BEFORE ALLAN L. MCVEY, INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA

Roger Holley,
Complainant,

v.

Admin. Proceeding No. 24-IC-159341

Farmers & Mechanics Fire and Casualty Insurance Company,
Respondent

FINAL ORDER

The undersigned, Insurance Commissioner of the State of West Virginia, does hereby adopt and approve the Recommended Decision of the Hearing Examiner, appended hereto, as well as the findings of fact and conclusions of law therein contained. The Complainant, Roger Holley failed to prove, by a preponderance of the evidence, that Respondent, Farmers & Mechanics Fire & Casualty Insurance Company violated West Virginia Unfair Trade Practices Act.

The Commissioner's final orders are subject to judicial review by the Intermediate Court of Appeals as set forth in W.Va. Code § 51-11-4(b)(4). Any person aggrieved by this Order may, **within 30 days of the entry of the judgment being appealed**, file an appeal as set forth in W.Va. Code § 33-2-14 and Rule 5(b) of the West Virginia Rules of Appellate Procedure.

THEREFORE, it is **HEREBY ORDERED** that the Complaint by Roger Holley is denied.

The objections of any party aggrieved by this Order and to the Recommended Decision herein adopted are preserved.

ENTERED this 5th day of June, 2024.

Allan L. McVey

ALLAN L. MCVEY, CPCU, ARM, AAI, AAM, AIS.
INSURANCE COMMISSIONER

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RECOMMENDED DECISION OF THE HEARING EXAMINER

On April 10, 2024, a hearing was held before Hearing Examiner Mark W. Carbone, Esq. at the Offices of the Insurance Commissioner, in Charleston, West Virginia. There then being present on behalf of Farmers & Mechanics Fire and Casualty Insurance Company, (hereinafter "Respondent") was Mr. Daniel T. Lemasters, Esq., Ms. Rose Casey, and Mr. Arnold Cooper (via telephone). Mr. Roger Holley (hereinafter "Complainant") appeared pro se. Ms. Nikki Holley was also present at the hearing.

Statement of the Case

This matter arises out of a first party complaint filed against Respondent alleging it violated West Virginia Code Unfair Trade Practices Act.

Findings of Fact

1. On September 15, 2023, the Complainant and his family were on vacation in the Smoky Mountains of Tennessee. (Tr. P. 5-6)

2. The Complainant's vehicle was the second vehicle back from a redlight, when a car turned right into the Complainant's vehicle. After the accident, the Complainant called 911. The next action the Complainant took was to call the Respondent to report the accident. (Tr. P. 6)

3. According to the testimony of the Complainant, he had to argue with the adjuster on the phone concerning the condition of his vehicle. He informed the adjuster that the vehicle was not in any condition to be driven at that time. Eventually, the Complainant was able to convince the adjuster that the vehicle could not be driven, so the adjuster authorized that the vehicle be towed and made a rental car available to the Complainant.[1] (Tr. P. 7)

4. According to the evidence, the Respondent initially told the Complainant that there was a $500.00 deductible that would have to be paid by the Complainant. (Tr. P. 7)

5. It was later determined that the driver of the other vehicle did not have insurance. In addition, the driver of the other vehicle did not have a license. (Tr. P. 7)

6. The Complainant instructed the Respondent to have his vehicle towed to Geer Brothers in Huntington, West Virginia, to be repaired. While at Geer Brothers, the Respondent sent an estimator, Mr. Call, to determine the repair costs. The Complainant then reviewed the estimate and stated that he believed that his vehicle had sustained damage to its frame. (Tr. P. 8)

7. Once the initial estimate was obtained, the Respondent issued a check for the repair amount of $9,280.71. The initial payment was reduced by $500.00 to cover the deductible for collision coverage. At this point fault had not been determined. The Complainant was upset that the Respondent would not take his word that he had not been at fault. (Tr. P. 24, 58-59; Ex. 1)

8. A couple of weeks after the accident, the Complainant obtained the police report. The report indicated that the Complainant was not at fault for the accident and the other driver did

[1] The Complainant stated the car provided by the Respondent was very small, making it difficult to transport him and his family home to West Virginia. (Tr. P. 8)

not have insurance. The deductible for uninsured coverage under the Complainant's policy was $300.00. The difference between the two deductibles was refunded to the Complainant on October 3, 2023. Tr. P. 72-73; Ex. 12)

9. The Respondent contacted Mr. Call and asked him to prepare a supplemental estimate. When Mr. Call contacted Geer Brothers he was told that there could not be another estimate until the vehicle was broken down. (Tr.. P. 62-63; Ex. 7)

10. On October 5, 2023, the Respondent sent an email to the Complainant indicating that Mr. Call was not able to get a supplemental estimate because the Geer Brothers were waiting for additional parts before work could begin. (Tr. P. 64-65; Ex. 8)

11. On January 30, 2024, the Respondent's adjuster, received the supplemental estimate. This estimate increased the cost of repair an additional $8,355.98. (Tr. P. 66-67; Ex. 10)

12. According to the testimony of the Complainant, the repairs took six months to complete. In addition, the vehicle had been towed to Walker Dodge for repairs that could not be done by the Geer Brothers.

13. The Respondent informed the Complainant that the delay in the repairs was attributed to the delay in obtaining parts to do the repairs at Geer Brothers. In addition, the vehicle spent a considerable amount of time at Walker Dodge. (Tr. P. 26, 43)

14. The Complainant challenged the explanation of the delay being caused by Geer Brothers inability to obtain parts, since he stated, after doing some research, that the parts were available online. (Tr. P. 32)

15. While the Complainant does not blame the Respondent for the delay in obtaining parts, he did state that the Respondent should have been more proactive in having the repairs done more quickly. (Tr. P. 32-33)

16. The Complainant's vehicle was sent to the Walker dealership on two occasions. The first time it went to Walker Dodge was due to an error code on the air ride suspension. The vehicle was there for a month before the error was cleared. The second visit to Walker Dodge was to have the draft shaft installed. (Tr, P. 94)

17. Another complaint by the Complainant is that he had not authorized the transportation of his vehicle to Waker Dodge. The Complainant asserts that the Respondent must give permission for the car to be removed from Geer Brothers. According to Mr. Cooper, once the vehicle is delivered to the mechanic repair shop and the Complainant gives permission for the car to be repaired, there is no obligation for Geer Brothers to obtain permission to send the vehicle to another repair shop. (Tr. P. 11-12)

18. The Respondent paid the towing bill when the vehicle was transported from Tennessee to Huntington. The Respondent paid $2,148.00 for the towing. (Tr. P 57-58)

19. At some point, the Complainant told Mr. Cooper, that his vehicle had been damaged while it was being towed. He was not sure whether it occurred during the initial tow from Tennessee or when it was towed to Walker Dodge. This amount paid for towing was contained in the first estimate. (Tr. P. 99; Ex, 1)

20. The Complainant's vehicle was picked up by the Complainant on February 22, 2024. When he had an opportunity to inspect his vehicle, he noticed that there were problems with the paint repair on the vehicle's fender and hood. He also noticed that there was a different bulb in one of the headlights. (Tr. P. 10, 96)

21. Another issue raised by the Complainant was a charge he received for the betterment of a tire. The Complainant could not understand, that when a tire was damaged in an accident, which was not his fault, how a new tire could be considered a betterment.

22. The Respondent was asked why it charged betterment for the tire. The response was that the Respondent was relying on the estimator who determined that replacing the tire would be a betterment. The Complainant did not present any records to indicate that the tire on his vehicle was new. (Tr. P. 79)

23. At one point the Complainant asked for diminished value for his vehicle. The reason for this was because the Complainant believed that his vehicle should be totaled. Part of his belief was that there was allegedly damage to the frame of the vehicle. The Respondent offered the Complainant $1,500.00 for diminished value. (Tr. P. 14)

24. The Complainant hired an estimator on his behalf. The Complainant's estimator stated that the Complainant was entitled to $6,000.00 in diminished value. The Respondent raised its offer, but the Complainant stated that the Respondent was not in the ballpark. (Tr. P. 14-15)

25. During his testimony, the Complainant stated that he had called Mr. Cooper fifty times and only once did Mr. Cooper return his call in a timely manner. He testified that sometimes it would be a couple of days or even a week before Mr. Cooper would call him back. However, the Complainant stated that Mr. Cooper sometimes responded by email. The Complainant did not present any evidence to support his contention about the number of phone calls. (Tr. P. 16-17, 33-34)

26. Ms. Rose Casey, a Litigation Claims Specialist for the Respondent, testified that she has reviewed the casefile and did not see that the Complainant made fifty calls that Mr. Cooper

did not respond to in a timely manner. She went on to testify that she did not see any gaps in the communication between Mr. Cooper and the Complainant. (Tr. P. 52-53, 75-76)

27. Ms. Casey stated that it was the Respondent's policy to return phone calls the same day or the next day, depending on the time the call was received. (Tr. P. 81-82)

28. According to the testimony, the Complainant's blue book value for his vehicle was $34, 000.00 and the initial repair cost was approximately $9,000.00. The second estimate for the repair cost was another $8,355.98. The total cost for the repair was nearly $18,000.00. (Tr. P. 66-69, 93; Ex. 7, 9)

Issue

Whether the Respondent violated the West Virginia Code Unfair Practices Act, if so, what is the remedy?

Burden of Proof

The Complainant has the burden of proof to prove, by a preponderance of the evidence, that the Respondent violated the insurance laws of the State of West Virginia.

Jurisdiction

The West Virginia Offices has jurisdiction over this matter under West Virginia Code § 33-2-3.

Analysis

The Complainant raises several issues during his testimony. Each issue will be addressed below.

The first issue raised by the Complainant is the fact that it took six months to get his vehicle repaired. The vehicle was involved in the accident on September 15, 2023, while he and his family were vacationing in the Smoky Mountains of Tennessee.

Once the Complainant contacted the Respondent to report the accident, and it was determined that the vehicle could not be driven any distance, the Respondent provided the Complainant with a rental car. In addition, the Respondent arranged for the Complainant's vehicle to be towed to Huntington, West Virginia. The vehicle was taken to the Geer Brothers in Huntington. The reason the vehicle was taken to the Geer Brothers was due to the request of the Complainant. In other words, the Complainant picked that place to have his vehicle repaired.

Once the vehicle was at Geer Brothers, it took over five months to repair the vehicle. The accident occurred on September 15, 2023, and the Complainant did not pick up his vehicle until February 22, 2024.

The Complainant's main complaint against the Respondent concerning the amount of time it took to repair his vehicle was that Mr. Cooper was not proactive enough with Geer Brothers. He believed that Mr. Cooper could have put more pressure on Geer Brothers to complete the repairs.

It is unknown whether additional pressure by Mr. Cooper would have made the repair faster since the main excuse by Geer Brothers was the difficulty they were having obtaining parts. In addition, the vehicle spent a considerable amount of time at Walker Dodge, which was out of the control of Geer Brothers.

There is no doubt that it took an extraordinary amount of time to make the repairs, but the blame lies with Geer Brothers and not with the Respondent. A small part of the blame can be assigned to the Complainant, since he was the one who wanted the repairs to be done by Geer Brothers in the first place.

The Complainant's next complaint deals with the allegation that Mr. Cooper did not timely return his calls. The Complainant testified that he had called Mr. Cooper over fifty times. He claims that only on one occasion did Mr. Cooper timely return his call. The only applicable rule to this issue is West Virginia Code of State Rules § 114-14-5.3. which states as follows:

§114-14-5. Standards For The Acknowledgment Of Pertinent Communications.

5.3. Replies to other pertinent communications. -- A reply shall be made within fifteen (15) working days of receipt by the insurer to all other pertinent communications from a claimant which reasonably suggest that a response is expected.

According to the Complainant, Mr. Cooper would take a couple of days to respond. He also stated that he might not call him back for a week. Assuming that the Complainant is accurate in his allegations, Rule §114-14-5.3 only requires a response within fifteen (15) working days. The Complainant's allegation that Mr. Cooper took up to a week to respond, does not violate Rule §114-14-5.3.

Another complaint expressed by the Complainant was the fact that the Respondent initially applied the $500.00 deductible to the car accident. The Complainant's policy states that in a normal collision incident there is a $500.00 deductible but if the owner of the other vehicle does not have insurance, uninsured motorist coverage, the deductible is only $300.00.

The Complainant questioned the application of the $500.00 deductible from the first payment made by the Respondent to repair his vehicle. He stated that the Respondent should have taken his word that the other driver was uninsured. The Respondent did not take the Complainant's word and waited for the police report to verify that the other driver was uninsured.

Once the Respondent verified that the driver of the other vehicle was uninsured, the Respondent refunded the $200.00. While I can understand why the Complainant believes that the

Respondent should take his word about the other driver, failure to do so is not a violation of the Unfair Trade Practices Act.

The next concern expressed by the Complainant was that his car was damaged during towing. It was unclear whether the damage occurred when the vehicle was brought back from Tennessee or when it was towed to Walker Dodge.

If the damage was done when the vehicle was taken to Walker Dodge, the Complainant's position was the damage should not have occurred because he never authorized his vehicle to be transported to Walker Dodge. It was explained during the hearing that the decision to send the vehicle to Walker Dodge was made by Geer Brothers and not by the Respondent. When the vehicle was initially taken to Geer Brothers, the Complainant signed an authorization for Geer Brothers to repair the vehicle. There were no restrictions in the release. Geer Brothers made the decision to send the vehicle to Walker Dodge and did not need the permission of either the Complainant or the Respondent

The Respondent paid for both times the vehicle was towed and for the damage done to the Complainant's vehicle due to towing. It does not appear that the Respondent has any other responsibilities as to the towing or the damage that may have occurred during the towing,

The next concern raised by the Complainant is that his vehicle was not totaled. He bases his contention on two issues, damage to the vehicles frame and that the cost of repairing the vehicle is more than the market value of the vehicle. The relevant West Virginia Code Section is as follows:

§46A-6-107a. Used motor vehicles sold "as is".

(c) For the purposes of this section, a used motor vehicle is a "total loss" only if:

(1) There is material damage to the vehicle's frame, unitized structure, or suspension system; and

(2) The projected cost of repairing the damage exceeds the market value of the vehicle at the time of the incident causing it to be declared a total loss.

The first issue to address is whether there is material damage to the vehicle's frame. The Complainant's belief is that since the bill for repairs indicated that there were four work hours spent on the vehicle's frame, there was material damage to the frame. According to the testimony of the Complainant, there were notes that indicated that some work had been done on the frame but not what kind of work was done. There was no evidence presented to indicate what, if any damage, was done to the frame, only that four hours of work were spent on the frame. Without evidence that the vehicle's frame had material damage, there is no proof that, under this West Virginia Code subsection, the vehicle should have been totaled.

As to the next section of the Code, West Virginia law requires that the cost of repairs exceed the market value of the vehicle for the vehicle to be totaled. It is the position of the Respondent that a vehicle can be totaled if the repair cost is over seventy-five per cent (75%) of the market value of the vehicle. The Respondent's position is more favorable to the Complainant than West Virginia law.

The Complainant's vehicle's market value is $34,000.00 and the total repair costs for both the first and second estimates were approximately $18,000.00. The total repair costs as a percentage of the value of the vehicle was 53%. This percentage does not require the vehicle to be totaled under the Respondent's position nor under state law. Therefore, this complaint by the Complainant is not supported by the facts or the law.

The next issue raised by the Complainant was that he should not have been charged with betterment for the tire that needed to be replaced. The Complainant claimed that there was a new tire on his vehicle, which was damaged during the accident. The Complainant did not present any

evidence to prove that there was a new tire on his car prior to the accident. Without proof that the tire was new, the Respondent is well within its rights to claim a betterment in the tire that was damaged, since the Complainant's policy does not allow for betterment coverage.

The final issue raised by the Complainant is the diminution of value of his vehicle following the accident. The West Virginia Supreme Court of Appeals, in Tom Ellis and Mara Ellis, his wife v. Honorable Charles E. King; JMI Transport, Inc. and Hamilton 184 W. Va. 227; 400 S.E.2d 235 (1990), held the following:

> Not all damage to a vehicle would allow the plaintiffs to recover for diminution in value. First of all, there must be actual proof that the value was diminished following repair. Secondly, we require that the damage be structural, something that is integral to the structure of the vehicle. For example, if an automobile is sideswiped and, as a result, the right front panel of the car must be replaced, diminution in value would not be permitted. However, if the frame of a car is damaged and would affect the future use of the vehicle even after repair, then diminution in value is recoverable. Finally, we note that only a vehicle with significant value prior to the accident is subject to recovery. Frankly, a vehicle that is so old or in such poor condition as to have minimal value will not be subject to recovery for loss or diminution in value.

It was the Complainant's position that the diminished value of his vehicle was $6,000.00. The Complainant reached this conclusion based on research he had conducted and by talking to a person who does auto adjusting. He also claimed that he had hired an independent inspector to help determine the diminution of value. None of the sources relied on by the Complainant were put into evidence by the Complainant other than his testimony.

The Respondent initially offered the Complainant $1,500.00 for diminished value. Eventually, Respondent offered the Complainant $3,000.00. As of the time of the hearing, the Complainant was maintaining his demand for $6,000.00.

In Ellis, the Supreme Court requires that there be actual proof that the value of the car was diminished after the repair. In addition, the Court requires that the damage be structural for the

Complainant to recover. The Complainant failed to meet his burden of proof to show that the value of his vehicle was diminished and did not prove that the damage sustained in the accident was structural.

Conclusions of Law

The following are made as conclusions of law:

1. The West Virginia Offices of the Insurance Commission has jurisdiction over this matter by virtue of West Virginia Code Chapter 33.

2. The Complainant has the burden to prove by a preponderance of the evidence that the Respondent violated the West Virginia Unfair Trade Practices Act.

3. The Complainant failed to meet his burden of proof, by a preponderance of the evidence, that the Respondent violated the West Virginia Unfair Trade Practices Act when the repair to his vehicle took five months.

4. The Complainant failed to prove, by a preponderance of the evidence, that the Respondent violated West Virginia Code of State Rules § 114-14-5.3, since the Respondent returned his calls within fifteen (15) working days.

5. The Complainant failed to prove, by a preponderance of the evidence, that the decision by the Respondent to initially apply the $500.00 deductible prior to receipt of the Police Report violated the West Virginia Unfair Trade Practices Act.

6. The Complainant failed to prove, by a preponderance of the evidence, that the damage incurred to his vehicle while being towed, was a violation of the Unfair Trade Practices Act.

7. The Complainant failed to prove, by a preponderance of the evidence, that the Respondent violated West Virginia Code § 46A-6-107a when it determined that the Complainant's vehicle was not totaled.

8. The Complainant failed to prove, by a preponderance of the evidence, that the Respondent's charge of betterment for a tire damaged in the accident was a violation of the West Virginia Unfair Trade Practices Act.

9. The Complainant failed to prove, by a preponderance of the evidence, that he was entitled to diminution of value for his vehicle under the requirements under Tom Ellis and Mara Ellis, his wife v. Honorable Charles E. King; JMI Transport, Inc. and Hamilton.

Recommended Decision

It is recommended that the consumer complaint of Roger Holley against Farmers & Mechanics Fire & Casualty Insurance Company of Pittsburgh be denied.

Respectfully recommended,

Mark W. Carbone

MARK W. CARBONE