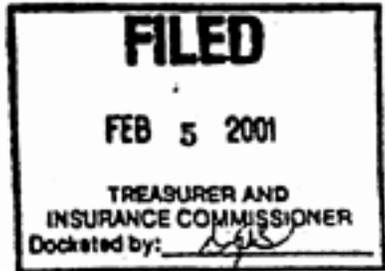




THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE



TOM GALLAGHER

IN THE MATTER OF:

Case No. 34703-00-CO

ACCELERATED BENEFITS CORPORATION

FINAL ORDER

THIS CAUSE came on before the undersigned Treasurer of the State of Florida, acting in his capacity as Insurance Commissioner, for consideration and final agency action. On June 29, 2000, Respondent, Department of Insurance (Department) issued an administrative complaint against Petitioner, ACCELERATED BENEFITS CORPORATION (ABC) alleging repeated instances wherein ABC effectuated viatical settlement agreements in the presence of circumstances showing fraud, yet failed to report those circumstances to the Department. On July 20, 2000, ABC filed an answer to the Administrative Complaint and requested a formal administrative hearing. Pursuant to notice, the matter was heard before the Honorable Arnold H. Pollack, Administrative Law Judge for the Division of Administrative Hearings, on October 25, 2000.

After consideration of the evidence, argument, and testimony presented at hearing, the Administrative Law Judge (ALJ) issued his Recommended Order on December 28, 2000. (Attached hereto as Exhibit A). The ALJ recommended that a Final Order be entered dismissing Counts One through Four and Eight of the

Administrative Complaint, but finding ABC guilty of Counts Five through Seven and Nine through Eleven, and both revoking its license and its eligibility for licensure as a viatical settlement provider in Florida.

Both parties have filed exceptions to the ALJ's Recommended Order. Based upon a complete review of the record, including the administrative complaint, the transcript and evidence adduced at the formal hearing, the Recommended Order and all exceptions thereto, and the relevant statutes, rules, and case law, I find as follows:

**RULINGS ON ABC'S EXCEPTIONS
TO THE FINDINGS OF FACT**

Section 120.57(1)(l), Florida Statutes, sets forth the standard an agency must use when reviewing the Recommend Order of an administrative law judge. With respect to the Recommended Order's findings of fact, an "agency may not reject or modify the findings unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." No argument has been made, nor does anything in the record indicate, that the proceedings did not comply with essential requirements of law. The question for each exception as to each finding of fact, therefore, is whether there is competent substantial evidence to support the finding, and, if there is, the exception is to be rejected.

1. ABC's first exception is directed at the ALJ's Finding of Fact number 6 asserting there to be no basis for a finding that D.K. made material misrepresentations

regarding his health to US Life, nor was there any basis for finding that ABC knew or should have known of any such alleged misrepresentation.

There was competent substantial evidence, as set forth in Finding of Fact 3, that D.K. stated in May of 1998, when he applied for his insurance policy, that he had not seen a physician for the prior five years, since May of 1993, yet the policy summary sheet incident to his application for viatication clearly indicated he had seen a doctor for treatment for HIV/AIDS in that period. It is difficult to imagine a more material misrepresentation in an application for life insurance. With respect to the finding that ABC knew or should have known of this misrepresentation, both these documents were in the possession of ABC, and, as the ALJ set forth, ABC's actions in concealing the misrepresentations is further evidence of ABC's knowledge of them.

Thus, there is competent substantial evidence to support the ALJ's finding in paragraph 6, and ABC's exception to that paragraph is rejected.

2. ABC's second exception is directed at the ALJ's Finding of Fact number 8. It states there is no basis for a finding that ABC knew that W.E. had AIDS.

Finding of Fact number 8 finds that ABC knew W.E. had AIDS *or* HIV. In his application for viatication W.E. clearly states that he has HIV, and had become aware of it a "few years ago." This document was in possession of ABC, and, thus, there is competent substantial evidence to support the ALJ's finding in paragraph 8 that ABC knew W.E. had AIDS or HIV. Consequently, ABC's exception to that paragraph is rejected.

3. ABC's next exception is directed at the ALJ's Finding of Fact number 11. ABC asserts there is no basis for a finding W.E. made material misrepresentations regarding his medical state to Life USA, nor is there any basis for finding ABC knew or should have known of any such alleged misrepresentation.

There was competent substantial evidence, as set forth in Findings of Fact number 8 through 10, that W.E. stated in November of 1997 when he applied for his insurance policy that he had not received any medical or surgical advice or treatment within the prior five years, which would be from November of 1992, had not been advised by a medical doctor that he had AIDS or ARC, and was not at that time taking any medication. Yet, in his application for viatication in that same year, W.E. clearly states that he has HIV, and had become aware of it a "few years ago." As stated above, it is difficult to imagine a more material misrepresentation in an application for life insurance. With respect to the finding that ABC knew or should have known of this misrepresentation, both these documents were in the possession of ABC, and, as the ALJ set forth in Findings of Fact 9 and 10, ABC's actions in concealing the misrepresentations is further evidence of ABC's knowledge of them.

Thus, there is competent substantial evidence to support the ALJ's finding in paragraph 11, and ABC's exception to that paragraph is rejected.

Finding of Fact number 7 has a typographical error in it, that the insurance policy was applied for in May of 1997. The evidence shows the correct month to be November of 1997. This Finding is modified accordingly.

4. ABC's next exception is directed at the ALJ's Finding of Fact number 15, and asserts there is no basis for a finding that A.T. made material misrepresentations, and that there is no basis for finding ABC knew or should have known of any such misrepresentations. ABC further states that the only evidence of record pertains to a "B.T.", and that no policy for A.T. was introduced by the Department.

The Department's Exhibit 7 is relevant to the matters raised in this exception. It pertains to an application for insurance covering A.T., and viatication of that same policy. That evidence shows that on April 26, 1997, A.T. signed an application for insurance stating that he had not been diagnosed with AIDS or ARC, and that he had not tested positive for HIV. Yet on January 13, 1998, A.T. in an application for viatication stated that he had progressive AIDS, and had first been diagnosed with HIV on August 28, 1989 and with AIDS on August 10, 1994.

With respect to the finding that ABC knew or should have known of this misrepresentation, both these documents were in the possession of ABC, and, as the ALJ set forth in Findings of Fact 14 and 15, ABC's actions in concealing the misrepresentations is further evidence of ABC's knowledge of them.

Thus, there is competent substantial evidence to support the ALJ's finding in paragraph 15, and ABC's exception to that paragraph is rejected.

5. ABC's next exception is directed at the ALJ's Finding of Fact number 16. The exception argues that there is no basis for a finding that R.M. had been diagnosed with an "immune disorder" as there was no testimony as to what an "immune disorder" is or consists of.

Finding of Fact number 16 finds that on September 30, 1996, R.M. submitted an application for insurance, on which application he indicated that he had not been diagnosed with an immune disorder within the preceding ten years. There is no finding in Finding of Fact number 16 that R.M. had such a disorder. Consequently, ABC's exception to that finding is rejected.

6. ABC's next exception is directed at the ALJ's Finding of Fact number 20. It states there is no basis for a finding that ABC knew or should have known that R.M. made any misrepresentation, and that there was no testimony as to what constitutes an immune system disorder.

Exhibit 9 contains the evidence relevant to Finding of Fact number 20. On his application for insurance dated September 30, 1996, R.M. represented that he had seen a doctor once in the previous five years (September 30, 1991 through September 30, 1996), for a check up in March of 1996. Yet in his application for viatication, R.M. states that his diagnosis for HIV occurred on February 11, 1994. Both the documents were in the custody of the Respondent. That there was no evidence as to what constitutes an immune system disorder is irrelevant. There is competent substantial evidence to support the ALJ's finding in paragraph 20 that ABC knew or should have known that R.M. made a material misrepresentation. Consequently, ABC's exception to that paragraph is rejected.

7. ABC's next exception is directed at the ALJ's Finding of Fact number 24. It states there is no basis for a finding that material misrepresentations were made by J.R.

to Interstate and no basis for a finding that ABC knew or should have known of the alleged misrepresentations.

Exhibit 10 contains the evidence relevant to Finding of Fact number 24. On his application for insurance dated May 12, 1997, J.R. represented that within the prior five years he had not been treated by a member of the medical profession, and that he had not had a consult with his personal physician. Yet in his application for viatication, J.R. states that his diagnosis for HIV occurred in May of 1996. An even earlier date is set forth in the Mortality Profile for this first diagnosis of HIV, August of 1995. Both documents were in the custody of the Respondent. Thus there is competent substantial evidence to support the ALJ's finding in paragraph 24 that material misrepresentations were made by J.R. to Interstate and that ABC knew or should have known of the alleged misrepresentations. Consequently, ABC's exception to that paragraph is rejected.

8. ABC's next exception is directed at the ALJ's Finding of Fact number 29 which asserts there is no basis for a finding that material misrepresentations were made by J.R. to Conseco (earlier Massachusetts General Life Insurance Company) or that ABC knew or should have known of the alleged misrepresentations.

Exhibit 11 contains the evidence relevant to Finding of Fact number 29. On his application for insurance dated May 16, 1996, J.R. represented that he had not had any blood or other medical tests, and had no known indication of any disease, condition or other physical disorder or defect, had not been treated by a member of the medical profession, and had not had a consult with his personal physician. Yet in his

application for viatication, dated July 9, 1997, J.R. states that his diagnosis for HIV occurred in May of 1996. An even earlier date is set forth in the Physician's Questionnaire for this first diagnosis of HIV, August 14, 1995. All these documents were in the custody of the Respondent. Thus, there is competent substantial evidence to support the ALJ's finding in paragraph 29 that material misrepresentations were made by J.R. to Mass Life, later Conseco, and that ABC knew or should have known of the alleged misrepresentations. Consequently, ABC's exception to that paragraph is rejected.

9. ABC next excepts to the ALJ's Conclusion of Law in Paragraph 31, regarding the standard set forth in Section 626.989(6). However, the Conclusion of Law in Paragraph 31 (henceforth Conclusion 31) merely recites the allegations in the administrative complaint; it does not establish any standard. The applicable law is set forth in Conclusion 35. Thus, ABC's exception to this conclusion is rejected.

10. ABC next excepts to Conclusion 40, asserting that the evidence failed to establish the commission of any act that would constitute a felony or misdemeanor. This conclusion nowhere addresses any felony or misdemeanor, and therefore, this exception is rejected. Notwithstanding this, the evidence in the findings of fact clearly set forth violations by the respective viators of Section 626.9541(1)(k), Florida Statutes, regarding misrepresentation in insurance applications. Such violations are misdemeanors, because Section 624.15, Florida Statutes, provides "Each willful violation of this code as to which a greater penalty is not provided by another provision

of this code or by other applicable laws of this state is a misdemeanor of the second degree..."

11. ABC next excepts to Conclusion 41, asserting that the Petitioner, having failed to establish violations of the Insurance Code on the part of the viators, fails to establish any violation by ABC of Section "626.9941(1)(b)". This exception is difficult to address, since there is no such section. Presumably ABC is referencing Section 626.9541(1)(b). That section is however inapplicable to the facts. The findings of fact do however clearly set forth violations by the respective viators of Section 626.9541(1)(k), misrepresentation in insurance applications.

The exception is rejected.

12. ABC next excepts to Conclusion 42, arguing that the records upon which the ALJ relied are not admissible under the business records exemption (sic) but are instead excluded from that exception by Section 90.806(b). There is no such section. It appears ABC meant to refer to Section 90.803(6)(b), which limits the admissibility of business records in the form of opinion or diagnosis. However, the diagnosis and medical opinion set forth in the evidence is not hearsay, since it is not being offered for the truth of the matter asserted, as is required by Section 90.801(c) for it to be hearsay. Obviously, when two statements are directly contradictory, such as "I am free of HIV" and "I have been diagnosed with HIV", the proffer of the two statements is not "for the truth of the matter asserted" in those documents, and the exception set forth in subsection (b) is inapplicable.

The exception is thereby rejected.

13. ABC next excepts to Conclusion 43, arguing that the failure of the Department to put into evidence any expert witness testimony as to the definitions of medical terms such as HIV and AIDS means that the Department has failed to meet its standard of proving its case with clear and convincing evidence. ABC offers no authority for this assertion. The standard for reviewing conclusions of law are set forth in Section 120.57(1)(l), Florida Statutes. That section permits the rejection or modification of a conclusion of law only where the agency's substituted or modified conclusion "is as or more reasonable" than the conclusion that was rejected or modified. The ALJ's explanation in Conclusion 43 that it is inconceivable that ABC did not know of the inconsistencies between the applications for insurance and the applications for viatication is more reasonable than any other conclusion, and therefore this exception is rejected.

14. ABC next excepts to Conclusion 44 on the same grounds as it did to Conclusion 41. Though that exception was rejected, this Conclusion differs from that Conclusion in one important aspect. Unlike that Conclusion, this Conclusion states that failure of ABC to report fraud it *knew or should have known of* is a violation of Section 626.989(6), Florida Statutes. The statute in question, however, as set forth in Conclusion 35, sets forth the duty to report when the licensee *knows or believes* that a fraudulent insurance act or any other act or practice which, upon conviction, constitutes a felony or a misdemeanor under the code, or under Section 817.234, Florida Statutes, is being or has been committed.

Presenting an application for an insurance policy with material misstatements is both a fraudulent insurance act, under Section 626.989(1), Florida Statutes, and, because it is a violation of Section 626.9541(1)(k), Florida Statutes, is a misdemeanor, under Section 624.15, Florida Statutes. Therefore, if ABC knew or believed that the viators in these counts had presented applications for insurance with material misstatements, the duty to report arose.

The factual findings of the ALJ are that ABC knew of the discrepancies between the applications for insurance and the applications for viatication. In Finding of Fact 6, with respect to Count 5, the ALJ found that ABC attempted to "conceal those misrepresentations..." In light of its actions to conceal, there is no more reasonable conclusion than that ABC believed there were misrepresentations in D.K.'s policy.

In Finding of Fact 11, with respect to Count 6, the ALJ also found that ABC "did not report that it had knowledge of W.E.'s condition to the Department." Because ABC had knowledge of W.E.'s condition, there is no more reasonable conclusion than that it knew or believed there was a material misstatement in his application for an insurance policy.

In Finding of Fact 15, with respect to Count 7, the ALJ found that ABC "thereafter took a course of action which was designed to conceal" that A.T. had made material misstatements in his application for a policy. In light of its actions to conceal, there is no more reasonable conclusion than that ABC knew or believed there was a material misrepresentation in A.T.'s policy.

In Finding of Fact 17, with respect to Count 9, the ALJ found that ABC had the knowledge that R.M. had been diagnosed with HIV at the time he completed the application for the life insurance policy. Further, the ALJ found that ABC took steps to conceal the transfer of ownership. In light of this knowledge and the active steps to conceal the transfer, there is no more reasonable conclusion than that ABC knew or believed there were material misrepresentations in R.M.'s policy.

In Finding of Fact 24, with respect to Count 10, the ALJ found that ABC knew of the material misstatement J.R. had made in his application for insurance. In light of this knowledge, there is no more reasonable conclusion than that ABC knew or believed there were material misrepresentations in J.R.'s policy.

In Finding of Fact 26 with respect to Count 11, the ALJ found that ABC knew of J.R.'s condition due to their earlier purchase of the Interstate policy. Notwithstanding this knowledge, Finding of Fact 27 relates, ABC viaticated the Conseco policy. In light of this knowledge, and the fact in Finding of Fact 29 that ABC attempted to conceal this misrepresentation from Conseco, there is no more reasonable conclusion than that ABC knew or believed there were misrepresentations in J.R.'s policy.

The ALJ makes clear in Conclusion 41 that in Counts Five through Eight and Ten and Eleven that ABC knew of those inconsistencies. As ABC knew of the inconsistencies, the evidence is clear in all these instances it knew and believed an act requiring reporting had occurred.

In light of the evidence and the wording of the applicable statute, Conclusion 44 is modified as follows:

44. Under the circumstances shown it is clear the Respondent had knowledge of and believed that material misstatements had been made by the various viators in each incident as alleged in Counts Five through Seven and Nine through Eleven, and that the Respondent should have reported it. The failure to do so constitutes a violation of Section 626.989(6), Florida Statutes.

15. ABC excepts to Conclusion 45, asserting that Section 626.9914(1)(b) is unconstitutional for vagueness. The administrative process cannot resolve a constitutional attack upon a statute. *State of Florida, Department of Administration, Division of Personnel v. State of Florida, Department of Administration, Division of Administrative Hearings*, 326 So.2d 187 (Fla. 1st DCA 1976). This exception is therefore denied.

RULING ON DEPARTMENT'S EXCEPTION

The Department filed one exception relating to an evidentiary ruling made by the ALJ concerning evidence the Department wished to offer on counts One through Four and Eight. The ALJ excluded the evidence for lack of authentication. In light of the fact that the admitted evidence resulted in a recommended sanction that was the maximum sanction that could be ordered, revocation, and that the recommended sanction is being adopted herein, the issue of the admissibility of the excluded records is moot.

IT IS THEREFORE ORDERED:

1. The Findings of Fact of the ALJ, except as modified herein, are adopted in full as the Department's Findings of Fact.

2. The Conclusions of Law of the ALJ, except as modified herein, are adopted in full as the Department's Conclusions of Law.

3. The recommended penalty by the ALJ for the Department to revoke ABC's license and its eligibility for licensure as a viatical settlement provider is accepted as the appropriate disposition of this case.

ACCORDINGLY, Accelerated Benefits Corporation's license and its eligibility for licensure as a viatical settlement provider is hereby revoked. Pursuant to Section 626.9915(1), Florida Statutes, the Department retains jurisdiction over ABC until all contracts have been fulfilled or canceled or have expired.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a Notice of Appeal with the General Counsel, acting as Agency Clerk, 200 East Gaines Street, 612 Larson Building, Tallahassee, Florida, 32399-0333 and a copy of the same and filing fee, with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE and ORDERED this 5th day of February, 2001.




TOM GALLAGHER
Treasurer and
Insurance Commissioner

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