

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

PAUL ADKINS,

Complainant,

v.

ADMINISTRATIVE PROCEEDING
NO.: 21-1C-02266

ERIE INSURANCE PROPERTY & CASUALTY 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. It is consequently ORDERED that Complainant, Paul Adkins, failed to prove that the Respondent, Erie Insurance Property & Casualty Company, violated West Virginia Unfair Trade Practices Act. Therefore, the consumer complaint of Paul Adkins against Erie Insurance Property & Casualty Company, and the same, is hereby, denied and dismissed.

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

ENTERED this 13th day of May, 2022.



Allan L. McVey
CPCU, ARM, AAI, AAM, AIS
Insurance Commissioner
State of West Virginia

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ERIE INSURANCE PROPERTY & CASUALTY COMPANY,

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**RECOMMENDED DECISION
OF THE HEARING EXAMINER**

On March 30, 2022, a hearing was held before Hearing Examiner Mark W. Carbone, Esq., at the Offices of the Insurance Commissioner, Charleston, West Virginia. Complainant, Paul Adkins (hereinafter "Complainant") appeared via telephone while his counsel, Samuel Cook, Esq. was present at the hearing. On behalf of Erie Insurance Property & Casualty Company (hereinafter "Respondent") was Matthew Perry, Esq., who was present at the hearing, Steve Rupp and Diana Dunar appeared via zoom.

FINDINGS OF FACT

1. The Complainant resides at [REDACTED], Augusta, West Virginia. The Complainant filed his complaint with the West Virginia Offices of the Insurance Commissioner on November 4, 2021. The Complainant had been insured by the Respondent for fifteen years. (Tr. P. 7, 14-15)

2. In his complaint, the Complainant stated, “Loss of Deke (sp) at my house of 4-19-21 cancellation of my policy after providing info they requested”. (Ex. 11)

3. During the hearing the Complainant testified that his deck collapsed on April 13, 2021. The date that is on the denial letter is April 9, 2021. After his deck collapsed, the Complainant filed a claim with his insurance agent, American Casualty, in Romney, West Virginia. (Tr. P. 8; Ex. 10)

4. The Complainant stated that an engineer was at his home within a day or two of filing his claim. On April 13, 2021, Mr. Raymond Rase, P.E., of SPECS Consulting Engineers and Surveyors, went to the Complainant’s home on behalf of the Respondent for an inspection. The Complainant admitted that the deck construction was faulty. In addition, he stated that the previous owner had built the deck to hide illegal pipes. (Tr. P. 9,11)

5. On April 29, 2021, Mr. Rase prepared a report following his inspection. The report stated that at the time of the inspection the deck attached to the house was not safe to walk on, and that several joists were in a state of decay. In addition, he stated that several of the pressure treated structural members were improperly located up against soil. (Tr. P. 25-26; Ex. 2)

6. In his report, Mr. Rase provided several recommendations to the Respondent. He recommended that the remaining deck be removed and replaced with the use of concrete footings; that the enclosed porch should be shored and underpinned; and, once the deck is complete, repair damaged drywall. There were several pictures attached to Mr. Rase’s report. (Tr. P. 32; Ex. 2)

7. The Complainant’s claim concerning the collapsed deck was denied by the Respondent on May 13, 2021 (Tr. P. 50; Ex. 10)

8. According to the testimony of Stephen Rupp, Senior Executive Resolution Examiner for the Respondent, the policy does not provide coverage when a loss is “caused by,

resulting from, or contributed to or aggravated by ...design, development of specifications, workmanship or construction.” (Tr. P. 48; Ex. 3)

9. In addition to an exclusion for faulty construction, the policy also excludes coverage for inadequate maintenance. (Tr. P. 48; Ex. 3)

10. Once the Respondent received the engineer’s report, it was sent to its claims department. After reviewing the report, the claims department issued a risk report which was sent to the underwriting department. (Tr. P. 22-23)

11. The fact that the deck was unsafe raised new liability concerns with the underwriting department. Once the new liability concerns were raised, a decision was made, that, in order to continue coverage, certain corrective actions must be taken. The Complainant’s policy allows for cancellation when there is an increase in risk. (Tr. P. 25, 27-28)

12. On page forty-nine of the Complainant’s insurance policy it states that the Respondent has the right to cancel the policy if one of ten listed reasons occur. The ten reasons on the policy match the listed reasons found in West Virginia Code §33-17A-5. According to the testimony of Steve Rupp, reason number five allows a cancellation when there is a change in risk that substantially increases the hazard. (Tr. P. 30-32; Ex. 5)

13. The Respondent’s underwriting department prepared a report listing the department’s recommendation of repairs to be sent to the Complainant. (Tr. P. 31-32; Ex. 4)

14. On May 21, 2021, the Respondent sent a letter to the Complainant requiring the Complainant to follow the recommendations listed on Mr. Rase’s report. While the letter did not state that the Complainant’s policy would be cancelled if he did not correct the problem it was implied. The letter gave the Complainant until August 18, 2021, to make the repairs so that the policy can continue to provide coverage. (Tr. P. xx; Ex. 4)

15. The Complainant testified that after receiving the May 21, 2021, letter from the Respondent, he had some friends come over and made three repairs recommended by the Respondent. Once the repairs were made, the Complainant took pictures and took them to his Insurance Agent in Romney, West Virginia. He did not directly contact the Respondent to let it know that the repairs were completed but assumed that his insurance agent would inform the Respondent that the repairs had been made. (Tr. P. 9, 18-19)

16. On October 19, 2021, The Respondent sent the Complainant a Notice of Cancellation. In the Notice, the Complainant was told that his policy would be cancelled effective at midnight on November 23, 2021. The basis of the cancellation was the fact that the Complainant did not inform the Respondent what, if any, of the repairs recommended in the engineer's report were made. (Tr. P. 34; Ex. 6)

17. The Respondent produced copies of emails that were sent to the Complainant's insurance agent. It also attempted to call the agent and, according to Rupp, the agency hung up on the caller. The Respondent was trying to determine whether the Complainant had made the required repairs. The insurance agency did not respond to any of the Respondent's inquiries. (Tr. P. 33; Ex. 8)

18. After receiving the Cancellation Notice, the Complainant contacted his agent to try to determine why his insurance was being cancelled. (Tr. P. 10)

19. The Complainant testified that with the help of his agent he was able to provide the Respondent with pictures showing that the requested repairs had been made. (Tr. P. 16-17)

20. Once the Respondent's underwriting department received information that the Complainant had complied with its repair requirements, the Respondent reinstated the Complainant's policy. The reinstatement was issued on November 9, 2021, prior to the scheduled

cancellation date November 23, 2021. The Complainant admitted that at no point had he lost coverage. (Tr. P. 16, 38; Ex. 9)

21. The Complainant filed his complaint with the WVOIC on November 4, 2021. (Ex. 11)

Issue

Whether the Respondent committed unfair trade practices when it denied coverage for the collapse of a deck on the Complainant's policy and/or when it issued the cancellation letter to the Complainant, and 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 Unfair Trade Practices Act.

Jurisdiction

The West Virginia Offices of the Insurance Commissioner has jurisdiction over this Complaint under West Virginia Code § 33-2-3.

Analysis

Prior to this decision, the undersigned below, issued an Order as to whether the Complainant's allegation in his complaint could be interpreted to include the denial of the Complainant's claim on the collapsed deck at his home, as well as the cancellation of the Complainant's policy by the Respondent. In the Order, it was stated that it was unclear from the plain reading of the complaint form whether the Complainant was complaining about both the denial and the cancellation.

It has been the past practice of the West Virginia Offices of the Insurance Commission to liberally construe the language in the complaint in a manner most favorable to the Complainant,

especially when the Complainant is pro se. While the Complainant had an attorney at the hearing, he was not represented when he filed his complaint. In the earlier decision, the holding was that in this decision it will be determined whether the Respondent's denial of the Complainant's claim was a violation of the Unfair Trade Practices Act.

Both parties were sent a copy of the Order, to allow them to take the interim decision into consideration when preparing their briefs in support of their respective positions.

The first issue to address is whether the Respondent violated the Unfair Trade Practices Act when it denied the Complainant's claim concerning the collapse of his deck. The first issue we normally review on these matters is whether the matter was handled in accordance with West Virginia Code of State Rules § 114-14-6.1 which states as follows:

§114-14-6. Standards For Prompt Investigations And Fair And Equitable Settlements Applicable To All Insurers.

6.1. Investigation of claims. -- Every insurer shall promptly conduct and diligently pursue a thorough, fair and objective investigation and may not unreasonably delay resolution by persisting in seeking information not reasonably required for or material to the resolution of a claim dispute. This section is not intended to conflict with the statutory requirements of the Medical Professional Liability Act, W. Va. Code §§55-7B-1 to 11, as the same relate to the assertion and investigation of medical professional liability claims.

This State Rule requires any investigation to be timely, thorough, fair, and objective. The Complainant testified that the Respondent sent Mr. Rase, from SPECS Consulting, to the Complainant's home within a day or two of filing of his claim. While it isn't clear of the exact day that the deck collapsed, however, based on the evidence, there is no doubt that the Respondent sent an inspector to the Complainant's home within a day or two of the collapse. The engineer completed his report by April 29, 2021, and the denial letter was sent out by May 13, 2021. In other words, from the date of the claim to the issuance of the denial was no more than thirty to thirty-two days. Therefore, the investigation was timely.

The next issue is whether the investigation was thorough. As stated above, the engineer was at the Complainant's home within a day or two of the collapse. The testimony of the Complainant, as well as, the engineer's report, it appears that the investigation conducted at the Complainant's home was thorough. The evidence was that the previous owner had constructed a faulty deck and had done so to hide various run off pipes. The report indicated that Mr. Race looked over the entire area and made conclusions based on the conditions he observed.

Once it has been determined that the investigation was fair, then it must be determined whether the investigation was fair and objective. No issues were raised by the Complainant that would indicate that the investigation was unfair in any manner. It seemed apparent that the Complainant agreed with the engineer's findings, as far as the cause of the damage.

The Complainant admitted that the deck was not constructed properly and that he was unable to properly maintain the deck because the problems were hidden by the previous owner.

Therefore, there is no violation of West Virginia Code of State Rules §114-14-6.1, since the investigation conducted by the Respondent was timely, thorough, fair, and objective.

The next item to consider is whether the Respondent properly denied the claim based on the language of the policy.

On page seven of the Complainant's policy, it allows for exclusions, or items that are not covered under the policy. Under the policy, the Respondent does not pay for damages which are caused by faulty construction. Both Mr. Race, in his report, and the Complainant in his testimony stated that the failure of the deck was related to faulty construction. That by itself would indicate that when the Respondent denied the claim it was correctly based on the exclusion covering damages due to faulty construction.

The Complainant's policy also excludes coverage for deterioration. The engineers report stated that joists of the deck were deteriorating and were no longer serviceable. Due to the fact that one of the reasons that the Complainant's deck failed was due to the deteriorating condition of the deck joists, the denial of the Complainant's claim was proper.

Therefore, there is no evidence that the Respondent's denial of the Complainant's claim violated the Unfair Trade Practices Act or the Complainant's policy.

The next issue to discuss is whether the decision by the Respondent to cancel the Complainant's policy was a violation.

When an insurance policy can be cancelled is determined by West Virginia Code § 33-17A-5 which states as follows:

§33-17A-5. Permissible cancellations.

After coverage has been in effect for more than sixty days or after the effective date of a renewal policy, a notice of cancellation may not be issued unless it is based on at least one of the following reasons:

- (a) Nonpayment of premium;
- (b) Conviction of the insured of any crime having as one of its necessary elements an act increasing any hazard insured against;
- (c) Discovery of fraud or material misrepresentation made by or with the knowledge of the named insured in obtaining the policy, continuing the policy or in presenting a claim under the policy;
- (d) Discovery of willful or reckless acts or omissions on the part of the named insured which increase any hazard insured against;
- (e) The occurrence of a change in the risk which substantially increases any hazard insured against after insurance coverage has been issued or renewed;
- (f) A violation of any local fire, health, safety, building or construction regulation or ordinance with respect to any insured property or the occupancy thereof which substantially increases any hazard insured against;

(g) A determination by the commissioner that the continuation of the policy would place the insurer in violation of the insurance laws of this state;

(h) Real property taxes owing on the insured property have been delinquent for two or more years and continue delinquent at the time notice of cancellation is issued;

(i) The insurer which issues said policy of insurance ceases writing the particular type or line of insurance coverage contained in said policy throughout the state or should such insurer discontinue operations within the state; or

(j) Substantial breach of the provisions of the policy.

The Complainant testified that he had been insured by the Respondent for fifteen years. Therefore, he meets the minimum requirement of having coverage for at least sixty days. Mr. Rupp testified that the Respondent determined that the Complainant's policy could be cancelled based on subsections (e) and (f) of the Code section. The Respondent's position is that the discovery of the faulty construction was a change in the risk which substantially increased the hazard of the insured property. In addition, the Respondent contended that the deck was in violation of construction codes.

Either of these conclusions by the Respondent were sufficient to justify the cancellation of the Complainant's policy. Therefore, the basis of the cancellation is within the limits allowed by law.

The Notice of Cancellation was also proper. In West Virginia Code § 33-17A-4(b) governs the requirements for a notice of cancellation. It states as follows:

§33-17A-4. Notification and reasons for a transfer, declination, termination, or renewal with reduction in coverage.

(b) A notice of cancellation of property insurance coverage by an insurer shall be in writing, shall be delivered to the named insured or sent by first class mail to the named insured at the last known address of the named insured, shall state the effective date of the cancellation, and shall be accompanied by a written explanation of the specific reason or reasons for the cancellation.

The Notice of Cancellation sent by the Respondent was in writing, was sent to the Complainant's last known address, provided the effective notice of cancellation and the specific reason for the cancellation.

Another issue raised by the Complainant was that the policy should not have been cancelled at all since the Complainant had made the required repairs. The Complainant testified that with the help of some friends that he made the repairs and gave pictures to his agent to prove he had made the repairs.

There was no proof offered by the Complainant that the pictures showing the repairs were sent by the agent to the Respondent. However, the Complainant argues that by him giving the pictures to his agent, who is also an agent of the Respondent, he fulfilled his duty to inform the Respondent that he had made the appropriate repairs. Complainant is relying on agency law in support of his position.

It is well settled law in West Virginia that the Complainant's insurance agent is also an agent of the Respondent. Therefore, the actions of the insurance agent are also the actions of the Respondent.

Other facts to consider is that the Respondent attempted to contact the insurance agent via email and telephone to check on the status of the Complainant's compliance with the requested repairs. The agent did not respond to the Respondent's emails and, according to the testimony, someone in the agent's office hung up on a call from the Respondent. In addition, the Complainant admitted that he did not contact his agent to make sure that the pictures were sent to the Respondent. He just assumed that they had been sent. Also, the Respondent did not directly contact the Complainant to ascertain the status of the repairs, but only contacted the Complainant's insurance agent.

Once the Complainant received the Notice of Cancellation, he immediately contacted his agent. Apparently, once he was contacted, the agent did provide the Respondent with the pictures and the Notice of Cancellation was withdrawn. There was no disruption of coverage.

While the law is clear that the Complainant's agent is an agent of the Respondent, and that the Notice of Cancellation should have never been issued, it is difficult to blame the Respondent for the failure of the agent since the Respondent made several attempts to contact the agent without success.

The fact of the matter is that the Notice of Cancellation should never had been issued and it appears that the fault lies directly with the agent. The fact that there was no interruption of coverage and that the Respondent attempted to contact the agent without success is mitigation enough to keep this issue from rising to the level of a violation.

I would encourage the Respondent to examine its relationship with this agent and determine how this issue can be avoided in the future.

Conclusions of Law

The following are made as conclusions of law:

1. The Complainant has the burden to prove, by a preponderance of the evidence, that the Respondent violated the insurance laws of West Virginia.
2. The Complainant failed to prove that the Respondent violated West Virginia Code of State Rules § 114-14-6.1 when he failed to prove that the investigation conducted by the Respondent wasn't timely, thorough, fair or objective.
3. A party to a contract has a duty to read the instrument." Syllabus point 5, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986)

4. A plain reading of the Complainant's policy indicates that the denial of the Complainant's claim was well within the power of the Respondent. The Policy has exclusions when the damage is caused by poor construction or by deterioration. Both of these exclusions were applicable to the claim of the Complainant.

5. West Virginia Code § 33-17A-4(b) governs the requirements that an insurance company must follow when issuing a notice of cancellation.

6. The Respondent followed the requirements of West Virginia Code § 33-17A-4(b) when issuing its notice of cancellation to the Complainant.

7. An insurance agency is an agent of the insurance company and is bound by the actions of the agent.

8. The failure of the Complainant's insurance agent to inform the Respondent of the Complainant's repairs, under agency law, is imputed to the Respondent.

9. The actions of the Respondent to contact the Complainant's agent should be considered mitigation.

10. The Respondent is held responsible for the acts of its agents, however, in this matter and considering the attempts at mitigation by the Respondent, the agents' actions do not rise to the level of a violation.

Recommended Decision

It is recommended that the Complainant failed to prove, by a preponderance of the evidence, that the Respondent violated the Unfair Trade Practices Act. Therefore, the

Complainant's complaint should be dismissed.

Respectfully recommended,



MARK W. CARBONE
HEARING EXAMINER

Date: May 12, 2022