

## Disclaimer

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**Financial Services  
Commission  
of Ontario**  
5160 Yonge Street,  
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**REGARDING** the *Insurance Act*, R.S.O. 1990, c.1.8, as amended (the “Act”), in particular, sections 393(9) – 393(11)

**AND REGARDING** a hearing concerning the suspension or revocation of the licence of Arnold Santos Africa

## DECISION and ORDER

### Introduction:

Pursuant to a Notice of Hearing dated August 29, 2011, an Advisory Board was duly appointed under section 393(9) of the Act. The hearing was conducted on January 19, 2012.

The allegations were set out in Schedule “1” as attached.

The report of the Advisory Board is attached.

Findings of Fact

The Advisory Board recommended that Mr. Africa's licence be suspended for a period of two months.

#### Recommendation of the Advisory Board:

The Advisory Board recommended that Mr. Edge's licence be suspended for a period of nine months.

The Advisory Board set out the factors it considered in recommending this penalty. Reference was made to other cases, in particular, *Conklin, Rutgers, Gualtieri, Agpaoa and Gillespie*. The Advisory Board noted the following factors that it considered in making its recommendation for this case – the length of time without insurance coverage, degree of co-operation with the Commission, awareness of the absence of E&O insurance, and whether business was conducted without E&O insurance. The Advisory Board considered Mr Africa's statement that he was under severe personal and financial strain and the period of time during which the Commission was aware of his non-compliance with the E&O insurance requirement as a mitigating factors.

#### Decision:

The Advisory Board has found that Mr. Africa failed to maintain errors and omissions insurance and failed to respond promptly to the Commission.

Errors and omissions insurance is necessary to protect consumers from negligence by insurance agents. Insurance agents without errors and omissions insurance may not have sufficient assets to indemnify policy holders or applicants for insurance from such losses. Errors and omissions insurance coverage is provided on a "claims made" basis, and accordingly claims related to business done in prior years can be made regardless if the agent is or is not doing business in the current year. These claims would only be covered if an insurance policy is in force at the time the claim is made. Accordingly insurance agents that do not have errors and omissions insurance cannot be allowed to be engaged in the business of insurance.

Agents are required to attest on their licence applications to having errors and omissions insurance and to maintain it. Accordingly this requirement is plainly acknowledged by agents when they apply for their licences. In this case, Mr. Africa was also aware he did not have E&O insurance and made a conscious decision not to purchase the insurance.

The purpose of penalties is to correct behaviour of the agent and to set an example for the industry.

Penalties ordered in previous cases related to maintenance of errors and omissions insurance have ranged from licence revocation to licence suspension. Generally where there was a finding of lack of suitability as a result of the failure to maintain errors and omissions insurance and the failure to facilitate an examination, revocation of the

agent's licence has been ordered. In other circumstances, a period of suspension has been ordered.

The Advisory Board has not concluded that Mr. Africa is unsuitable to be a life insurance agent, and accordingly it recommended a period of suspension rather than revocation of his licence. I agree that a period of suspension is required.

I disagree with the Advisory Board that the timing of enforcement action by the Commission is relevant in assessing the responsibility of the agent for non-compliance. The obligation to comply is entirely that of the agent. It is unclear from the Advisory Board report what, if any, impact this might have had on the recommended penalty.

The Advisory Board noted several cases that it used as a reference. These cases reflect two important considerations – the extent of the period of contravention of the law and whether the agent responded to the authority of the Superintendent.

Both the *Rutgers* and *Conklin* orders imposed periods of suspension of nine months, a requirement to take a course in professional ethics and an obligation to provide proof of E&O insurance. These cases involve some significant differences from the facts of this case. The *Rutgers* and *Conklin* cases reflect a knowing disregard of the authority of the Superintendent which is not present in this case. These cases also reflected the lapse in E&O insurance for significantly longer than this case. The cases also differ in that Mr. Africa ultimately acquired E&O insurance without requiring an order of the Superintendent.

However this case reflects a knowing failure to comply with the law and a risk to any clients who made a claim within the period that Mr. Africa was uninsured. This is a claims-made insurance policy and accordingly a risk to clients existed regardless whether business was conducted.

While the circumstances in many cases warranted revocation of the agent's licence, where suspension were appropriate, a period of three months has commonly been ordered in recent years. The *Gualtieri* and *Agpaoa* cases resulted in orders for suspension for periods of three months. I agree with the Advisory Board's recommendation about a period of suspension of two months in light of the degree of co-operation with the Commission that Mr. Africa demonstrated.

## **ORDER**

Accordingly, the life insurance agent licence of Mr. Arnold Santos Africa is hereby suspended for a period of two months commencing June 1, 2012 by this order.

Dated at Toronto, this twenty seventh day of April, 2012

*Original Signed By*

Grant Swanson  
Executive Director, Licensing and Market Conduct  
by delegated Authority from  
Superintendent of Financial Services

## **Schedule 1**

The following allegations were set out in the Notice:

1. Africa has failed to maintain appropriate errors and omissions insurance ("E&O"), as is required by section 13 of Regulation 347/04.
2. Africa is not amenable to regulation, pursuant to sections 4(1) (i) and 8(d) of Regulation 347/04. Africa refused to provide information and provide an explanation for his not having E&O insurance coverage.
3. As a result of the above violations, he is not suitable to maintain his licence pursuant to section 4(1) (i) of the Regulation.
4. Such further allegations as counsel for FSCO may advise.

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