

STATE OF INDIANA )  
 ) SS:  
COUNTY OF MARION )

BEFORE THE INDIANA  
COMMISSIONER OF INSURANCE

CAUSE NUMBER: 5415-AG07-0427-017

IN THE MATTER OF:

Dennis Fowler )  
 )  
Respondent )  
 )  
109 South Salem Street )  
Boston, Indiana 47324 )  
 )  
Type of Agency Action: Enforcement )  
 )  
Indiana Resident Producer License No. 2034270 )

**FILED**  
FEB 05 2008  
STATE OF INDIANA  
DEPT. OF INSURANCE

**Final Order**  
**Granting Enforcement Division's Objections and**  
**Modifying ALJ's Recommended Order**

The Commissioner of the Indiana Department , James Atterholt, having read and reviewed the Administrative Law Judge (ALJ) John Kissling's Findings of Fact, Conclusions of Law and Recommended Order; Indiana Department of Insurance Enforcement Division's Objections to Findings of Fact, Conclusions of Law and Recommended Order of September 24, 2007; and the Hearing Transcript (HT) and now being duly advised in the premises grants said Objections in part and pursuant to IC 4-21.5-3-29, as the ultimate authority in this case issues this Final Order modifying ALJ Kissling's Recommended Order of September 24, 2007.

**Grant of Enforcement Division's Objections**

The Commissioner grants the following objections:

1. The ALJ's Conclusions of Law as to Counts I-IV of the Statement of Charges are inconsistent with his Findings of Fact and the preponderance of evidence presented in this case. (Objection No. 1)
2. The sanction included in the ALJ's Recommended Order, calling only for a five hundred dollar (\$500.00) change of address fine is insufficient and not supported by the ALJ's Findings of Facts and the evidence presented in this case. (Objection No. 2)

3. The ALJ's Findings of Fact and the preponderance of evidence support the conclusion that the Department has more than met its burden of proving all counts of the Statement of Charges:

Respondent, by surrendering Ellen Duning's Southland Life policy without her knowledge or consent and not forwarding those funds to her, improperly withheld, misappropriated, or converted monies received in the course of doing insurance business, violated Indiana Code 27-1-15.6-12(b)(4) as alleged in Count I. (HT at 17-22, 25-26, 29-30, 50, 55-58, 60-63, 67, 71, 77, and 84)

Respondent, by surrendering Ellen Duning's Southland Life policy without her knowledge or consent, committed fraud while in the business of insurance, violated Indiana Code 27-1-15.6-12(b)(8) as alleged in Count II. *Id.*

Respondent, by retaining two thousand dollars (\$2,000.00) given to him by Ellen Duning as an annuity premium payment for an annuity that had already been surrendered, improperly withheld, misappropriated, or converted monies received in the course of doing insurance business, violated Indiana Code 27-1-15.6-12(b)(4) as alleged in Count III. (HT at 20, 48, and 50-51)

Respondent, by retaining two thousand dollars (\$2,000.00) given to him by Ellen Duning as an annuity premium payment for an annuity that had already been surrendered, committed fraud in the business of insurance, violated Indiana Code 27-1-15.6-12(b)(8) as alleged in Count IV. (HT at 19-22, 38-29, 33, 68-69, 77-79, and 85-88) (Objection No. 3, partial)

4. The ALJ's Conclusions of Law as to Counts I-IV are not consistent with his Findings of Fact and fail to give proper weight to evidence admitted at hearing. The Department presented the testimony of Ellen Duning, Respondent's victim, Steven Dybwad, Respondent's friend and business predecessor, Richard Perun, senior investigator for ING America, and David Cuthbert, expert witness in general insurance matters. (HT at 16-30, 53-62, 64-71, and 72-82) The Department also presented documentation supporting all allegations in the Statement of Charges, all of which was admitted into evidence without objection. *Id.* (Objection No. 4)

#### **Additional Findings of Fact**

In addition to the ALJ's Findings of Fact, which are incorporated into this Order, the Commissioner finds:

1. Respondent, in October of 2006, confessed to Ellen Duning at her home that he had surrendered her annuity in 1995 and proceeded to falsify documents and mail them to her in an effort to deceive her and to conceal his misappropriation. (HT at 17-30, 50-52, and 60-62). Respondent was the agent of record on a Southland Life annuity purchased by Ellen Duning on September 21, 1994, and on October 14, 1995 Respondent surrendered that annuity without the knowledge or consent of Ellen Duning and did not remit the resulting funds to her. (HT at 17-18, 24, 29-30, 50, 55-58, 67, 71, and 77)
2. Respondent, on cross-examination of Ellen Duning, questioned the accuracy and veracity of Duning's testimony. (HT at 38-50). In response, Steve Dybwad, a fourteen year friend and business associate of Respondent, testified that Ellen Duning had recounted Respondent's confession to him shortly after Respondent made it, and that that account was consistent with the account Ellen Duning gave at hearing. (HT 59-61 and 63)
3. Respondent was given two thousand dollars (\$2,000.00) ('annuity payment') dated September 3, 1997 by Ellen Duning for premium payment on her Southland Life annuity. As of that date, said annuity had already been surrendered by Respondent and Respondent did not remit that annuity payment to Southland Life or return it to Ellen Duning. (HT at 20, 48, 50, and 51)

The ALJ's Findings of Fact, the evidence presented at hearing by the Department, and the lack of evidence presented at hearing by the Respondent do not support the ALJ's ultimate Conclusions of Law as to Counts I, II, III, and IV of the Statement of Charges. The Department has met its burden of demonstrating by a preponderance of the evidence that Respondent did surrender Ms. Duning's Southland Life annuity without her knowledge or consent, that Respondent did not distribute the resulting funds to Ms. Duning, that Respondent did receive and retain two thousand dollars (\$2,000.00) intended as an annuity payment from Ms. Duning, and that Respondent falsified documents to conceal his misappropriation of Ms. Duning's assets.

### **Order**

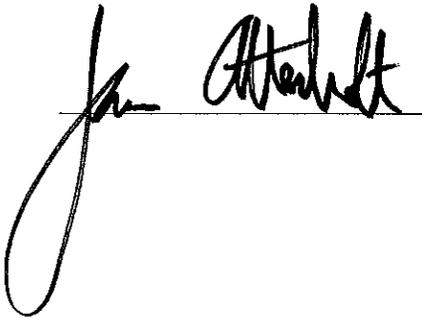
The Commissioner now Orders:

1. Respondent's insurance license 2034270 is permanently revoked.
2. Respondent shall remit two thousand dollars (\$2,000.00) in restitution to Ellen Duning for the September 3, 1997 payment she made to Fowler Financial Services for her annuity, which at that time had

already been surrendered. Payment is to be made within thirty (30) days of execution of this order.

3. Respondent shall remit a fine in the amount of ten thousand dollars (\$10,000.00) for violating Indiana Code 27-1-15.6-12(b)(4) and violating Indiana Code 27-1-15.6-12(b)(8). Within ninety (90) days of execution of this order.

ALL OF WHICH IS ORDERED by the Commissioner this 5 day of February, 2008.

A handwritten signature in black ink, appearing to read "James Atterholt", written over a horizontal line. The signature is stylized and cursive.

James Atterholt, Commissioner  
Indiana Department of Insurance