BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of: Christopher Anderson, Appellant.	Docket No. 17-0124 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

TO: Christopher Anderson
Sarah Anderson
24295 31st Avenue West
Brier, WA 98036

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Melanie Anderson, Deputy Commissioner, Consumer Protection Division
Jeff Baughman, Licensing & Education Manager, Consumer Protection Division
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BACKGROUND

1. On July 17, 2017, the Office of the Insurance Commissioner ("OIC") issued a "Notice of Intent to Impose Fine After Hearing" ("Notice"), seeking to impose a fine against Christopher Anderson of at least $500 for alleged violations of insurance law. On the same date, the OIC also filed a Demand for Hearing ("OIC Demand") to address the Notice.

2. On July 18, 2017, I issued to the OIC a Notice of Receipt of Demand for Hearing, acknowledging receipt of the OIC Demand. On the same date I transmitted the OIC Demand and the OIC's case to the Office of Administrative Hearings ("OAH"), and requested that an Administrative Law Judge ("ALJ") from OAH as presiding officer conduct an evidentiary hearing, and issue an initial order in this matter.

3. On July 26, 2017, Mr. Anderson filed a Demand for Hearing ("Anderson Demand") contesting the allegations contained in the Notice.

4. On July 26, 2017, I issued to Mr. Anderson a Notice of Receipt of Demand for Hearing, acknowledging receipt of the Anderson Demand. On the same date I transmitted the Anderson Demand to OAH, and indicated the Anderson Demand was related to the earlier OIC Demand I sent to OAH on July 18, 2017.

5. On September 14, 2017, ALJ Lisa N.W. Dublin of OAH, acting as Presiding Officer, conducted an evidentiary hearing on both the OIC Demand and Anderson Demand. On November 15, 2017, Judge Dublin entered an Initial Order in this matter which contained findings of fact and conclusions of law. A copy of ALJ Dublin's Initial Order is attached hereto.

6. ALJ Dublin's Initial Order was transmitted to me for review and for entry of Findings of Fact, Conclusions of Law, and Final Order, pursuant to RCW 34.05.464.

7. I have reviewed and considered the record in this matter, including the evidence presented to ALJ Dublin.

8. I have given due regard to ALJ Dublin's opportunity to observe the witnesses pursuant to RCW 34.05.464(4). Put another way, a review judge may substitute his or her findings for those of a presiding officer, but cannot reject credibility determinations without substantial evidence to the contrary in the record. *Chandler v. Office of the Ins. Comm'r*, 141 Wn. App. 639, 657, 173 P.3d 275 (2007). That said, evaluating the record to determine whether a witness' testimony is substantively consistent differs from a true credibility determination. *Id.*

FINDINGS OF FACT

I adopt the Findings of Fact in ALJ Dublin's Initial Order, but make the following amendments and additions thereto:

4.3. Rewrite as: "On July 18, 2017, the OIC transmitted the OIC Demand and the OIC's case to the Office of Administrative Hearings ("OAH"), and requested that an Administrative Law Judge ("ALJ") from OAH as presiding officer conduct an evidentiary hearing, and issue an initial order in this matter.

4.4. Add after "OIC received": "the Anderson Demand. On the same date OIC transmitted the Anderson Demand to OAH, indicating the Anderson Demand was related to the earlier OIC Demand OIC sent to OAH on July 18, 2017."

4.6 Add after "Agent/Broker of Record," and before "form," the parenthetical "("BOR")."

4.7. Delete first sentence. Rewrite the second sentence, now the first sentence, to read as follows: "The declaration (Ex. 14, ¶ 4) of Mr. Woods, and his testimony during the hearing which I accept, shows that the agent he met with at Vern Fonk told him that signing the

BOR form would allow him to shop better rates for automobile insurance for Mr. Woods." Rewrite the fourth sentence, now the third sentence, to read as follows: "In his October 17, 2016 statement (Ex. B) to OIC Senior Investigator Barry Walden, Mr. Anderson posits that he does not remember the specific conversation with Mr. Woods prior to him signing the BOR form." Then add: "Mr. Anderson explained that it was not his practice to switch an individual's policy to Vern Fonk without their express consent. Ex. B. Mr. Anderson also explained that during the ten years he was employed at Vern Fonk it was never company policy to require an individual to sign a BOR form *prior* to issuing a quote. *Id.*"

4.8. Delete first sentence. Rewrite second sentence, now first sentence, as follows: "Mr. Anderson's evidence is limited to his October 2016 statement to OIC (Ex. B) and the testimony of a single character witness (Melanie Amaya) without any first-hand knowledge of the incident."

4.9. Rewrite the paragraph as follows: "I reject the testimony of Mr. Woods that he signed the BOR form not realizing that Top Insurance would no longer be his broker of record. But I accept the testimony of Mr. Woods that while he read and/or glanced at the BOR form, he did not read the BOR form as closely as he should have, or the title of the BOR form Mr. Anderson provided him. Furthermore, I accept the testimony of Mr. Woods that he generally relies on insurance agents to explain documents to him, and inform him whether anything legally binds him. I also accept the testimony of Mr. Woods that he is an experienced salesman familiar with reading and executing written contracts as part of his occupation. While the evidence shows that Mr. Woods *alleges* he never intended to switch his broker of record to Vern Fonk, and did not realize he made such a change or was not made aware of it (Ex. 2, p. 3, Ex. 12, p. 2, Ex. 14, ¶ 4), evidence addressed below in Finding of Fact 4.11. demonstrates that shortly after executing the BOR form Mr. Woods was aware that the BOR form he executed changed his BOR from Top Insurance to Vern Fonk."

4.10. Rewrite the paragraph as follows: "I accept the testimony of Mr. Woods that *before* he signed the BOR form Mr. Anderson reviewed automobile insurance quotes with him and told Mr. Woods that his current insurance rate was the lowest he could find. I also accept the testimony of Mr. Woods that following his execution of the BOR form Mr. Anderson told him that he would *continue* to look for lower automobile insurance quotes for Mr. Woods and would notify him if he found a better rate."

4.11. Rewrite the paragraph as follows: "I accept the testimony of Mr. Woods that he threw away the business card he received from Mr. Anderson during their encounter on February 19, 2015. I also accept the testimony of Mr. Woods that shortly after signing the BOR form on February 19, 2015 he received insurance cards listing Vern Fonk as his BOR, and was aware they stated this. Mr. Woods later received a statement dated October 7, 2015 from his insurer, regarding the renewal of his automobile insurance policy for the period November 12, 2015 through November 12, 2016, listing Vern Fonk as his BOR."

4.12. Rewrite the paragraph as follows: "I reject the testimony of Mr. Woods that sometime between receiving the statement from his insurer dated October 7, 2015 and executing another BOR form on February 1, 2016, he found out by mistake that he had changed his BOR from Top Insurance to Vern Fonk, and *then* called Greg Arsenault with Top Insurance to find out what happened. See also Ex. 14, ¶ 5. Mr. Arsenault's testimony was that Mr. Woods called him to remove a driver from his automobile insurance policy, but was unable to do so because he was no longer with Top Insurance, which Mr. Arsenault informed Mr. Woods of at that time. Mr. Arsenault explains that Mr. Woods reacted in an upset fashion to this information from him. So, if Mr. Woods already knew his BOR was Vern Fonk prior to calling Mr. Arsenault, Mr. Woods' credibility is diminished since he asked Mr. Arsenault to act as his agent and make changes to his policy, and then reacted surprised and/or upset that he could not. Then we have the declaration of Melissa Tolle (Ex. 16, ¶ 4) that states Mr. Woods called Top Insurance to talk to Mr. Arsenault, at which point it was discovered his automobile insurance policy had been transferred to Vern Fonk, and that Vern Fonk received the commission from the sale of the policy. In her declaration (Ex. 16, ¶ 4) Ms. Tolle echoes Mr. Arsenault that Mr. Woods was angry about this. But Ms. Tolle's testimony, which I do not accept, is that she and Top Insurance received from Vern Fonk a copy of the BOR form Mr. Woods executed on February 19, 2015. However, I accept Ms. Tolle's testimony that commissions Top Insurance received on Mr. Woods' account were large, and when her company did not receive the commission when Mr. Woods' policy renewed in November 2015 she noticed it. I also accept Ms. Tolle's testimony that Mr. Woods did not call her to inquire about his automobile insurance policy, but rather either she and/or Mr. Arsenault called Mr. Woods about the BOR form when they learned they were no longer Mr. Woods' BOR. I suspect Top Insurance never received a copy of the BOR form from Vern Fonk after Mr. Woods executed it on February 19, 2015. But rather as Mr. Anderson explains at page 8 of the Anderson Demand, sometime after November 2015 when Mr. Woods' automobile insurance policy renewed Top Insurance received a commission statement from the insurer that indicated Top Insurance was no longer BOR for Mr. Woods. This explains the large gap in time between Mr. Woods' execution of the first BOR form on February 19, 2015, and the second BOR form on February 1, 2016. Otherwise, if Top Insurance received notification from Vern Fonk shortly after Mr. Woods' execution of the first BOR form, it would not have taken almost a year for Mr. Woods to execute the second BOR form, or for Ms. Tolle to file a complaint with the OIC. I find that Mr. Woods never contacted Top Insurance about his change of BOR from Top Insurance to Vern Fonk, but rather Top Insurance contacted him because of the large commission they lost and to inquire why Mr. Woods switched his BOR from Top Insurance to Vern Fonk. Given the conflicting versions of events, and specifically how Mr. Woods came to learn about his change of BOR from Top Insurance to Vern Fonk, and how Top Insurance learned of Mr. Woods' execution of the first BOR form, the collective credibility of Mr. Woods, Mr. Arsenault, and Ms. Tolle takes a massive hit."

4.13. Delete the first three sentences. Rewrite the fourth sentence, and now only sentence, as follows: "I accept the testimony of Mr. Woods that prior to executing the second BOR

form on February 1, 2016, a representative of Vern Fonk gave him three $5 gift cards in the hopes of retaining him as a customer. See also Ex. 3 and Ex. 14."

CONCLUSIONS OF LAW

For purposes of the Conclusions of Law in this Final Order, I adopt Conclusion of Law 5.2 in ALJ Dublin's Initial Order, but add after the completion of the sentence in Conclusion of Law 5.2 the citation "RCW 48.02.060." However, I reject Conclusion of Law 5.1., the subject heading "*Violations of RCW 48.17.530 & RCW 48.30.090*" prior to Conclusion of Law 5.2, and Conclusions of Law 5.3.-5.8. in the Initial Order, and replace them with Conclusions of Law 5.1., and 5.3.-5.43., and the italicized and underlined subject headings below, which read as follows:

Jurisdiction

5.1. I have jurisdiction to decide this matter as reviewing officer per RCW 48.04.010, RCW 34.05.464, and WAC 284-02-070.

Burden of Proof

5.3. Leaving aside the heighted clear, cogent, and convincing evidence standard applied when determining whether someone has proven fraud, intentional misrepresentation, or fraudulent misrepresentation,[1] and addressed below, as the Court explained in *Hardee v. Dep't of Soc. and Health Servs.*, 172 Wn.2d 1, 18, 256 P.3d 339 (2011), exclusive of professional licenses, most licenses the subject of administrative hearings only require application of the preponderance of the evidence standard:

> We hold that, at an administrative hearing to revoke a home child care license, the statutory requirement that the Department justify its revocation by a preponderance of the evidence satisfies constitutional due process. Our decision in *Nguyen* does not control because, unlike the present case, it involved an individual's unique property interest in a *professional* license.

(Emphasis added). See also *In the Matter of the Disciplinary Proceeding Against Lori A. Petersen*, 180 Wn.2d 768, 788-89, 329 P.3d 853 (2014)("Applying the *Mathews v. Eldridge* three-part balancing test, we are satisfied the preponderance of the evidence standard adequately protects Petersen's property interest in continued certification."). Preponderance of the evidence means evidence that is more probably true than not true. *In re Sego*, 82 Wn.2d 736, 739 n. 5, 513 P.2d 831 (1973)(citing *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962)).

[1] As the court explains in *In re* Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973), the clear, cogent, and convincing evidence standard means the ultimate fact in issue must be shown by evidence to be "highly probable."

RCW 48.17.530.

5.4. RCW 48.17.530 permits the commissioner, among other things, to levy a civil penalty against an insurance producer for certain causes, and states in part:

> (1) The commissioner may . . . levy a civil penalty in accordance with RCW 48.17.560 or any combination of actions, for any one or more of the following causes: . . .
>
> (b) Violating any insurance laws, or violating any rule, subpoena, or order of the commissioner or of another state's insurance commissioner;
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> * * *
>
> (e) Intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance;
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> * * *
>
> (h) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in this state or elsewhere; . . . .

(Emphasis added).[2]

5.5. As stated in *Tesoro Refining and Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 317, 190 P.3d 28 (2008): "The goal of statutory interpretation is to carry out the legislature's intent. *Burns,* 161 Wash.2d at 140, 164 P.3d 475. If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words."[3] As stated in *Tenino*

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[2] RCW 48.17.560 states:

> After hearing or upon stipulation by the licensee or insurance education provider, and in addition to or in lieu of the suspension, revocation, or refusal to renew any such license or insurance education provider approval, the commissioner may levy a fine upon the licensee or insurance education provider. (1) For each offense the fine shall be an amount not more than one thousand dollars. (2) The order levying such fine shall specify that the fine shall be fully paid not less than fifteen nor more than thirty days from the date of the order. (3) Upon failure to pay any such fine when due, the commissioner shall revoke the licenses of the licensee or the approval(s) of the insurance education provider, if not already revoked. The fine shall be recovered in a civil action brought on behalf of the commissioner by the attorney general. Any fine so collected shall be paid by the commissioner to the state treasurer for the account of the general fund.

(Emphasis added).

[3] Although an Insurance Commissioner cannot bind the courts, the courts appropriately defer to an Insurance Commissioner's interpretation of insurance statutes and rules. *Credit General Ins. Co. v. Zewdu*, 82 Wn. App. 620, 627, 919 P.2d 93 (1996); *Premera v. Kreidler*, 133 Wn. App. 23, 37, 131 P.3d 930 (2006). As the Court stated in

Aerie v. Grand Aerie, 148 Wn.2d 224, 239, 59 P.3d 655 (2002): "Legislative definitions provided in a statute are controlling. . . ." See also *Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 195, 72 P.3d 1122 (2003)("If a term is defined in a statute, we must use that definition.").

5.6. Aside from statutory definitions of terms, "Washington courts use Webster's Third New International Dictionary in the absence of other authority." *State v. Glas*, 106 Wn. App. 895, 27 P.3d 216 (2001)(citing *In re Personal Restraint of Well*, 133 Wn.2d 433, 438, 946 P.2d 750 (1997)). But as the Washington Supreme Court explained in *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015), the ordinary definition of a term is not dispositive of a statute's plain meaning where the term is also a term of art. As the Court states in *City of Spokane, ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002): "Technical language should be given its technical meaning when used in its technical field. *Keeton v. Dep't of Soc. & Health Servs.*, 34 Wn. App. 353, 361, 661 P.2d 982 (1983). In other contexts, courts have turned to the technical definition of a term of art even where a common definition is available."

5.7. The Washington Supreme Court has clarified that the plain meaning rule also encompasses related statutes:

> Additionally, while traditional plain language analysis of statutes focused exclusively on the language of the statute, this court recently has also recognized that "all that the Legislature has said in the statute and related statutes" should be part of plain language analysis. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.* 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

Cerrillo v. Esparza, 158 Wn.2d 194, 202, 142 P.3d 155 (2006). The rules of statutory construction require that when possible the various provisions of an act be harmonized; this usually arises within particular statutory chapters. *State v. Williams*, 62 Wn. App. 336, 338, 813 P.2d 1293 (1991). Statutes that concern the same subject matter, *in pari materia*, should be construed "as constituting one law to the end that a harmonious total schema which maintains the integrity of both is derived." *Beach v. Bd. of Adjustment*, 73 Wn.2d 343, 346, 438 P.2d 617 (1968); *State v. Houck*, 32 Wn.2d 681, 684, 203 P.2d 693 (1949). In seeking to harmonize provisions of a statute, statutes relating to the same subject must be read as complementary instead of in conflict with each other. *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000).

Subsection (1)(b)

5.8. Among other things, one can violate RCW 48.17.530(1)(b) if they violate *any* insurance

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Premera: "An agency's interpretation of the statutes it administers should be upheld if it reflects a plausible construction of the statute's language and is not contrary to legislative intent." 133 Wn. App. at 37.

laws or regulations. Since Judge Dublin's Initial Order only addresses Mr. Anderson's alleged violations of RCW 48.17.530(1)(e) and (h), and RCW 48.30.090, I will determine whether Mr. Anderson violated either. If I determine he violated neither provision, then he did not violate RCW 48.17.530(1)(b), and I will not analyze that provision further herein. I now turn to an analysis of the remaining provisions of RCW 48.17.530(1) in question in this section, and RCW 48.30.090 in the next section.

Subsection (1)(e)

5.9. The question to be addressed under RCW 48.17.530(1)(e) is, by having Mr. Woods execute the BOR form, whether Mr. Anderson was "intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance." This requires analysis of the language in that provision, which necessarily involves and examination of related statutes and case law addressing intentional misrepresentation, and what an insurance contract or application for insurance is.

5.10. The terms "intentional misrepresentation," "fraudulent misrepresentation" and "fraud" are synonymous. *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 904 (Tenn. 1999). See *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 905, 247 P.3d 790 (2011)("Fraudulent misrepresentation requires proof by clear, cogent, and convincing evidence of the nine elements of fraud."); *Hawkins v. EmpRes Healthcare Mgmt., LLC*, 193 Wn. App. 84, 100, 371 P.3d 84 (2016)("To state a claim for fraud or intentional misrepresentation, a plaintiff must plead nine elements.")(Citing *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996) via footnote).

5.11. The nine elements of fraud/intentional misrepresentation/fraudulent misrepresentation are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Stiley*, 130 Wn.2d at 505. The law recognizes two distinct types of fraudulent misrepresentation: affirmative misrepresentation and silence when a duty of disclosure is owed. *Dussault v. Am. Int'l Group, Inc.*, 123 Wn. App. 863, 871, 99 P.3d 1256 (2004). A duty of disclosure is not an element of fraud when the plaintiff alleges affirmative misrepresentations by the defendant. *Id*

5.12. In *Cornerstone Equip. Leasing, Inc.*, as to the eighth element of fraud above, or the right of a plaintiff to rely upon the truth of the representation of an existing fact, respondent contended that a promisee could not establish a right to rely on statements that are inconsistent with a written agreement made contemporaneously. The court agreed, stating:

> As a general rule, a party has no right to rely on an oral representation that contradicts unequivocal written evidence that demonstrates the falsity of the alleged

representation. *See Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 553-54, 55 P.3d 619 (2002).

¶15 Consistent with *Baik* is a federal case cited by [respondent], *Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Invs.*, 951 F.2d 1399, 1412 (3d Cir. 1991). In that case, Mellon Bank attempted to rely on oral promises that directly contradicted its written agreements with another party. *Mellon Bank*, 951 F.2d at 1412. Under the circumstances, where the agreements at issue were between sophisticated businessmen, Mellon Bank could not justifiably rely on a "gentlemen's agreement." *Mellon Bank*, 951 F.2d at 1412.

[6] ¶16 [Appellant] attempts to distinguish his case from *Mellon Bank* on three grounds. Mellon Bank was a major banking institution while [appellant] is merely an individual who dealt directly with Chevigny, Cornerstone's president; Mellon Bank consulted with counsel while [appellant] did not; and [appellant] and Chevigny had established an informal course of dealing that frequently involved toleration by Chevigny of partial and inconsistent performance by [appellant]. These facts, however, did not make it reasonable for [appellant] to rely on Chevigny's alleged representations as a basis for ceasing to make the payments due. It is patently unreasonable to freely sign a document acknowledging a debt based on an oral assurance that the document is meant for "internal purposes" only. Like in *Mellon Bank*, [appellant] is an experienced business person and he could have retained counsel. The fact that Chevigny was the major officer of his company did not justify [appellant] in relying on his oral representations where they directly contradicted the written terms of the loan. To allow avoidance of the debt under these circumstances would affront the law of contracts and destabilize business transactions.

¶17 We conclude [appellant's] defense of fraudulent misrepresentation fails because, as a matter of law, he had no right to rely on an alleged oral promise not to enforce a contemporaneous written agreement. Whether [appellant] could establish the other elements of fraudulent misrepresentation need not be addressed.

Cornerstone Equip. Leasing, Inc., 159 Wn. App. at 905-906 (brackets and emphasis added).

5.13. Even if we assume for the sake of argument that Mr. Anderson made oral representations that contradicted the plain and unambiguous one page BOR form that he handed Mr. Woods - which we have no evidence of, but simply Mr. Woods' reliance that Mr. Anderson would set forth to him the consequences of executing the BOR form - per *Cornerstone* Mr. Woods had no right to rely on such oral representations since unequivocal written evidence (i.e., the BOR form) demonstrated the falsity of the alleged representations. Mr. Woods' failure to read the BOR form closely, but to simply rely on Mr. Anderson, does not alter the legal reality here. Per *Cornerstone*, Mr. Anderson did not intentionally misrepresent

the terms of the BOR form. Rather, after receiving quotes from Mr. Anderson and being told the current automobile insurance rate he had was the optimum rate, Mr. Woods signed the BOR form on February 19, 2017 making Mr. Anderson his new insurance agent with the promise that Mr. Anderson would continue to search for cheaper automobile insurance rates for him. This was not illegal. Case law addressing the failure of an insured to read either an application for insurance or their insurance policy buttresses this conclusion.

5.14. Insureds have an affirmative duty under Washington law to examine their applications for insurance and read their insurance policy, and be on notice of the terms and conditions therein. *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 257, 928 P.2d 1127 (1996); *Carstensen v. Standard Accident Ins. Co.*, 8 Wn.2d 72, 78, 111 P.2d 565 (1941)("It appearing that the policy in question contained a plain and unambiguous provision authorizing appellant to cancel the policy, which would have been apparent to respondent had he read the policy. . . ."); *Carew, Shaw & Bernasconi v. General Cas. Co.*, 189 Wash. 329, 341, 65 P.2d 689 (1937)("Appellant is presumed and is required to know the provisions of the insurance contract into which it enters.");[4] *Hein v. Family Life Ins. Co.*, 60 Wn.2d 91, 97, 376 P.2d 152 (1962)("We think it is proper to hold, as so many courts have done: That good faith toward the insurer, as well as reasonable care on the part of the applicant, requires an examination of the application on which their contract is based; and that a failure to report any false statements amounts to a ratification.")

5.15. Setting aside whether Mr. Anderson intentionally misrepresented the terms of the BOR form, which I conclude above he did not, the other inquiry under RCW 48.17.530(1)(e) is whether the BOR form was an actual or proposed insurance contract, or application for insurance, itself a prerequisite to trigger the application of that provision.

5.16. RCW 48.01.040 defines "insurance" as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." (Emphasis added).

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[4] In *Carew* the Court emphasized the conspicuous nature of the crucial language in the insurance policy at issue regarding coverage, and the large gap of time that passed without an objection from insured to the same, and stated at page 340:

> On October 10, 1934, Lambuth sent the policy to Shaw, who manually handled the policy and retained it in his possession. He testified, however, that he did not read it. The coverage is typed in a conspicuous place on page three of the policy. The endorsements now attached to the policy were not then on the policy. Our examination of the policy shows that opening the first sheet, which would be pages one and two, would disclose the coverage. To ascertain the amount of coverage, the term of the policy, the effective date, the amount of the premium, one would be required to look at the portion of the policy wherein is stated and defined the coverage. Shaw, appellant's vice-president, and two of appellant's agents saw the policy, handled the policy, and were under a duty to examine that policy. Not one of the three ever questioned the coverage afforded by it. More than a year passed. The first and second premiums were paid on the policy. Shaw asked for a temporary increase in coverage. This was ordered through Roach, of Lamping & Company, in 1935. The endorsement making the increase passed through the same channel as the policy.

(Emphasis added).

RCW 48.18.190 equates an insurance contract with an insurance policy,[5] and explains that an insurance policy must contain the entire contract between the insurer and insured, and states: "No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy." (Emphasis added).

5.17. Per RCW 48.01.040 and RCW 48.18.190, the BOR form Mr. Anderson presented Mr. Woods and had him sign was not insurance, or an insurance contract or policy. At all relevant times, with either Top Insurance or Vern Fonk as his BOR, the terms of Mr. Woods' automobile insurance policy remained unchanged. Case law addressing RCW 48.01.040 demonstrates the terms "insurance policy" and "insurance contract" are not to be applied broadly. With regards to self-insurance, which similar to the BOR form at issue is also not insurance, or an insurance contract or policy, in *Krykos v. State Farm Mut. Auto. Ins. Co.*, 121 Wn.2d 669, 674-675, 852 P.2d 1078 (1993) the court stated:

> State Farm urges a broad understanding of the term "insurance policy" so as to include self-insurance. However, such a reading is specifically foreclosed by RCW Title 48, which defines "insurance" as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. When a statute is unambiguous, its meaning must be derived from the actual language chosen by the Legislature. *Everett Concrete Prods., Inc. v. Department of Labor & Indus.*, 109 Wn.2d 819, 822, 748 P.2d 1112 (1988). By its very nature, self-insurance does not involve this type of third party arrangement. *See Jones v. Henry*, 542 So. 2d 507, 509 (La. 1989) ("Self-insurance . . . is a misnomer. It is not insurance, but instead is one of four methods by which a person can satisfy the [financial responsibility statute] . . . . Consequently, the certificate of self-insurance cannot be considered a 'policy' for the purposes of uninsured motorist coverage requirements under [the statute]"). Because the self-insurance exclusion conflicts with the specific language of the UIM statute, we hold that it is void and unenforceable.

(Emphasis added).

5.18. RCW 48.18.080(1) addresses applications for insurance, and implies they generally precede an insurer's issuance of an insurance policy or contract to an insured, and states in part: "No application for the issuance of any insurance policy or contract shall be admissible in evidence in any action relative to such policy or contract, unless a true copy of the application was attached to or otherwise made a part of the policy when issued and delivered." (Emphasis added).

5.19. WAC 284-30-560(1) addresses, among other things, application forms used for vehicle insurance, the contents required therein, and the requisite handling of such applications, and states:

[5] Along the same lines, see RCW 48.18.080(1) and its reference to "insurance policy or contract."

> Every application form used in connection with homeowners', dwelling fire and vehicle insurance, shall contain a clear and conspicuous statement setting forth whether or not coverage has commenced.
> (a) If coverage has commenced, the effective date shall be stated.
> (b) If coverage has not commenced, there shall be an explanation as to the circumstances which will cause coverage to commence and the time when coverage will become effective.
> (c) The statement concerning commencement of coverage shall not be minimized, rendered obscure, or presented in an ambiguous fashion or intermingled with the other contents of the application so as to be confusing, misleading or not readily evident.
> (d) A copy of such application shall be delivered or mailed to the applicant promptly following its execution.

(Emphasis added).

5.20. Per RCW 48.18.080(1) and WAC 284-30-560(1), the BOR form Mr. Woods executed on February 19, 2015 is not an application for insurance. Having concluded that Mr. Anderson did not intentionally misrepresent the BOR form to Mr. Woods, and given that any alleged intentional misrepresentation at issue did not involve the terms of an actual or proposed insurance contract or application for insurance since the BOR form is neither, I conclude that Mr. Anderson did not violate RCW 48.17.530(1)(e).

Subsection (1)(h)

5.21. The question to be addressed under RCW 48.17.530(1)(h) is, by having Mr. Woods execute the BOR form, whether Mr. Anderson was "using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness". This requires us to interpret that crucial statutory phrase. As explained in *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010):

> "The dictionary describes "or" as a "function word" indicating "an *alternative* between different or unlike things." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1585 (2002) (emphasis added). In this sense, "or" is used to indicate an *inclusive* disjunctive—one or more of the unlike things can be true. The dictionary gives the example: "wolves [or] bears are never seen in that part of the country." *Id.*

Given the inclusive disjunctive "or" present in the relevant statutory phrase in RCW 48.17.530(1)(h), we will evaluate the meaning of the sub-phrases "using fraudulent, coercive, or dishonest practices," and "demonstrating incompetence, untrustworthiness" separately, since both represent alternative modes of violating that statutory provision.

5.22. The verb "using" in RCW 48.17.530(1)(h) is an undefined statutory term. Webster's Third New International Dictionary, 2523 (2002) defines the verb "use," of which "using" is the nonfinite verb/participle form, in relevant part, as follows:

> **1 a** *archaic* **:** to observe or follow as a custom . . . **b** *archaic* **:** to follow or practice regularly as a mode of life or action . . . **c** *archaic* **:** to make familiar by repeated or continued practice or experience . . . **d** *chiefly dial* **:** to resort to regularly **:** FREQUENT

5.23. The adjective "fraudulent" is an undefined statutory term. Webster's Third New International Dictionary, 904 (2002) defines the adjective "fraudulent," in part, as follows:

> **1 :** belonging to or characterized by fraud . . . **:** founded on fraud . . . **:** obtained or performed by fraud. . . .

5.24. Webster's Third New International Dictionary, 904 (2002) defines the noun "fraud," in part, as follows:

> **1 a :** an instance or an act of trickery or deceit . . . **:** an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right **:** a false representation of a matter of fact by words or conduct, by false or misleading allegations, or by the concealment of what should have been disclosed that deceives or is intended to deceive another so he shall act upon it to his legal injury. . . .

5.25. The adjective "coercive," an undefined statutory term, is defined in Webster's Third New International Dictionary, 439 (2002), in part, as follows:

> **:** serving or intended to coerce **:** being or exerting coercion . . .

5.26. The verb "coerce" is defined in Webster's Third New International Dictionary, 439 (2002), in part, as follows:

> **1 :** to restrain, control, or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation) . . . **2 :** to compel to an act or choice by force, threat, or other pressure . . .

5.27. The adjective "dishonest" is also an undefined statutory term. Webster's Third New International Dictionary, 650 (2002) defines the adjective "dishonest," in part, as follows:

> **2 :** characterized by lack of truth, honesty, probity, or trustworthiness or by an inclination to mislead, lie, cheat, or defraud **:** FRAUDULENT <~ politicians> <hoarding his ~ gains> <a ~ report on his earnings>

Syn DECEITFUL, LYING, MENDACIOUS, UNTRUTHFUL : DISHONEST may apply to any breach of honesty or trust, as lying, deceiving, cheating, stealing, or defrauding . . . < a ~ clerk fired for stealing>

5.28. "Practices" is too an undefined statutory term. Webster's Third New International Dictionary, 1780 (2002) defines the noun "practices" as follows:

> habitual conduct that is socially, ethically, or otherwise unacceptable <the unwholesome ~s of folk medicine> <departing these evil ~s>.

(Emphasis added).

5.29. Harmonizing these dictionary definitions, I conclude that the sub-phrase "using fraudulent, coercive, or dishonest practices" in RCW 48.17.530(1)(h) means customary or regular (i.e., habitual) conduct characterized by a lack of truth, honesty, probity, or trustworthiness; by an inclination to mislead, misrepresent, lie, cheat, trick, deceive, conceal, not disclose, or defraud; or by force, threat, or other pressure compelling another to act; that is socially, ethically, or otherwise unacceptable. This definition is consistent with the call in RCW 48.01.030 that requires all persons in the business of insurance be actuated by good faith, abstain from deception, and practice honesty and equity in all matters.

5.30. On February 19, 2015, by having Mr. Woods execute the BOR form, Mr. Anderson was not "using fraudulent, coercive, or dishonest practices" in violation of RCW 48.17.530(1)(h). First of all, there is no evidence that Mr. Anderson customarily or regularly (i.e., habitually) had potential clients of Vern Fonk, including Mr. Woods, sign BOR forms by being dishonest or untrustworthy, by misrepresenting or not disclosing the purpose of the BOR form, or by forcing, threatening, or pressuring them to do so. Rather, Mr. Woods simply alleges that he assumed the BOR form he signed on February 19, 2015 *only* enabled Mr. Anderson to keep investigating after their initial meeting whether he could get a lower automobile insurance rate for Mr. Woods. But the facts show that Woods signed the BOR form on February 19, 2017 making Mr. Anderson his new insurance agent with the promise that Mr. Anderson would continue to search for cheaper automobile insurance rates for him. This was not illegal. Mr. Woods testified that while he had experience with written contracts as a salesman, he only glanced at and/or skimmed the BOR form Mr. Anderson gave him to execute, and did not read the BOR form as closely as he should have. Mr. Woods simply relied on Mr. Anderson to explain the BOR form to him, and whether anything might legally bind him, contrary to the duty explained above he had to read the one page BOR form himself. Only after a representative of Top Insurance contacted Mr. Woods in early 2016, almost a year after he signed the first BOR form to inquire why he changed his BOR, and after he received new insurance cards and a renewal statement listing Vern Fonk as his BOR months earlier, did Mr. Woods come forward and raise for the first time his concerns about Vern Fonk being his BOR. Given

these circumstances, Mr. Anderson's conduct did not amount to "using fraudulent, coercive, or dishonest practices" in violation of RCW 48.17.530(1)(h).

5.31. Now turning to the sub-phrase "demonstrating incompetence, untrustworthiness," in RCW 48.17.530(1)(h), and whether Mr. Anderson's actions on February 19, 2015, violated that clause. The verb "demonstrate" is an undefined statutory term. Webster's Third New International Dictionary, 600 (2002) defines the verb "demonstrate," in part, as follows:

> **1** . . . **b :** to manifest clearly, certainly, or unmistakably **:** show clearly the existence of . . .

5.32. The noun "incompetence" is also an undefined statutory term. Webster's Third New International Dictionary, 1144 (2002) defines the noun "incompetence," in part, as follows:

> the state or fact of being incompetent: as **a :** lack of physical, intellectual or moral ability **:** INSUFFICIENCY, INADEQUACY . . . **b :** lack of legal qualification or fitness . . .

5.33. The noun "untrustworthiness" is too an undefined statutory term. Webster's Third New International Dictionary, 2514 (2002) defines the noun "untrustworthiness," in part, as follows:

> **:** the quality or state of being untrustworthy

5.34. Webster's Third New International Dictionary, 2514 (2002) defines the adjective "untrustworthy," in part, as follows:

> **:** not trustworthy **:** UNRELIABLE

5.35. In *Chandler v. Office of the Ins. Comm'r*, 141 Wn. App. 639, 661-662, 73 P.3d 275 (2007), the court addressed RCW 48.17.530 and what it means to be untrustworthy under that statute, stating:

> The purpose of RCW 48.17.530 is to protect the public and the profession's standing in the eyes of the public. In the context of the common knowledge and understanding of members of the insurance profession, the terms "trustworthy" and "untrustworthy" are sufficiently clear to put an insurance agent on notice that certain conduct is prohibited. As the Supreme Court said about the term "moral turpitude" in *Haley v. Medical Disciplinary Board*, the central question is whether the conduct in question reflects an unfitness to practice the profession. In *Haley*, the court explained that "[p]hysicians no less than teachers . . . veterinarians, . . . police officers, [or insurance agents] will be able to determine what kind of conduct indicates unfitness to practice their profession."

* * *

> He cannot seriously contend that he did not know or realize or have adequate notice that this conduct would violate the statutory standard.

(Emphasis added, footnotes omitted).

5.36. Again, harmonizing these dictionary definitions with the case law above, I conclude that the sub-phrase "demonstrating incompetence, untrustworthiness" in RCW 48.17.530(1)(h) means where a person manifests clearly, certainly, or unmistakably that they lack the ability to practice in the insurance profession because they are not trustworthy or reliable.

5.37. To reiterate, Mr. Woods simply assumed that the purpose of the BOR form he signed on February 19, 2015 was to enable Mr. Anderson to keep investigating after their initial meeting whether he could get a lower automobile insurance rate for Mr. Woods. Mr. Woods testified that while he had experience with written contracts as a salesman, he only glanced at and/or skimmed the BOR form Mr. Anderson gave him to execute, and did not read the BOR form as closely as he should have. Mr. Woods simply relied on Mr. Anderson to explain the BOR form to him, and whether anything might legally bind him, contrary to the duty explained above he had to read the one page BOR form himself. Given these circumstances, Mr. Anderson's conduct does not manifest clearly, certainly, or unmistakably that he was untrustworthy or unreliable, and therefore unable to practice in the insurance profession. Mr. Anderson's conduct did not amount to "demonstrating incompetence, untrustworthiness" in violation of RCW 48.17.530(1)(h).

RCW 48.30.090.

5.38. RCW 48.30.090 addresses, among other things, misrepresentation of the terms of an insurance policy, or the benefits or advantages promised thereby, and states:

> No person shall make, issue or circulate, or cause to be made, issued or circulated any misrepresentation of the terms of any policy or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or use any name or title of any policy or class of policies misrepresenting the nature thereof.

(Emphasis added).

5.39. The legal term "misrepresentation" in RCW 48.30.090 is broader than the legal term "intentional misrepresentation" in RCW 48.17.530(1)(e), and as case law explains, the former necessarily includes "negligent misrepresentation" under its umbrella, whereas the latter does not. But RCW 48.30.090 still requires, among its alternatives, that the

"negligent misrepresentation" relate to the terms, benefits, or advantages of an insurance policy. Case law addressing RCW 48.30.090 supports my interpretation of the language in RCW 48.30.090.

5.40. In *Shah v. Allstate Ins. Co.*, 130 Wn. App. 74, 121 P.3d 1204 (2005), in February 2000 appellants agreed to purchase a house in Bellevue, Washington for $760,000, which it would use as a rental property. Appellant wife had been a real estate agent for over 25 years, and the appellants had bought numerous properties. A bank agreed to loan them $400,000 to purchase the real property. The bank required appellant to purchase an insurance binder for the property. To obtain the binder appellants contacted an agent with Allstate Insurance Company. Appellant husband testified that he told the insurance agent to send the bank whatever they needed, and that he relied on the agent to meet the bank's requirements. The bank faxed the agent an appraisal of the property. The appraisal estimated the total value of the property using the cost approach as $760,995. The bank also provided the insurance agent the form requesting the binder, which did not specify how much coverage was required, or whether the coverage was to be replacement coverage. The insurance agent entered information from the appraisal and title records into the Allstate Cost Estimator (ACE) program, which generated an insurance value of $307,000. However, although the house was about 3,771 square feet, the insurance agent entered the home into the ACE as having only 2,070 square feet. Later the insurance agent met with appellants to go over the policy and the application. The insurance agent testified he did not know how the ACE program generated insurance values, and that it was not his practice to ask lenders what their requirements were, but rather to use only the ACE to determine insurance values.

Appellant husband testified that in fall 2002, while shopping insurance quotes from different companies, he received a quote for a $700,000 policy from another insurance company. Apparently, appellant husband asked the insurance agent from Allstate in October 2002 why the policy amount on the house was so low, and appellant husband testified the agent told him not to worry, that appellants had replacement value. In November 2002 the property burned down. Allstate paid appellants about $330,000, which included the $307,000 policy limit and some additional money for debris removal and land damage. But the total cost to rebuild the property was estimated between $513,675 and $589,350. Appellants claimed the insurance agent was negligent because he underinsured the real property in question, relied on incorrect information when creating the policy, and did not inform them of uninsured exposures.

5.41. The court concluded in *Shah* that appellants made out a case for *negligent misrepresentation* - as opposed to fraudulent/intentional misrepresentation above – which the court equated to a violation of RCW 48.30.090, stating in part:

[5] [6] P19 A person who commits the tort of negligent misrepresentation is

> "'One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.'"

Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002) (quoting *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) (quoting RESTATEMENT (SECOND) OF TORTS §552 (1) (1977))). Justifiable reliance means that the "'reliance was reasonable under the surrounding circumstances.'" *Baik*, 147 Wn.2d at 545 (emphasis omitted) (quoting *ESCA Corp.*, 135 Wn.2d at 827-28). "Whether a party justifiably relied upon a misrepresentation is an issue of fact." *ESCA Corp.*, 135 Wn.2d at 828.

[7] P20 The trial court erred in holding that no reasonable person could find that there was justifiable reliance. [Appellant husband] stated that when he asked [the Allstate insurance agent] why his policy amount was so much lower than quotes given by other insurance companies, [the agent] told him it was replacement value and not to worry. [Appellant husband] also stated that he decided to stay with Allstate because of those assurances. [Appellants] produced evidence that [the Allstate insurance agent] had known their family for the past 20 years, and that [the agent] had created policies for [appellants'] children. They also produced evidence that [the agent] had previously made recommendations about adequate insurance coverage. Due to [appellants'] long-standing relationship with [the Allstate insurance agent] and their historic reliance upon him for their insurance coverage needs, there is genuine issue of material fact as to whether [appellant husband's] reliance on [the agent's] statement was justified in this instance.

P21 Because there is a genuine issue of material fact as to whether [appellants] justifiably relied on [the agent's] statement, we remand for trial on the issue. The [appellants] have presented evidence on all of the other elements of a claim of negligent misrepresentation. They presented evidence that [the agent] supplied them with false information: that their policy was for replacement value. They also presented evidence that they suffered a pecuniary loss as a result of the misrepresentation, because they did not get the replacement value of their home. Finally, [appellants] presented a declaration from [another insurance underwriter] that stated [the agent] did not act with reasonable care or competence when he made the statement to them.

* * *

The alleged misrepresentation made to [appellant husband] violates RCW 48.30.090.

* * *

[W]hether [the Allstate insurance agent] violated RCW 48.30.090 by making a misrepresentation about [appellants'] coverage is a matter of public interest.

Shah, 130 Wn. App. at 84-87 (brackets and emphasis added).

5.42. In *Peterson v. Big Bend Ins. Agency*, 150 Wn. App. 504, 202 P.3d 372 (2009), on January 19, 2004, an insurance agent and part owner of Big Bend Insurance Agency ("the agent/owner") met with appellants to determine whether they "wanted to stay with Big Bend or obtain insurance coverage elsewhere." The agent/owner informed appellants that his agency would "take care of business." While discussing homeowner's insurance, the agent/owner told appellants they had replacement value coverage with a limit of $179,800 in coverage. The appellants explained that they wanted their home insured so that it could be replaced if destroyed. Appellants indicated they did not know what the cost of this coverage would be, or how that figure would be determined. The agent/owner told the appellants that his agency would use a formula that involved "plugging in" certain items, such as the square footage, the type of construction, and certain upgrades. The agent/owner told appellants he would handle this task for them. Appellants described their home to the agent/owner, who informed appellants they were underinsured. Appellants stressed their desire to have their home insured for its full replacement value. Appellant wife asked who would come up with the replacement number for the home. The agent/owner replied he would, and that this would require him to go to their home, take measurements, gather other information, and plug the information into the formula to come up with the replacement number. At no time did the agent/owner represent he was an appraiser, builder, or had expertise in valuing real property or its replacement cost. The formula the agent/owner used was a computer software program designed by E.H. Boeckh Company, known as the Boekch Cost Guide. Use of this software, or similar program, was commonly used in the insurance industry in determining the replacement value of homes. It was Big Bend's policy to use the Boekch Cost Guide to estimate the cost to replace a home in the event of a total loss. The guide was not usually provided to the client, but Big Bend's agents would usually go over the report with the client when they discussed policies and renewals.

The Boeckh Cost Guide results for appellants' home established a basic replacement value of $219,103, with a location adjusted value of $223,463. On June 21, 2004, Big Bend sent an insurance summary to appellants which showed replacement value coverage of $193,000 for their home. On September 14, 2004, Appellant husband signed the insurance summary. On November 27, 2004 appellants' home burned down. The Grange assigned the claim to a field representative. On January 5, 2005, appellants' attorney called the field representative and requested copies of the policies, and expressed concern that the coverage limits on appellants' home had been undervalued. On January 21, 2005, the field representative received the appraisal on appellants' home that placed a fair market value of $190,000 on the home based on comparable sales analysis, and a new replacement value

of $328,843. In late January 2005 appellants obtained a bid from a general contractor totaling $310,030.57, but the Grange continued to reject appellants' claim for replacement cost in excess of $193,000. Appellants then filed a complaint for, among other things, negligent misrepresentation, asserting that the agent/owner of Big Bend undertook to provide them with full replacement value coverage on their home of $328,000. The court in *Peterson* disagreed with the trial court and found that the agent/owner's *negligent misrepresentation* of the limits of the replacement value coverage on their home violated RCW 48.30.090, and stated in part:

> ¶41 [Appellants] contend that Big Bend engaged in an unfair or deceptive practice by violating RCW 48.30.090, which states, in part, that no person shall "make, issue or circulate, or cause to be made, issued or circulated *any misrepresentation of the terms of any policy*." (Emphasis added.)
>
> ¶42 The trial court determined that Big Bend did not misrepresent the limits of the [appellants'] replacement value coverage for purposes of a CPA claim. The court concluded that Big Bend's negligent misrepresentation did not fall within the prohibitions of RCW 48.30.090 because Big Bend's negligent misrepresentation did not relate to the limits of the replacement coverage or any other term in the policy but, instead, related to how this particular term was determined. The court explained that Big Bend did not misrepresent the limits of the policy because the insurance summary clearly stated the limit as $193,000.
>
> * * *
>
> [18] ¶47 The court found that Big Bend negligently provided [appellants] with false information when it provided them with a replacement limit that was not calculated under the cost guide formula. As a result, the $193,000 figure in the policy was false because it was not based on the cost guide formula. The Petersons justifiably relied on this false information to their detriment. By providing the $193,000 figure to the Petersons, Big Bend misrepresented the terms of the policy to the Petersons and violated RCW 48.30.090. The trial court erred by concluding that Big Bend did not misrepresent the limits of the replacement coverage.

Peterson, 150 Wn. App. at 520-521 (brackets and emphasis added).

5.43. Ignoring the fact that Mr. Woods simply expected Mr. Anderson to explain the BOR form to him without carefully reading it, and assuming any alleged representations Mr. Anderson made to Mr. Wood regarding the BOR form equated to representations of the terms of an insurance policy or the benefits or advantages promised thereby, which they do not per the analysis above, we still have no justifiable reliance per *Shah* by Mr. Woods on representations made by Mr. Anderson. As with the cause of action of intentional misrepresentation, justifiable reliance is a required element of the cause of action of

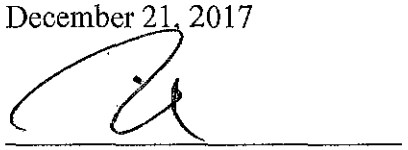
negligent misrepresentation. No justifiable reliance exists here since as explained above Mr. Woods has an affirmative duty under Washington law to examine his applications for insurance and read his insurance policies, and be on notice of the terms and conditions therein. Either way, the holdings in *Shah* and *Peterson* with regards to violations of RCW 48.30.090 are distinguishable since Mr. Anderson never misrepresented the terms of any policy or the benefits or advantages promised thereby, as the insurance agents in those two cases did with replacement coverage at issue. To reiterate, Woods signed the BOR form on February 19, 2017 making Mr. Anderson his new insurance agent with the promise that Mr. Anderson would continue to search for cheaper automobile insurance rates for him. This was not illegal. As such, I conclude Mr. Anderson did not violate RCW 48.30.090.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, I reject Paragraphs 6.1.-6.3. in ALJ Dublin's Initial Order, and replace them with Paragraph 6.1. which read as follows:

6.1. On February 19, 2015, by having Mr. Woods execute the BOR form changing his BOR from Top Insurance to Vern Fonk, Mr. Anderson did not violate RCW 48.17.530(1)(b), (e), or (h), or RCW 48.30.090. As such, I impose no fine on Mr. Anderson.

December 21, 2017



William G. Pardee
Reviewing Officer

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

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing Findings of Fact, Conclusions of Law and Final Order on the following people at their addresses listed below:

Christopher Anderson
Sarah Anderson
24295 31st Avenue West
Brier, WA 98036

Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Melanie Anderson, Deputy Commissioner, Consumer Protection Division
Jeff Baughman, Licensing & Education Manager, Consumer Protection Division
Toni Hood, Deputy Commissioner, Legal Affairs Division
David Jorgensen, Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Dated this 21st day of December, 2017, in Tumwater, Washington.

Dorothy Seabourne-Taylor
Paralegal, Hearings Unit

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

FILED

2017 NOV 16 A 10:29

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the matter of: Christopher Anderson, Appellant.	Docket Nos. 07-2017-INS-00015 & 07-2017-INS-00017 **INITIAL ORDER** Agency: Office of the Insurance Commissioner Agency No. 17-0124

1. ISSUES

1.1. Did the Appellant, Christopher Anderson, violate RCW 48.17.530(1) and RCW 48.30.090 as set out in the 'Notice of Intent to Impose Fine', issued on July 17, 2017, and the proposed 'Consent Order', issued on May 11, 2017?

1.2. If so, what is the appropriate penalty?

2. ORDER SUMMARY

2.1. Yes. Appellant Christopher Anderson violated RCW 48.17.530(1) and RCW 48.30.090, by intentionally misrepresenting the contents of the Broker of Record form to Mr. Woods.

2.2. Appellant Christopher Anderson is responsible for paying a fine in the amount of $500.00.

3. HEARING

3.1. Hearing Date:	September 14, 2017
3.2. Administrative Law Judge:	Lisa N. W. Dublin
3.3. Appellant:	Christopher Anderson ("Mr. Anderson")
3.3.1. Representative:	Sarah Anderson, attorney
3.3.2. Witness:	Melanie Amaya
3.4. Agency:	Office of the Insurance Commissioner ("OIC")
3.4.1. Representative:	David Jorgensen, OIC staff attorney
3.4.2. Witnesses:	
3.4.2.1. Jeffrey Woods	
3.4.2.2. Jessica Bullington	
3.4.2.3. Brandon Lee	
3.4.2.4. Greg Arseneault	

3.4.2.5. Melissa Tolle

3.5. Exhibits: Exhibits A-C and 1-18 were admitted.

4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

4.1. On May 11, 2017, OIC issued a Consent Order Levying a Fine to Mr. Anderson. Ex. 17.

4.2. On July 17, 2017, OIC issued to Mr. Anderson a 'Notice of Intent to Impose Fine after Hearing'.

4.3. On the same day, July 17, 2017, Mr. Anderson filed a Demand for Hearing regarding the Notice of Intent to Impose Fine after Hearing.

4.4. On July 26, 2017, OIC received Mr. Anderson's Demand for Hearing regarding the consent order.

Jeffrey Woods' Insurance Policy

4.5. On November 12, 2014, Jeffrey Woods, a Washington resident, purchased an automobile insurance policy from Greg Arseneault of Top Insurance, located in Everett, Washington. *Testimony of Woods, Testimony of Arseneault.*

4.6. On February 19, 2015, to ensure he was receiving the lowest insurance rate, Mr. Woods visited a Vern Fonk Insurance office in Kirkland, Washington. *Testimony of Woods, Ex. 3, and Ex. 14.* There, Mr. Woods signed a one-page, "Agent/Broker of Record" form. *See* Ex. A. This form stated in particular part, "**Please be advised that we wish to name** Vern Fonk Insurance Services Inc. 0203353 **as our exclusive representative effective** 02/19/2015 **for the lines of business shown above, currently in force or submitted by application.**" *Id.*

4.7. At this point, the parties' evidence conflicts. According to Mr. Woods, the male agent he met with at Vern Fonk told him that signing the BOR form would allow the agent to shop better rates. OIC later identified the agent as Mr. Anderson, a Washington-licensed insurance producer. Mr. Anderson, on the other hand, did not remember Mr. Woods and denied any practice of switching a customer's broker of record without express consent, or prior to issuing a quote.

4.8. Based on the totality of the circumstances, I weigh conflicting evidence in favor of OIC. Mr. Anderson's supporting evidence is limited to his October 2016 written statement to OIC during the investigation, and the testimony of a single character witness without any first-hand knowledge of the incident. *See* Ex. B. Mr. Anderson did not testify at the hearing to dispute or otherwise explain OIC witness testimony or exhibits. In addition, the BOR form Mr. Woods signed sets out Mr. Anderson's

personal email address, which form Mr. Anderson processed later that same day. *See* Ex. 9. Furthermore, Vern Fonk Insurance agents receive a commission on every insurance policy they bring into the agency. A change in the broker of record is considered a new policy, which results in a commission for the agent. *Testimony of Amaya.*

4.9. Mr. Woods signed the BOR form, not realizing that Top Insurance would consequently no longer be his broker of record. Mr. Anderson did not tell Mr. Woods that the signed document would change the broker of record from Top Insurance to Vern Fonk Insurance. Mr. Woods never intended to switch his broker from Top Insurance to Vern Fonk Insurance. *Testimony of Woods; Ex. 2, pg. 3; Ex. 12, pg. 2;* and *Ex. 14.*

4.10. After Mr. Woods signed the form, Mr. Anderson reviewed rates and told Mr. Woods that his current insurance rate was the lowest he could find. Mr. Anderson told Mr. Woods that he would continue to look for lower rates and would notify him if he found a better rate. *Testimony of Woods.*

4.11. On November 12, 2015, when Mr. Woods' insurance policy renewed, Vern Fonk Insurance received the commission for this renewal. *Testimony of Woods and Ex. 2, Pg. 3.*

4.12. A short time later, Woods received his insurance policy renewal information. Woods' policy listed Vern Fonk Insurance as his insurance provider of record. Woods contacted Greg Arseneault of Top Insurance to question why his policy listed Vern Fonk Insurance as his provider. *Testimony of Woods and Ex. 15.*

4.13. A short time later, Mr. Woods received his insurance policy renewal information, which listed Vern Fonk Insurance as his insurance broker of record. Mr. Woods then contacted Mr. Arseneault at Top Insurance to inquire. *Testimony of Woods* and *Ex. 15.* Mr. Woods then contacted Vern Fonk Insurance and requested his broker of record change back to Top Insurance. A representative of Vern Fonk Insurance apologized for the misunderstanding and gave Mr. Woods three Starbucks gift cards, valued at $15.00 total, in the hope of retaining him as a customer. *Testimony of Woods, Ex. 3, and Ex. 14.*

4.14. On February 1, 2016, Mr. Woods executed another BOR form, changing his broker of record back to Top Insurance effective November 12, 2015. *Testimony of Woods; Ex. 2, pgs. 2 and 5; Ex. 10;* and *Ex. 13.*

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OIC Investigation

4.15. On February 8, 2016, Melissa Tolle, Owner of Top Insurance, filed a complaint with OIC, alleging an agent at Vern Fonk Insurance fraudulently induced Mr. Woods to sign a BOR form, changing his broker of record from Top Insurance to Vern Fonk Insurance. *Testimony of Tolle; Ex. 2, Pg. 1; Ex. 6; Ex. 7;* and *Ex. 16.*

4.16. OIC Investigator Barry Walden investigated the Tolle Complaint. *Testimony of Lee.* As a part of the OIC's investigation, Mr. Anderson provided a written response. He could not recall dealing with Mr. Woods. However, Mr. Anderson provided, "...[I]t was my practice to only switch an individual's agent upon that individual's request." *Ex. B, pg. 2.*

4.17. Investigator Walden found the Tolle Complaint allegations were substantiated. *Ex. 1.* On May 11, 2017, OIC presented Mr. Anderson with a consent order, which provided: "By misrepresenting a change of broker form ("BOR") to Mr. Woods, and having Mr. Woods sign the BOR without Mr. Woods knowing it would change the broker of record, Mr. Anderson violated RCW 48.17.530(1)(b), RCW 48.17.530(1)(e), and RCW 48.30.090, justifying the imposition of a fine under RCW 48.17.560." The consent order prescribed a $500.00 fine. Mr. Anderson declined to sign it.

4.18. On July 17, 2017, OIC issued a Notice of Intent to Impose Fine, providing that Mr. Anderson violated RCW 48.17.530(1)(b), (e), and (h), as well as RCW 48.30.090. The Notice of Intent sought to impose a minimum $500.00 fine.

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

5.1. I have jurisdiction to hear and decide this matter under RCW 48.04.010(5), chapters 34.04 and 34.12 RCW, and Washington Administrative Code (WAC) 284-02-070(2)(d)(i).

Violations of RCW 48.17.530 & RCW 48.30.090

5.2. The Office of the Insurance Commissioner is responsible for implementing and enforcing the provisions of Title 48 RCW and Title 284 WAC, which governs the Washington State insurance industry.

5.3. RCW 48.01.030 'Public Interest' provides:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their

representatives rests the duty of preserving inviolate the integrity of insurance.

5.4. RCW 48.17.530(1) provides, in relevant part:

> The commissioner may place on probation, suspend, revoke, or refuse to issue or renew an adjuster's license, an insurance producer's license,...or may levy a civil penalty in accordance with RCW 48.17.560 or any combination of actions, for any one or more of the following causes:
>
> (b) Violating any insurance laws, or violating any rule, subpoena, or order of the commissioner or of another state's insurance commissioner;
>
> (e) Intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance;
>
> (h) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility in this state or elsewhere.

5.5. RCW 48.30.090 'Misrepresentation of policies' establishes:

> No person shall make, issue or circulate, or cause to be made, issued or circulated any misrepresentation of the terms of any policy or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or use any name or title of any policy or class of policies misrepresenting the nature thereof.

5.6. Mr. Anderson had a duty, under RCW 48.17.530(1)(h), as an insurance producer not to misrepresent or mislead Mr. Woods regarding the BOR form. Mr. Anderson disregarded this duty when he mischaracterized the significance of the BOR form to Mr. Woods, and thereby obtained Mr. Woods' signature on the form. Counsel for Mr. Anderson argued that OIC failed to establish that Mr. Anderson did so intentionally. However, there is no evidence on record that Mr. Anderson did so accidentally or inadvertently, and undisputed evidence that Mr. Anderson had a financial interest in misguiding Mr. Anderson.

5.7. Counsel for Mr. Anderson also argued that Mr. Woods failed to read the form, which was clear and self-explanatory, and is thus solely responsible for the

resulting change of broker. However, this is a red herring, given that Mr. Woods relied on Mr. Anderson's representation that signing the BOR form would allow him to continue conducting the requested rate search. But for Mr. Anderson giving Mr. Woods the form to sign and misrepresenting the purpose of it, more likely than not no broker change would have transpired.

5.8. Mr. Anderson violated RCW 48.17.530(1)(h) and RCW 48.30.090 by intentionally misrepresenting the BOR form to Mr. Woods. The OIC's 'Notice of Intent to Impose Fine After Hearing', dated July 17, 2017, and consent order issued May 11, 2017, are affirmed.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

6.1. The Office of the Insurance Commissioner action is AFFIRMED.

6.2. Mr. Anderson violated RCW 48.17.530(1)(b),(e), and (h), and RCW 48.30.090 by intentionally misrepresenting a form to a customer.

6.3. Mr. Anderson is responsible for paying a fine in the amount of $500.00.

Issued from Tacoma, Washington on the date of mailing.

L. Dublin

Lisa N. W. Dublin
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

APPEAL RIGHTS

FINAL ORDER:

An initial order does not become a final order until the Insurance Commissioner reviews it.[1] The Insurance Commissioner's Chief Hearing Officer will automatically review this matter and issue a final order.

PETITION FOR REVIEW:

In addition to the automatic review, any party may file a Petition for Review.[2] If you file a Petition for Review, the Chief Hearing Officer will consider your specific objections to the Initial Order and your arguments for a different result.

You must file your Petition for Review with the Office of the Insurance Commissioner (OIC) within twenty (20) days of the date OAH mailed the Initial Order.[3] "File" means served on all other parties and delivered during business hours.[4] Mail a copy to the other parties at the addresses in the Certificate of Mailing below.

The Petition for Review must specify all parts of the Initial Order that you dispute and the evidence that supports the Petition.[5] Other parties may file a reply to the Petition within 10 days after the petitioner serves the Petition.[6]

Deliver the Petition for Review and Reply to the following address:

Office of Insurance Commissioner
Chief Hearing Officer
Hearings Unit, OIC
PO Box 40255
Olympia, WA 98504-0255

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[1] WAC 284-02-070(2)(c)(i).
[2] RCW 34.05.464; WAC 10-08-211.
[3] WAC 10-08-211.
[4] WAC 10-08-110.
[5] WAC 10-08-211(3).
[6] WAC 10-08-211(4).

CERTIFICATE OF SERVICE FOR OAH DOCKET NOS. 07-2017-INS-00015 AND 07-2017-INS-00017

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

Christopher Anderson 24295 31st Ave West Brier, WA 98036 ***Appellant***	☒ First Class Mail ☐ Certified Mail, Return Receipt ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail
Sarah Anderson 24295 31st Avenue W. Brier, WA 98036 ***Appellant Representative***	☒ First Class Mail ☐ Certified Mail, Return Receipt ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail
David Jorgensen Office of the Insurance Commissioner Legal Affairs Division MS: 40255 PO Box 40255 Olympia, WA 98504-0255 ***Agency Representative***	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Hand Delivery via Messenger ☒ Campus Mail ☐ Facsimile ☐ E-mail
Dorothy Seabourne-Taylor Office of the Insurance Commissioner MS: 40255 PO Box 40255 Olympia, WA 98504-0255 ***Agency Representative***	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Hand Delivery via Messenger ☒ Campus Mail ☐ Facsimile ☐ E-mail

Date: Wednesday, November 15, 2017

OFFICE OF ADMINISTRATIVE HEARINGS

Ricci Frisk
Legal Assistant 4