

NPN - 166 4930
TN-ID - 0685690

BEFORE THE COMMISSIONER OF COMMERCE AND INSURANCE
OF THE STATE OF TENNESSEE

TENNESSEE INSURANCE DIVISION)
Petitioner,)
vs.)
JAMES BURKS)
Respondent.)

No. 12.01-115534J

FINAL ORDER

Respondent, James Burks, commenced this appeal of the Initial Order entered by Steve R. Darnell, Administrative Law Judge within the Department of State, Administrative Procedures Division, on August 28, 2012. The August 14, 2012 Initial Order held that Petitioner, the Tennessee Insurance Division, had proven by a preponderance of the evidence that Respondent failed to forward \$6,377.31 of clients' premiums to his former employer, Monumental Life Insurance Company. The Order also held that Petitioner had proven by a preponderance of the evidence that Respondent's conduct required the revocation of his insurance producer license and the assessment of civil penalties in the amount of \$6,300.00.

The Administrative Law Judge found that Respondent had improperly withheld, misappropriated or converted money or property received in the course of doing insurance business, a ground for discipline pursuant to TENN. CODE ANN. § 56-6-112(a)(4); and used fraudulent, coercive or dishonest practices or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business in

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this state or elsewhere, a ground for discipline pursuant to TENN. CODE ANN. § 56-6-112(a)(8).

In accordance with a Scheduling Order entered on October 5, 2012, the parties submitted briefs in support of, and in opposition to, this appeal.

Upon careful review of the record in this matter and due consideration of the briefs filed by the parties, the Commissioner hereby finds that the record is sufficient to support the findings of the Administrative Law Judge and affirms the Initial Order.

WHEREFORE, it is hereby **ORDERED AND ADJUDGED** the Initial Order entered on August 14, 2012 by Administrative Law Judge Steve R. Darnell is **AFFIRMED** and expressly incorporated herein by reference. This Final Order is made pursuant to TENN. CODE ANN. §4-5-313 and marks the disposition of this matter.

NOTICE OF RECONSIDERATION AND APPEAL PROCEDURES

Within fifteen (15) days after the Final Order is entered, a party may file a Petition for Reconsideration of the Final Order with the Commissioner of Commerce and Insurance, in which the Petition shall state the specific reasons why the Final Order was in error. If no action is taken by the Commissioner of Commerce and Insurance within twenty (20) days of filing of the Petition for Reconsideration, the Petition is deemed denied. TENN. CODE ANN. § 4-5-317.

A party who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in Davidson County Chancery Court within sixty (60) days after the entry of the Final Order, or if a Petition for Reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the Petition for Reconsideration. The filing of a Petition for Reconsideration

does not itself act to extend the sixty (60) day period, if the petition is not granted. A reviewing court also may order a stay of the Final Order upon appropriate terms. TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

IT IS SO ORDERED.

This 22nd day of February, 2013.



Julie Mix McPeak, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Final Order has been filed in the Administrative Procedures Division, Department of State, and sent via hand delivery to Tony Greer, attorney for the Department of Commerce & Insurance and via Certified, Return Receipt Requested and by United States Mail, First Class, Postage Prepaid, to the Respondent, James Burks, at 5050 Poplar Avenue, Suite #2000, Memphis, Tennessee 38157 on this 25th day of February, 2013.



Certifying Attorney

**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE**

IN THE MATTER OF:

TENNESSEE INSURANCE DIVISION,
Petitioner,

v.

JAMES BURKS,
Respondent.

DOCKET NO: 12.01-115534J

INITIAL ORDER

This matter came to be heard on June 21, 2012, in Nashville, Tennessee before Administrative Law Judge Steve R. Darnell, assigned by the Secretary of State, Administrative Procedures Division, to sit for the Commissioner of the Tennessee Department of Commerce and Insurance (Department). Attorney Bruce Poag represented the Department, and Respondent, James Burks, was in attendance but was not represented by counsel. The record closed on June 26, 2012, when the Department filed its proposed order.

ISSUES FOR DETERMINATION

1. Did the Department show, by a preponderance of the evidence, that Respondent failed to forward \$6,377.31 of clients' premiums to his employer?
2. Did the Department show, by a preponderance of the evidence, that Respondent's insurance license should be revoked in addition to being fined for his conduct?

SUMMARY OF DETERMINATION

It is **DETERMINED** that the Department has proven, by a preponderance of the evidence, that Respondent failed to forward \$6,377.31 of clients' premiums to his employer. The Department has further shown, by a preponderance of the evidence, that Respondent's

conduct requires the revocation of his license in addition to substantial monetary penalties. This determination is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

1. Respondent did not dispute the Department's evidence.
2. The Department issued Respondent insurance producer license number 685690 in 1987. Respondent's current licensure expires on November 30, 2013.
3. Respondent previously sold Monumental Life Insurance Co. ("Monumental") insurance products. After Respondent left Monumental's employment on approximately September 20, 2010, Monumental audited Respondent's accounts. Monumental's audit revealed missing premium funds of \$808.03 in account shortages, \$5,569.28 in missing premium payment deposits, and \$200 in missing equipment.¹ The audit revealed a total of \$6,377.31 in unaccounted for client premiums.
4. During October 2009 to September 2010, Respondent failed to credit his clients' policies with premiums paid directly to him totaling \$808.03, and instead retained these monies for his personal use. Respondent converted premiums on sixteen (16) occasions as follows:
 - a. Maelinder Ayers in the amount of \$52.01 on October 7, 2009, March 9, 2010, June 7, 2010 and June 8, 2010 (the Itemized Statement of Shortage regarding Maelinder Ayers' account (Exhibit 6) erroneously lists the shortage amount as \$53.48, not \$52.01, so Respondent is given a credit of \$1.47 from the original declared indebtedness of \$809.50 as indicated in Exhibit 5);
 - b. Annie Chambers in the amount of \$55.40 on August 10, 2010 and September 17, 2010;
 - c. Brendia Clark in the amount of \$409.36 on December 7, 2009, January 19, 2010, March 18, 2010, April 22, 2010 and September 17, 2010;

¹ The allegation of missing equipment is inconsequential to this order. If the only dispute between Monumental and Respondent was the missing equipment, there would be no basis for any action on Respondent's license.

- (8) Using fraudulent, coercive or dishonest practices or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.

4. TENNESSEE CODE ANNOTATED § 56-6-112(g)(2) (Supp. 2011) permits a penalty of one thousand dollars (\$1,000) per violation of TENN. CODE ANN. § 56-6-112(a), up to a total penalty of \$100,000.

5. In deciding the appropriate penalty, TENN. CODE ANN. § 56-6-112(h) (Supp. 2011) requires the Commissioner to consider the following:

1. Whether the person could reasonably have interpreted such person's actions to be in compliance with the obligations required by statute, rule or order;
2. Whether the amount imposed will be a substantial economic deterrent to the violator;
3. The circumstances leading to the violation;
4. The severity of the violation and the risk of harm to the public;
5. The economic benefits gained by the violator as a result of noncompliance;
6. The interest of the public; and
7. The person's efforts to cure the violation.

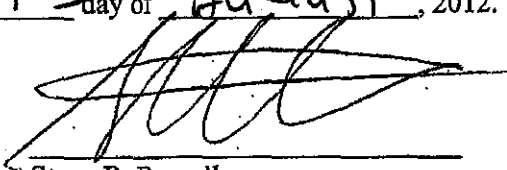
IT IS CONCLUDED THAT the Department has shown, by a preponderance of the evidence, that on twenty-eight (28) occasions Respondent accepted clients' premiums totaling \$6,377.31 and failed to forward these monies to Monumental. It appears Respondent converted all these premiums to his personal use.

For each of these twenty-eight (28) violations, Respondent should be assessed a civil penalty of \$225 each, or a total civil penalty of \$6,300. In addition, Respondent should be required to pay the cost of this cause. More importantly, Respondent has breached the trust and fiduciary duty owned to his clients and to his employer. The Department cannot ignore the severity of Respondent's conduct. Revocation of Respondent's license is the only action the


Department can take and carry out its obligation to enforce Tennessee's insurance laws and protect its citizens.

IT IS THEREFORE ORDERED that Respondent's, James Burks, insurance producer license number 685690 is revoked. Respondent is assessed twenty-eight (28) civil penalties of \$225 each for a total of \$6,300. The Department's cost of prosecuting this case is also assessed against Respondent.

This Order entered and effective this 14TH day of AUGUST, 2012.


Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 14TH day of AUGUST 2012.


Thomas G. Stovall, Director
Administrative Procedures Division

**APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES**

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243-1102. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.