

No. **2021-6952**

**Official Order
of the
Texas Commissioner of Insurance**

Date: 08/05/2021

Subject Considered:

Texas Department of Insurance

v.

Brandon N. Burden and 3B Insurance Agency, LLC

SOAH Docket No. 454-21-0597.C

NUNC PRO TUNC ORDER

On July 13, 2021, the Texas Department of Insurance issued Commissioner's Order No. 2021-6916, revoking Brandon N. Burden's general lines agent license and the applications for general lines agent licenses submitted by 3B Insurance Agency, LLC. Due to a clerical error, 3B Insurance Agency, LLC, is referenced as "3B Insurance Agency, Inc." in Order No. 2021-6916. This order is issued nunc pro tunc to correct the error, and it stands in place of Order No. 2021-6916.

The reference to "3B Insurance Agency, Inc." is a clerical error, as demonstrated by the fact that each filing in this matter stating the full name of the company refers to it as "3B Insurance Agency, LLC." The Commissioner of Insurance has plenary power to correct an order that contains a clerical error due to inadvertence or mistake at any time by the entry of a nunc pro tunc order. Correction of a clerical error is not a substantive change in the order. *In re Ward*, 137 SW.3d 910, 913 (Tex. App.—Texarkana 2004, no pet.).

Other than the correction of the error, the text of the original order remains the same and reads as follows:

General remarks and official action taken:

The subjects of this order are Brandon N. Burden's general lines agent license and the applications for general lines agent licenses submitted by 3B Insurance Agency, LLC (3B). This order revokes Mr. Burden's license and denies 3B's applications.

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Background

After proper notice was given, the above-styled case was heard by an administrative law judge for the State Office of Administrative Hearings. The administrative law judge made and filed a proposal for decision containing a recommendation that Brandon N. Burden's general lines agent license be revoked and that the applications submitted by 3B be denied. A copy of the proposal for decision is attached as Exhibit A.

Findings of Fact

The findings of fact contained in Exhibit A are adopted by the Texas Department of Insurance (TDI) and incorporated by reference into this order.

Conclusions of Law

The conclusions of law contained in Exhibit A are adopted by TDI and incorporated by reference into this order.

Order

It is ordered that Brandon N. Burden's general lines agent license with life, accident, health, and HMO and property and casualty qualifications is revoked. It is further ordered that 3B's applications for a general lines agent license with a life, accident, health, and HMO qualification and a general lines agent license with a property and casualty qualification are denied.

Commissioner of Insurance

By:  _____
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Doug Slape
Chief Deputy Commissioner
Tex. Gov't Code § 601.002
Commissioner's Order No. 2018-5528

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COMMISSIONER'S ORDER

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Recommended and reviewed by:

DocuSigned by:

Allison Eberhart

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Allison Eberhart, Deputy General Counsel

DocuSigned by:

Justin Beam

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Justin Beam, Assistant General Counsel

TEXAS DEPARTMENT OF INSURANCE, Petitioner	§ § § § § § § § §	BEFORE THE STATE OFFICE
v.		OF
BRANDON N. BURDEN and 3B INSURANCE AGENCY, LLC, Respondents		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff (Staff) of the Texas Department of Insurance (the Department) brought this enforcement action to revoke the general lines agent license held by Brandon N. Burden and to deny the applications of 3B Insurance Agency, LLC (3B), which he co-owns. Staff alleges that Mr. Burden engaged in fraudulent or dishonest acts in violation of the Texas Insurance Code by creating false roof replacement documents and submitting those documents with customer applications. The Administrative Law Judge (ALJ) finds that Staff established the basis for discipline and recommends that Mr. Burden’s license be revoked and 3B’s applications be denied.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no disputed issues of notice or jurisdiction in this case. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing on the merits was held via Zoom videoconference on February 10, 2021, before ALJ Rebecca S. Smith. Staff appeared and was represented by Staff Attorney Amanda Cagle. Mr. Burden and 3B were represented by attorney Christopher James. The record closed at the conclusion of the hearing.

II. APPLICABLE LAW

The Texas Insurance Code authorizes the Department to regulate the business of insurance in this state and to take disciplinary action against agents who violate the law or rules related to

insurance.¹ In particular, under Texas Insurance Code § 4005.101, the Department may take disciplinary action against a license holder for engaging in a fraudulent or dishonest act or practice.² Staff bears the burden of proof on this allegation.³

Similarly, and also under section 4005.101, the Department may deny licensure to an applicant who has, individually or through an officer, director or shareholder, engaged in fraudulent or dishonest acts or practices. Although Staff has the burden of showing a basis for denying a license—in this case, the fraudulent dishonest acts—the applicant then has the burden to show its fitness for licensure and that its application should be granted despite the basis for denial.⁴

III. EVIDENCE, ARGUMENT, AND ANALYSIS

Mr. Burden holds a generalized agent license issued by the Department in 2004, with a qualification for life, accident, and health, and also a qualification for property and casualty.⁵ 3B, which is co-owned by Mr. Burden and his wife, Jennifer Burden, submitted two applications with the Department on July 10, 2020. The first application was for a general lines agency license with a life, accident, health, and health maintenance organization qualification (LAH application). The second application was for a general lines agency license with a property and casualty application (P&C application). The LAH application solely lists Mr. Burden as the designated responsible licensed person.⁶ The P&C application lists both Mr. and Mrs. Burden as designated responsible licensed persons.⁷

¹ Tex. Ins. Code §§ 31.002(1), (3), 4005.102.

² Tex. Ins. Code § 4005.101(b)(5).

³ 1 Tex. Admin. Code § 155.427.

⁴ 1 Tex. Admin. Code § 155.427.

⁵ TDI Ex. 11.

⁶ Jennifer Burden does not hold the life, accident, health, and HOM qualification to serve as the designated responsible licensed person for the LAH application.

⁷ TDI Ex. 12.

At the hearing, Staff offered fifteen exhibits, which were admitted, and presented the testimony of two witnesses, Ryan Summy and Lewis Wright IV. Mr. and Mrs. Burden each testified; no exhibits were introduced on behalf of Mr. Burden or 3B.⁸

A. Evidence

1. Testimony of Ryan Summy

Ryan Summy works for Farmers Insurance Company (Farmers) in its internal audit department. He did not investigate Mr. Burden, who formerly was an agent with Farmers, but took over the case after the investigator who worked on it retired.

Mr. Summy testified that the investigation into Mr. Burden began when Farmers' underwriting department noticed that his agency had the fourth highest percentage of new roof discounts in Texas. A Farmers' employee looked at a sample of Mr. Burden's policies and identified 58 of them that caused concern.⁹ For example, some of the 58 policies were supported with roof invoices from the same roofing company, and each of those invoices indicated that an identical amount of material was used, even though the individual insureds' houses were different sizes. Additionally, many of the invoices would use exactly the same language in the job description, even though the invoices were from different companies. After these issues were discovered, the internal audit department attempted to contact the roofing companies named on the invoices. The investigator was able to contact six companies, each of whom denied not only producing those invoices, but also doing any work for the customers named in the invoices.¹⁰ For some of the 58 policies, Farmers hired an inspector to perform a visual inspection of the insured property. Mr. Summy testified that in several cases, the roofing material observed by the inspector did not match the roofing material provided in the invoice.¹¹

Relying on Farmers' records, Mr. Summy described an October 22, 2019 interview of Mr. Burden. From those records, Mr. Summy testified that Mr. Burden admitted that he created

⁸ The ALJ sustained hearsay objections to two of Mr. Burden and 3B's exhibits.

⁹ Transcript (Tr.) at 27.

¹⁰ Tr. at 29-30.

¹¹ Tr. at 37-39.

the documents for customers who told him that their roof had been replaced and that he was solely responsible for creating them. He also admitted submitting those documents to Farmers.¹² Mr. Burden also signed a written statement, which states, in part, “I would create the roof replacement documents from previous documents I had received from roofers in the past. The customers can’t always find their roof replacement documents so it seemed easier to create these documents.”¹³ Farmers terminated Mr. Burden’s agent appointment agreement on February 28, 2020.¹⁴

According to Mr. Summy, other agents handled missing roof-replacement documents differently. He described handling other cases where “if somebody can’t find their roof invoice to show that it was replaced, they’ll have a roofing company come out and do an inspection of the roof, and the inspection will then state, yes, the roof appears to have been new within the last two years or whatever, and then they’ll submit that in lieu of an actual invoice, so—to confirm that yes, this roof is new.”¹⁵

In short, Mr. Summy testified that the investigation found that Mr. Burden created false roof replacement documents and that Mr. Burden admitted to the investigator that he had done so. Those documents were used to lower the rates on his customers’ policies. On cross-examination, Mr. Summy agreed that no one in Farmers’ internal audit department ever investigated whether the 58 clients actually had new roofs.¹⁶

2. Testimony of Lewis Wright IV

Mr. Wright, who has worked in the insurance field for almost 34 years, is the Department’s administrative review liaison to the Department’s enforcement division. In that position, he works with applications that raise concern and thus require additional review to determine fitness for licensure. He also reviews reports of misconduct by existing license holders.¹⁷ According to

¹² Tr. at 31-32.

¹³ TDI Ex. 3 at 21.

¹⁴ TDI Ex. 11 at 391.

¹⁵ Tr. at 62.

¹⁶ Tr. at 50.

¹⁷ Tr. at 68-71.

Mr. Wright, the Department expects agents to be honest, trustworthy, and reliable.¹⁸ He added that agents licensed by the Department are required to take two hours of ethics training every two years.¹⁹

Mr. Wright testified that the Department received notice of Mr. Burden's for-cause employment termination from Farmers. An insurance company is required to inform the Department whenever it terminates an agent for conduct that possibly could be a violation of the Texas Insurance Code.²⁰

Falsifying documents is considered a fraudulent act, Mr. Wright explained, and is thus the basis for discipline. He also explained the factors that the Department considers in deciding what level of sanction is appropriate once a violation is found. According to Mr. Wright, the Department considers the severity and frequency of occurrences, the age of the individual at the time, the length of time the individual has been licensed, opportunity of continuing education, exposure to ethics training, and exposure to the industry and its standards related to ethics.²¹

Mr. Wright set out why he believes the appropriate remedy for Mr. Burden's conduct is revocation of his license. In looking at remedies, Mr. Wright focused on the nature, severity, and frequency of Mr. Burden's creation of false documents. He noted that Mr. Burden's activities were recurring and did not reflect a one-off incident.²² Mr. Wright also testified that Mr. Burden's description of his termination from Farmers as being "for procedural errors made during my tenure with the company" appeared to minimize his actions.²³ This statement, which was made to the Department as part of 3B's application, also led Mr. Wright to question whether Mr. Burden understood his own wrongdoing. He also relied on Mr. Burden's written statement to Farmers stating that it was easier to create the fake documents than to go through an alternative process, which showed his intention. Mr. Wright also expressed concern that, by making misrepresentation

¹⁸ Tr. at 73.

¹⁹ Tr. at 78.

²⁰ Tr. at 76, 79.

²¹ Tr. at 79.

²² Tr. at 80-81, 93.

²³ TDI Ex. 12 at 506; Tr. at 93.

on his clients' behalf, Mr. Burden could have potentially harmed them.²⁴ Mr. Wright also noted that Mr. Burden was an experienced agent, having been licensed since 2004, and that his actions could not be written off as a youthful indiscretion.²⁵

As for 3B's application, Mr. Wright noted that a Certificate of Formation for a Limited Liability Company for 3B was filed with the Secretary of State on June 17, 2020. The certificate lists Mr. Burden and Jennifer Burden as managing members. Mr. Wright noted that this was significant because when evaluating an application for an entity, any of the controlling members should be evaluated and vetted as if they were individual licensees.²⁶ In this case, because Mr. Wright does not believe that Mr. Burden should be licensed, he explained that 3B should therefore not be licensed either.²⁷

3. Mr. Burden's and Jennifer Burden's Testimony

Mr. Burden testified that he has been in the insurance industry for approximately sixteen years and that he began working for Farmers in 2011.²⁸ He described Farmers' training program and the company's responsibility to provide him training. He also emphasized that from October 2019 through February 2020, Farmers had rated him a three out of four in their underwriting quality rating system and noted that it would have been difficult, if not impossible, for a small business like his to receive the highest rating of four. He described the rating system as being based on the quality of the business he was writing for Farmers.²⁹

Mr. Burden described as lengthy and difficult Farmers' process under which a customer could receive a discount for having a new roof. According to Mr. Burden, at the time in question, Farmers required a customer to obtain a new roof certificate. To obtain this certificate, a customer would have to reach out to the contractor or roofer who had replaced the roof, but in Mr. Burden's

²⁴ Tr. at 93-94.

²⁵ Tr. at 77.

²⁶ Tr. at 96-97.

²⁷ Tr. at 99.

²⁸ Tr. at 115-16.

²⁹ Tr. at 122-24.

estimation, “the majority of the time those roofing companies are out of business.”³⁰ Then, he added, the challenge of getting the roofer to provide the necessary information would begin. This challenge, in Mr. Burden’s view, was that the roofer did not care about providing that information, but rather wanted to go on to the next roof. He added that if obtaining the documentation took too long, Farmers’ underwriting department would remove the discount.³¹ As an example, he described the difficulty he had when trying to obtain a new roof discount from Farmers’ on his own homeowners’ policy.³²

At times in his testimony, Mr. Burden suggested that the roofing documents he created were substantively accurate, such as in the following exchange:

Q: Do you admit—is it your position that you created fraudulent documents or is it your position that you made honest, accurate documents?

A: Well, Ms. Cagle, yes or no in the reality of life and situations is never that clear. What I did was I—I took customer information provided from Farmers Insurance and from the clients and used that to generate documents necessary to meet Farmers Insurance needs.³³

Similarly, while agreeing that he had created the false documents, Mr. Burden suggested those documents were based on loss information provided by Farmers.

According to Mr. Burden, he was surprised by the October 22, 2019 meeting when the investigation was discussed with him. He testified that he was not given an opportunity to understand Farmers’ procedures for these kinds of investigations or what he should expect.³⁴ He testified that after that meeting, he was started using a self-attest form, under which a homeowner certifies the age of the roof, instead of a new roof certificate.³⁵ He also suggested that perhaps he had not been terminated for willful misrepresentation by noting that, although his Farmers’

³⁰ Tr. at 126.

³¹ Tr. at 126-27.

³² Tr. at 128-31.

³³ Tr. at 142-43.

³⁴ Tr. at 131-35.

³⁵ Tr. at 137. Mr. Burden did not testify that this certification form was unavailable before the October 22, 2019 meeting.

contract indicated that the company would not make a contract value payment if he was terminated for willful misrepresentation, he received such a payment after his February 2020 termination.³⁶

Mr. Burden currently works for an agency called Colorado Insurance. He testified that Colorado Insurance's underwriting department handles all verification documents. In other words, the client submits the information to the department, without the agent's involvement. According to Mr. Burden, with Colorado Insurance, there was no chance that an agent could provide inappropriate or inaccurate documentation to the insurer.³⁷

Jennifer Burden testified that she has been licensed as an agent with the Department since July 2020. She agreed with her husband that Colorado Insurance has safeguards in place that would prevent him from submitting false or fraudulent documentation.³⁸

B. Argument and Analysis

1. Alleged Violation

Staff seeks to discipline Mr. Burden for engaging in fraudulent or dishonest acts or practices, namely creating false roofing invoices and submitting those false documents to Farmers so that his customers could get a discount on their premiums. Although Mr. Burden admits creating those documents and submitting them, he argues that some of the blame for his actions belongs to Farmers because it made obtaining a discount such a difficult process for clients. But even if that were the case,³⁹ creating and submitting false documents, as Mr. Burden undisputedly did, is not the solution.

Mr. Burden also suggests that the falsified documents were mostly true and that, accordingly, no one was harmed by his actions. He also argued that 58 false documents, out of the many policies he sold, is an insignificant amount.

³⁶ Tr. at 118-21.

³⁷ Tr. at 139-41.

³⁸ Tr. at 148-49.

³⁹ The merits of Farmers' policies are not at issue in this matter, and the ALJ will not address them.

The ALJ finds neither of Mr. Burden's arguments persuasive. The issue is whether Mr. Burden engaged in fraudulent and dishonest acts, not what the ratio of fraudulent to non-fraudulent acts was or whether Mr. Burden felt justified in doing what he did. The ALJ finds that intentionally creating false invoices and submitting those false documents to Farmers constitutes a fraudulent and dishonest act. Accordingly, Staff established a basis for disciplining Mr. Burden under Texas Insurance Code § 4005.101(b)(5).

2. Penalty for Mr. Burden's Violation

Because Staff established that Mr. Burden engaged in conduct for which he can be disciplined, the issue becomes what discipline is appropriate. Under Texas Insurance Code 4005.102, the Department may, among other things, suspend or revoke a license, assess an administrative penalty, or reprimand a license holder.

In his testimony, Mr. Wright set out the reasons he believed that license revocation, while serious, was the appropriate penalty. He pointed to the repeated creation of the documents, and noted that it was not just a one-off event. He observed, too, that Mr. Burden was an experienced agent who had taken ethics courses. He also testified that Mr. Burden's clients could possibly be harmed by having misrepresentations in their file with Farmers.

For his part, Mr. Burden argued that the 58 files with false documents were a small percentage of his total book of business and that his current employment with Colorado Insurance had systems in place to prevent him from submitting false documents.

The ALJ finds that revocation is appropriate in this case, where Mr. Burden repeatedly created false documents and submitted them to Farmers in the course of his work. The ALJ is not persuaded that it was Farmers' responsibility to prevent Mr. Burden from creating false documents, and does not find that the safeguards Colorado Insurance has in place make up for the risk Mr. Burden presents. Thus, based on the evidence about Mr. Burden's conduct, along with Mr. Wright's testimony, the ALJ concludes that Mr. Burden's license should be revoked.

3. 3B's Application

As set out above, the Department may deny 3B's applications based on Mr. Burden's fraudulent or dishonest acts. Staff has the burden to set out a basis for denial—in this case, the actions that justify disciplining Mr. Burden—and then 3B has the burden to establish why it should be issued a license despite the basis for denial.

The ALJ finds that 3B has not met its burden. 3B presented no evidence specifically on this point. To the extent that 3B relies on Colorado Insurance's safeguards, the ALJ continues to find those safeguards insufficient to establish fitness for licensure. The ALJ recommends that 3B's applications be denied.⁴⁰

C. Conclusion

For the reasons stated above, the ALJ recommends that Mr. Burden's general lines agent license be revoked and that 3B's applications for general lines licenses be denied. The ALJ proposes the following Findings of Fact and Conclusions of Law.

IV. FINDINGS OF FACT

1. Respondent Brandon N. Burden holds a general lines agent license originally issued by the Texas Department of Insurance (Department) on June 14, 2004. After a lapse, his license became active again November 19, 2010. His original license had a life, accident, health and health maintenance organization (HMO) qualification, and he obtained a property and casualty qualification for his license on January 18, 2011.
2. 3B Insurance Agency, LLC (3B) applied for a general lines license with a life, accident, health and HMO qualification with the Department on July 10, 2020. In this application, Mr. Burden is listed as the designated responsible licensed person.
3. 3B also applied for a general lines license with a property and casualty qualification with the Department of July 10, 2020. For this application, Mr. Burden and his wife, Jennifer Burden, are listed as the designated responsible licensed persons for 3B.

⁴⁰ There are no allegations of wrongdoing against Mrs. Burden, but she lacks the qualification to be a responsible licensed individual for the LAH application, and 3B did not present evidence or argument to show that her fitness or honesty outweighs Mr. Burden's conduct so as to justify 3B's licensure.

4. On January 27, 2011, Mr. Burden was appointed to act as an agent for Farmers Insurance Company (Farmers).
5. Concerned by the percentage of new roof discounts awarded to Mr. Burden's customers, Farmers began an investigation into him.
6. The investigation uncovered that 58 false roof replacement invoices had been submitted with Mr. Burden's customer applications between January 2018 and July 2019.
7. The false invoices were used to qualify customers for new roof discounts on their premiums.
8. Mr. Burden admitted that he created the false documents using old invoices and submitted them to Farmers.
9. Mr. Burden told Farmers that creating the false documents was easier than complying with Farmers' process to verify a new roof when the customer lacked paperwork.
10. Mr. Burden is an experienced agent who had taken ethics courses as required for licensure.
11. Mr. Burden's clients faced potential harm from having false documents in their files with Farmers.
12. On February 28, 2020, Farmers canceled Mr. Burden's appointment.
13. In response to a Department question, Mr. Burden downplayed his conduct by referring to his termination from Farmers as being "for procedural errors made during my tenure with the company."
14. On June 17, 2020, a Certificate of Formation for a Limited Liability Company for 3B was filed with the Texas Secretary of State. The certificate lists Mr. Burden and Jennifer Burden as managing members.
15. On November 10, 2020, the Department mailed a Notice of Hearing to Respondent and 3B. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
16. On November 13, 2020, Respondent and 3B filed an answer to the Department's Notice of Hearing.
17. The hearing on the merits was held via Zoom videoconference on February 10, 2021, before Administrative Law Judge (ALJ) Rebecca S. Smith. Staff (Staff) of the Department appeared and was represented by Staff Attorney Amanda Cagle. Mr. Burden and 3B were represented by attorney Christopher James. The record closed at the conclusion of the hearing that day.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter of this proceeding. Tex. Ins. Code §§ 4005.102; 4001.002.
2. SOAH has jurisdiction over all matters relating to the conduct of the proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003; Tex. Ins. Code § 4005.104.
3. Adequate and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051, 2001.052; Tex. Ins. Code § 4005.104(b).
4. Staff had the burden of proof to establish grounds for revocation of Mr. Burden's license. 1 Tex. Admin Code § 155.427.
5. Staff had the burden to establish a basis for denying 3B's license, and 3B had the burden of proof to establish fitness for licensure despite the basis for denial. 1 Tex. Admin Code § 155.427
6. Mr. Burden engaged in fraudulent or dishonest acts or practices in violation of Texas Insurance Code § 4005.101(b)(5).
7. The Department is authorized to revoke Mr. Burden's license. Tex. Ins. Code §§ 4005.101(b)(5), .102(2).
8. Mr. Burden's license should be revoked.
9. The Department is authorized to deny 3B's applications. Tex. Ins. Code §§ 4005.101(b)(5), .102(1).
10. 3B's applications should be denied.

SIGNED April 7, 2021.


REBECCA S. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS