10001
7324

3250
11:32370

MARYLAND INSURANCE ADMINISTRATION
MAR 13 2018

BEFORE THE
MARYLAND INSURANCE ADMINISTRATION

MARYLAND INSURANCE ADMINISTRATION	*	
v.	*	
BRADLEY BURTON,	*	Case No. MIA-2015-07-031
Respondent	*	

* * * * * * * * * * * * * *

MEMORANDUM AND FINAL ORDER

Pursuant to §§ 2-204 and 2-214 of the Insurance Article of the Annotated Code of Maryland,[1] the Maryland Insurance Commissioner (Commissioner) concludes that Bradley Burton ("Respondent") violated §27-406(1) of the Insurance Article. Pursuant to Respondent's violation of § 27-406(1) and as allowed by § 27-408(c) the Commissioner concludes that Respondent shall pay an administrative penalty in the amount of $3,250.

STATEMENT OF THE CASE

This matter arises from an Order originally entered by the Maryland Insurance Administration (MIA) on July 27, 2015, and made pursuant to § 2-108, § 2-201, §2-204, and § 2-405 against Respondent. After an investigation, the MIA concluded that Respondent violated § 27-406 and imposed an administrative penalty in the amount of $5,000. On July 27, 2015, the MIA ordered Respondent to pay a penalty of $5,000. The Respondent disagreed with this finding and timely requested a hearing on August 12, 2015, which was granted. On January 28, 2016, the MIA took further action when it issued an Amended Order that assessed a total penalty of $6,500 (the original $5,000 plus an additional $1,500) as a result of the investigation into Respondent's violation of the Insurance Article. On February 3, 2016, the Respondent again timely requested a hearing which was granted.

[1] Unless otherwise noted, all statutory citations are to the Insurance Article of the Annotated Code of Maryland.

ISSUE

The issue presented in this case is whether the Respondent committed insurance fraud in or related to an application or applications for insurance by willfully or knowingly making a false or fraudulent statement or statements in violation of § 27-406(1), thereby making himself subject to an administrative penalty under § 27-408.

SUMMARY OF THE EVIDENCE

A. Testimony

The hearing in this matter took place on March 1st and 2nd, 2016. The Maryland Insurance Administration was represented by Assistant Attorney General Brandy J. Gray. Witnesses for the prosecution were: Theodore Kuzcarski, Insurance Agent; John Bauer, Investigator with Northwestern Mutual Life Insurance Company ("Northwestern Mutual"); Fred Mullis, Regional Director, APPS; Patricia Collins, Medical Assistant; David Kuntz, Lab Director, Clinical Reference Laboratory, Inc.; Joseph Smith, MIA, Assistant Chief Investigator, Civil Fraud Unit; Stewart Thompson, MIA Investigator.[2]

Respondent was represented by A. Donald C. Discepolo, Esquire, of the Law Firm Discepolo, LLC. Respondent did not offer any exhibits or witness testimony at the hearing. Respondent was subpoenaed to testify and was sworn in to do so at the hearing. He however refused to testify and instead claimed a Fifth Amendment privilege against self-incrimination under the United States Constitution.

B. Exhibits

MIA Exhibits:

A. Northwestern Mutual; Individual Life Insurance Application; dated August 14, 2014

B. Northwestern Mutual; Disability Insurance Application; dated August 14, 2014

[2] An additional witness, Heather McLaughlin was not permitted to testify for the MIA. Ms. McLaughlin is the Compliance Coordinator for the Maryland Board of Pharmacy and Respondent is a licensed pharmacist. Although the MIA's Fraud Division has a statutory obligation under §

C. Northwestern Mutual; Medical History Questionnaire and Paramedical Examination; dated August 8, 2014

D. Northwestern Mutual; Client History Interview of Respondent; dated August 15, 2014

E. Clinicial Reference Laboratory Form; dated August 8, 2014

F. Clinical Reference Laboratory From; Notice and Consent for Testing taken from Exhibit V Clinical Reference Laboratory drug test kit

G. Lab Results from Clinical Reference Laboratory; dated August 20, 2014

H. APPS Case Log

I. Denial of Coverage letter from Northwestern Mutual; dated September 3, 2014

J. Northwestern Mutual; A Life Insurance Illustration; dated August 14, 2014

K. Northwestern Mutual; Life Disability Income Presentation; dated August 14, 2014

L. Denial of Coverage; Northwestern Mutual dated September 3, 2014

M. Northwestern Mutual; SIU Application Review

N. September 16, 2014 e-mail from Respondent to Theo Kuczarski

O. September 26, 2014 e-mail from Respondent to Theo Kuczarski

P. Letter from John Bauer, Invetigator, Northwestern Mutual; dated October 22, 2014

Q. Fraud Report ID: 228991053, Submitted by Northwestern Mutual on September 8, 2014

R. United States District Court for the District of Maryland Disposition Sheet; dated July 19, 2010

S. Conditions of Probation outlined by the United States District Court for the District of Maryland; dated July 19, 2010

T. Judgment in a Criminal Case issued by the United States District Court for the District of Maryland; dated July 21, 2010, by Thomas M. DiGirolamo, Magistrate Judge

U. Curriculum Vitae of David J. Kuntz, PhD, F-ABFT

2-405 to notify professional licensing boards in instances of insurance fraud involving professionals, the MIA's notification obligation was not at

V. Clinical Reference Laboratory Testing Kit

W. Treatment Completion Letter from Charles O. Rouse, Addictions Counseling Service of Maryland; dated November 17, 2010

X. Supplement Report from interview notes from Investigator Stewart Thompson's interview of Respondent

Y. Handwritten notes by Investigator Thompson taken during Interview of Respondent

Z. Supplement Report interview notes from Investigator Stewart Thompson's interview of Lou Kallas, President of American Para Professional Systems (APPS) and Patricia Collins, Medical Assistant at the APPS Baltimore Metro Office located at 8600 LaSalle Road, Towson, Maryland.

AA. Report from Clinical Reference Laboratories

PROCEDURAL HISTORY

On July 27, 2015, the MIA issued an Order against Respondent for committing insurance fraud and imposed an administrative penalty of $5,000.

On August 12, 2015, the MIA received a Request for a Hearing from Samuel D. Snyder, Attorney ("Attorney Snyder"), attorney with Discepolo LLP on behalf of the Respondent. A hearing was scheduled for March 1, 2016.

On August 21, 2015, the MIA submitted a Request for Production of Documents. On October 5, 2015, A. Donald C. Discepolo, Attorney ("Attorney Discepolo"), attorney with Discepolo LLP, sent a copy of Respondent's Response to Maryland Insurance Administration's request for Production of Documents to the MIA.

---

issue and any testimony Ms. McLaughlin's could have offered was deemed to be not relevant.

On October 19, 2015, the MIA submitted a Motion to Allow Testimony by Telephone for a Mr. David Kuntz, Lab Director of Clinical Reference Laboratory, Inc. Mr. Kuntz is based in Lenexa, Kansas. This motion was granted by the Hearing Officer.

On December 18, 2015, the MIA submitted a Motion for Partial Summary Decision in this case. On January 15, 2016, Attorney Discepolo submitted the Respondent's Opposition to Claimant Maryland Insurance Administration's Motion for Partial Summary Decision. On February 12, 2016, the MIA submitted the MIA's Reply to Respondent's Opposition to MIA's Motion for Partial Summary Decision. On February 23, 2016, the Hearing Officer denied the Motion for Partial Summary Decision.

On January 27, 2016, the MIA filed their Pre-Trial Hearing Statement.

On January 28, 2016, the MIA issued an Amended Order imposing an administrative penalty of $6,500 in total against Respondent as opposed to the original $5,000 penalty.

On February 3, 2016, Attorney Discepolo filed another Request for Hearing with the Administration.

On February 10, 2016, the MIA filed a Motion to Allow Testimony by Telephone for Mr. John Bauer, an Investigator with Northwestern Mutual Life Insurance Company. Mr. Bauer is based in Milwaukee, Wisconsin. This motion was granted by the Hearing Officer.

On February 22, 2016, Attorney Discepolo filed Respondent's Pre-Trial Hearing Statement.

On February 23, 2016, the MIA filed their Amended Pre-Trial Hearing Statement. The Hearing proceeded as scheduled on March 1st and carried over to March 2nd, 2016 at the Maryland Insurance Administration, 200 Saint Paul Place, 24th Floor Hearing Room. The MIA and Respondent each filed Post Hearing Briefs.

FINDINGS OF FACT

These findings of fact are based upon a complete and thorough review of the entire record in this case including the hearing transcript and all exhibits and documentation provided by the parties. The

credibility of the witnesses has been assessed based upon the substance of their testimony, their demeanor, and other relevant factors. To the extent that there are any facts in dispute, the following facts are found, by clear and convincing evidence, to be true. Citations to particular parts of the record are for ease of reference and are not intended to exclude, and do not exclude, reliance on the entire record.

On March 18, 2010, Respondent was arrested within the State of Maryland for Driving Under the Influence of Alcohol ("DUI"). (MIA Exhs. R, T.)

On May 5, 2010, Respondent began treatment at the Addictions Counseling Service of Maryland. (MIA Ex. W; T. 287.)

On July 19, 2010, Respondent appeared before the Honorable Thomas M. DiGirolamo, a United States Magistrate Judge for the United States District Court for the District of Maryland for his March 18, 2010 DUI charge. (MIA Exhs. R, S, T.) Respondent pleaded guilty to the DUI charge. As a result of his guilty plea, Magistrate Judge DiGirolamo issued a Judgment In a Criminal Case ("Judgment") in which he sentenced Respondent to twelve months of probation and required two additional conditions of probation. (MIA Exhs S,. T.) The conditions of Respondent's probation required Respondent to comply with the conditions stated in sections A, B, and C of the Judgment. Section C of the Judgment stated that, "The [Respondent] shall satisfactorily participate in a treatment program approved by the probation officer relating to substance and/or alcohol abuse, which may include evaluation, counseling, and testing as deemed necessary by the probation officer." (MIA Ex. T.) The other condition of Respondent's probation was that, "The [Respondent] shall successfully complete the program at the Addiction Counseling Center." (Id.)

The DISPOSITION SHEET from the U.S. District Court case also reflects these requirements. (MIA Exh. R.)

The unsigned Conditions of Probation document issued by Magistrate Judge DiGirolamo to Respondent, stated both the Statutory and the Standard Conditions of Supervision, along with Additional Conditions Ordered by the Court and memorialized in the Judgment. (MIA Exhs. S, T.) This included

the condition that Respondent, "shall satisfactorily participate in a treatment program approved by the probation officer relating to substance and/or alcohol abuse, which may include evaluation, counseling, and testing as deemed necessary by the probation officer." (Id.) The Conditions of Probation document also included as a requirement that Respondent, "refrain from excessive use of alcohol." (MIA Ex. S.)

On November 15, 2010, Respondent completed the alcohol and drug treatment program at Addictions Counseling Service of Maryland and, was given a Certificate of Completion because he "successfully completed the 26-week Alcohol and Drug Treatment Program." (MIA Exh. W.)

Charles O. Rouse, a Licensed Clinical Social Worker and Licensed Clinical Alcohol & Drug Counselor licensed by the State of Maryland Department of Health and Mental Hygiene, stated in a letter dated November 17, 2010, that Respondent "...met the criteria for alcohol abuse..." (Id.)

On August 14, 2014, Respondent completed and signed an application for a life insurance policy (# D2190425), and completed and signed a disability insurance policy (# 20887235) with Northwestern Mutual Life Insurance Company ("Northwestern"). (MIA Exhs. A, B.)

As part of the application process, Respondent completed and signed a Medical History Questionnaire ("Questionnaire") that was a part of each of his applications to Northwestern Mutual on August 8, 2014. (MIA Ex. C.)

Ms. Patricia M. Collins, a paramedical examiner with American Paraprofessional Systems ("APPS") testified at the hearing. Ms. Collins testified that she did not remember Respondent personally. (T. at 134-135.) Ms. Collins testimony was based on her standard examination process and the forms from Respondent's case she has reviewed or was presented with at the hearing. (T. at 149.) She said although she did not remember him personally she follows the same process for every client for blood and urine sample collection. (T. at 136.) Ms. Collins also testified that she does not have any specific recollection of Respondent's signing the form but that she follows the same process with every applicant. (T. at 157.)

Ms. Collins has done approximately 2,000 paramedical examinations since the one with Respondent on August 8, 2014. (T. at 164.)

Ms. Collins testified that in August of 2014 she met with Respondent at his home to complete the Northwestern Mutual Medical History Questionnaire. (T. at 130-131; MIA Ex. C.) She testified that when she meets with an applicant/client she enters the home, secures the client's drivers license, explains to the client that she is going to do measurements including those involving blood, urine, height, weight, blood pressure, and pulse. (T. at 130-131, 149.) She also testified that if she ever arrived at an applicant's home and that person appeared under the weather that she would not continue with the examination. (T. at 135.)

Ms. Collins testified and described the process she follows to collect the blood and urine samples which is the same for every applicant/client. (T. at 136.) The Questionnaire itself has a number in box 13 which shows the bar code ID number for the blood and urine specimens that she enters into the computer so the specimens can be matched to the Respondent's exam. (MIA Ex. C; T. at 134.) Ms. Collins also testified specifically to the specimen collection process for urine and the chain of custody by stating:

> "[A]fter I collect the blood, I give them a cup to go into the restroom to give me a urine sample. When they bring the cup back, I check the temperature on the cup. It has a little temperature strip. If it's under 94, it is not submittable. It has to be above 94 degrees. Then I pour it into two tubes provided in the kit and then I have a chain of custody strip at the bottom that the client signs and I have to put that on one of the urine tubes." (T. 136.)

Ms. Collins stated that once she collects the samples that she boxes them up, turns the box over and hands it to the applicant/client and explains the basics of what will be looked for in the specimens provided. (T. at 139.) After she completes the specimen collections Ms. Collins puts them away in a bag and goes into the computer to start with the Questionnaire. (Id.)

Ms. Collins testified that Exhibit F is a Clinical Reference Laboratory ("CRL") Lab slip form along with a Notice and Consent Form. (MIA Ex. F.)[3] A Notice Consent and Chain of Custody Statements form was signed by Ms. Collins and Respondent signed on August 8, 2014 at 2:10 pm. (MIA Ex. E.)

Ms. Collins also testified that when she administers the Questionnaire she always sits within three feet of the client, meaning the applicant. (T. at 132.) Ms. Collins testified that the Questionnaire process, including the one she followed with Respondent, involves starting at the beginning with Respondent's name. (T. 131.) She testified that she then goes through the question on Respondent's primary care physician and then goes into each medical question individually. (T. at 131-132.) Ms. Collins stated that she reads the questions from the Questionnaire aloud. (T. at 140.) She also testified that she reads to the applicant every word of every page of an insurance company form during an examination appointment. (T. at 162-163.) After the medical history questions are asked and answered, Ms. Collins then inputs the vital signs and the measurements taken into the Questionnaire on her computer. (T. at 154.)

Ms. Collins testified that the specimen taking portion of an appointment typically takes just a few minutes. (T. at 140.) She then testified that going over the applicant/client's medical history portion of the appointment generally takes 15-45 minutes depending on the individual's history and the entire appointment generally takes about an hour. (Id.) Ms. Collins also testified that she provides the applicant/client a chance to review the Questionnaire answers on her computer screen before submission. (T. at 140-141.)

Ms. Collins testified at the hearing that based on her experience and looking over the Questionnaire with Respondent's "yes" responses requiring supplemental information, that her estimate was that Respondent's medical history portion of the appointment took 30 minutes. (T. at 152-153.)

[3] The original binder copy of the CRL Lab slip form was a bad photocopy and was replaced with the copy from inside the sample drug kit which was admitted as Exhibit V.

Before electronically signing the Questionnaire, an applicant/client has the opportunity to review all of the information input by Ms. Collins. (T. at 159-160.) Ms. Collins testified that in order to electronically sign the document, the applicant has to click on an "I Agree" box two separate times, first agreeing nothing is to be changed and second to state everything is true and not fraudulent. (T. at 159-161.) By signing the Questionnaire, Respondent affirmed "[I] have reviewed my answers and statements in this application and declare that they are correctly recorded, complete, and true to the best of my knowledge and belief." (Id.)

Ms. Collins stated she arrived at the Respondent's residence to administer the paramedical examination at the appointment time. (T. at 142.) She testified that must have been around 1 pm but was guessing that was correct. (T. at 142-143.)

Ms. Collins also testified that she was not sure if the computer she used automatically converted Eastern Time to Central Time. (Id.)

Ms. Collins testified that the Questionnaire was electronically signed by both Respondent and Ms. Collins at 2:02 PM, but that she was not sure if this was Eastern Time. (T. at 142-143.) Her testimony about the signature time was based on the form itself. (T. at 146) and the process she follows for every client per the protocol. (T. at 157.)

The Questionnaire was electronically signed by both Respondent and Ms. Collins at 2:02 PM, Central Daylight Time on August 8, 2014. (MIA Ex. C.) Respondent electronically signed the application first and then Ms. Collins electronically signed as a witness. (T. at 156-157.)

Ms. Collins stated that she does not know if the timestamp on the computer and documents are automatically converted to Central Standard Time. (T. at 142-143.) Ms. Collins testified that she cannot specifically recall the time she got to Respondent's residence, the time she and Respondent electronically signed the documents, or the time it was uploaded. (T. at 146-147.)

Question 4(a) of the Questionnaire asked, "Have you ever sought, received, or been advised to seek treatment, counseling, or participation in a support group for the use of alcohol or drugs?" Respondent answered "No," in response on August 8, 2014. (MIA Exh. C at p. 2.)

Question 4(b) of the Questionnaire asked, "Have you ever been advised to reduce or discontinue the use of alcohol?" Respondent answered "No," in response on August 8, 2014. (MIA Exh. C at p. 2.)

Question 4(c) of the Questionnaire asked, "in the last 10 years, have you used marijuana, cocaine, heroin, methamphetamine, hallucinogens, or any other illegal drug or substance?" Respondent answered "No," in response on August 8, 2014. (MIA Exh. C at p. 2.)

Ms. Collins confirmed that the records show that Respondent reviewed and confirmed the questions on the Questionnaire, on her computer laptop screen. (T. at 162.)

On August 15, 2015, Respondent gave a telephone client history interview with a representative of Northwestern Mutual as part of the application process taken in the normal course of business. (MIA Ex. D; T. at 45-49.) During that interview Respondent represented to the Northwestern Mutual representative that at some point in time he had been recommended by his attorney to enter a treatment program, but not by a court order. (MIA Exh. D at p. 24; T. 283.) The question at the bottom of page 23 of asks, "Have you received or been advised to receive treatment or counseling for the use of alcohol or drugs?" The recorded answer was "Comment". (MIA Ex. D at p. 23.) The details section of that question contains the recorded notes of Respondent's explanation as, "recommendation by attorney but not a court order. Treatment program- weekly group sessions for a few mos". (MIA Ex. D at p. 24.)

On August 20, 2014, the CRL testing laboratory which analyzed Respondent's urine sample notified Northwestern Mutual that Respondent's specimen tested positive for cocaine metabolites. (MIA Ex. G.)

On August 22, 2014, Northwestern Mutual's underwriting department referred the matter to the Northwestern Mutual's Special Investigation Unit ("SIU") for investigation. (MIA Ex. M.) Mr.

Bauer testified regarding the SIU investigation. Mr. Bauer testified that he reviewed Respondent's investigation file, including the application, the medical history questionnaire, life insurance policy application, disability insurance policy application, client history interview, the coverage declination letter, and the lab results. (T. at 109.) The total value of the policies Respondent was applying for was $394,489.00. (T. at 110-111.) As a result of the SIU investigation and in particular the lab results indicating cocaine use, Northwestern Mutual determined that it had a good faith belief that fraud had been committed and a statutory obligation under Section 27-802(a)(1)[4] of the Insurance Article to forward the file to the MIA. (MIA Ex. M; T. at 111.) Therefore, Northwestern Mutual referred the matter to the MIA with supporting documentation. (MIA Exhs. P, L-O.)

Respondent's financial planner and insurance agent, Theodore Kuczarksi, testified that he and Respondent discussed the application process, including the need for blood and urine specimens and a medical history. (T. at 22.) Mr. Kuczarski also testified that it is part of Northwestern Mutual's application process to conduct a client history interview with an applicant over the telephone. (T. at 45-46.) He also testified that the applications, questionnaires, etc. is all part of the underwriting process. (T. at 46.)

On September 3, 2014, Northwestern Mutual notified Respondent by letter that it was unable to issue the policies, as his urine specimen was positive for cocaine. (MIA Exh. I.) Mr. Kuczarski was notified the same day that Respondent's application had been declined due to confidential information. (MIA Ex. L.)

Mr. Kuczarksi testified at the hearing that on September 16, 2014, he received an email from Respondent explaining the reason for the positive urine test results for cocaine metabolite. Respondent wrote, "I was shocked when I found out, but realized what happened when I thought back through that weekend." (MIA Exhs. L, N.)

[4] Section 27-802(a)(1) of the Maryland Insurance Article states, "An authorized insurer, its employees, or insurance producers, who in good faith have cause to believe that insurance fraud has been or is being committed, shall report the suspected insurance fraud in writing to the Commissioner, the Fraud Division, or the appropriate federal, State or local law enforcement authorities."

The MIA's Stuart Thompson, an Investigator was assigned to investigate the fraud referral made by Northwestern Mutual to the MIA pursuant to Respondent's application. (T. at 230, 265.) Investigator Thompson testified that he interviewed witnesses and reviewed the case documentation, including the documents showing the declination of Respondent's application by Northwestern Mutual due to the alleged cocaine use. (T. at 265-266.) Investigator Thompson took notes during his interviews and wrote up reports afterwards. (MIA Exhs. X, Y, and Z; T. at 267.) At the hearing Investigator Thompson spoke clearly, was well organized in his presentation, and presented as a credible witness.

Investigator Thompson contacted Respondent and asked him to come to the MIA for an interview about his insurance applications with Northwestern Mutual. (T. at 267-268.) That interview took place on April 22, 2015. (MIA Ex. X.) Investigator Thompson asked Respondent if he could record the interview but Respondent did not want the interview recorded, so it was not recorded. (T. at 308.) Investigator Thompson testified that at the interview Respondent was honest, forthright, transparent, not defensive, and credible throughout. (T. at 301-302.)

Investigator Thompson testified that he showed the Questionnaire to Respondent during the interview. (T. at 318.) Investigator Thompson also testified that Respondent told him that he had been transparent about his cocaine use with Mr. Kuczarski and also acknowledged that he answered negatively to Question 4.a. (T. at 269.) Investigator Thompson testified that Respondent also stated that he could not dispute the accuracy of the tests on his blood and urine. (T. at 319.) Investigator Thompson also testified that Respondent stated that he snorted one or two lines of cocaine on August 7th, the day before the paramedical investigation. (T. at 270.) Investigator Thompson testified that Respondent stated he went forward with the medical examination even though he had used cocaine because he had rescheduled it a couple of times and that he did not know they were going to test for cocaine. (T. at 270-272; T2[5] at 32.)

---

[5] T2 refers to the transcript of the Second day of the hearing, March 2, 2016.

Under cross examination Investigator Thompson was asked about the notes he took during the interview with Respondent. When asked specifically about one portion his interview notes, Investigator Thompson testified that Respondent was, "a bit confused as to when exactly he used cocaine and wondering if it was relevant to the insurance application." (T2 at 46.) These notes specifically read as follows, "...Initially Respondent thought the answers to the question about drug use were prior to doing coke, but after reviewing his smart phone and the app, he realized it had come before. Respondent said he wasn't told about what type of drug he would be tested for and would have rescheduled had he known it was coke. I'm in the profession. I know how accurate those drug tests are. He asked for all docs such as reference, drug history results, regarding his case. Investigator Smith said he would be able to request docs." (MIA Ex. Y; T2 at 50-51.)

Investigator Thompson testified that his report encompasses everything substantive he believes Respondent said to him during the interview. (T. at 307.)

Mr. Joseph E. Smith, III, Assistant Chief Investigator for the MIA, was asked by Investigator Thompson to sit in for a portion of Investigator Thompson's interview with Respondent and did so. (T. at 229-230, 270-271.) Investigator Smith testified that Investigator Thompson never told him that Respondent said he was drunk the night before the examination. (T. at 239.) However, Investigator Smith also testified that he recalled hearing from Investigator Thompson in a subsequent conversation that Respondent stated that he was out the night before his examination drinking while celebrating his birthday with a friend and that he forgot that he did cocaine because he was drinking so much. (T2 at 243-244.)

During the interview Investigator Thompson testified that he told Respondent that Respondent was at the interview voluntarily and could leave at any time for any reason. (T. at 297, 300) Investigator Thompson recorded this in his notes of the interview. (MIA Ex. Y; T. at 300, 307.) Investigator Thompson testified that he understands a custodial interrogation is where the interviewee is in a setting where he or she does not feel free to leave. (T. at 299.) Investigator Thompson also stated that he did

not provide any Miranda warning to Respondent (T. at 297) or have him sign an Advice of Rights form. (T. at 300.)

Respondent asked about the repercussions of a civil order towards the end of the interview. (T. at 303.) Investigator Thompson also testified that Respondent did not ask for an attorney, but did indicate that he planned to consult with an attorney. (T. at 303-305.)

Investigator Smith testified that he asked Respondent if he was at the interview voluntarily and Respondent answered yes to the question. (T. at 240-241.)

Investigator Thompson interviewed Ms. Collins on May 13, 2015. (MIA Ex. Z.) Ms. Collins stated at that time that she did have some recollection of the meeting with Respondent because she remembered a specific blood cell condition "betathalassemia" was included as part of the Respondent's medical history. (Id.) She specifically recalled having to look up this medical condition on her smart phone. (Id.) She discussed Respondent's paramedical examination, the Questionnaire, and the CRL consent and chain of custody forms. (Id.)

The notes of that interview indicate that Ms. Collins told Investigator Thompson that the custody/chain of consent form was signed by both she and Respondent on August 8, 2014 at approximately 2:10 pm. (Id at p. 2; MIA Ex. E.) Although there is no specific indication as to whether that was Eastern Time or Central Daylight Time, this form was signed manually by both Respondent and Ms. Collins in Baltimore, Maryland which is in the Eastern Time zone. (MIA Ex. E.)

Investigator Thompson also interviewed Mr. Kuczarksi. Mr. Kuczarski stated that after he received notification from Northwestern Mutual that Respondent's insurance applications had been denied for "confidential reasons," he contacted Respondent. In response, Respondent sent him an e-mail on September 16, 2014, stating that Northwestern Mutual's denial was based on a positive test for cocaine metabolites. The e-mail stated, "...The rationale for the decline was a urine test positive for cocaine (or metabolite?). I was shocked when I found out, but realized what happened as I thought back through that weekend...." (MIA Exhs. L, N.)

The MIA established the unbroken chain of custody of Respondent's urine sample through the testimony of Ms Collins, Mr. Mullis, Dr. Kuntz and Exhibit E. The Court of Special Appeals, in *Amos v. State*, 42 Md. App. 365, 381 (1979), outlined the test for admissibility holding:

> "[A]lthough for purposes of admissibility the chain of custody authentication of evidence need not be beyond a reasonable doubt, it must create a reasonable probability of sameness, just as in a like instance it must preclude by reasonable probability, any tampering."

Mr. Mullis, General Manager of APPS Paramedical testified at the hearing on the processes the paramedical examiners use, including those used to collect the blood and urine specimens. Mr. Mullis, using the sample CRL Blood and Urine Kit which was admitted into evidence as Exhibit V[6], explained the urine specimen collection process and stated:

> "[S]he takes the specimen and in front of the applicant, she fills the two yellow top tubes. Okay. Those are the urine tubes and those go into the kit, now, this has got the bar code that matches and everything ties into the zip slip and the chain of custody and all of this is sent to the lab. The donor's name is on the side of each one, of all the tubes. Not just the urine tubes. All the tubes.
>
> There is a security seal that's put across the tubes. All of that ties into the donor or applicant. Insurance company is the applicant...Then it goes back into here [the specimen collection kit]. It is sealed, sealed with one of the security strips packaged and sent to the lab." (T. at 62-63.)

Mr. Mullis also testified that the paramedical examination and Questionnaire process takes about 45 minutes, but could take longer depending on the applicant's medical history. (T. at 72.) He testified that the interview portion of the process takes about 20 to 25 minutes. (T. at 95.)

Mr. Mullis also testified about Ms. Collins medical examination based on his review of the APPS record log for Respondent's case which includes notes on the paramedical examination appointment. Mr. Mullis testified that the appointment between Ms. Collins and Respondent was scheduled for 2:00 pm Eastern time on August 8, 2014. (MIA Ex H; T. at 84.) Mr. Mullis also stated that based on his review of the Questionnaire that it was signed at 3:02 Eastern Time, which is also 2:02 Central Daylight Time. (T. at 101.) Mr. Mullis testified that the note in the system on the APPS case log at 5:31 pm

indicates that Ms. Collins reported that she completed the case sometime during the day of August 8, 2014. (T. at 97.)

David Kuntz, PhD, F-ABFT, Executive Director and Co-Laboratory Director for the CRL testified for the MIA. Dr. Kuntz testified that he is a board certified forensic toxicologist, is a member of the Society of Forensic Toxicologists, the American Academy of Forensic Sciences, and the American Association for Chemical Chemistry, that he has undergone special training in drug analysis, and has been functioning as a forensic toxicologist since 1989. (T. at 178-179; MIA Ex. U.) Dr. Kuntz also testified that he has testified as an expert approximately 500 times in his career, including cases where the lab testing and adulteration of fluids like urine, blood and sweat are involved. (T. at 180.) Dr. Kuntz also testified that as a board certified forensic toxicologist, he has also been qualified as an expert in cases where the issue of a potential false positive test result for cocaine is raised. (T. 181.) Dr. Kuntz was accepted by the hearing officer as an expert in the field of analytical toxicology. (T. at 183.)

Dr. Kuntz helped establish the chain of custody of the Respondent's sample. (MIA Ex. G; T. at 184-185.) Dr. Kuntz testified about the process through which Respondent's urine sample was received and then processed by CRL. Initially, the sample is tested by a different CRL lab from the one in which Dr. Kuntz actually works. His lab becomes involved with testing a separate sealed and secure portion of the same sample after the insurance testing lab receives a positive test result. (MIA Ex. G; T. at 200.) Dr. Kuntz testified that,

> "...[T]he sample would have been received in the insurance testing laboratory, which is a separate, separate laboratory. They're going to perform their testing and those that would have screened positive would be transferred to us. They're going to be received in a tube that's got a seal on it; tamper evidence seal, along with a document asking us to perform testing. In this case, it would have been cocaine.
> What we are going to do is we're going to provide data, a laboratory session number for toxicology, and we are going to pour a portion of that urine into a secondary tube that also has the same labeled number and it's going to be processed under our normal procedures for the presence of cocaine metabolite, or benzoylecgonine." (T. 184-185.)

[6] The transcript indicates this kit to be Exhibit B but it is clear that this is a mistake and should be Exhibit V.

Dr. Kuntz testified that when Respondent's sample was initially received by CRL that it went to the insurance laboratory within CRL. (T. at 199.) The letter sent from CRL to Northwestern Mutual on August 20, 2014 providing the results of Respondent's tested sample was signed by Mark E. Magee, Vice President of Laboratory Operations. (MIA Ex. G; T. at 197-198.) There were 2 confidential one page reports from CRL with the heading "Drugs of Abuse Testing Report", each dated August 20, 2014, attached to the letter. (MIA Ex. G.) One report showed the chain of custody of Respondent's sample and the other the results of test of Respondent's urine sample on August 12, 2014. (Id.)

Dr. Kuntz testified that the fourth page of MIA Ex. G is a standardized report of the type typically created by the CRL insurance laboratory, which shows the results for Bradley Burton. (T. at 195.) Dr. Kuntz testified that his laboratory's report results were reported to the insurance laboratory and incorporated into this report. (MIA Ex. G at p. 3.)

Respondent's counsel entered a continuing objection to the admissibility and use of the Exhibit G and the attached reports into evidence based on a lack of foundation, including regarding the calibration of the machine used to test Respondent's sample. (T. at 195-206.) However, Respondent conceded in his Post Hearing Brief that he had used cocaine on the night in question. "The Respondent's position pertaining to the use of cocaine is that he did not recall using cocaine until the results of the medical examinations were given to him." (Resp. Brief at p. 2.)

Dr. Kuntz testified that the testing procedures he described for detecting the presence of cocaine or cocaine metabolites are analyzed by a well recognized methodology called gas chromatograph mass spectrometry or GC-MS. (T. at 185.) Dr. Kuntz explained that this has been the standard technique for confirmation of drugs since the late 1980's. (T. at 185, 201.)

Dr. Kuntz also described how the gas chromatograph acts to separate drugs from other compounds after a fluid sample is injected and how the mass spectrometer identifies and measures, and quantifies any drug components of the tested and separated material. (T. at 186-187.)

Dr. Kuntz testified to the processes used in his lab at CRL to test the Respondent's urine sample. He stated that his lab uses both an electronic check of the GC-MS and open controls to ensure that the GC-MS instruments used to do the testing is calibrated and functioning properly. (T. at 187-189.) The open controls are a test which involves injecting samples that are known to contain benzoylecgonine, a cocaine metabolite, in a certain concentration both above and below the testing cut-off ranges. (T. at 189.) In addition, there are also control injections done after the sample is tested to finalize controls at the end of the testing process as well. (T. at 187-188.) Results of the tests are printed on standardized reports. (T. at 189-190.)

Respondent's sample was tested on an Agilent machine, known in Dr. Kuntz's lab as model MSD-25. (T. at 197; 214.) The testing done on this sample was a test to detect cocaine. (T. at 206-207.) The results of that test from his lab showed a concentration of greater than 18,000 nanograms per milliliter of benzoylecgonine. (T. at 206.) The results of that test was sent to the insurance laboratory for inclusion in the report issued by CRL to Northwestern Mutual. (MIA Ex. G; T. at 192-193.)

Dr. Kuntz conceded on cross examination that the CRL lab results show Respondent's creatinine level was high and that this can be indicative of dehydration and a person being hung over from drinking. (T. at 219.) He also testified that when a person drinks a large amount that they are prove to episodes known as "blackouts." (T. at 222.)

Dr. Kuntz testified that he did not personally conduct the gas chromatography test or the second portion of the test on Respondent's urine sample. (T. at 190-191; 202.) Dr. Kuntz testified that he did not do the initial verification of the results from his lab, but testified that he did personally certify to the verification done by the staff. (T. at 191.) Verification included reviewing the data and printed records generated around the test, including the controls and calibration of the machine, and the report generated which includes his laboratory's results. (T. at 204.)

Respondent was subpoenaed by the MIA to testify at the hearing. He was sworn in and did testify but refused to answer any questions. In response to every question except when asked to state his

name and address, he simply stated, "I'll take the Fifth Amendment." (T2 at 6, 10-14.) Counsel for the MIA objected on the basis that the information sought was not for use in a criminal matter. Respondent's counsel stated that the testimony sought was designed to circumvent the Fifth Amendment and that he would not advise Respondent to answer any question at all absent a court order from a judge. (T2 at 9.)

Respondent was specifically asked to testify about Section C of the Judgment, the Conditions of Probation, and the court ordered treatment at the Addictions Counseling Center Respondent. Respondent would only answer, "I'll take the Fifth Amendment." (T2. at 12.)

DISCUSSION

A. Position of Parties.

The MIA argues that on July 1, 2014, Respondent committed insurance fraud when he wilfully and/or knowingly made a false statement concerning his having sought, received, or been advised to seek treatment, counseling, or participation in a support group for the use of alcohol or drugs on the medical questionnaire portion of the application for the life and the disability policy. The MIA also argues that Respondent committed insurance fraud when he wilfully and/or knowingly made a false statement concerning his cocaine usage on his applications for the life and disability policies. The MIA asserts that the U.S. District Court records, the treatment records, the drug testing laboratory records, the documents presented at the hearing, and the testimony of the witnesses show by clear and convincing evidence that that Respondent's actions violated § 27-406(1).

Respondent defended himself at the hearing but did not put on a case or offer any evidence. In his Post-Hearing Brief Respondent argues that there was insufficient evidence presented to show by clear and convincing evidence that he had a knowing intent to make a false or fraudulent statement regarding cocaine use to Northwestern Mutual on the applications for life and disability insurance.

Respondent also asserts that he was never told he would be subject to questions or testing about drug or alcohol use. In addition, Respondent argues that the evidence does not support that the

Questionnaire was properly handled and signed and therefore cannot be the underlying documentation to support by clear and convincing evidence of a knowing misrepresentation.

Respondent argues that the Questionnaire portion of the application is invalid under the Maryland's Uniform Electronics Transactions Act.[7]

Further, Respondent also argues that certain portions of Dr. Kuntz's testimony show he was too impaired to knowingly commit insurance fraud.

Respondent also argues that the interview conducted by the MIA Investigators of Respondent was improper, required a Miranda warning, and therefore any statements made during those interviews should not form a basis for the fact that the Respondent knew or purposely made a false application.

Finally, Respondent argues that the fine of $6,500 is inappropriate and that the penalty is inconsistent with the legislative intent of the statute because of additional penalties the Respondent will incur outside of the fine after a finding against him in this matter.

B. Statutory Framework

Title 27, Subtitle 4 of the Insurance Article describes "fraudulent insurance acts" and the penalties thereof. Section 27-406(1) specifically addresses fraudulent acts of applicants and states:

It is a fraudulent insurance act for a person:

---

[7] Respondent also argued that Respondent's individual privacy rights under HIPAA were violated by Northwestern Mutual. The Health Insurance Portability and Accessibility Act of 1996, Public Law 104-191, as amended established the Privacy Rule for personal health information ("PHI"). The Privacy Rule generally prohibits a covered entity, including insurance companies that provide or pay for the cost of medical care, from using or disclosing an individual's PHI unless authorized and where this prohibition would result in unnecessary interference with certain other important public benefits or national priorities. 45 CFR § 164.506; 45 § CFR §§ 160.102(a), 160.103 . The Privacy Rule permits insurance companies to use and disclose PHI with certain limits and protections for treatment, payment, and health care operations activities. "Health care operations" are defined in the Privacy Rule at 45 CFR 164.501(4) and includes activities by an insurance carrier which is a covered entity conducting fraud detection and compliance. 45 CFR 164.504. HIPAA Privacy violations are within the jurisdiction of the United States Department of Health and Human Services. Because Northwestern Mutual was statutorily obligated to report the circumstances of Respondent's situation under state law, it appears to have been permitted to do so under the HIPAA Privacy Rule, and there is no violation of HIPAA asserted against the MIA, and the MIA has no jurisdiction to address alleged violations of the Privacy Rule, I have not addressed these allegations.

(1) to knowingly or willfully to make a false or fraudulent statement or representation in or with reference to an application for insurance.

Section 27-408(c)(1) and (2) allows administrative penalties for violations of 27-406 and states in pertinent part that:

> (1) In addition to any criminal penalties that may be imposed under this section, on a showing by clear and convincing evidence that a violation of this subtitle has occurred, the Commissioner may:
>
> (i) impose an administrative penalty not exceeding $25,000 for each act of insurance fraud; and...
>
> (2) In determining the amount of an administrative penalty, the Commissioner shall consider:
>
> (i) the nature, circumstances, extent, gravity, and number of violations;
> (ii) the degree of culpability of the violator;
> (iii) prior offenses and repeated violations of the violator; and
> (iv) any other matter that the Commissioner considers appropriate and relevant.

The Code of Maryland Regulations also sets out factors to be considered in administrative penalties. COMAR 31.02.04.02 states,

> In determining the amount of the financial penalty to be imposed, the Commissioner shall consider the following:
> A. The seriousness of the violation;
> B. The good faith of the violator;
> C. The violator's history of previous violations;
> D. The deleterious effect of the violation on the public and the insurance industry; and
> E. The assets of the violator.

Electronic signatures are recognized as having the same legal force and effect as a written signature on a contract under Maryland law. Section 21-106 of the Commercial Law Article of the Maryland Annotated Code states:

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.

Section § 21-108 of the Commercial Law Article of the Maryland Annotated Code requires that the surrounding circumstances in existence at the time of the creation of the electronic signature be reviewed if there is any question about the validity of an electronic signature. Section 21-108(b) states:

> (b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) of this section is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

The standard of review in a case involving a violation of § 27-406 is by clear and convincing evidence.

C. The Respondent's conduct when answering the questions about his treatment for and use of alcohol constituted a violation of § 27-406(1) based on clear and convincing evidence, but his conduct when answering questions related to his cocaine use did not, and an administrative penalty of $3,250 is appropriate.

At some point in 2014 Mr. Kuczarski and Respondent discussed a financial plan for Respondent. The two discussed insurance as part of this plan and Respondent agreed to apply for insurance. Mr. Kuczarkski explained to Respondent that he would be subject to medical underwriting as part of the insurance application process. The Respondent then applied for policies of life and disability insurance and was required to submit to a paramedical exam which included providing urine and blood samples for testing and answering questions about his medical history.

Ms. Collins met Respondent on August 8, 2014 to administer that paramedical examination. Ms. Collins was unable to specifically recall the Respondent at the hearing, but testified about that exam based on the records of that exam and the process which she follows when doing paramedical examinations. Ms. Collins' demeanor was calm, professional, and she presented as an open and honest witness. Ms. Collins very clearly described the process she follows when doing each and every one of her exams. She also testified that if she ever went to an applicant's home and that person appeared under the weather that she would not continue with the examination. She also testified that she always sits

within three feet of the applicant while asking the medical history questions. Ms. Collins testified that she always reads the questions to the applicants out loud and provides the applicant an opportunity to review the Questionnaire on her computer before he or she electronically signs the document by clicking "I Agree" two separate times.

Ms. Collins testified about Respondent's exam from the records which show she took blood and urine samples from Respondent. There is no dispute that she took these samples.

The circumstances surrounding the medical history portion of the application clearly demonstrate that Ms. Collins sat with Respondent and went over a series of medical history questions in significant detail. The Questionnaire itself lists four significant medical items were provided to and recorded by Ms. Collins as part of this history, including a blood condition known as betathalassemia.[8] The number of items, their medical significance, and the details recorded on the Questionnaire clearly demonstrate that Respondent and Ms. Collins were appropriately engaged in a detail oriented discussion about Respondent's medical history. In the absence of any credible evidence to the contrary, I conclude that the paramedical examination appointment took place and that Respondent provided the information as recorded by Ms. Collins on the Questionnaire.

Respondent's answers about these medical conditions listed are good evidence that Respondent was not truthful when he answered "No" to Question 4.a of the Questionnaire. The evidence produced by the MIA from the Respondent's 2010 DUI case clearly establish that Respondent should have answered yes in response to this question because he had been ordered by a court to seek treatment for substance abuse and had participated in and completed a court ordered group alcohol and drug treatment program. The Judgment issued by the U.S. District Court states in section C that, "The defendant shall satisfactorily participate in a treatment program approved by the probation officer relating to substance and /or alcohol abuse..." and that "The defendant shall successfully complete the program at the Addiction Counseling Center."

[8] I am not disclosing the medical conditions for confidentiality purposes with the exception of one which is necessary.

Respondent attempted to show through the questioning of the MIA's witnesses that part of the Judgment, specifically the separate Conditions of Probation Document, that Respondent's Probation Officer never approved a program and that this should negate the treatment requirement and the evidence showing treatment. This theory relies on a misreading of the actual Judgment and ignores other evidence. In both places the Judgment states the Respondent, "shall" participate or complete the program. Any discretion provided to the probation officer in the Judgment about which particular substance abuse program and the specific program components he or she may require for Respondent does not negate the sentenced mandatory and ordered treatment. Further, the alcohol/drug program portion of Section C clearly and specifically required successful completion of the program at the Addiction Counseling Center. Respondent was advised to seek treatment when he was ordered in the Judgment to satisfactorily participate in and complete a treatment program, including the specific program at the Addiction Counseling Center. The Respondent's Conditions of Probation included that he satisfactorily participate in a treatment program and refrain from excessive use of alcohol.

Most importantly, Respondent actually sought and received treatment and counseling for the use of drugs and alcohol over a period of six months as an active participant in group counseling as evidenced by the letter and Certificate of Completion from the Addictions Counseling Service of Maryland admitted as Exhibit W. Given the plain language of the Judgment in both places in Section C and the conditions of probation that Respondent was required to comply with, Respondent should have answered "yes" to question 4.a.

Section 27-406 requires that any misrepresentation be made knowingly or willfully by Respondent to constitute a civil fraud violation. When involving a criminal prosecution, the Court of Special Appeals has defined "wilful" as "the element of a general intent to do the thing which is done, factoring out involuntary or accidental actions and those actions done by one who is incompetent in terms of criminal responsibility." *DeBettencourt v. State*, 48 Md. App. 522, 525 (1981). Although

this is not a criminal matter this opinion is instructive. Also instructive are the Maryland Criminal Jury Instructions and Commentary Section 303 which states,

> "'Knowingly" is generally defined as having knowledge. An act is done knowingly if done voluntarily and purposely, and not because of mistake, accident, inadvertence, or other innocent reason. The purpose of the word 'knowingly' is to ensure that no one would be convicted for an act done where there exists a reasonable, innocent, explanation."

There was no credible evidence offered to show that Respondent did not willfully or knowingly make a false representation about his alcohol use or the treatment program on his application or Questionnaire. Although Respondent did testify at the hearing under subpoena from the MIA, he refused to answer any questions. Respondent was specifically asked about the Section C of the Judgment, the Conditions of Probation, and the court ordered treatment at the Addictions Counseling Center. In each instance, Respondent claimed a Fifth Amendment privilege against self-incrimination. Counsel for the MIA objected on the refusal to testify and argued that the information sought was not for use in a criminal matter. Respondent's counsel stated that the testimony sought was designed to circumvent the Fifth Amendment and that he would not advise Respondent to answer any question at all absent a court order from a judge. (T. at 7-9.) I did not order Respondent to answer at the hearing based on his counsel's representation. However, Respondent's failure to testify allows me as the fact finder to draw an adverse inference against Respondent as recognized in Robinson v. Robinson, 328 Md. 507, 55, (1992) (quoting Whitaker v. Prince Georges County, 307 Md. 368, 384-7 (1986)) in stating,

> "[O]nce the privilege is invoked by a party who testifies in a civil case the refusal to answer the question cannot be used against the party in a subsequent criminal proceeding; however, the fact finder in the civil proceeding is entitled to draw an adverse inference against the party from that refusal to testify." (Id.)

The Respondent asserts that the DUI and participation in a treatment program was voluntary as recommended by an attorney and was also disclosed as part of the application process. The telephone interview notes show that Respondent offered this attorney recommendation explanation as part of that

interview. However, that interview was conducted with Respondent on August 15, 2014, a week after his meeting with Ms. Collins. He definitely knew at the time of the telephone interview that his alcohol treatment was an application issue because he had already been asked about it by Ms. Collins and failed to disclose the treatment. He attempted to make a partial disclosure during the telephone interview by re-characterizing the court ordered treatment as attorney recommended. In addition, the day before the telephone interview Respondent disclosed the existence of the DUI on the written and signed applications for life and disability insurance. I can easily infer that Respondent refused to testify because he did not want to have to explain the failure to disclose his court ordered treatment on the day of his meeting with Ms. Collins, his disclosure of the DUI, and the mischaracterization of the ordered treatment in the telephone interview in the face of the substantial documentary evidence like the Judgment itself.

It is not reasonable to believe that Respondent somehow forgot that he participated in or somehow otherwise misinterpreted the nature of his participation in a six month long alcohol and drug treatment program so that it did not need to be disclosed to Ms. Collins. It is also not reasonable for him to forget that he was ordered to refrain from excessive use of alcohol as part of the Judgment and as a condition of probation.

I now turn to whether Respondent signed the Questionnaire as part of his application. Respondent claims the evidence shows that the electronic signature is not valid and therefore, no false statement or fraudulent statement or representation, in or related to the Respondent's applications, exist.

Section 21-106 of the Commercial Law Article makes an electronic signature as valid as a written signature. The Respondent's electronic signature appears on the Questionnaire as indicated by the signature line which electronically indicates a printed signature of "ESIGNED BY BRADLEY BURTON 08-08-2014 AT 2:02 PM, CDT", CDT meaning Central Daylight Time. Respondent claims that this signature on the Questionnaire is invalid as a result of the circumstances under which it was obtained. Specifically, Respondent's counsel tried to establish through the questioning of Ms. Collins

and Mr. Mullis at the hearing that the APPS records and application submission timing is inconsistent with the other evidence and that this should discredit the testimony of Ms. Collins.

Section 21-108 of the Commercial Law Article of the Maryland Annotated Code is applicable. That section states,

> "The effect of an electronic record or electronic signature attributed to a person under subsection (a) of this section is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any,..."

While there is certainly some inconsistency in the evidence about the exact time the application was signed, any questions or issues are cleared up by looking at the time zone differences and the amount of time it took to do the examination. Ms. Collins testified at the hearing and spoke at the interview with Investigator Thompson based on the documentation from Respondent's case. She was unequivocal in stating at the hearing that she follows the same process with each applicant, that she reads each question on the form to the applicant, and that she gives the applicant a chance to review the answers before signing electronically.

Ms. Collins testified about the amount of time it takes to do the specimen collection and measurements, the medical history, and stated that the whole appointment generally takes about an hour. The system notes that both she and Mr. Mullis testified from indicate that her appointment with Respondent was to begin at 2:00 pm Eastern Time and that the application was signed at 2:02 Central Time. The APPS log shows the entries in chronological order from bottom to the top of the page. The entries related to the date the exam was scheduled, August 4, 2014, to the date of the actual examination on August 8, 2014 are:

> 2014-08-08 5:31:40 PM – Done per Examiner on 2014 -08-08
>
> 2014-08-08 3:02:00 PM – Smart Paramed/ Examiner E-Signed on 2014 -08-08 02:02 PM
>
> 2014-08-08 3:02:00 PM – Smart Paramed/ Applicant e-Signed on 2014 -08-08 02:02 PM
>
> 2014-08-08 3:02:00 PM – Smart Paramed/ Examiner e-Signed on 2014 -08-08 02:02 PM

2014-08-08 11:30:48 AM – Case scheduled for AUG 08, 2014 – 02:00 PM

These times are absolutely consistent with the process described and average one hour examination time Ms. Collins testified to at the hearing. Respondent's counsel argued at both the hearing and in Respondent's Post Hearing Brief that the timestamps on the Questionnaire and APPS log indicate that the interview took just a few minutes and is obviously flawed. However, both Ms. Collins and Mr. Mullis' testimony adequately established the differences between Eastern and Central Time and how long a normal exam should take. It is undisputed that Respondent provided samples of urine and blood which must take more than the 2 minutes that Respondent implies the records show the entire exam took. The Notice Consent and Chain of Custody Statements that Ms. Collins and Respondent signed on that date in Baltimore, in the Eastern Time zone, was signed at 2:10 pm. Also, Respondent's medical history answers show that adequate time was taken to ensure that the Questionnaire was completed properly. Both the APPS records and the testimony of Ms. Collins and Mr. Mullis make clear Ms. Collins examination took approximately one hour, beginning at 2:00 PM Eastern Time, and concluding at approximately 3:02 Eastern Time when the Questionnaire was signed electronically by Respondent. This is entirely consistent with Ms. Collins testimony that the medical history can take up 45 minutes depending on the answers.

Addressing another circumstance around the electronic signature, Respondent's counsel questioned Dr. Kuntz about the urine specimen provided by Respondent and more specifically, whether it indicated Respondent was dehydrated at the time of the examination and unable to consent to signing due to intoxication. Dr. Kuntz did testify that Respondent's creatinine level was high and indicative of dehydration. Although Dr. Kuntz's testimony and Respondnet's urine sample suggest Respondent may have been dehydrated or even hung over at the time of signature, there is certainly not sufficient evidence to find that he was intoxicated to the point of incapacitation at the time of signature. In addition, Respondent was specifically asked at the hearing about his signature on the Questionnaire but he refused to answer and claimed a Fifth Amendment privilege. (T.2 at 10.)

I infer from the refusal to testify and the credible evidence presented that Respondent did meet with Ms. Collins for approximately one hour. I also find that Respondent knowingly provided Ms. Collins with only certain details of his medical history and then Respondent electronically signed the Questionnaire. Therefore, I do not find any merit in Respondent's argument that the timestamps indicate a flawed paramedical exam or that the electronic signature is invalid based upon the surrounding circumstances.

Respondent also tries to state that the timing of the APPS system notes indicate that the Questionnaire was not submitted as Ms. Collins claims because of the note at 5:31:40 PM which states it was done per examiner on 2014-08-08. However, Mr. Mullis testified without hesitation that this was the time that Ms. Collins enters into the system a note stating that she has completed the exam sometime during the day, not that she had just uploaded all of the information from that day as Respondent's counsel implied in his questioning.

Therefore, based on the documentary evidence presented, the testimonial evidence, and the inference afforded me by Respondent's refusal to testify about his treatment program, I find by clear and convincing evidence that Respondent knowingly made false representations when answering "No" to Questions 4.a and 4.b of the Questionnaire and in response to the telephone interview question, "Have you received or been advised to receive treatment or counseling for the use of alcohol or drugs?", each of which was in reference to his application for polices of life and disability insurance.

Whether Respondent willfully or knowingly made a false or fraudulent statement regarding the cocaine use requires a more detailed analysis. Respondent's concedes in that post-hearing brief that he used cocaine. "The Respondent's position pertaining to the use of cocaine is that he did not recall using cocaine until the results of the medical examinations were given to him." (Resp. Brief at p. 2.) With Respondent's actual use not at issue, my inquiry focuses on whether falsely answering no to having used cocaine in the last 10 year on Question 4.c of the Questionnaire was done willfully or knowingly by Respondent.

The earlier question regarding Respondent's court ordered treatment was answered because Respondent acted knowingly and did not require an in depth analysis of what constitutes "willfully" making a false or fraudulent statement. As previously stated, the Court of Special Appeals has defined "wilful" in the criminal context as "the element of a general intent to do the thing which is done, factoring out involuntary or accidental actions and those actions done by one who is incompetent in terms of criminal responsibility." *DeBettencourt v. State*, 48 Md. App. 522, 525 (1981). While the *DeBettencourt* opinion is instructive there are several other opinions which are helpful and discuss willful conduct in a civil context. The Maryland Court of Appeals discussed willful conduct in several civil cases including some involving premises liability. In Doehring v. Wagner, 80 Md. App. 237, 246, 562 A.2d 762, 767 (1989), the Court discussed willful conduct in contrast to wanton conduct, and in doing so recognized some level of knowledge on the part of the actor within willfulness by stating in pertinent part:

> "There is a distinction between "willful" and "wanton" misconduct. Willful misconduct is performed with the actor's actual knowledge or with what the law deems the equivalent of actual knowledge of the peril to be apprehended, coupled with a conscious failure to avert injury. A wanton act, by contrast is performed with reckless indifference to its potentially injurious consequences. Doehring v. Wagner, 80 Md. App. 237, 246, 562 A.2d 762, 767 (1989) *citing Evans v. Miller*, 8 Wash.App. 364, 507 P.2d 887 (1973)."

In discussing the applicable precedents the Court of Appeals stated there has to be some degree of calculated and deliberate behavior:

> "The Maryland cases have generally looked to conduct of a more deliberate nature than that involved here, i.e., conduct calculated to or reasonably expected to lead to a desired result. *See Hensley v. Henkels & McCoy, Inc.*, 258 Md. 397, 265 A.2d 897 (1970) (stating generally that a licensor is liable for injuries a licensee sustains because of entrapment, concealment, or presentation of deceptive appearance)." *Doehring* at 246.

I see this as requiring more than just a finding of general intent on Respondent's part to do the thing done. Rather, I am looking to determine if by clear and convincing evidence Respondent made a false statement; 1) with actual knowledge; or 2) by conduct which shows a level of intent sufficient to

establish the equivalent of actual knowledge, in answering "No" to Question 4.a of the Questionnaire as part of the applications at 3:02 pm on August 8, 2014.

Clear and convincing evidence means, "the witness to a fact must be found to be credible, and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly in order, so as to enable a trier of the facts to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue." *Attorney Grievance Commission v. Mooney, 359 Md. 56, 79 (2000). See also, Attorney Grievance Commission v. Bear, 362 Md. 123 (2000).*

Respondent's first known reaction to the results of his test indicate he had to go backward and piece the events of the weekend, including the night before the examination together. Respondent sent an email to Mr. Kuczarski expressing shock at the results of his urine test showing the presence of cocaine in his system. But although surprised, Respondent had actually gone back and thought through that weekend and realized what had happened. At the time of that email the Respondent did not have reason to suspect that he was going to be subjected to a civil fraud action. I find this statement to be credible and one that shows Respondent's understanding at the time of the paramedical examination.

Investigator Thompson interviewed Respondent approximately eight months later after the paramedical examination with Ms. Collins and described him as forthright and credible. Respondent indicated that he was transparent with Mr. Kuczarski about his drug use and according to the records of that interview and Investigator Thompson's notes Respondent admitted using a small amount of cocaine on the day in question. The notes also indicate that Respondent said he thought he had used the cocaine after the examination but after checking dates on his smart phone realized it was before.

At that interview, Respondent told Investigator Thompson that he did not cancel the interview even though he had used cocaine the night before because he just wanted to get it over as it had already been rescheduled and that Respondent did not realize they were going to test for cocaine. But the notes and report of that interview also indicate that he said that he is a pharmacist and that he is aware of the accuracy of the tests for cocaine as a result. These two statements are difficult to reconcile and raise

questions as opposed to providing clarity. Why would Respondent go submit to both a blood and urine test if he knows he has just done cocaine? The easy answer is that he would not. The consequences of such an act would be far more reaching than the simple failure to be issued a life or disability insurance policy as noted by Respondent in his brief. Had he been aware that he was going to even potentially be tested after doing a drug like cocaine, Respondent very easily could have rescheduled the exam again, told Mr. Kuczarski he was not going to go through with the application process at that time, or even call soon after the exam itself and just say cancel everything. He was just asked about cocaine use by Ms. Collins so he has to be aware of the possibility of it being tested for. When Respondent realized during the interview with the MIA Investigators that there was a potential threat in the form of a civil order, one which could threaten his professional standing, he indicated that he was going to seek counsel. Respondent was faced with a similar threat to his profession and livelihood on the day of the examination. However, he took no steps to protect himself even though several options including rescheduling the exam again, canceling the exam, or withdrawing his applications altogether would have been very easy to do. These action and inaction on August 8, 2014 is not consistent with a man who realizes he has just taken cocaine.

It would be too simple to say that Respondent was not honest about the alcohol so he must have also been dishonest about the cocaine. For a pharmacist, the use of a legalized drug or substance like alcohol is a far less serious matter than the use of an illegal and highly addictive substance like cocaine. There are several indications that Respondent did not see the threat on the day of the examination, which is substantial evidence of the fact that he did not have any recollection of his cocaine use the night before when he electronically signed the Questionnaire. If he did not remember taking the cocaine he cannot have acted deliberately or with a conscious failure to avoid injury to himself.

Investigator Thompson's notes and report do not have any mention of Respondent's having been drinking the night he used the cocaine. At the hearing Investigator Smith was asked specifically if Respondent ever said that on the night before the examination that he was drinking so much that he

forgot that he did cocaine. After initially responding that Respondent did not tell him that, Investigator Smith testified that Investigator Thompson told him in a conversation after the interview that Respondent had stated this to be the case. No record of this representation by Respondent is found anywhere in Investigator Smith's notes or report, but such a statement is consistent with Respondent's prior statement to Mr. Kuczarksi. Both investigators provided honest and credible testimony and I have no reason to doubt the veracity of their statements. However, the lack of any reference in Investigator Thompson's notes or report of the Respondent mentioning this as a cause for his not remembering using cocaine leaves me with an unanswered question as to why it is not mentioned and a question about the overall inclusiveness of the report.

Respondent also argues that he was too impaired from being hung over from alcohol intoxication at the time of the exam with Ms. Collins to knowingly intend to commit insurance fraud. There is insufficient evidence to establish that Respondent was even hung over on August 8th from drinking the night before. But Dr. Kuntz's testimony offers some corroboration of and physical evidence that Respondent had been drinking the night before. Dr. Kuntz presented as a knowledgeable witness even though when questioned about the portion of the lab report and their relation to alcohol use he became defensive and uncooperative. Dr. Kuntz conceded on cross examination that the CRL lab results show Respondent's creatinine level was high and that this can be indicative of dehydration and a person being hung over from drinking. He also acknowledged the possibility of blackouts.

Under a clear and convincing standard the facts must enable a trier of the facts to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue. There are points in time where Respondent stated that he did not remember using cocaine as a result of his drinking and there are questions raised by the facts as presented, including ones related to Respondent's decision to act or not in similar situations and the lack of a mention of Respondent's drinking. Many of these questions would possibly have been answered had Respondent testified. Respondent's counsel advised him that he should not testify without being ordered to do so by a judge. I am allowed to draw an adverse inference from his

failure to testify and do so. However, even utilizing such an inference there is not sufficient evidence for me to reach the point of being able to come to a clear determination of the truth without substantial hesitancy.

Respondent's conduct and statements do not rise to the required level showing that he knowingly or willfully provided a false answer false answer to Question 4.a of the Questionnaire on April 8, 2014. Therefore, based on the evidence I do not find that the MIA has met its burden by clear and convincing evidence that Respondent violated § 27-406(1) by stating no in response to Question 4.c on the Questionnaire.

Respondent argued that in a civil context he is entitled to Miranda warnings, citing *Mathis v. United States* 391 U.S. 1 (1968), and asserting that any statements made by him to the MIA Investigators from which a negative inference is drawn is improper. I agree that there are some similarities to the facts of this matter and those presented in Mathis, but there also appear to be differences which distinguish that case from the facts presented here. However, Respondent's custodial interrogation argument is moot since I have not drawn any negative inference from the statements made by Respondent in that meeting.

The Amended Order imposed a fine of $6,500 for violations of § 27-406(1) related to questions and answers about Respondent's alcohol treatment, alcohol use and cocaine use. In consideration of the fact that Respondent's violation of § 27-406(1) in answering questions 4.a and 4.b of the Questionnaire was made knowingly, that I find no violation of that section related to the Respondent's answers to question 4.c, and the factors set forth in § 27-408(c)(2) and COMAR 31.02.04.02, I find the imposition of a reduced penalty in the amount of $3,250 is appropriate under the facts of this case.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, it is found, as a matter of law, that Respondent violated § 27-406(f)(1) of the Insurance Article of the Annotated Code of Maryland by knowingly providing a false answer of "No" to questions 4.a and 4.b of the Questionnaire in relation to

his applications for life and disability insurance. Therefore, Respondent shall pay an administrative penalty in the amount of $3,250.

FINAL ORDER

IT IS HEREBY ORDERED that:

1. The January 28, 2016 Order be **AMENDED**; and it is further
2. **ORDERED** that Respondent shall pay an administrative penalty in the amount of $3,250; and it is further
3. **ORDERED** that the records and publications of the Maryland Insurance Administration reflect this decision.

It is so **ORDERED** this 25th day of May, 2016.

ALFRED W. REDMER, JR.
Insurance Commissioner

signature on original

ROBERT D. MORROW JR.
Associate Commissioner-Hearings

Administrative penalties shall be made payable to the Maryland Insurance Administration and shall identify the case by invoice number, case number, and name. Unpaid penalties will be referred to the Central Collection Unit for collections. Payment of the administrative penalty shall be sent to the attention of Victoria August, Associate Commissioner, Compliance and Enforcement, 200 St. Paul Place, Suite 2700, Baltimore, MD 21202.