-54-253 prohibits Ability from requiring anything more than proof of "cognitive impairment or loss of functional capacity" for reinstatement.

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.] n November and again in December 2009, without even recognizing that Silvernail had submitted proof of cognitive impairment and loss of functional capacity (indeed,

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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 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

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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).

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 28454-253. 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

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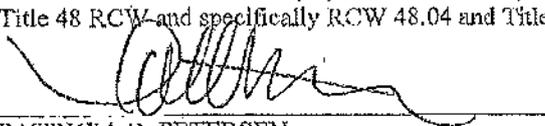
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Company is hereby UPHeld. The Certificate of Authority of Ability Insurance Company, Certificate of Authority WAOIC796, is hereby suspended for a period of six months which suspension shall commence and take effect ten days from the date of entry of 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 11th day of June, 2012, pursuant to Title 48 RCW and specifically RCW 48.04 and Title 34 RCW and regulations applicable thereto.



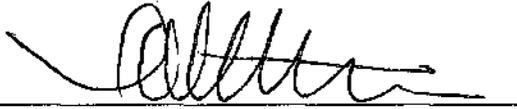
PATRICIA D. PETERSEN
Chief Hearing Officer
Presiding Officer

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The above Amended Findings of Fact, Conclusions of Law and Final Order is ENTERED at TUMWATER, WASHINGTON, this 4th day of October, 2012, pursuant to Title 48 RCW and specifically RCW 48.04 and Title 34 RCW and regulations applicable thereto.



PATRICIA D. PETERSEN
Chief Presiding Officer

Pursuant to RCW 34.05.461(3), 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 5th day of October, 2012.


KELLY A. CAIRNS