

INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

**In the Matter of the *Insurance Act*, R.S.A. 2000, c. I-3, as amended
(“*Insurance Act*”)**

**And In the Matter of the *Insurance Councils Regulation*, Alta. Reg. 126/2001, as
amended (“*Insurance Councils Regulation*”)**

BETWEEN:

ARNEY FALCONER

Appellant

- and -

LIFE INSURANCE COUNCIL

Respondent

Heard in Calgary, Alberta on June 1 and 8, 2015

Before:

JULIE G. HOPKINS	-	Appeal Panel Chair
DAVID BRITTAIN	-	Appeal Panel Member
OSCAR BUERA	-	Appeal Panel Member

REASONS FOR DECISION AND ORDER

1. This is an appeal of a decision of the Life Insurance Council dated May 7, 2014 (the “Decision”) wherein the Life Insurance Council found that Mr. Arney Falconer had contravened section 480(1)(a) of the *Insurance Act* in that he “made a misrepresentation and acted in an untrustworthy and dishonest manner” and revoked Mr. Falconer’s certificates of authority to act as an insurance agent in Alberta.

Procedural History

2. Mr. Falconer commenced his appeal of the Decision by a Notice of Appeal in the form of a letter to the Superintendent of Insurance dated May 26, 2014.

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

2

3. On June 5, 2014, a panel of the Insurance Councils Appeal Board was selected to hear the appeal. At the request of the Life Insurance Council, and by an Adjournment Order dated June 17, 2014, the date of the hearing was adjourned to September 5, 2014 and a Notice of Hearing was issued scheduling the hearing for that date.
4. At the request of Mr. Falconer and by an Adjournment Order dated September 19, 2014, the hearing was adjourned to October 9, 2014. At the further request of Mr. Falconer, the date of the hearing was then adjourned to January 27, 2015 by an Adjournment Order dated October 27, 2015.
5. On January 24, 2015, on its own motion, the Panel adjourned the hearing of the appeal pending the appointment of a replacement panel member. By letter from the Office of the Superintendent of Insurance dated January 26, 2015 a replacement panel member was appointed.
6. On March 17, 2015, the Panel issued a Notice of Hearing scheduling the hearing for June 1, 2015.
7. Both parties were present at the hearing on June 1 and June 8, 2015. Mr. Martinson appeared as counsel on behalf of the Life Insurance Council. Mr. Falconer appeared without counsel. He acknowledged that he was aware that he had the right to appear with counsel and stated that he elected to proceed unrepresented.
8. The parties confirmed they had no objection to the constitution of the Panel or its jurisdiction to hear the appeal.
9. There was no objection to both the record before the Life Insurance Council and the Decision being received in evidence by the Panel. There was a written proceeding before the Life Insurance Council and the record consisted of a written report prepared by the Alberta Insurance Council ("AIC") and a letter provided by Mr. Falconer.
10. In addition to relying on the record before it, the Life Insurance Council called four witnesses at the hearing. They were: Bernard Van Brabant, the AIC investigator who investigated the complaint against Mr. Falconer; * M.H. an agent who purchased a book of insurance business from Mr. Falconer in 2010 that included a

Canadian Automobile Dealers Association (“CADA”) group benefits program for Lone Star Inc. (“LS”) placed with Great West Life Assurance Company (“GWL”) and who ultimately made the complaint to the AIC concerning Mr. Falconer; and * A.D. and * R.M. who were the agents who replaced the CADA group benefits program LS had with GWL with a program offered by Equitable Life Insurance Company of Canada (“Equitable Life”).

11. In addition to testifying in his own defence, Mr. Falconer called as witnesses * P.G. the payroll and benefits administrator at LS, and * K.S., an account executive with GWL responsible for CADA business during the relevant period of time.

12. At the close of evidence, the Panel heard submissions by both parties and reserved its decision with written reasons to follow. At the request of the Panel, the Life Insurance Council provided the Panel and Mr. Falconer with decisions by the Insurance Councils or the Insurance Councils Appeal Board considering whether an agent’s certificate of authority should be revoked. The parties were given an opportunity to provide written submissions concerning those cases which they both did.

Relevant Law

13. Section 480(1)(a) of the *Insurance Act* provides:

480(1) If the Minister is satisfied that the holder or a former holder of a certificate of authority

(a) has been guilty of misrepresentation, fraud, deceit, untrustworthiness or dishonesty,

...

the Minister may revoke, suspend or refuse to renew or reinstate one or more of the certificates of authority held by the holder, impose terms and conditions provided for in the regulations on one or more of the certificates of authority held by the holder and impose a penalty on the holder or former holder.

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

Issues to be Decided

14. The issues to be decided on this appeal are:
- (a) The standard of review;
 - (b) Whether Mr. Falconer contravened section 480(1)(a) of the *Insurance Act*;
 - (c) The appropriate sanction if Mr. Falconer contravened section 480(1)(a) of the *Insurance Act*.

Summary of Facts

Background

15. Mr. Falconer has held certificates of authority to act as an agent in relation to life insurance and accident and sickness insurance in the province of Alberta since 1985. He has particular experience with group benefits policies. Presently, he focuses on what he describes as a cross-border business and he spends a portion of his time living and working in the United States. He is licensed as an insurance agent in the State of Nevada. He is 72 years old.

16. From November 1999 to March 1, 2011, Mr. Falconer was a plan member under the Mechanical Contractors Association Group Insurance Plan which provided him life, health, dental, disability and accidental death and dismemberment insurance. During most of that period of time he was the servicing agent for that group benefits policy. Mr. Falconer testified he was insured as part of a special class created under the policy for consultants which he believed he may have arranged with the insurer himself when he was the agent for the policy.

GWL Group Benefits Policy

17. In 2010, Mr. Falconer sold a block of his group insurance business to * M.H. The transaction involved 25 to 30 accounts. One of the accounts sold to Mr. *M.H. was the CADA group benefits policy issued by GWL to LS. Mr. Falconer was the servicing agent for LS for the group benefits plan from October 1, 2005 until the time

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

the business was sold to * M.H. Mr. Falconer appeared to have a warm working relationship with * A.S. who was the general manager and a principal of LS

18. In February 2011, Mr. Falconer's coverage was ending under the Mechanical Contractors Association Groups Insurance Policy because of his age. He approached Mr. * A.S. and they discussed Mr. Falconer's insurance situation. As a result, * A.S. extended an offer to him to participate as a plan member under LS's group benefits plan. Mr. Falconer and LS entered into an Agreement as of February 8, 2011 ("Agreement"). The one page Agreement provided:

Falconer agrees to provide up to 25 hours per week as requested of consulting in the areas of Human Resources, Benefits and Pensions at no charge to Lone Star in exchange for being enrolled with full access to all benefits under Lone Star's CADA 360 benefit plan #340617 as at March 1, 2011 forward.

A separate consulting class will be set up through Great West Life under plan #340617 with Falconer subscribing to a minimum amount of Life, Accidental Death and Dismemberment, and the prescribed Dependent Life along with Health and Dental Care. The cost, once determined will be paid to Lone Star quarterly in advance. [Emphasis added].

19. At the hearing Mr. Falconer acknowledges that he did not meet the requirements to participate under LS's CADA group benefits plan with GWL as an "eligible employee" because he did not work the minimum twenty hours a week for LS that was required under the plan and, of course, there was no employer/employee relationship. He testified that it was specifically because of this that the Agreement contemplated a separate consulting class being set up to accommodate him.

20. In taking steps to set up a separate class for himself under the GWL policy, Mr. Falconer pursued the matter without involving * M.H. who was by that time the agent for the LS group benefits plan with GWL.

21. Mr. Falconer emailed directly the GWL account executive responsible for the LS group benefits plan, * K.S. with whom he had a pre-existing relationship from their time working together on various pieces of CADA business including the LS group benefits plan. On February 9, 2011, Mr. Falconer wrote:

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

I have been retained effective March 1, 20[11] as both a HR and Special Projects Consultant for Lone Star. I will be providing 25 hours of weekly service to them. As part of the agreement and package, I will be going on their benefits plan. If it is necessary to set up a separate Class for me, would you please have it initiated and advise accordingly. [Emphasis added]

22. Mr. Falconer admitted that his statement to * K.S. that “I will be providing 25 hours of weekly service to them” was incorrect as the Agreement provided that he would be working “up to 25 hours per week”. He also acknowledged that with this statement, he was indicating to GWL that he met the hours requirement for an eligible employee under the LS group benefits plan. In his evidence he sometimes referred to this statement as a “misrepresentation” other times to it as “being false” and still others as a “typo”.

23. Mr. Falconer testified * K.S. failed to get back to him on this request concerning the setting up of a new class and Mr. Falconer never followed up with him. In a written statement addressed to the AIC investigator dated February 19, 2014 Mr. Falconer said “Great West Life never notified me that I could not be enrolled, nor did they raise any subsequent objection or request that I withdraw from the plan...I assumed the amendment was made and I was totally compliant”.

24. However, contrary to his testimony and written statements, Mr. Falconer did hear back from * K.S. On the same day, * K.S. responded by email stating in part:

Obviously, the request is ‘a little’ unusual given you have been their CADA benefits advisor. There is a significant out of country risk here that CADA may not want to extend coverage for. I am working on it and will let you know soon.

25. In response, Mr. Falconer wrote back to him, also the same day, stating:

Since there is a Hassel (sic) over consulting, even though I have accounts with consultants in them and I can name off more that have the same status, and regardless they have full entitlement to all benefits. To alleviate this I am being hired as an employee meeting all of the hourly requirements! [Emphasis added]

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

26. Mr. Falconer acknowledged that the statement: "I am being hired as an employee meeting all of the hourly requirements" was not true. The evidence was it was never intended that he would be an employee of LS nor was he.

27. * K.S. testified that upon receiving this email he understood that Mr. Falconer would be meeting the requirements of an eligible employee under the LS group benefits plan and it was no longer necessary to pursue the creation of a separate class for him. As a result of receiving that email * K.S. said he "washed his hands of it". He had made internal inquiries and been advised that LS could enroll whomever it wished under the plan provided that person met the requirements of an eligible employee. In his view, plan administration, was not his role. Enrollment under the plan was the responsibility of LS.

28. On February 10, 2011, * P.G., who, as stated, is the LS payroll and benefits administrator, emailed Mr. Falconer an enrollment form for the GWL group benefits plan. On February 13, 2011 he emailed her back stating "...my Blue Cross...is primary payer for prescriptions and most procedures. And I will have the minimum life, ADD with no disability". He then stated "Call me to discuss when you enter me on the systems as an (sic) part time employee with 25 hours per week on average for the sake of the system". Mr. Falconer acknowledged that this statement was also incorrect as he was not a part time employee with an average of 25 hours per week nor was he intended to be.

29. * A.S. provided * P.G. a copy of the Agreement and when she received the email from Mr. Falconer she set about enrolling Mr. Falconer under the GWL policy as an employee. She testified at the time she was relatively inexperienced with group benefits insurance policies and was unfamiliar with the concept of special classes. She testified that as part of the GWL computerized enrollment system "earnings" were a required input. She stated that in previous cases where compensation was unknown at the time of enrollment (for example, in the case of a commissioned sales person) GWL had told her to enter \$25,000.00 initially in the system but she would later vary the amount based on T4s. Although her understanding was that Mr. Falconer would be receiving no "earnings" under the Agreement, she entered the \$25,000.00 amount to meet the requirements of the system. It was she who determined the \$25,000.00 amount and

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

not Mr. Falconer. She did not think it made any difference what amount was entered as it was as her understanding that the level of earnings would have no bearing on Mr. Falconer's entitlements under the GWL policy. She simply entered an amount for administrative convenience.

30. Even though it was * P.G. who determined the \$25,000.00 "earnings" amount entered in the GWL system, Mr. Falconer filled out and signed the application form to be enrolled with the plan dated February 14, 2011 which stated his earnings were \$25,000.00 per year and his occupation was "HR Specialist". * P.G. testified that Mr. Falconer would have filled out the application himself. The form provided that "I certify that the information given is true, correct and complete to the best of my knowledge". Mr. Falconer acknowledged that it was never intended that he would make any earnings under the Agreement.

31. The handwritten earnings amount written on the application form is unclear in some copies. At one point in the proceedings Mr. Falconer was under the impression that the handwritten amount was \$2,500.00. He offered an explanation for why he entered the \$2,500.00 amount on the application form saying it was the amount of the estimated remuneration if in fact a consulting fee had been paid to him by LS. He now acknowledges the handwritten amount is \$25,000.00. As a result, the explanation offered for the \$2,500 amount would also appear to be untrue.

32. As to whether any work was actually performed under the Agreement by Mr. Falconer, there was evidence he provided some emails and memoranda to * A.S. concerning various insurance issues from the period 2009 to 2012. He also testified that he would provide * A.S. telephone advice on various issues when requested. Mr. Falconer testified he evaluated the GWL CADA policy relative to the proposal to switch the coverage to Equitable Life and advised * A.S. as to the relative merits of each plan. This was confirmed by another witness, * A.D. who said he had been told that by * A.S. . However, Mr. Falconer acknowledged that for many weeks, and even months, he provided no services at all to LS under the Agreement.

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

33. It eventually came to * M.H. attention that Mr. Falconer was enrolled as a plan member under the GWL policy issued to LS. Mr. Falconer testified that he advised * M.H. of his consulting relationship with LS in February 2011 and also that he was a plan member under the GWL policy. However, it was clear from his evidence and that of * K.S. that he did not involve * M.H. or tell him about his efforts to set up a special class under the plan. Although Mr. Falconer may have advised * M.H. of his consulting relationship with LS in February 2011 it would be unlikely that Mr. Falconer would have told * M.H. he was a plan member under the GWL policy as he did not involve him in the creation of a special class and none was established. * M.H. testified he did not find out that Mr. Falconer was a plan member until 2012 and the Panel accepts that testimony.

34. * M.H. testified he called Mr. Falconer and advised him he was going to “go to market”, that is, to obtain quotes from other insurers for the LS group benefits business. Part of that process would have involved * M.H. obtaining an employee census from LS which would have shown all the plan members. Shortly after that call, Mr. Falconer called him back and told him he was on the LS group benefits plan. Mr. * M.H. said that this revelation “did not sit well” with him. He contacted GWL and told them he did not agree with Mr. Falconer being a plan member and that if there were any claims associated with him being on the plan he “washed my hands of them”. Mr. * M.H. stated in particular he was concerned that Mr. Falconer did not meet the requirements for an eligible employee under the plan and as a result that might lead to exposure to LS or GWL in the event of a large claim. Because Mr. Falconer was over 65 and * M.H. understood he had property in the United States which he visited quite often and had some health issues he was concerned about the potential for a very large Out of Country claim. * M.H. testified that to his knowledge nothing came from his complaint to GWL.

35. * M.H. further testified that after he went to market with the LS group benefits business he met with * A.H. and * P.G. and explained to them the results of the exercise and also told them that some insurers had raised concerns with Mr. Falconer being on LS’s group benefits plan. He explained to them that unless Mr.

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

Falconer met the requirements of an eligible employee under the plan he should not be allowed to be a plan member. *P.G. denies she was ever told this. *A.S. was not called as a witness.

36. In June 2012, *M.H. was informed that LS was terminating GWL as its group benefits provider and that it would be dealing with a new agent. As of August 1, 2012, Equitable Life was to be the new group benefits provider and Lone Star's new agents were *A.D. along with his business partner *R.M.

Equitable Life Group Benefits Policy

37. *A.D. and *R.M. both testified that as part of the process that resulted in Equitable Life becoming the new benefits provider to LS, they put together a package for insurers to bid on. When they reviewed the employee census data as part of that process, they became aware that Mr. Falconer was a plan member. They knew he was the previous agent for the then existing GWL plan.

38. Both *R.M. and *A.D. testified that they had concerns with Mr. Falconer being a plan member. *A.D. said he advised *A.S. that the chance that a large claim made by Mr. Falconer under the policy would be paid "would be nil" because the insurer would require proof of the employer/employee relationship.

39. *R.M. testified that he advised *A.S. that there was significant reputational and financial risk to LS if a claim was made by someone who was found to be ineligible under the policy. As a result of giving this advice to *A.S. both he and *A.D. were under the impression that Mr. Falconer would not be allowed to continue as a plan member under the new plan with Equitable Life. They were not asked by LS to pursue the creation of a separate class for consultants with Equitable Life to accommodate Mr. Falconer and they did not do so.

40. However, Mr. Falconer did enroll as a plan member under the new Equitable Life group benefits policy. In July 2012, Mr. Falconer completed an enrollment form provided to him by LS. The form stated that Mr. Falconer's earnings were \$25,000.00 per year. The evidence was that the earnings amounts were pre-populated on the forms

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

based on previous GWL records. The space on the form identifying “occupation” was left blank. The form stated Mr. Falconer was a member of class “A” or the employee class under the plan. The form provided “I certify that all of the information given on this form is true, correct and complete”. Equitable Life advised it later requested the missing information as to occupation and it was told he was a “consultant”.

41. Mr. Falconer testified that when he was provided the pre-printed form he contacted *P.G. and he pointed out to her that the salary amount was not correct.

*P.G. said she had no recollection of that conversation although she did recall him approaching her about the matter after the investigation was started.

42. In the context of the appeal of the Decision, *P.G. signed an undated letter addressed to the Superintendent of Insurance which stated, similar to Mr. Falconer’s testimony, that he had approached her with concerns about the salary amount on the form and the fact he was listed as a member of the employee class at the time of enrollment. Under cross examination by the Life Insurance Council, *P.G. stated that the letter had been drafted by Mr. Falconer for her signature and she confirmed she had no recollection of that interaction.

43. As agents, *R.M. and *A.D. were not informed of the plan members that were actually enrolled under the group benefits policy issued by Equitable Life. They testified they did not find out that Mr. Falconer was a plan member under the group benefits policy issued to LS by Equitable Life until after the AIC investigation into Mr. Falconer had started.

Premiums and Claims

44. In terms of premiums and claims experience under both the GWL and Equitable Life group benefits plans, the evidence was Mr. Falconer paid the premiums and his only claims under the plans related to some prescription drugs.

Investigation

45. In 2013, *M.H. approached the AIC with a complaint concerning Mr. Falconer and the AIC opened an investigation.

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

46. In response to an inquiry from the AIC investigator, Equitable Life stated that it did not have any document:

confirming Equitable Life's knowledge about the relationship between Mr. Falconer and Lone Star Inc. We identified one person who may have been aware of this relationship and it is *J.S. who is no longer employed by Equitable Life *J.S. was a Group Marketing Manager with Equitable Life.

47. Mr. Falconer testified that he spoke to *J.S. after Mr. Falconer became aware of the investigation and *J.S. said he knew Mr. Falconer was enrolled as a plan member under the Equitable Life group benefits plan. *J.S. was not called as a witness.

48. On October 9, 2013, Equitable Life advised the AIC investigator that

[i]mmediately after receiving the statements submitted to Alberta Insurance Council by both Mr. Falconer and Lone Star, Equitable Life terminated Mr. Falconer as a plan member under Lone Star [sic]. Equitable Life effectively terminated its relationship with Mr. Falconer by no longer accepting any business from him.

49. Mr. Falconer wrote a letter dated September 5, 2013 to the AIC investigator stating "at no time was it represented that I was an employee of Lone Star Inc." and "at no time did I personally declare that a salary amount or earnings were at \$25000 per annum". He goes on to state "when first completing the Great West application form I did note an amount of \$2500 per year. This was the estimate remuneration if in fact a consulting fee for service would be submitted".

Discussion

Standard of Review

50. Although this is considered a *de novo* appeal,¹ a standard of review analysis must be done by this Panel to determine what deference, if any, is to be given to the Decision.²

¹ *Gilbert v. Alberta Insurance Council*, 2009 ABQB 673 at para. 28.

² *Imperial Oil Resources Ltd. v. 826167 Alberta Inc.*, 2007 ABCA 131 at paras. 8-18; *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, para. 52.

51. The Panel in this case had the benefit of the testimony of seven witnesses, including Mr. Falconer, and a number of additional exhibits at the *de novo* appeal hearing that were not before the Life Insurance Council.

52. Where new evidence or a new issue is raised on appeal with the result that the issue before the appeal panel is new or different than what was considered by the body whose decision is being reviewed, there is no decision on point. As stated by the Court of Appeal, in such circumstances “it is artificial to speak of any standard of review”.³ Rather, the appeal panel considers the issue as a tribunal of first instance. That is the case here where the new evidence is material to both the alleged offence and the appropriate sanction if any. In the result, although mindful of the Decision, the Panel will consider this appeal as a tribunal of first instance.

Did Mr. Falconer contravene section 480(1)(a) of the Insurance Act?

53. In *Roy v Alberta (Insurance Councils Appeal Board)*,⁴ Justice Marceau reviewed the requirements for an offence to be made out under section 480(1)(a) of the *Insurance Act*. These requirements are (1) that objectively one or more of misrepresentation, fraud, deceit, untrustworthiness or dishonesty have been proven; and (2) that the mental element required has been proven. These requirements must be proven on the balance of probabilities.⁵

³ *Kikino Metis Settlement v. Metis Settlements Appeal Tribunal*, 2013 ABCA 151 at para. 13.

⁴ 2008 ABQB 572

⁵ The Life Insurance Council stated in the Decision that there is a requirement “for ‘clear and cogent evidence’ because our findings can dramatically impact an insurance agent’s ability to remain in the industry”. However, the requirement for clear and cogent evidence does not mean that the evidence is to be scrutinized any differently than it should be in any other civil case. In all civil cases evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities. In *F. H. V. McDougall* 2008 SCC); [2008] 3 S.C.R. 41 the Supreme Court of Canada states:

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

14

54. Turning to the first requirement for proving an offence under section 480(1)(a) of the *Insurance Act*,), that objectively one or more of misrepresentation, fraud, deceit, untrustworthiness or dishonesty have been proven, the Life Insurance Council found that Mr. Falconer's conduct amounted to a misrepresentation, dishonesty or untrustworthiness. In determining, based on the evidence before us, whether any of misrepresentation, dishonesty or untrustworthiness have been proven objectively, the Panel considered the following definition of these terms.

55. To "misrepresent" is defined in the Oxford Canadian Dictionary as "to represent wrongly; give a false or misleading account or idea of". Black's Law Dictionary (6th Edition) defines misrepresentation, in part, as "[t]hat which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead".

56. "Dishonesty" is defined in the Oxford Canadian Dictionary as "a lack of honesty, esp. a willingness to cheat, steal, lie or act fraudulently". "Honesty" is defined, in part, as "truthfulness".

57. "Trustworthy" is defined in the Oxford Canadian Dictionary as "deserving of trust; reliable, dependable" and "trust" is defined in part as "reliance on the truth of a statement etc. without examination".

58. The Panel finds it has been proven, and in many cases it has been admitted, that Mr. Falconer made a number of objectively false statements in the process of obtaining for himself coverage first under the GWL group benefits policy and then under the Equitable Life group benefits policy.

59. First, he stated to *K.S. at GWL, in attempting to have a special class set up for himself under the LS group benefits policy, that he would be providing "25 hours of weekly service" to LS. He admitted this was a false statement.

defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

60. Then, he stated to *K.S. he was “being hired as an employee meeting all of the hourly requirements”. The evidence was it was never contemplated he would be hired by LS as an employee and he knew he did not meet the eligibility requirements of an employee under the plan.

61. Next, he appeared to counsel } *P.G. who was relatively inexperienced with group benefits policies, to “enter me on the systems as (sic) an part time employee with 25 hours per week on average for the sake of the system”. Again, this representation was made with the full knowledge that the statements as to hours and employment status were incorrect.

62. He then filled out an enrollment application for benefits under the GWL group benefits policy stating he made \$25,000.00 per year and certifying the information he was giving was true when he knew it was not. Subsequently, he signed an enrollment form for coverage under the Equitable Life group benefits policy certifying that is was true that he made \$25,000.00 per year which he did not and that he was applying under the employee class for which he knew he was not eligible.

63. These false and misleading statements are sufficient to prove the objective element of the offence. The making of a false statement is in and of itself sufficient to demonstrate the objective component of a misrepresentation under the section. In relation to the allegation of “dishonesty”, false statements are not true and therefore do not demonstrate honesty on the part of the person giving the answer but, in fact, demonstrates the opposite. In relation to “untrustworthiness”, false statements cannot be trusted: see *Roy*, para. 27. Neither can the person making them.

64. Turning to the second requirement under *Roy*, as to the requisite level of intent, Madam Justice Rowbotham, referring to the predecessor section to section 480(1)(a) stated in *Alberta (General Insurance Council) v. Howatt*, that “these allegations require some level of intent; at most that she intended the result or at the very least she acted recklessly”.⁶

⁶ 2000 ABQB 259

65. In considering whether the mental element of the offence has been proven in this case, the Panel finds that Mr. Falconer was motivated to obtain group benefits coverage because his previous coverage was coming to an end in March 2011. Given his age and health situation and the fact that he lived and worked in the United States for a portion of the year, his lack of insurance coverage would have been a serious concern to him.

66. Mr. Falconer was an agent with many years of experience who understood the eligibility requirements under group benefits plans generally and specifically the eligibility requirements of the plans at issue in this case as he had been the servicing agent for one plan and had reviewed the other plan and provided advice to LS in relation to it. He testified he knew he did not meet the requirements of an eligible employee under the GWL policy and this is the very reason why the Agreement with LS contemplated the establishment of a special class for him. The Panel considers that Mr. Falconer knew that each of the objectively false statements he made were false at the time he made them. The misrepresentations were made to different parties over a period of time. They were designed to enable him to obtain insurance benefits for which he knew he did not qualify. In the result, the Panel finds that the intention to misrepresent and act in a dishonest and untrustworthy manner has been proven in this case.

67. As part of these proceedings Mr. Falconer also made a number of statements and representations which were less than truthful. Although we do not consider these statements in the context of whether an offence has been committed under section 480(1)(a) of the *Insurance Act*, we do consider them in the context of the appropriate sanction.

Sanction

68. In terms of the applicable sanctions, we have the ability to levy a civil penalty in an amount not exceeding \$5,000.00 pursuant to s. 13(1)(a) of the *Certificate Expiry, Penalties and Fees Regulation*, A.R. 125/2001, as amended. We also have the ability to suspend or revoke Mr. Falconer's certificate of authority.

69. In determining the appropriate sanction, the Panel takes into account Mr. Falconer's age and that he is nearing the end of a lengthy career as an insurance agent

and has not been subject to any previous disciplinary action. It also takes into account that there was no evidence of actual harm to the insurers or the plan sponsor, LS, as a result of his actions. Further, it also considers Mr. Falconer's argument that in some way he attempted to mitigate the risk of harm to the insurers and LS because he held other Out of Country insurance coverage.

70. Fundamentally, however, in the Panel's view, Mr. Falconer's conduct is deserving of serious sanction. He secured for himself, through a series of misrepresentations that he made to a number of different people, insurance benefits to which he knew he was not entitled. In doing so, he knew he was subjecting the insurers and LS to significant risk. That is true whether or not he held other Out of Country insurance coverage in an attempt to mitigate the risk. The fact that the risk never materialized was merely a matter of chance.

71. The Panel considers that such behavior must be deterred as it serves to undermine the public confidence in the insurance industry in general and insurance agents in particular. The entire insurance industry is built on trust and the concept of utmost good faith and this duty of good faith is owed by every participant in an insurance contract.

72. In addition, Mr. Falconer's lack of truthfulness in his dealings with the AIC and in his testimony raises a concern for the Panel. Examples of this conduct are:

- (a) Mr. Falconer's representations to the AIC during its investigation that "at no time was it represented that I was an employee of Lone Star Inc." and "at no time did I personally declare that a salary amount or earnings were at \$25,000 per annum" which were both patently false.
- (b) Mr. Falconer's fabricated explanation to the AIC and his testimony to this Panel based on his mistaken belief that he had put down \$2,500.00 as opposed to \$25,000.00 for his earnings in a benefit enrollment form.
- (c) Mr. Falconer's testimony and statements that it was GWL that failed to follow up with his request to set up a special class which was shown to be false in light of

the email that he sent to GWL on the very same day that stating he was to be hired as an employee.

73. The Panel is also concerned with Mr. Falconer's dealing with *P.G. in that he appeared to take advantage of her relative inexperience in insurance matters, when he counseled her to enter him into the GWL computer system as a part time employee. He also drafted a letter for her signature that he submitted in these proceedings that did not accurately represent her testimony.

74. Taking all the above into consideration, the Panel is of the view that Mr. Falconer's conduct is inconsistent with the continuing ability to act as an insurance agent and that the only adequate sanction in this case is the revocation of the certificates of authority that Mr. Falconer holds to act as an insurance agent in Alberta.

Appeal Fee

75. Section 24 of the *Insurance Councils Regulation* provides that, in determining an appeal, a panel shall also determine the disposal of the appeal fee paid by the appellant to commence the appeal to one or both of the parties taking into consideration both the results of the appeal and the conduct of the parties. Given the success of the Life Insurance Council in this appeal, in the Panel's view, it is entitled to the appeal fee.

* To protect the privacy of third parties their personal information has been removed from this record in accordance with section 40(4) of the Freedom of Information and Protection of Privacy Act.

Order

76. For the above reasons, it is ordered that:

- (a) The Decision is confirmed and the appeal is dismissed;
- (b) The appeal fee is to be paid to the Life Insurance Council forthwith.

DATED at Calgary, Alberta, this 2nd day of July, 2015.

INSURANCE COUNCILS APPEAL BOARD OF ALBERTA

Per: _____
Julie G. Hopkins – Panel Chair

Authorized to sign for:

Per: _____
David Brittain – Panel Member

Authorized to sign for:

Per: _____
Oscar Buera – Panel Member

Appearances:

Mr. W. Martinson	on behalf of the Life Insurance Council
Mr. Arney Falconer	on his own behalf