

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE DIRECTOR OF THE DIVISION OF INSURANCE**

In the Matter of)	
)	
ALEX A. TATE)	
d/b/a TATE INSURANCE SERVICES)	OAH No. 07-0086-INS
_____)	Agency Case No. D 07-03

DECISION AND ORDER

I. Introduction

The Alaska Division of Insurance (“Division”), Department of Commerce, Community, and Economic Development filed its five-count amended accusation on May 18, 2007.¹ Count I alleges that Mr. Tate made a false sworn statement to the Division concerning a motor vehicle surety bond. Count II alleges incompetence or untrustworthiness on the part of Mr. Tate with respect to the failure of Alaska Insurance Services (“AIS”), Mr. Tate’s former employer, to timely procure a policy of workers’ compensation insurance. Counts III and IV allege falsification of an insurance document by Mr. Tate. Count V alleges incompetence on the part of Mr. Tate concerning his application for an insurance firm license.

The hearing in this matter occurred on May 19-20, 2008, and June 20 & 24, 2008, before Administrative Law Judge James T. Stanley. Alex A. Tate, individually, and d/b/a/ Tate Insurance Services, was represented by Gary Zipkin, Guess & Rudd, P.C. Daniel Wilkerson, Assistant Attorney General, represented the Division. Barbara Karl, Paralegal II, with the Division, also attended the hearing. The hearing was recorded.

The Division called as witnesses Linda Brunette (Licensing Supervisor, Division of Insurance), John R. Holley (Investigator, Division of Insurance), Roy Douglas Shaffer (Owner, Associated Insurance Services, Mr. Tate’s former employer), Dennis Alonzo Beeching (employee, Associated Insurance Services, Mr. Tate’s former co-worker), Pat Henderson (Vice-President for Audit, Alaska National Insurance Company), and Mark Lutz (Workers’ Compensation Fraud Investigator, Department of Labor). Mr. Tate testified extensively on his own behalf.

¹ The initial accusation against Mr. Tate was filed January 19, 2007.

of this decision and order, will result in the automatic reinstatement of the suspended portion of the fine.

- The unsuspended portion of the fine shall be paid within six months after the effective date of this order.

Dated this _____ day of September, 2008.

By: _____

James T. Stanley
Administrative Law Judge

Adoption

The undersigned Director of the Division of Insurance adopts this Decision and Order in OAH Case No. 07-0086-INS as the final administrative determination in this matter with revisions which may be found at page 2, pages 17-18 and pages 25-26.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 2nd day of December 2008.

By: _____

Signature

Name

Title

Linda S. Hall

Director

I hereby certify that a copy of the document(s) listed below was distributed to the below listed parties and files by mail or by personal delivery. The original document has been filed in the Administrative Law Judge's official file in Anchorage, AK.

Pages one and 26 of the Decision and Order, signed by the Director of Insurance on December 2, 2008, in Case No. OAH No. 07-0086-INS (D 07-03), In the Matter of Alex A. Tate, d/b/a Tate Insurance Services. This signature page (26) is being distributed to reinstate the first four lines at the top of the page that were inadvertently stricken in the document that was signed and distributed on December 1, 2008. Page one is included to identify the case and document.

Director of Insurance
Juneau, AK

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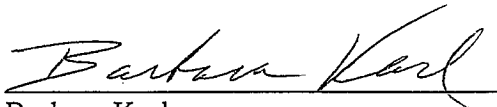
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Licensing file of the Division of Insurance in Juneau
Investigator file of the Division of Insurance in Anchorage

Dated: December 2, 2008 in Anchorage, Alaska.


Barbara Karl

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matter of)
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ALEX A. TATE)
d/b/a TATE INSURANCE SERVICES)
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OAH No. 07-0086-INS
Agency Case No. D 07-03

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¹ The initial accusation against Mr. Tate was filed January 19, 2007.

Division exhibits 1 and 3 through 76 were admitted into evidence. Tate exhibits 2001 through 2049, 2051 through 2053, 2056 through 2058, and 2060 were admitted into evidence.

II. Facts

Alex A. Tate is the owner of Tate Insurance Services and was licensed by the State of Alaska as an individual producer under license # 3698, issued on August 8, 2005. Mr. Tate was first licensed in Alaska on September 21, 1984 and he has worked in the insurance industry for approximately 40 years.² From 1997 through 2004, Mr. Tate worked for Associated Insurance Services ("AIS"), which is owned by Roy Douglas ("Doug") Shaffer.

A. The Failure to Procure Workers' Compensation Coverage

Gary R. Sloane is the sole owner of Accessible Design and Adaptive Products, Inc. ("ADAP"), a small Alaska construction company. Mr. Tate met with Mr. Sloane on February 5, 2001, regarding several insurance policies, one of which was workers' compensation coverage. During the meeting, Mr. Tate completed the application for a workers' compensation policy from information provided by Mr. Sloane. Mr. Sloane made a down payment on the policy and both men believed that workers' compensation insurance for ADAP had been placed and would be effective on February 5, 2001.³ ADAP's application was sent to the National Council on Compensation, Inc. ("NCCI"), a national statistical agent that files rates for insurance policies.⁴

Unbeknownst to Mr. Tate, two issues would create problems for ADAP's application for workers' compensation insurance. First, ADAP had an outstanding debt to a former insurer, Alaska National Insurance Company ("ANIC"), for a worker's compensation policy it placed for ADAP in 1999. The evidence suggests that Mr. Sloane knew about the prior debt.⁵ Second, ADAP had previously registered an executive waiver with respect to the prior workers' compensation policy; as a result of the prior executive waiver, Mr. Sloane would likely be excluded from coverage under a workers' compensation policy issued to ADAP.⁶ Mr. Sloane

² Prior to becoming licensed in Alaska, Mr. Tate was licensed in California in 1969, or earlier.

³ Gary Sloane deposition, p. 17; exhibit 2037, p. 5.

⁴ NCCI is the nation's largest provider of workers' compensation insurance and employee injury data and statistics. For its member insurers, NCCI prepares workers' compensation insurance rates. See www.ncci.com.

⁵ ANIC cancelled ADAP's prior workers' compensation policy on October 10, 1999 for non-payment. Exhibit 13, p. 2; Exhibit 21. Further, ADAP was denied workers' compensation insurance by two other carriers in the 60 days preceding its application with AIS. Exhibit 2001, p. 2 (ACORD 133 form).

⁶ AS 23.30.240(a) allows an executive officer of a corporation to waive coverage otherwise required under the Alaska Workers' Compensation Act.

may not have recalled that he had an executive waiver currently in place with the state.⁷ In any event, he did not tell Mr. Tate about the executive waiver until later in 2001.⁸

On February 6, 2001, NCCI sent Mr. Tate a facsimile with questions regarding the ADAP application for workers' compensation insurance. NCCI posed questions regarding the proposed effective date of the policy and the nature of ADAP's business. Those initial questions were resolved and the effective date of the policy was changed to February 6, 2001.⁹

In a subsequent facsimile sent on February 6, 2001, NCCI advised Mr. Tate that coverage for ADAP would not be placed with a workers' compensation liability insurer unless and until ADAP resolved its outstanding financial obligation to ANIC deriving from the 1999 policy.¹⁰ The facsimile further advised Mr. Tate that coverage for ADAP would be effective February 6, 2001 (established effect date), and remain in effect providing the financial obligation to ANIC which arose in 1999 was resolved no later than February 8, 2001.¹¹ If the 1999 financial matter involving ADAP and ANIC was not cleared by February 8, 2001, the workers' compensation coverage for ADAP would lapse; NCCI advised AIS in its February 6, 2001 fax communication that "(T)he established effective date will be rendered void and coverage will not be afforded unless the requested information is received by the date and time referenced above."

Mr. Tate called Mr. Sloane on February 6, 2001, to inform him of NCCI's facsimile message and the requirement for ADAP to resolve the alleged outstanding obligation to ANIC in order for the (new) workers' compensation policy to be issued.¹² Mr. Tate's testimony regarding the substance of his telephone conversation with Mr. Sloane was substantially corroborated by Douglas Shaffer, AIS' owner, who testified that he was physically in a position to overhear Mr. Tate's portion of the conversation in question.

It is not clear from the record whether Mr. Sloane understood that for him to obtain workers' compensation coverage, he would need to revoke the executive waiver as well as

⁷ At a deposition taken on May 19, 2004, Mr. Sloane testified he included himself under workers' compensation insurance coverage, or removed himself, depending on his assessment of potential job dangers, and he may have applied for the waiver as early as 1998. Gary Sloane deposition, p. 15. As of August 21, 2001, the waiver was still in effect. Exhibit 2024. Mr. Sloane revoked it in writing on October 4, 2001. Exhibit 2029.

⁸ Gary Sloane deposition, p. 54.

⁹ Exhibit 2001, p. 3.

¹⁰ Exhibit 2007, p. 2.

¹¹ *Id.*

¹² Hearing testimony of Mr. Tate and Mr. Shaffer.

resolve the financial obligation with ANIC.¹³ Regardless, he did not timely pay the outstanding debt to ANIC for ADAP's prior workers' compensation coverage, nor did he inform Mr. Tate of his failure to promptly resolve the debt.

The down payment from ADAP for the new workers' compensation policy was placed into the AIS trust account on or about February 5, 2001.¹⁴ The balance of the premium was supplied by MEPCO Premium Financing Company ("MEPCO"), which forwarded the funds to AIS; these monies were similarly deposited into the AIS trust account.¹⁵ Doug Shaffer exercised exclusive control over the AIS trust account and Mr. Tate had no access to the AIS trust account or the trust account statements.¹⁶

The premium for ADAP's workers' compensation policy remained in the AIS trust account after February 5, 2001. The record is silent as to the typical time frame for premiums to be paid from the insurance agency to the insurer; however, Mr. Shaffer testified in his deposition that it is not unusual for NCCI to take thirty days before NCCI requests disbursement of premium moneys held in trust.¹⁷ Mr. Shaffer acknowledges that AIS was required by AS 21.36.255(a)(2)(A) to return the unearned ADAP premium for the workers' compensation policy to ADAP within 45 days following that policy's rejection by NCCI; Mr. Shaffer concedes that AIS failed to comply with that statutory requirement.¹⁸ Mr. Shaffer testified that if he had timely returned the unearned premium to ADAP, it would have been accompanied by a cover letter explaining that the ADAP workers' compensation coverage could not be procured by AIS due to the unresolved financial obligation to ANIC.

Mr. Tate had no knowledge that ADAP had not taken care of its debt to ANIC, that ADAP did not have workers' compensation insurance in place, or that the unearned premium for the workers' compensation policy remained in the AIS trust account and had not been returned to ADAP.¹⁹

¹³ Mr. Sloane did not testify at the hearing. His affidavit of September 11, 2007, submitted in support of Mr. Tate's opposition to the Division's motion for summary adjudication of Counts I and II, is silent as to what Mr. Sloane understood after completing the application and making the down payment for the workers' compensation coverage.

¹⁴ Exhibit 2005 and exhibit 12.

¹⁵ Apparently assuming that ADAP's workers' compensation insurance would be placed with ANIC, MEPCO sent ANIC a notice that ADAP's premium had been financed.

¹⁶ Testimony of Doug Shaffer, and Exhibit 2056, p. 104, *Deposition of Roy Douglas Shaffer*, May 18, 2008.

¹⁷ Deposition of Doug Shaffer, p. 36; exhibit 2036, p. 10.

¹⁸ Testimony of Doug Shaffer and Exhibit 2056, p. 107.

¹⁹ Exhibit 2052, para. 9, *Affidavit of Alex Tate* dated September 12, 2007.

On April 27, 2001, ANIC notified Mr. Tate by facsimile that ANIC had received a copy of a financed premium notice from MEPCO with respect to ADAP's application for workers' compensation insurance, but ANIC had no application from ADAP and thus no "current coverage" existed for that risk. After an unexplained three-week delay, Mr. Tate responded to the April 27, 2001 ANIC notice with an urgent memo to NCCI, asking for the status of the ADAP workers' compensation insurance application (Application No. 7283890).²⁰ Mr. Tate also sent a copy of his NCCI inquiry to "Lynelle" at ANIC, with whom he had been in contact after receiving ANIC's facsimile on April 27, 2001.²¹

NCCI never responded to Mr. Tate's urgent request for help regarding the status of the ADAP application for workers' compensation insurance.²² If NCCI had answered Mr. Tate's May 15, 2001 inquiry, it is more probable than not that Mr. Tate would have contacted Mr. Sloane and advised him that ADAP did not have workers' compensation insurance in place.

On May 20, 2001, while on the job, Mr. Sloane fell from a scaffold and injured his knee. His injury required surgery, which was scheduled for July 2001. No workers' compensation policy was in place at the time of Mr. Sloane's injury. Had such a policy been procured based on the application dated February 5, 2001, the policy would have contained an exclusion for executive officers, such that Mr. Sloane may not have been covered by the policy.²³

Mr. Shaffer eventually procured a workers' compensation policy for ADAP,²⁴ but under mysterious circumstances. Mr. Sloane later alleged that he did not sign the August 8, 2001 application, but that Doug Shaffer had signed it. For his part, Doug Shaffer testified that he did not sign the application on behalf of Mr. Sloane.²⁵ In any event, Mr. Tate eventually came to

²⁰ Exhibit 2015. Although Mr. Tate's response to ANIC's April 27, 2001 notice, Mr. Shaffer was aware of the problem and repeatedly urged Mr. Tate to find out what was going on with the ADAP application. Deposition of Doug Shaffer, pp. 34-41, pp. 10-11, exhibit 2036.

²¹ *Id.*

²² Testimony of Mr. Tate.

²³ This decision assumes that the executive waiver could be an obstacle to individual coverage for Mr. Sloane, but that question need not be decided here.

²⁴ Exhibit 2036, deposition of Gary Sloane dated May 17, 2004 (deposition page 49), ADAP resolved its prior workers' compensation debt to ANIC in order to obtain workers' compensation coverage as applied for in August, 2001.

²⁵ In his deposition of May 17, 2004, at deposition page 49, Mr. Sloane stated, referring to the second workers' compensation application, "No, I never submitted a second application with Mr. Shaffer. He did that."

believe that Mr. Shaffer had signed Mr. Sloane's name to the application without Mr. Sloane's permission.²⁶

The question of when Mr. Sloane first learned that ADAP did not have workers' compensation coverage is disputed. In a subsequent lawsuit, discussed below, Anchorage Superior Court Judge Morgan Christen found that "Sloane was informed that he had no workers' compensation coverage shortly before the surgery scheduled to occur in July (2001)."²⁷ The record in this administrative licensing action, however, indicates that more likely than not, since Mr. Sloane knew that he had not resolved the old financial obligation to ANIC, he knew or should have known that workers' compensation insurance was not in place for ADAP. However, the record also strongly suggests that he did not know that once ANIC was paid, the executive waiver would need to be revoked before workers' compensation coverage would be available for him personally.

As to Mr. Shaffer, it is clear from the record that from February 6, 2001 through the date of Mr. Sloane's injury on May 20, 2001, Mr. Shaffer knew, or should have known, that if the ADAP premium payment was still in the AIS trust account, coverage was not in place once the temporary binder expired.²⁸ Given that Mr. Shaffer is the owner of AIS with exposure to liability for acts and omissions of AIS employees, it is surprising that Mr. Shaffer did not intervene sooner. Both Mr. Shaffer and Mr. Tate "dropped the ball" to their eventual, financial detriment. Mr. Tate did not follow up after informing Mr. Sloane that ADAP would have to resolve its debt with ANIC before a workers' compensation policy would be in place. For his part, Mr. Shaffer accepted Mr. Tate's representations that he was taking care of the problems with ADAP's application, even though Mr. Shaffer knew that ADAP's premium payment had remained in the AIS trust account for an unduly long period of time.²⁹

²⁶ Whether or not Mr. Shaffer signed an application on behalf of Mr. Sloane need not be answered to resolve the Division's allegations against Mr. Tate.

²⁷ Finding para. 11, *Findings of Fact and Conclusions of Law*, issued August 23, 2004, by Superior Court Judge Morgan Christen in *Gary R. Sloane, individually and ADAP Inc., an Alaska Corporation v. Alex A. Tate, individually, Doug Shaffer, individually, and Associated Insurance Services*, Case No. 3AN-03-5497-CI.

²⁸ Hearing testimony of Mr. Shaffer and at pages 34-39 of his deposition.

²⁹ Mr. Shaffer explained under direct and cross-examination that he personally reconciled the AIS trust account upon receiving the bank statements in mid-month; accordingly, on or about March 15, 2001, and in a similar time frame for April, May, and June, 2001, Mr. Shaffer said he was aware that the ADAP worker's compensation premium money had not been disbursed from the AIS trust account, thus reminding him of the ADAP coverage placement problem and prompting his query to Mr. Tate. Shaffer deposition at pp. 34-39, 59; exhibit 2046, pp. 10-11, 16.

B. ADAP and Sloane File Suit for Failure to Obtain Coverage

ADAP and Mr. Sloane filed suit for damages against AIS, Mr. Tate, and Mr. Shaffer in Superior Court, Third Judicial District, Case No. 3AN-03-5497 Civil. The case was eventually tried as a bench trial before Judge Christen; the only issue to be resolved at trial was the extent of Mr. Sloane's damages because AIS had already admitted liability "for compensatory damages caused by its negligent failure to procure worker's compensation insurance."³⁰ Judge Christen issued extensive findings of fact and conclusions of law on August 23, 2004, finding that Mr. Sloane was "entitled to the entry of judgment in the amount of \$67,683.02 plus costs per Rule 79, attorney fees per Rule 82, and post-judgment interest at the rate of 5%."³¹

Mr. Tate did not testify or attend the bench trial at the direction of his counsel. The issue of the comparative negligence among the defendants in failing to procure a workers' compensation policy on behalf of ADAP was not actually litigated during the bench trial before Judge Christen.³² Mr. Sloane also did not testify during the hearing of this matter but has stated in an affidavit "(I) personally believe that all of the fault relating to the failure to procure the requested insurance policy is properly attributed to Doug Shaffer and Associated Insurance Services."³³

C. Erroneous Certificates of Coverage

Mr. Tate was employed at AIS from 1999 through 2004. During the course of his employment there, and during the years following his departure from AIS, Mr. Tate has issued hundreds of certificates of liability insurance for various companies and individuals. During the period from 2002-2004, Mr. Tate received requests from Anchor Trucking, Two Speed Enterprises and SBH Services to issue certificates of liability insurance confirming that those companies had renewed the workers' compensation insurance policies which Mr. Tate had earlier procured on their behalf.³⁴

Because the companies specifically requested that Mr. Tate issue the certificates, he was led to believe that these trucking company clients had renewed or soon would be renewing their

³⁰ Finding number 18, *Findings of Fact and Conclusions of Law*, Case No. 3AN-03-5497 CI.

³¹ *Id.* Conclusion of law para. 11.

³² On August 14, 2007, the Division filed a motion for summary adjudication on Counts I and II of the amended accusation, arguing that the findings of fact issued by Judge Christen translated to a finding that Mr. Tate was untrustworthy and incompetent. After extensive briefing by the parties and oral argument, the motion was denied. *See fn.* 11.

³³ *Affidavit of Gary R. Sloane* dated September 11, 2007, filed in support of Mr. Tate's opposition to the Division's motion for summary adjudication on counts I and II of the amended accusation.

³⁴ Exhibits 33-38, 43, 47, and 60. The certificates are identified in the Amended Accusation, paragraphs 15-22.

workers' compensation policies of insurance. It was standard practice for the insurers in question to bill their insureds directly for the cost of the insurance and provide copies of the billings to AIS.³⁵

Mr. Tate issued six certificates for Anchor Trucking between May 13, 2002 and November 21, 2002.³⁶ Mr. Tate issued twelve certificates for Two Speed Trucking between June 5, 2003 and September 30, 2003.³⁷ Mr. Tate issued one certificate for SBH Services on September 23, 2003.³⁸ The insurers were willing to renew the policies in question, and had provided premium quotes for the cost of renewing those policies, but workers' compensation insurance was not in place for these companies at the time. Mr. Tate has conceded that he issued the certificates in question.³⁹

Mr. Tate did not confirm that the trucking companies had coverage before issuing the certificates. If he had inquired, he would have found that the companies in question did not have workers' compensation insurance at the time he issued the certificates. Thus, all of the certificates were invalid.

Mr. Tate and Mr. Shaffer testified that there may be various reasons why an insured might request that a certificate be issued prior to the date that the insured makes payment for the renewal policy.⁴⁰ Nevertheless, both Mr. Tate and Mr. Shaffer testified that errors may occur and a prudent insurance agent will confirm that the policy has, in fact, been renewed prior to sending out a certificate of insurance. Mr. Tate and Mr. Shaffer further opined that the more certificates an agent mails out over the course of his or her career, the greater the chance that honest mistakes will be made.

Mr. Tate concedes that he made multiple mistakes but has since taken steps to confirm policy renewal prior to the issuance of certificates of insurance. No evidence was presented to indicate that Mr. Tate issued any erroneous certificates of insurance during the four-year period of time prior to the hearing in this matter.

³⁵ Testimony of Mr. Tate and Mr. Shaffer. Exhibit 30, a letter from ANIC to Anchor Trucking, is a typical letter advising the insured of when coverage will expire and the renewal premium. Exhibit 60, a letter from ANIC to SBH Services, is a typical letter advising of the impending policy expiration and the new premium amount. Exhibit 41 is a similar letter from ANIC to Two Speed.

³⁶ Exhibits 33-38, 47.

³⁷ Exhibit 43 (multiple pages).

³⁸ Exhibit 60.

³⁹ Hearing testimony of Mr. Tate.

⁴⁰ Hearing testimony of Mr. Shaffer and Mr. Tate.

The evidence establishes that once the errors regarding the certificates of insurance became known, the trucking companies renewed the policies in question. Thus, measurable harm did not result from the erroneous issuance of the certificates of insurance.⁴¹

D. The Questioned Motor Vehicle Surety Bond Signature

On February 20, 2004, while he was still employed by AIS, Mr. Tate was asked to execute a motor vehicle surety bond on behalf of Barr's Cars, a local business owned by Barry Barr.⁴² At the time Mr. Tate signed the bond, Mr. Barr was not physically in the presence of Mr. Tate and Mr. Tate had never previously met him.⁴³

It is not Mr. Tate's normal business practice to execute a surety bond when he does not personally know the client in question.⁴⁴ In a similar fashion, Mr. Tate does not ordinarily sign a surety bond as attorney-in-fact for the insurer (surety), if the principal (e.g. Barry Barr) is not present. The evidence in this case does not explain how Mr. Tate came to sign the surety bond in contravention of his stated policy and practice; the inference is that the surety bond was signed on a busy day in a small office.

AIS terminated Mr. Tate during the summer of 2004; Mr. Tate and AIS owner Douglas Shaffer parted on bad terms.⁴⁵ Mr. Tate believed that the manner in which he had been terminated was personally humiliating.⁴⁶ Following Mr. Tate's termination, the relationship between him and Mr. Shaffer has been acrimonious at best.⁴⁷

In early December of 2005, one year and 10 months after the Barr's Cars surety bond in question had been executed, Mr. Tate learned that Barry Barr needed to procure another bond.⁴⁸ At that time, Mr. Barr showed Mr. Tate the surety bond issued on February 20, 2004, which included Mr. Tate's signature as attorney-in-fact for Western Surety Company.⁴⁹ However, Mr. Tate did not recall executing the surety bond in question; he believed that someone had forged his signature.⁵⁰

⁴¹ Testimony of Mr. Shaffer. Testimony of Mr. Tate.

⁴² Exhibit A to the Division's amended accusation. The amended accusation (without exhibits) is Tate's exhibit 2050.

⁴³ Exhibit 2056, pp. 3-4, *Transcript of Interview of Barry Barr* by investigator Holley.

⁴⁴ Testimony of Mr. Tate. Affidavit of Alex Tate, para. 14, September 12, 2007.

⁴⁵ Testimony of Mr. Shaffer. Testimony of Mr. Tate.

⁴⁶ Mr. Shaffer locked Mr. Tate out of the office and piled his desk and other furniture outside.

⁴⁷ Hearing testimony of Mr. Tate and Mr. Shaffer, and affidavit of R. Douglas Shaffer. 3, offered as exhibit 2 to the Division's motion for summary adjudication on Counts I and II of the amended accusation.

⁴⁸ Exhibit 2052. para. no. 14, *affidavit of Alex A. Tate*.

⁴⁹ *Id.*

⁵⁰ *Id.*

Mr. Tate had remained unhappy with the manner in which he was terminated by AIS and he was suspicious of the circumstances under which ADAP's August 8, 2001, application for workers' compensation insurance was signed.⁵¹ This suspicion led Mr. Tate, at least in part, to erroneously, but honestly, believe that his signature on the surety bond had been forged by Alonzo Beeching, the AIS employee who notarized that signature.⁵² By letter dated December 8, 2005, Mr. Tate requested that the Division investigate the alleged forgery.⁵³

John R. Holley, Division of Insurance investigator, interviewed Mr. Tate three times regarding his claim that his signature on the Barr's Cars surety bond was forged. The first interview was telephonic and occurred on December 13, 2005.⁵⁴ Two in-person interviews were held on January 13⁵⁵ and February 2, 2006.⁵⁶ During each interview, Mr. Tate remained steadfast in his belief that his signature on the bond in question had been forged. Mr. Holley did not administer a formal oath to Mr. Tate on December 13, 2005 or February 2, 2006 when taking Mr. Tate's statement. However, during the January 13, 2006 interview, Mr. Tate was asked whether "...what you're about to tell me sir is the truth and nothing but the truth?" Mr. Tate responded "(N)othing but the truth."⁵⁷ Later, in the same January 13, 2006 interview, Mr. Tate volunteered, "(E)verything I told is the truth."⁵⁸ Nothing in the record suggests that Investigator Holley was authorized to administer oaths. The three interviews do not include any certifications. None of the interview transcripts are signed, much less notarized. None of the interviews purports to be given under penalty of perjury. Nothing in the records indicates that Mr. Tate was afforded the opportunity to review the interview after it was transcribed. Mr. Tate did not sign or certify in writing any aspect of the three transcribed interviews.

During the investigation of the alleged forgery, the Division obtained a report from an examiner of questioned documents which concluded that Mr. Tate "...very probably wrote the signature..." on the bond.⁵⁹ After the accusation was first filed against Mr. Tate on January 19,

⁵¹ Para. 12, exhibit 2052, affidavit of Alex A. Tate.

⁵² *Id.* 15.

⁵³ Mr. Tate's letter of December 8, 2005 contained a plethora of allegations, but only the forgery allegation was deemed potentially actionable under insurance laws by the Division's investigator.

⁵⁴ Exhibit 6.

⁵⁵ Exhibit 7.

⁵⁶ Exhibit 8.

⁵⁷ Exhibit 7, p. 2.

⁵⁸ Exhibit 7, p. 23.

⁵⁹ Exhibit 9, a *Questioned Handwriting Examination/Comparison* by Mark D. Halterman. The document contains a date in the footer of 9-27-06. Considering that the investigator presented the results of the examination to Mr. Tate on February 2, 2006, the date in the footer must not reflect when the report was prepared.

2007, Mr. Tate acknowledged on February 1, 2007 that he had made a mistake about the signature and withdrew his assertion of forgery.⁶⁰

III. Discussion

The Division is seeking an order revoking Mr. Tate's individual producer license and imposing monetary penalties. Mr. Tate denies untrustworthiness, incompetence, and intentional wrongdoing. In very general terms, the theme of Mr. Tate's defense is that human beings make mistakes, he is human, he accepts responsibility for his mistakes, and the totality of his mistakes does not support a revocation of his license.

AS 21.27.410 provides the Director with the authority to deny issuance, deny renewal, suspend, or revoke a license issued pursuant to AS 21.27 for the conduct of affairs under a license, if the licensee exhibits conduct considered by the Director to reflect incompetence or untrustworthiness, or to be a source of potential injury or loss to the public.⁶¹ AS 21.27.440(a)(2) authorizes the Director to impose a civil penalty of not more than \$10,000 for each violation of a provision of AS 21.27, or a civil penalty of not more than \$25,000 for each violation if the Director determines that the person willfully violation the provisions of AS 21.27.

The term *incompetence* is not defined by Alaska's insurance statutes or regulations. However, other professional statutes and regulations provide a guide to defining incompetence by a professional licensee. In the medical licensing arena, professional incompetence is defined by regulation as "lacking sufficient knowledge, skills or professional judgment...to a degree likely to endanger the health of his or her patients."⁶² Adapting the forgoing for use in insurance license sanction matters, an acceptable definition for incompetence could be *lacking sufficient knowledge, skills, or professional judgment to a degree likely to cause injury or loss to the public.*

Count I:

The Division grounds its argument in support of Count I on the alleged fact that Mr. Tate filed or made a false sworn statement to the Division when he claimed that his signature had been forged on a motor vehicle surety bond certificate. More than a year after his claim of forgery, Mr. Tate withdrew the forgery claim and said that he had made an honest error. Mr.

⁶⁰ Para. 7, Mr. Tate's Request for Hearing and Notice of Defense, filed February 2, 2007 with the Division of Insurance.

⁶¹ AS 21.27.410(a)(8).

⁶² 12 AAC 40.970, cited with approval in *Halter v. State, Dept. of Commerce and Economic Development, Medical Bd.*, 990 p.2d 1035 (Alaska 1999).

Tate proclaims “(O)nly after I reviewed the handwriting analysis provided by the Division of Insurance did I realize that the signature on the surety bond was indeed my signature.”⁶³

AS 21.36.360(d) provides that “(A) fraudulent insurance act is committed by a person who makes a false *sworn* statement that the person *does not believe to be true* as to a matter material to an examination, investigation, or hearing of the division.”⁶⁴ AS 21.36.360(e) provides that “(A) fraudulent insurance act is committed by a person if (1) as to a matter material to an examination, investigation, or hearing by the division, the person makes *two or more* sworn statements that are irreconcilably inconsistent to the degree that one of them is necessarily false; *and* (2) the person does not believe one of the statements to be true at the time the statement is made.”(emphasis added).

In order to prevail on Count I, applicable law requires that the Division must establish not only that Mr. Tate made the false statement and that the statement was sworn; the Division must also establish that Mr. Tate did not believe the statement to be true when he uttered the statement under oath.⁶⁵ The critical element of the charge that must be proven by the Division is that Mr. Tate knew at the time he made a sworn statement to Investigator Holley that Mr. Tate did not then believe the statement was true.⁶⁶

Two issues rise from the claim of a knowingly false statement. First, was the statement made by Mr. Tate a sworn statement made under oath? Second, did Mr. Tate believe his statement to be true at the time it was made to Investigator Holley?

The Division argues that Mr. Tate’s statement to Investigator Holley on January 13, 2006 was given under oath because Mr. Tate agreed to tell “(N)othing but the truth.” Mr. Tate argues that his statements on January 13, 2006 were not given under an adequate oath or affirmation.

⁶³ Affidavit of Alex A. Tate, page 6 of exhibit A to Tate’s opposition to the Division’s request for summary adjudication on Counts I & II.

⁶⁴ Emphasis added to the quoted statute language.

⁶⁵ The Division alleged in Count I of its amended accusation that Mr. Tate violated AS 21.27.020(a) and (b)(4) because he is not a trustworthy person. The Division does not appear to have pursued a violation of AS 21.27.020(a) and (b)(4), as to Count I. Even if the Division did pursue a sanction based upon an alleged violation of this statute, AS 21.27.020 (general qualifications for license) does not apply because it addresses license issuance or renewals. Mr. Tate held a license at all pertinent times and was not seeking issuance or renewal of his license. However, a missing qualification (e.g., be a trustworthy person) for licensing or renewal can be a ground for license suspension (or revocation) when later established under AS 21.27.410(a)(1). This is addressed in Count IV.

⁶⁶ The Division has not presented evidence that Mr. Tate made *two or more* false statements. The focus of the evidence presented was the single statement by Mr. Tate that his signature had been forged.

The term “sworn statement” means a statement knowingly given under oath or affirmation attesting to the truth of what is stated.”⁶⁷ An affirmation is a statement by which a person signifies that he is bound in conscience to act truthfully.⁶⁸ No particular form of oath or affirmation is required by law.⁶⁹ Alaska’s appellate courts have chafed at arguments favoring a narrow interpretation of the term “sworn statement.”⁷⁰ For purposes of determining whether a sworn statement has been made, the crucial issue is not whether an oath was actually given, but rather whether the statement amounted to “a verification on its face of the facts contained therein.”⁷¹ A signed and notarized statement not given under oath, but expressly declaring that the statement was “made under penalty of perjury” qualifies it as an affirmation; the presence of the “made under penalty of perjury” on the face renders the statement to be one that “purports to be sworn.”⁷² A signed affidavit, which declares that it was made pursuant to AS 09.63.020, complies with the requirement for certification, and constitutes a sworn statement.⁷³ Ideally, an oath or affirmation should be “administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”⁷⁴

Mr. Tate’s “nothing but the truth” statement does not qualify as a sworn statement because it lacks substantial compliance with the requirements of Alaska law. While it is true that there is some latitude given under the law when assessing whether a statement is a sworn statement, more formality than the cavalier statement of “nothing but the truth” is required. Here, Mr. Tate was not administered an oath, he did not sign the transcribed interview; he did nothing to suggest that his statements were made under penalty of perjury, and the interview

⁶⁷ AS 11.56.240(2)(a). Sworn statements can also be notarized statements, and other statements given under penalty of perjury.

⁶⁸ *Anchorage Sand and Gravel Co et al, v. Wooldridge, et al.*, 619 P.2d 1014, 1016 (Alaska 1980).

⁶⁹ *Id.* at 1016.

⁷⁰ *Harrison v. State*, 923 P.2d 107, 109 (Alaska 1996).

⁷¹ *Gargan v. State*, 805 P.2d 998, 1005 (Alaska App. 1991). The court in *Gargan* dealt with a perjury conviction involving an affidavit that purported on its face to be sworn before a notary. Evidence at trial established that the notary had not actually placed Gargan under oath. Nevertheless, the court affirmed Gargan’s perjury conviction, observing that, for purposes of determining whether a sworn statement had been made, the crucial issue was not whether an oath was actually given, but whether the statement amounted to a verification on its face of the truthfulness of the facts contained in the statement.

⁷² *Knix v. State*, 922 P.2d 913, 917 (Alaska App. 1996). *Knix* involved a notarized statement that did not state on its face that it was sworn before a notary and in fact was not given under oath. Because “UNDER PENALTY OF PERJURY, THIS IS A TRUE AND ACCURATE STATEMENT” was on the face of the notarized statement, the court in *Knix* deemed the statement to be a sworn statement.

⁷³ *Harrison v. State*, 923 P.2d 107 (Alaska App. 1996). The court in *Harrison* found an affidavit given under penalty of perjury, but lacking a statement that a notary public or other official empowered to administer oaths was unavailable, to be a sworn statement

⁷⁴ Alaska R. Evid. 603.

statement has no certification or other declaration suggesting that it is to be treated as a sworn statement.

Resolution of the question of whether Mr. Tate believed his sworn statement of January 13, 2006 to be true at the time it was made requires a much broader review of the evidence. Of particular importance is the reasonableness of Mr. Tate's explanation of why he believed that his claim of forgery was true, and a general assessment of Mr. Tate's credibility on this particular allegation. Credibility may be defined as "the quality or power of inspiring belief."⁷⁵ Credibility "involves more than demeanor. It apprehends the over-all evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence."⁷⁶

The parties do not dispute that Mr. Tate did not meet Mr. Barr at the time Mr. Barr procured a surety bond from AIS. Mr. Tate's explanation of his long-standing practice to only sign surety bonds for clients that he knew or to whom he had been introduced is reasonable, believable, and understandable. It is undisputed that Mr. Tate was angry over his termination and suspicious of Mr. Shaffer and Mr. Beeching. Stated differently, Mr. Tate required very little evidence to believe that his signature had been forged. The fact that Mr. Tate made a mistake or rushed to judgment too quickly is unfortunate. Nonetheless, the question is not whether Mr. Tate should have believed he was telling the truth; rather, it is simply whether he did so believe.

Based upon all of the evidence in the record which relates to the alleged forgery, it is more likely than not that Mr. Tate honestly but erroneously believed that his signature on the bond in question had been forged and that he did not realize his mistake until the Division had the document inspected by an expert. While Mr. Tate and Mr. Shaffer thoroughly dislike each other, the record does not support a finding that Mr. Tate's state of mind or anger distilled to a point that he knowingly decided to file a false statement with the goal of hurting his former employer or co-workers. The mistaken statement does not satisfy the intent requirements necessary to be deemed a fraudulent insurance act.

Count II:

The argument and evidence supporting the allegations of Count II principally derive from the fifteen pages of findings of fact and conclusions of law entered by Superior Court Judge

⁷⁵ *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971).

⁷⁶ *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963).

Morgan Christen in *Gary R. Sloane, individually, and ADAP, INC., an Alaskan corporation, v. Alex A. Tate, individually, Doug Shaffer, individually, and Associated Insurance Services, Case No. 3AN-03-5497 CI* (the “Sloane litigation”).⁷⁷ Because of the specific findings and conclusions made by Judge Christen, the Division has made two principal arguments. First, it argues that Mr. Tate is collaterally estopped to deny the findings of fact made by Judge Christen. Second, it contends that the findings of fact entered by Judge Christen coalesce to establish that Mr. Tate was incompetent.

A synopsis of the Sloane litigation is necessary. Sloane and his corporation, ADAP, Inc., sued Tate individually, Shaffer individually, and AIS, the insurance brokerage owned by Shaffer, because AIS did not procure workers’ compensation insurance for ADAP as requested. More specifically, Judge Christen found that “Tate neither procured the workers’ compensation coverage requested by Sloane for ADAP nor gave Sloane written notice that coverage was not obtained. AIS admits that this falls below the standard of care of a reasonable insurance brokerage.”⁷⁸ While employed by ADAP, Sloane was injured on a job site. Because Sloane was not covered by worker’s compensation insurance at the time of injury, he faced medical and other costs that would have been covered by the insurance.

The Sloane litigation was scheduled for trial on June 1, 2004. At the commencement of the trial, plaintiffs and defendants waived their right to a jury trial, plaintiffs waived their claim for punitive damages, and defendants informed the court that they were admitting liability. On June 2, 2004, a bench trial commenced which focused almost exclusively on the amount of Sloane’s damages. Judge Christen concluded as a matter of law that: AIS admitted liability for compensatory damages; Sloane met the burden of proving damages for medical benefits, temporary total disability benefits, permanent partial disability benefits, and temporary partial disability benefits; and, Sloane is entitled to a money judgment⁷⁹ in the amount of \$67,683.02, plus allowable costs, attorney fees, and interest.⁸⁰

⁷⁷ Judge Christen’s findings of fact and conclusions of law is Exhibit 5 to the Division’s request for summary adjudication on Counts I & II of the amended accusation.

⁷⁸ Para. 7, Judge Christen’s findings of fact.

⁷⁹ A copy of the final judgment was not introduced as an exhibit at the hearing; accordingly, the record does not reveal if the judgment was directed solely against AIS, or imposed joint and several liability on AIS, Mr. Tate, and Mr. Shaffer.

⁸⁰ Pp. 13, 14, and 15 of Judge Christen’s conclusions of law. The judge reached other conclusions which are not relevant to this decision.

Mr. Tate was not present for any portion of the trial proceedings in the Sloane litigation. The specific findings of fact by Judge Christen, which are adverse to Mr. Tate, were not relitigated in the instant licensing action. The Sloane litigation findings and conclusions are helpful. We know that AIS, the business entity, admitted liability for the compensatory damages caused by its negligent failure to procure workers' compensation insurance.⁸¹ We know that AIS admitted that its failure to obtain coverage for ADAP "...falls below the standard of care of a reasonable insurance brokerage."⁸² We know that AIS was liable in damages to Mr. Sloane. We know that Mr. Tate prepared the ADAP insurance application, and we know that coverage was not placed.

The testimony of Mr. Tate and Mr. Shaffer, taken together, plus the documentary evidence relating to the ADAP workers' compensation insurance application are instructive as to who "dropped the ball". Mr. Tate did not follow through in a timely fashion to insure that coverage was placed, or in the alternative, timely inform Mr. Sloane that coverage was not in place. As the owner of AIS, the supervisor of Mr. Tate, and the keeper of the trust funds, Mr. Shaffer, is hardly without fault. The evidence is clear that both Mr. Tate and Mr. Shaffer knew what needed to be done, but neither performed in a careful, professional manner with respect to the ADAP application, even though they have been in the insurance business for approximately 40 and 24 years, respectively.⁸³ Even though Mr. Tate and Mr. Shaffer erred with respect to the ADAP worker's compensation application, the record of that single lamentable event does not totally tarnish their long careers in the insurance industry. Both possess sufficient knowledge, experience, skill, and professional judgment to work competently in the insurance industry. To the extent that reliability is part of being trustworthy, the evidence supports a finding that as to the ADAP application and failure to place coverage, Mr. Tate demonstrated untrustworthiness, but not to the degree, standing alone, that his license should be revoked.

Counts III and IV:

Counts III and IV allege falsification of insurance documents with respect to Anchor Trucking, Two Speed Enterprises, and SBH Services failure to obtain and maintain workers' compensation insurance for their respective businesses. The evidence produced at the hearing

⁸¹ Judge Christen states in her conclusions of law that "AIS is liable for lost workers' compensation benefits as an economic harm proximately caused by **defendant's admitted negligence.**" However, nowhere does Mr. Tate or Mr. Shaffer admit negligence as an individual defendant; only AIS admits liability and damages.

⁸² Para. 7, Judge Christen's findings of fact.

⁸³ Deposition of Doug Shaffer, pp. 7-8; exhibit 2036, p. 3.

clearly establishes that Mr. Tate willfully generated certificates of insurance on nineteen occasions which purported to affirm the existence of workers' compensation insurance when such coverage was not in place.⁸⁴ Anchor Trucking, Two Speed Enterprises, and SBH Services did not testify or submit evidence establishing that they requested that Mr. Tate procure the workers' compensation coverage. The testimony and evidence show that each of the businesses had an ongoing business relation with Mr. Tate and/or AIS, and that each had previously been covered by workers' compensation insurance. However, the evidence shows that the insurer placed the businesses on notice that their coverage would expire on a date certain and it was the principal responsibility of the insured to renew the coverage or allow it to lapse. Copies of notices of renewal may have been sent to AIS as a courtesy, but the obligation to renew coverage rests with the insureds in the first instance.⁸⁵

Mr. Tate issued the nineteen certificates of insurance without confirming coverage. The Division treats this activity as nineteen instances of misconduct which constitutes incompetence and/or untrustworthiness sufficient to support license revocation. Mr. Tate minimizes the misconduct by pointing out that he received request for certificates from three clients and not from nineteen clients. The testimony of Mr. Tate and Mr. Shaffer indicate that certificates are frequently issued in great numbers as a service to clients; the issuance of hundreds of certificates per year means that the accuracy of the certificates does not receive close scrutiny. In other words, Mr. Tate believes the gravity of the offense is not very serious because "mistakes happen", and as corroborated by Mr. Shaffer,⁸⁶ the public did not suffer loss or injury because of the erroneous certificates.

While the undisputed failure to confirm existing coverage of three insureds is sufficiently serious to warrant suspension of a license, the casual manner in which certificates were routinely requested and issued at AIS seems to set the stage for errors. Given that third parties rely upon certificates of insurance when making important business decisions, and given that the non-existence of insurance coverage could easily harm a member of the public, Alaska law allows the

⁸⁴ The absence of workers' compensation coverage to "back up" the certificates issued by Mr. Tate was not discovered until approximately one year later. Mr. Shaffer sent a memo to Mr. Tate on November 7, 2003 requiring that all certificates be reviewed by him before they were issued. Exhibit 28. In the course of cross-checking information, the Workers' Compensation Division discovered that coverage was not in place when Mr. Tate issued certificates at the request of Two Speed. Exhibits 44-46. Missing coverage for SBH came to the attention of the Workers' Compensation Division in 2004. Exhibits 55, 57- 58.

⁸⁵ Hearing testimony of Ms. Henderson, Mr. Tate, and Mr. Shaffer.

⁸⁶ Hearing testimony of Doug Shaffer under cross-examination.

making of a false certificate of insurance to be prosecuted as a crime,⁸⁷ in addition to sanctions against the license. Mr. Tate's conduct of issuing erroneous certificates appears to be a combination of laziness, negligence, and attempted fast customer service. Nonetheless, the Director views the issuance of these false certificates as very serious offenses. The potential for harm to the public is significant and the harm could have been catastrophic in a particular situation. Mr. Tate's wrongful and willful issuance of nineteen certificates constitutes untrustworthiness, which in turn supports a period of license suspension or probation.⁸⁸

Although the Division's argument suggests otherwise, nothing in the record established that it is Mr. Tate's ongoing business practice to *not* check underlying coverage. At the hearing, Mr. Tate testified that in response to his admitted errors, he has tightened his procedures to confirm that coverage is in place before issuing any certificate of insurance.

Count V:

The gravamen of Count V of the amended accusation is that Mr. Tate filed an application for a license for the Tate Insurance Company on May 4, 2004, but did not receive an individual producer's license until August 8, 2005, more than one year after the application process was commenced. The Division urges that the lengthy application process was due to Mr. Tate's incompetence. If Mr. Tate is incompetent, AS 21.27.410(a)(8) provides the Director with authority to deny issuance of a license, refuse to renew a license, suspend a license, or revoke a license if the conduct of affairs under a license by the licensee are considered by the Director to reflect incompetence or untrustworthiness, or to be a source of potential injury and loss to the public.

Count V also includes a list of prior licensing actions against Mr. Tate in California and Alaska, the most recent of which occurred in 1994. Mr. Tate was the subject of a California Order of Revocation and Issuance of a Restricted License on October 27, 1978; he admitted failing and neglecting to either remit or return premiums, and he admitted failing to maintain

⁸⁷ AS 21.36.360(q)(9) provides that a person who falsely makes completes, or alters a certificate of insurance may be prosecuted under AS 11.46 (criminal offenses against property).

⁸⁸ A license cannot be renewed or issued if the applicant is not a trustworthy person. AS 21.27.020(b)(4). Even though Mr. Tate is not seeking issuance or renewal of his license in this case, the Director has the authority to suspend his license for a cause for which issuance of the license or its renewal could have been denied had it then existed and been known to the Director. AS 21.27.410(a)(1). Therefore, a determination that a licensee is untrustworthy can support a suspension. Because falsely making a certificate of insurance violates AS 21.36.360(p)(2), the Director can suspend a license under AS 21.27.410(a)(8) because such conduct reflects untrustworthiness.

fiduciary funds in a trust account at all required times.⁸⁹ On October 3, 1979, the Division (Alaska) imposed (and suspended) a six month license suspension because Mr. Tate had failed to disclose in his Alaska license application that he was the holder of a California restricted license and not a regular license, and Mr. Tate sold insurance in Alaska for a period of approximately three months while not qualified to be listed on his employing firm's license.⁹⁰ On October 20, 1986, the director of the Division issued an Order Dismissing Show Cause Order (by stipulation of the parties).

Pursuant to a Stipulated Settlement Agreement⁹¹ approved by the Director on February 9, 1994, Mr. Tate's firm license was surrendered or suspended for five years, he was allowed to apply for an individual producer's license under certain terms and condition, and a \$30,000 fine was imposed, with \$10,000 suspended. Payments due under the agreement were paid by July 7, 1997. The violations by Mr. Tate settled in 1994 by way of a stipulated agreement appear more serious than the violations alleged in 2007 by the Division. In the 1993 and 1994 time frame, Mr. Tate and Tate and Associates, Inc. admitted, *inter alia*, the following: failure to account for trust funds; borrowing funds from the trust account for personal use; failure to return insurance premiums; improper licensure; premature payment of commissions to himself; serious shortage in the trust fund for premiums; and, failure to maintain proper records. The 1993-94 violations are very serious in that they involve breach of fiduciary duties and significant sums of money wrongfully appropriated to personal use.

The licensing supervisor⁹² for the Division testified on May 19, 2008 that Mr. Tate completed his application, answered all questions, met the licensing requirements, and received his individual producer's license on August 5, 2005. Given that various "bad acts" committed by Mr. Tate and cited by the Division in Counts II, III, and IV appear to have occurred **prior** to issuing the license on August 5, 2005, and considering that a license applicant "...shall be a trustworthy person",⁹³ we can assume that as of August 8, 2005, Mr. Tate was a trustworthy person in the eyes of the Division.

An insurance license applicant's rate of progress in the application progress is not, *per se*, a violation of any insurance statute or regulation. A myriad of reasons may exist to explain the

⁸⁹ Exhibits 66-67.

⁹⁰ Exhibit 68.

⁹¹ Exhibit 76.

⁹² Linda Brunette.

⁹³ AS 21.27.020(b)(4)

delay in Mr. Tate's application for a license in the 2004-2005 time periods. Nevertheless, the incompetence contemplated by AS 21.27.410(a)(8) refers to the *conduct of affairs under a license* and not to a slow application process. Accordingly, a protracted, but ultimately successful, application process does not constitute incompetence that gives rise to a sanction under AS 21.27.410.

IV. Conclusion

A. Violations

- Mr. Tate's sworn but mistaken assertion of a forgery is not a violation of AS 21.27.20(a) or (b)(4), or AS 21.36.360(d) or (e). The Division has not proven the allegations contained in Count I by a preponderance of the evidence.
- Mr. Tate's willful failure to obtain workers' compensation insurance coverage for ADAP/Gary Sloane and notify the applicant that coverage was lacking subjects Mr. Tate's license to the sanctions available under AS 21.27.410(a) and penalties available under AS 21.27.440 (not to exceed \$25,000 per willful violation of a provision of AS 21.27). The Division has proven the allegations contained in Count II by a preponderance of the evidence.
- Mr. Tate's willful issuance of nineteen erroneous certificates of liability insurance constitutes fraudulent insurance acts under AS 21.36.360(p)(2) and therefore subjects his license to sanctions available under AS 21.27.410(a) and penalties available under AS 21.27.440. The Division has proven the allegations contained in Counts III and IV by a preponderance of the evidence.
- Mr. Tate's insurance application process lasting approximately thirteen months does not subject his license to sanctions provided by AS 21.27.410(a). The Division has established that Mr. Tate took thirteen months to acquire a license, but that fact does not violate any standard of conduct prescribed by law. The evidence of prior sanctions and penalties that were offered under the rubric of Count V are considered solely for the imposition of sanctions and penalties under Counts II, II, and IV.
- Mr. Tate's recent violations (2001 and forward) are serious but do not involve the diversion of trust funds, the theft of premium payments, knowing injury to clients and the public, knowingly lying under oath, or a myriad of other "bad acts."

When “bad acts” of this description do occur, the probability of license revocation is substantially increased.⁹⁴ Here, the tenor of the violations which have been established reflect sloppiness, laxity, negligence, and lack of professional care more than incompetence or untrustworthiness flowing from intentional acts.

B. Sanctions and Penalties

- The Director has broad authority to suspend, revoke or place conditions on a person’s license if the Director determines that the licensee has violated a provision of Title 21.⁹⁵ If the Director finds that a provision of Title 21 has been violated, the Director may place conditions on the person’s license if the Director finds that the conditions will protect the public from injury or potential injury. In addition to license denial, nonrenewable, suspension, and revocation, the Director may impose civil penalty of not more than \$10,000 for each violation or a civil penalty of not more than \$25,000 for each violation if the Director determines under AS 21.06.170-21.06.240⁹⁶ that the person willfully violated the provisions of AS 21.27.
- The imposition of a sanction in professional disciplinary proceedings may fulfill a variety of functions, such as deterring the licensee from similar conduct, affirming professional standards and norms of reasonable conduct, and rehabilitation of the licensee.⁹⁷ The overriding purpose of any sanction is to protect the public.⁹⁸
- A review of prior Alaska insurance proceedings reveals that lengthy periods of license suspension or revocation of licenses have been imposed when the licensee engaged in a pattern and practice of improper conduct over a substantial period of

⁹⁴ *In the Matter of Wagstaff*, Division of Insurance Case No D94-22 (misrepresentation, deceit, diversion of client funds to personal use, the entry of a civil money judgment in excess of \$948,000, and an order to pay restitution of \$216,651 coalesced to result in the revocation of the respondent’s license).

⁹⁵ AS 21.27.420(a).

⁹⁶ These statutes address examinations, investigations, and hearings conducted by the Director (or an examiner if the Director so authorizes).

⁹⁷ *See In the Matter of Armbrecht*, D92-19, a decision adopted by the Director of the Alaska Division of Insurance.

⁹⁸ *In the Matter of Pyrah*, D95-04.

time.⁹⁹ In Mr. Tate's case, the single failure to procure worker's compensation insurance for ADAP occurred over an approximately five month period, beginning with the application in February 2001 and ending with Mr. Sloane's injury in May 2001. Mr. Tate's willful failures to check for underlying insurance coverage, followed by the sporadic issuance of nineteen false certificates of insurance for three clients during 2002 and 2003. The violations of Mr. Tate do not appear to be the result of him seeking personal financial gain or making a conscious decision to break the rules; rather, the violations appear to be the result of failure to properly process an application for insurance, and failures to properly check for underlying coverage before routinely issuing certificates of insurance. Conduct representing inadequate follow-through and inadequate checking for coverage can be remedied, whereas, for example, theft of money and loss of that money cannot be easily remedied.

- The Director has previously considered aggravating and mitigating factors when determining the proper sanction(s).¹⁰⁰ Other insurance tribunals have also considered aggravating and mitigating factors.¹⁰¹ Aggravating factors include: prior disciplinary offenses; dishonest or selfish motive; a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by

⁹⁹ See *In the Matter of Wagstaff*, D94-22 (license revoked), wherein the licensee repeatedly converted the funds of other to his personal use, made false representations, and failed to be properly licensed; *In the Matter of Washington*, D93-27 (license revoked), wherein the licensee made multiple misrepresentations on applications, failed to repay loans from clients, converted funds belonging to other to his personal use, and engaged in fraudulent conduct; *In the Matter of Landeis*, D93-03 (license relinquished), wherein the licensee stipulated to diverting and misappropriating trust funds, commingling trust funds, failing to account for premiums received from others, falsifying trust account reports, and violating a prior stipulated agreement and order; *In the Matter of Armbrecht*, D92-19 (license revoked), wherein the licensee made multiple misappropriation of funds belonging to others and used the funds for his personal use, and failed to remit premiums paid to him.

¹⁰⁰ See *In the Matter of Pyrah*, D95-04, and *In the Matter of Armbrecht*, D92-19; both matters are Alaska Division of Insurance decisions. Both *Pyrah* and *Armbrecht* cite to *Alaska Survival v. State*, 723 P.d 1281, 1287 (Alaska 1986) for the proposition that aggravating and mitigating factors must be considering when determining sanctions. Unfortunately, *Alaska Survival* has nothing to do with licenses or sanctions. *Alaska Survival* is an appeal challenging a state land disposal of 32 agricultural homesteads near Talkeetna. Both *Pyrah* and *Armbrecht* cite to *Morrison v State Board of Education*, 461 P.2d 375 (Cal. 1969) to support consideration of certain additional circumstances (conduct affect on clients, degree of adversity, remoteness in time, type of license, motive for conduct, likelihood of recurrence). Unfortunately, *Morrison* does not contain the quoted circumstances. *Morrison* addresses the question of whether a male teacher in California should lose his teaching diploma as a result of consensual, private, and noncriminal homosexual conduct.

¹⁰¹ *In the Matter of Michael K. Frazier*, Agency Case No. INS 04-06-021, Office of Administrative Hearings ("OAH"), State of Oregon; *In the Matter of Bailey & DeBernardi Insurance, Inc.*, Agency Case No. INS 04-09-014, Office of Administrative Hearings, State of Oregon.

intentionally failing to comply with rules or orders of the disciplinary process; submission of false evidence; false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge wrongful nature of conduct; vulnerability of victim; substantial experience in the profession; and, indifference to making restitution.¹⁰² Mitigating factors include: absence of prior disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the profession; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions in the instant proceeding; remorse; and, remoteness of prior offenses.¹⁰³

The following factors aggravate against Mr. Tate;

- *Prior disciplinary offenses.* The California Department of Insurance revoked Mr. Tate's license in 1978 because he failed to remit premiums and failed to maintain a fiduciary trust account. He was able to retain a limited license in California. In 1979, the Alaska Division of Insurance suspended his license for six months because he had been selling insurance from June through September, 1979, at a time when his license had not been transferred from California to Alaska; the Director found that Mr. Tate did not know that his California license was not transferable. The six month license suspension was suspended on condition that he commit no further violations during the suspension period. Fourteen years later in 1993, the Division filed two accusations against Mr. Tate following the Division's examination of Tate and Associates, Inc. and Brokers Plus, Inc. In a stipulated settlement agreement with the Division, Mr. Tate admitted his failure to maintain records, taking commissions before the premiums were earned, allowing the trust account to be "short" funds, personally borrowing money from the trust account, using trust account funds to pay off a personal line of credit, failure to procure insurance coverage for a client and failure to timely return premiums as

¹⁰² *In the Matter of Grant H. Gilbertson and Gilbertson Insurance*, Agency Case No. INS 02-04-03 (OAH, Oregon 2003).

¹⁰³ *Id.*

required by statute. As part of the stipulated agreement, Mr. Tate agreed to surrender the Tate and Associates' license, apply for an individual producer's license, and not have authority over any trust account for five years. Fourteen years later in 2007, the Division filed the accusation in question against Mr. Tate.

- *Substantial experience in the profession.* Mr. Tate was first licensed to sell insurance thirty-five years ago. He has worked solo and he has worked for firms. He has sold a variety of different types of insurance. Given his lengthy experience in the insurance industry and his broad exposure to insurance laws, regulations, and industry practices, he cannot now say that he did not "know better," he cannot deny that he exhibited bad judgment when he issued false certificates of insurance, and he cannot deny his unprofessional failure to follow through with the ADAP worker's compensation application so that the client knows that it does, or doesn't have coverage.

The following factors mitigate in favor of Mr. Tate:

- *Absence of a dishonest or selfish motive.* Mr. Tate's violations illustrate sloppy work rather than an attempt to gain financial or other reward. When Mr. Tate issued false certificates of insurance, he gained nothing (but he did mislead the certificate recipient). If the record in this case established knowing and intentional conduct on the part of Mr. Tate to falsify documents, divert funds to his own use, intentionally lie to investigators, then his conduct would rise to the level warranting license revocation. Stated differently, dishonest motives and conduct invoke sanctions harsher than sloppy or negligent practices. For example, *In the Matter of Pyrah* involved the knowing and intentional backdating of a \$200 premium payment, followed by failure to tell the investigator the truth.¹⁰⁴ The Director approved a license suspension of thirty days, probation for two years, additional license education, restitution of investigation expenses, and assorted reporting requirements during the two year probationary period. In contrast, the facts of Mr. Tate's case are characterized by delay, inadequate follow-through, negligence, and poor business practice, but the facts are not characterized by knowing, devious conduct.

¹⁰⁴ *In the Matter of Pyrah*, D95-04, Alaska Division of Insurance.

- *Interim rehabilitation.* Mr. Tate's demeanor indicates that he is well aware of the serious accusations levied against him. There is little doubt that defending himself in this proceeding has been expensive. His testimony indicates that he seeks to avoid trouble with the licensing authority and intends to tighten his business practices to avoid problems. In fact, he has not been cited for any violation in the four years preceding the hearing.

VI. Order

- Each violation that Mr. Tate committed could have been avoided. Because the Division has proven the allegations of Counts II, III, and IV, and in light of the aggravating factors, especially Mr. Tate's prior disciplinary offenses, substantial sanctions are warranted.
- Under the authority granted by AS 21.27.410(a)(1), (2), and (8), and AS 21.27.420(a), Alex A. Tate's¹⁰⁵ individual producer license number 3698 is placed on probation for twelve months from the effective date of this order.¹⁰⁶ Any violation of the Alaska Insurance Code during the probationary period shall result in the immediate revocation of Mr. Tate's license.
- During the probationary period, Alex A. Tate shall submit to the Division every three months a sworn affidavit stating that he has been in compliance with, and has not violated, Alaska insurance statutes and regulations. The due date for these affidavits shall begin three months after the date the Director signs this order and follow every three months thereafter.
- Under the authority of AS 21.27.440(a)(2), Alex A. Tate is fined a total amount of \$48,000 for all violations.¹⁰⁷
- Of the \$48,000 fine, the sum of \$38,000 is suspended, subject to no further violations of the Alaska Insurance Code during the twelve month period following the effective date of this order. Any violation of the Alaska Insurance Code during the probationary period, or any failure to comply with a requirement

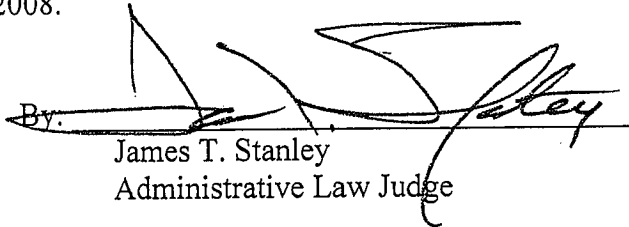
¹⁰⁵ All references to Alex A. Tate include Tate Insurance Services.

¹⁰⁶ The Director's authority to place a license on probation derives from AS 21.27.420 (b) which allows the Director to place conditions on a license. Imposing probation has been accomplished in other cases. *See In the Matter of Pyrah*, Case No. D95-04 (two year probation in addition to thirty day suspension).

¹⁰⁷ The fine is based upon failure to procure workers' compensation coverage for ADAP (\$10,000) and the willful issuance of nineteen certificates of insurance (\$2,000 each).

- The unsuspended portion of the fine shall be paid within six months after the effective date of this order.

Dated this 30th day of September, 2008.

By: 
James T. Stanley
Administrative Law Judge

Adoption

The undersigned Director of the Division of Insurance adopts this Decision and Order in OAH Case No. 07-0086-INS as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of _____, 2008.

By: _____
Signature

Name

Title

of this decision and order, will result in the automatic reinstatement of the suspended portion of the fine.

- The unsuspended portion of the fine shall be paid within six months after the effective date of this order.

Dated this ____ day of September, 2008.

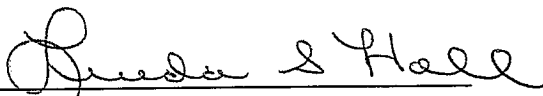
By: _____
James T. Stanley
Administrative Law Judge

Adoption

The undersigned Director of the Division of Insurance adopts this Decision and Order in OAH Case No. 07-0086-INS as the final administrative determination in this matter with revisions which may be found at page 2, pages 17-18 and pages 25-26.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 1ST day of December, 2008.

By: 
Signature
LINDA S. HALL
Name
Director
Title

I hereby certify that a copy of the document(s) listed below was distributed to the below listed parties and files by mail or by personal delivery. The original document has been filed in the Administrative Law Judge's official file in Anchorage, AK.

Decision and Order, signed by the Director of Insurance on December 1, 2008, in Case No. OAH No. 07-0086-INS (D 07-03), In the Matter of Alex A. Tate, d/b/a Tate Insurance Services.

Director of Insurance
Juneau, AK

Office of the Lieutenant Governor
P. O. Box 110015
Juneau, AK 99811

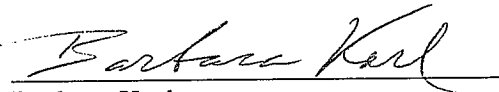
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Licensing file of the Division of Insurance in Juneau
Investigator file of the Division of Insurance in Anchorage

Dated: December 1, 2008 in Anchorage, Alaska.


Barbara Karl