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

PAULETTE GRAHAM,

Complainant,

v. **ADMINISTRATIVE PROCEEDING NO.: 21-IC-02031**

RANDY YOUNG, AGENT FOR WESTERN & SOUTHERN LIFE ASSURANCE COMPANY and WESTERN & SOUTHERN LIFE ASSURANCE COMPANY,

Respondents.

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 Respondent Western & Southern Life Assurance Company, violated W.Va. Code R. §§ 114-8-4.2.a, 114-8-4.2.b and 114-14-5.3 and that Respondent Randy Young violated W. Va. Code R. §§ 114-8-4.2.a and 114-8-4.2.b.

Pursuant to W.Va. Code § 33-12-22 Randy Young is the agent of Western & Southern Life Assurance Company and not the agent of the Complainant.

Pursuant to the Commissioner's authority under W.Va. Code § 33-2-9, it is ORDERED that the Commissioner's Market Conduct Unit conduct an examination of Western & Southern Life Assurance Company with respect to the selling of annuities.

It is further ORDERED that, pursuant to W.Va. Code R. § 114-8-9.4 and W. Va. Code § 33-3-11(b), Western & Southern Life Assurance Company shall pay a penalty to the State of West Virginia in the amount of Five-Thousand Dollars ($5,000.00) within thirty (30) days of the date of this Order.

It is further ORDERED that, pursuant to W. Va. Code R. § 114-8-9.4 and W. Va. Code § 33-11-6 Randy Young shall pay a penalty to the State of West Virginia in the amount of One-Thousand Dollars ($1,000.00) within thirty (30) days of the date of this Order.

Any party aggrieved by this Order may appeal to the West Virginia Intermediate Court of Appeals.

ENTERED this 1ST day of November, 2022.

ALLAN L. MCVEY CPCU, ARM, AAI, AAM, AIS
Insurance Commissioner

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RANDY YOUNG, AGENT FOR WESTERN & SOUTHERN LIFE ASSURANCE COMPANY and WESTERN & SOUTHERN LIFE ASSURANCE COMPANY,

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RECOMMENDED DECISION OF THE HEARING EXAMINER

On April 6, 2022, a hearing was held, before Hearing Examiner Mark W. Carbone, Esq., at the West Virginia Offices of the Insurance Commissioner, Charleston, West Virginia. Paulette Graham (hereinafter "Complainant") appeared via telephone while her counsel, Samuel Cook, Esq. was present at the hearing. On behalf of Western & Southern Life Assurance Company (hereinafter "Respondent") was Joseph Ward, Esq., who was present at the hearing. Appearing on behalf of Randy Young (hereinafter "Young") was Randy Young and Jeffrey Carder, Esq. both appearing in person.

FINDINGS OF FACT

1. The Complainant resides at [redacted] Wyoming. The Complainant filed her complaint on January 17, 2020, with the West Virginia Offices of the Insurance Commissioner (hereinafter "WVOIC"). (Ex. 8)

2. The Complainant's mother is Helen Herring. Ms. Herring purchased an annuity from the Respondent in 2005 for $122,661.83. According to the Complainant, the annuity had a 3.7% interest rate with a 1% interest rate enhancement. Young testified that the 2005 annuity had a 3 % interest rate, not 3.7%. This annuity was fully annuitized in 2016. (Tr. P. 11, 114)

3. Ms. Herring had a business relationship with Young's firm and the Respondent for more than twenty years. (Tr. P. 10-11)

4. Young started working with the Respondent in June, 2006. According to Young, Ms. Herring was originally a client of Mr. Charles Smith, who was an agent in the same office. Once Mr. Smith left employment with the Respondent, Ms. Herring became Young's client. (Tr. P. 11, 65, 67)

5. According to the testimony of Young, he had met with Ms. Herring on January 11 and 12, 2018, to explain the options that she had available for her desired financial planning. Young stated that Ms. Herring's main goal at that time was to get her life insurance policies out of her name and to cash out her annuities. Young provided Ms. Herring with a spread sheet on January 11, and a revised one on the 12th, allegedly reflecting her wishes. (Young took notes of the meeting.) Young also testified that Ms. Herring had been using the interest from the 2005 annuity to pay the premiums on her life insurance policies. (Tr. P. 68-69, 71-74; Ex. Young 1, 3, 4)

6. Later in Young's testimony he stated that Ms. Herring's goal was to be able to pay her premiums and have enough money for her long-term care. (Tr. P. 81-82)

7. Young put into evidence the notes he took during his meeting with Ms. Herring on January 11th and 12th. These notes do not reflect Young's position that Ms. Herring wanted a new annuity. The January 11, 2018, notes do say that Young told Ms. Herring that the interest rate

would be lower, and she could only withdraw 10% a year without penalty. Young testified that he did not recommend that Ms. Herring cash out her annuities due to tax reasons. The January 11 and 12, 2018, notes have the exact date of the meeting on top of the first page of the notes. (Tr. P. 80-81; Ex. Young 1)

8. The notes from the January 12, 2018, meeting indicate that Young gave Ms. Herring two alternatives. While the notes do not reflect the two alternatives, Young testified that the first alternative was to place the annuity proceeds into a bank. The second alternative was to cash out an annuity and use the proceeds to purchase another annuity. (Tr. P. 90; Ex. 3)

9. Young stated that Ms. Herring was a shrewd businesswoman and financially knowledgeable and understood annuities and the alternatives provided by Young. (Tr. P. 70, 91)

10. Young testified that during the January 12, 2018, meeting Ms. Herring decided to put the proceeds from the 2005 annuity into a new annuity and put it in the Complainant's name. This choice is not reflected in the January 12, 2018 notes. (Tr. P. 91; Ex. Young 3)

11. The Complainant testified that Ms. Herring was suffering from Parkinson's disease and was showing early signs of dementia. (Tr. P. 18)

12. On May 18, 2018, Ms. Herring and the Complainant, along with Ms. Herring's other children, met with Young at Ms. Herring's home. It was the Complainant's understanding that the meeting was held so that her siblings could understand their mother's financial situation. She did not believe that the meeting was to discuss possible options as to what to do with the fully annuitized annuity. This was the first time the Complainant had met with Young. According to Young's notes, Young and the Complainant met separately from the Complainant's siblings. (Tr. P. 11, 18, 56-57, 101; Ex, Young 5)

13. The testimony of the Complainant was that during the May 2018, meeting Young advised Ms. Herring to withdraw the 2005 annuity, that was fully annuitized, and put it into an account at Poca Valley Bank. Young then allegedly advised the Complainant to take the proceeds from the 2005 annuity out of the bank and invest it into another annuity in the Complainant's name. Young testified that getting another annuity in the Complainant's name was what Ms. Herring wanted. Ms. Herring withdrew the money, $123,548.55, from the annuity on June 1, 2018, and deposited the proceeds into Poca Valley Bank. (Tr. P. 11, 91)

14. The Complainant claimed that neither the interest rate nor surrender charges were discussed during the May meeting with the Respondent. The Complainant stated that she did not become aware of the interest rate on the second annuity until after she began an investigation after the annuity had been purchased. (Tr. P. 18-20)

15. Young claimed that he had told the Complainant about the interest rate and the surrender charges during the May 18th meeting and again on June 4, 2018, when the Complainant dropped off the check to pay for the new annuity. However, the notes from the May 18, 2018, meeting do not reflect that the interest rate and surrender charges were discussed with the Complainant. In fact, the notes have a June date at the top of the document without citing a specific date in June. The meeting was on May 18, 2018. (Tr. P. 97, 108; Young Ex. 5)

16. Young testified that it was his practice to make notes from any meeting that would indicate that the client wants to make an alteration to an existing contract. He stated that he would prepare those notes either at the meeting, in the car after the meeting or when he returned to the office. The meeting with the family of Ms. Herring occurred on May 18, 2018, however, based on the date found on the notes from that meeting the notes were written sometime in June 2018.[1]

[1] The notes from the May 18, 2018, meeting did not contain an exact date but only stated June. The meetings from January 11 and 12, 2018, contained the exact dates at the top of the notes.

Assuming that date is correct, this means the notes were prepared at the minimum of two weeks after the meeting. (Tr. P. 73; Ex, Young 5)

17. According to Young's notes, the Complainant stopped at Young's office in Elkview to meet with Young. Young stated that the Complainant did not have an appointment, so he was not able to meet with her. He claimed that he had his son, Andrew Young, to assist the Complainant in completing an application. The Complainant denies that she ever met with Andrew Young. The application indicated that it was completed on May 25, 2018. However, the alleged notes from that meeting had the notation at the top which indicates that the meeting occurred in June, not May 25, 2018. (Tr. P. 104-106; Ex. Respondent 1 and Young 6)

18. When the Complainant dropped off the check to fund the new annuity, Young testified that he again went over the terms of the new "fixed annuity" with the Complainant. (Tr. P. 107; Ex. 6)

19. Mr. Andrew Young did not appear at the hearing. (Tr. P. 5, 60)

20. The Complainant stated that she does not remember seeing or signing the application. However, the Complainant admitted that it was her signature on the document. (Tr. P. 34; Respondent Ex. 1)

21. The Complainant admitted that she did sign the section of the application affirming that she had read the application and that her answers and statements are accurate. The Complainant went on to state that she did not read the application and trusted Young. (Tr. P. 28-29; Ex. Respondent 1)

22. On the first page of the application it asks whether the owner of the annuity has any existing annuities. On the Complainant's application, the answer is marked yes. The next question on the form is whether there will be a surrender of an annuity due to the purchase of the new

annuity. The answer marked on that question is no. If the answer had been yes, the applicant is required to list those annuities. This section of the application was left blank on the Complainant's application. The Complainant does not remember reviewing any of these questions. Young testified that if he had completed the application, he would have marked yes on whether there was an annuity being surrendered. (Tr. P. 31-32, 135; Ex. Respondent 1)

23. Page seven of the application warns that if anyone makes a false statement on the application, that person may be guilty of a criminal offense. The attorney for the Respondent asked the Complainant whether she knew it was a crime to submit false information on an application for insurance. The Complainant testified that she was not aware that submitting false information was a criminal offense and asked what she had falsely submitted. (Tr. P. 33; Ex. Respondent 1)

24. Just below the signature line on the application is a statement that purchasing a replacement policy may not be in the applicant's best interest. The statement goes on to state that the applicant should talk with the agent to get information about the applicant's existing annuity. This section then states that the applicant should talk to his agent about any surrender charges. A following section asks if the applicant wants the above section read aloud. On the Complainant's application, it is marked no, with the Complainant's typed initials following the question. The Complainant admits that those are her initials but contends that she was unaware of that this section could be read to her and if she had been aware of that, it would have raised questions to her. (Tr. P. 36-38; Ex. Respondent 1)

25. A section of the Application is titled "Questionnaire for Suitability". The Complainant admitted that it was her signature on this section. However, she stated that she does not remember this section. (Tr. P. 40; Ex. Respondent 1)

26. The Complainant admitted that she does not remember going over the application. She stated that she blindly signed the document, which was her mistake. She did it because she trusted Young. (Tr. P. 39; Ex. Respondent 1)

27. On June 4, 2018, the Complainant withdrew $123,000.00 from the Poca Valley Bank and reinvested the money for a new annuity with the Respondent. The new annuity was in the name of the Complainant and not in the name of Ms. Herring. (Tr. P. 11)

28. According to Young's testimony he told Ms. Herring at the January meeting that she should make a decision about purchasing a new annuity after speaking with a Medicaid expert. (Tr. P. 78; Ex. 3)

29. Young testified that he advised Ms. Herring to contact Mr. Scott Wyant, an alleged Medicaid expert so that she could understand how the purchase of the annuity could affect her Medicaid in the future. When Mr. Young met with the family on May 18, 2018, he also advised them to meet with Scott Wyant. Young does not know whether Ms. Herring or her children ever consulted a "Medicaid Expert". (Tr. P. 77; Young Ex. 1, 2, 3, 5)

30. Young testified that he had referred other clients to Scott Wyatt. Young admitted that he did not know what, if any, qualifications that Mr. Wyatt had as an alleged Medicaid expert. It is unknown how Mr. Wyatt earned the title "Medicaid Expert". (Tr. P. 124; Ex. Young 2)

31. The Complainant alleges that she and Ms. Herring were told by Young that they would be able to access the money to pay for Ms. Herring's home health care. The Complainant testified that she was told by Young that the annuity would be like a checking account. (Tr. P. 11)

32. The Complainant testified that she did not realize that there would be a penalty for any withdrawal until she withdrew money from the new annuity to pay for her mother's health care. She later discovered that there would be surrender fees for the next seven years. In addition,

she claimed that she did not know that the annuity would be at a much lower rate, 2.25%, than the previous annuity. (Tr. P. 23, 49)

33. The Complainant stated in her testimony that she did not know anything about annuities and did not own any annuities, but after consulting with her husband, she admitted she owned an annuity with Transamerica. (Tr. P. 19, 21-22)

34. The Complainant denies that she has ever seen the contract that was issued by the Respondent after the application had been approved. She stated that the contract may have been sent to her mother because she does not remember giving Young her address. In addition, she admitted that she did not take any steps to obtain a copy of the contract. (Tr. P. 42-44; Ex. Respondent 2)

35. On the third page of the contract, the Data Page, it states that the initial interest rate is 2.25% with a rate enhancement of 1.0%. The Complainant stated that she had never seen the Data Page. (Tr. P. 45-46; Ex: Respondent 2)

36. On page five of the contract there is a paragraph titled "Surrender Charge". This section indicates that there is a seven per cent surrender charge if funds are withdrawn during the first three years of the annuity. In the fourth year, the charge is reduced to six per cent, in the fifth year it is reduced to five per cent, in the sixth year the surrender charge is four per cent and in the seventh year the surrender charge is three per cent. After the seventh year, there is no surrender charge. (Tr. P. 47-49; Ex. Respondent 2)

37. The Complainant admitted that she failed to read the fine print, but again stated that she had trusted Young and his advice. The Complainant's trust was based on the fact that Young had been Ms. Herring's agent for several years. She went on to state, that the inability to access her mother's money in the annuity has cost her mother a substantial amount of money and has

caused mental anguish. (Tr. P. 10, 31, 39)

38. The Complainant attempted to contact the Respondent when she began to question why she was sold this annuity. Her questions arose when she found out that there were surrender charges and a lower interest rate than in the original annuity. She wanted the Respondent to review her mother's policies and annuities. She testified that she called Derek Davenport, an employee of the Respondent, right before Christmas and Davenport stated that he would call her back after the holidays. (Tr. 49-50)

39. Mr. Davenport never did call the Complainant back even though she called him a couple of more times after the initial call. (Tr. P. 50)

40. The Complainant testified that she talked with Chris Mattox, another representative of the Respondent, several times. She believes that she was the one that first contacted Mr. Mattox. She also isn't sure when this conversation occurred. Young stated that the Complainant had to have talked to Mr. Mattox after April 1, 2019, since that was the day he was discharged. Young testified that if Mr. Mattox had talked to the Complainant prior to his discharge, he would have been informed of the conversation. Mr. Mattox was the Agency Manager for the Respondent. (Tr. P. 51-52, 134-135)

41. At some point, the Complainant learned that Young was no longer an agent of the Respondent. The Complainant introduced into evidence the FINRA report. The report stated that Young was "terminated for repeatedly failing to identify replacement transactions, provide disclosures regarding replacements, repeatedly paying for consumers to receive estate planning services as an inducement to purchase life insurance/annuities violating company policies regarding replacements and inducements." (Tr. P. 13-14: Ex. Complainant 1)

42. On January 17, 2020, the Complainant filed a complaint with the WVOIC. (Ex. Young 8)

Issue

Whether the Respondent and/or Young violated the insurance laws of the State of West Virginia when it sold an annuity to the Complainant?

Burden of Proof

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

Jurisdiction

The West Virginia Offices of the Insurance Commissioner has jurisdiction over this matter pursuant to Chapter 33 of the West Virginia Code.

Analysis

The Complainant has alleged that Young failed to properly inform her about the surrender charges and the reduced interest rate on an annuity purchased in 2018. The Complainant claimed that the annuity was to be used for the care of her mother. The Complainant also claimed that the actions of Young are imputed to the Respondent under the allegations that Young was an agent of the Respondent.

The key issue was whether Young, and the Respondent under agency law, violated the insurance laws of the state of West Virginia when the Complainant purchased an annuity in 2018. The Complainant testified that it was her understanding that she was meeting with Young in May of 2018 so that she and her siblings could understand their mother's, Ms. Herring, financial situation. In 2018, the Complainant's mother suffered from Parkinson's disease and was in the early stages of dementia.

Young testified that he met with the Complainant's mother on January 11 and 12, 2018, and presented her with two options for her future investments. He stated that Ms. Herring's main goal at that time was to get her insurance policies out of her name and to cash out her annuities.

Young entered into evidence the notes he prepared following both of the meetings held on January 11 and 12, 2018. Young testified it was his practice to prepare notes from any meeting in which a client is considering a change to their financial instruments He went on to testify that he either completed those notes while with the client, when he got in the car or when he returned to the office. The specific date of those meetings appeared at the top of each of these notes.

According to the testimony of Young, on January 12, 2018, he told Ms. Herring that she could put the money from the 2005 annuity into a bank, where the interest rate is very low or purchase another annuity. Young's notes do not reflect whether Ms. Herring made a decision at that time.

It appeared from the evidence that Ms. Herring wanted Young to meet with her children when they were all together. This meeting took place on May 18, 2018 at Ms. Herring's home. All of her children were present for the meeting.

The Complainant stated that her goal and that of her siblings during the May 18, 2018 meeting was to determine their mother's financial situation.

During the meeting on May 18, 2018, the Complainant testified that it was Young's advice that she cash in her mother's 2005 annuity and purchase a new annuity. The 2005 annuity was fully annuitized and, according to the Complainant, had an interest rate of 3.7%. However, Young testified that the interest rate on the 2005 annuity was 3%. In addition, there were no surrender charges associated with the 2005 annuity since it was fully annuitized. Prior to their meeting, Ms. Herring had used the interest from the 2005 annuity to pay the premiums on her various life

insurance policies.

Young stated that during the May 18, 2018 meeting he met with the Complainant away from her siblings to talk about a potential new annuity. Based on the Complainant's testimony, it was Young's recommendation that the 2005 annuity be exchanged for a new annuity with the Complainant being the owner as opposed to her mother. Young asserted that it was Ms. Herring's wish to cash out the 2005 annuity and to purchase the new annuity in 2018.

It is difficult to determine which version of the alleged facts concerning who made the decision or recommendation to purchase a new annuity are accurate. Young testified that Ms. Herring was very knowledgeable concerning her financial issues. However, the testimony of the Complainant was that her mother had Parkinson's disease and was beginning to show signs of dementia. Assuming that is true, it seems that a reasonable agent, such as Young, should refrain from following Ms. Herring's wishes until he determined her ability to make an informed decision. It does seem unreasonable that it would be in the best interest of Ms. Herring to withdraw her money from the 2005 annuity and purchase another one with a lower interest rate and new surrender charges.

Young testified that he was following Ms. Herring's wishes when the idea of buying an annuity was raised. However, these wishes are not reflected in Young's notes from the January meetings. At one point he stated that he would not have recommended cashing out an annuity due to tax reasons. If that is true, then it becomes questionable why he would advise the Complainant to cash in the 2005 annuity and purchase another annuity even if he believed it was Ms. Herring's wishes to do so. If that was his opinion, then the question is why didn't he inform Ms. Herring's children that he did not recommend cashing out an annuity. If he had truly believed that it wasn't in Mr. Herring's interest, the children should have been informed.

Young did not present any evidence that he advised Ms. Herring's children that if there was a new annuity issued that there would not be enough money available for her to pay for her own long-term care. Contrary to Young's testimony, I believe that Young did not tell the Complainant that the new annuity would have a lower interest rate and surrender charges at the May 18, 2018 meeting. As he testified any decision to change financial instruments would be reflected in his notes. Even if he did advise the Complainant of these issues, it does not appear that he was communicating to her in a way that the Complainant would have understood.

There was zero evidence to show that the Complainant or any of her siblings were financially sophisticated. In fact, the Complainant didn't even know what an annuity was and didn't realize that she owned one until her husband told her. However, if Young had told them that if they purchased a new annuity, there would not be enough money available for their mother's long-term care, they may have understood.

Young, as an agent, has a duty to fully explain the product that he was selling. While it may be true that Ms. Herring wanted everything out of her name, there are so many other options available to the family to move the money out of her name and into some financial vehicle where it can be accessed to pay medical bills. For instance, why couldn't the ownership of the 2005 annuity be put into the Complainant's name but allow Ms. Herring to continue to use the income to pay for her insurance policies or be used for long-term care.

If he truly had the interests of Ms. Herring in mind and not just wanting to sell another annuity, he would have explained all the options to the family.

While it is true that Young could have explained to the Complainant and her siblings in a simpler manner, it is equally true that the Complainant has a duty to read any document that she signs. The Complainant claimed that she did not read the application and she should have read it.

She admitted that it was her signature and initials on the document.

It appears based on the testimony of the Complainant, Young and the answers on the application, that the Complainant was simply told where to sign and initial on each document. One indication of that can be found on the application. The Complainant allegedly marked no when asked if the purchase of this new annuity, was being funded by another annuity. The Complainant knew that Young was using the proceeds from the 2005 annuity to fund the 2018 annuity, so why would she mark no. More importantly, Young knew that they were using the money from the 2005 annuity to fund the new annuity. At the very least he should have advised the Complainant to answer that correctly.

Young stated that Andrew Young was the one who completed the application with the Complainant. That gives more credence to the Complainant's claim that she did not answer that question. She should have answered yes on the question of funding, but since the answer was no, then it appears that Andrew Young answered that question and he either did not know about the redemption of the 2005 annuity or ignored that fact. This all could have been resolved if Andrew Young had testified at the hearing,

Again, assuming that Young would have marked yes on the question, he should have reviewed the application since he was the one with a relationship with Ms. Herring. If he would have reviewed the application, he would have seen that the answer was incorrect and at the very least had the Complainant complete a new application.

Another indication that the application was not read to the Complainant were the time stamps by the Complainant's signature on the application. Over the entire document it was noted that the Complainant signed the document at the same time. In addition, the signature of Andrew Young was only a minute later. The fact that the signatures were made at the same time indicates

that either the signatures were signed at the end of reviewing the document or that the document wasn't reviewed, and Andrew Young just had the Complainant sign the document where he indicated to sign. While there are two possibilities, a reasonable conclusion is that the document was not reviewed. It makes little sense for the Complainant to wait until the very end and then go back and sign the document. The reasonable conclusion would be that the Complainant would sign at the appropriate places as she was going through the document. If that had had happened, then the timestamps would have been further apart.

As was stated above, Young testified that if he had been completing the application along with the Complainant, he would have marked yes in the box that asked if the Complainant had an existing annuity. The application in question was marked no.

When an annuity is being replaced, the relevant rules are West Virginia Code of State Rules §114-08-1, Replacement of Life Insurance Policies and Annuity Contracts. The first section of this Rule deals with the scope of the Rule and states as follows

1.1. Scope. -- The purposes of this rule are to regulate the activities of insurers and producers with respect to the replacement of existing life insurance and annuities and to protect the interests of life insurance and annuity purchasers by establishing minimum standards of conduct to be observed in replacement or financed purchase transactions. It will assure that purchasers receive information with which a decision can be made in his or her own best interest, reduce the opportunity for misrepresentation and incomplete disclosure, and establish penalties for failure to comply with requirements of this rule. This rule is based on the National Association of Insurance Commissioners' "Life Insurance And Annuities Replacement Model Regulation (Model 613)," as amended in 2006; the 2008 amendments to this rule reflect the promulgation of 114CSR11C, which adopted the NAIC model rule on life insurance illustrations.

It is clear from the scope of this Rule that the goal of the Rule is to protect the purchaser of a new insurance policy and annuity when making that purchase. Specifically, West Virginia Code of State Rules § 114-8-4.1 and 4.2, is applicable to the instant situation. The Rules state as follows:

4.1. A producer who initiates an application shall submit to the insurer, with or as part of the application, a statement signed by both the applicant and the producer as to whether the applicant has existing policies or contracts. If the answer is "no," the producer's duties with respect to replacement are complete.

4.2.

a. If the applicant answered "yes" to the question regarding existing coverage referred to in subsection 4.1. of this section, the producer shall present and read to the applicant, not later than at the time of taking the application, a notice regarding replacements in the form as described in Appendix A or other substantially similar form approved by the commissioner. However, no approval is required when amendments to the notice are limited to the omission of references not applicable to the product being sold or replaced. The notice shall be signed by both the applicant and the producer, attesting that the notice has been read aloud by the producer or that the applicant did not wish the notice to be read aloud (in which case the producer need not have read the notice aloud), and left with the applicant.

b. The notice shall list all life insurance policies or annuities proposed to be replaced, properly identified by name of insurer, the insured or annuitant, and policy or contract number if available; and shall include a statement as to whether each policy or contract will be replaced or whether a policy will be used as a source of financing for the new policy or contract. If a policy or contract number has not been issued by the existing insurer, alternative identification, such as an application or receipt number, shall be listed.

As is obvious from this Rule section and the application, that if an answer is yes to the questions on whether the applicant is discontinuing an existing contract or to the question whether the applicant is using the funds from an existing annuity, then the applicant must list the policies being terminated. The application of the Complainant, according to Young, should have been marked yes, therefore, the policies should be listed, and they were not.

As was stated above, the Complainant has the burden of proof. The Complainant testified that she had never met Andrew Young and that she does not remember reviewing the application. However, the facts are that an existing annuity is being used to fund the new annuity. The application for the 2018 annuity should have listed the 2005 annuity. By failing to list that annuity, the Complainant proved that there was a violation of West Virginia Code of State Rules § 114-8-4.2(b)

In addition, when the answer is yes, then the Producer must read the notice regarding replacements or the applicant can waive the reading of the notice. As was determined by the testimony of Young, the answer on this section should have been yes. On the application completed by the Complainant, her initials appear in the section waiving the need to read the notice. However, in her testimony, the Complainant first stated that she did not remember filling out the application and then said that if she had been asked to read the notice, she would have asked the producer to read it.

Based on the financial sophistication of the Complainant and the other issues raised above, it does not appear that the notice was either read to the Complainant or that she knowingly waived the reading of the notice. This was the only evidence introduced concerning whether she was read the notice or waived that opportunity. Young could have brought Andrew Young into testify to rebut this statement. Since Andrew Young did not testify, the only person present at the signing of the application was the Complainant and she testified that she would have had Andrew Young read the notice to her, and she would have asked questions about the notice.

Since it is reasonable to conclude that the application section concerning whether the notice was not read to the Complainant and she did not knowingly waive the reading, the Complainant proved that Young and Respondent violated West Virginia Code of State Rules § 114-8-4.2(a).

While not conclusive, it is interesting to note that Young advised the Complainant to cash in the 2005 annuity and deposit the proceeds into Poca Valley Bank. The easiest method would have been to roll over the 2005 annuity proceeds into the new annuity. This action does give credence to the possibility that someone did not want to have a record that the proceeds from the 2005 annuity were being used to fund the 2018 annuity.

While this was not a violation of the West Virginia Insurance law, I have to note that it was disturbing at the hearing when counsel for the Respondent implied that by marking no on the question about the funding of the new annuity that the Complainant may have been committing insurance fraud. First of all, it was not appropriate to accuse the Complainant of some crime. Secondly, the evidence at that point was that the Complainant did not read the document, therefore, the accusation was totally unfounded and unfair. None of the evidence presented at the hearing directly contradicted the Complainant's testimony that she did not read the document.

The next issue to discuss is whether the Respondent violated the Unfair Trade Practices Act. The first area to address is the contact that the Complainant tried to have with Derek Davenport and his failure to respond. West Virginia Code of State Rules §114-14-5.3 which states as follows:

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.

It must first be addressed whether the Complainant is a claimant under this Rule. West Virginia Code of State Rules § 114-14-2 provides the relevant definitions. A claimant is defined as follows:

2.2. "Claimant" means either a first-party claimant, a third-party claimant, or both.

The Complainant cannot be construed as a third-party claimant because she is the owner of the policy. Therefore, we must look at the definition of a first party claimant.

2.3. "First-party claimant" or "Insured" means an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract.

The Complainant is the Insured as contemplated under the Rule.

The next step in the analysis is whether the Complainant is asserting a right to payment. It is without doubt that the Complainant contacted the Respondent in an attempt to get clarification on the terms of her purchased annuity. The real issue is whether the Complainant is making a claim. In order to determine that we must look at the definition of a clam which can be found in West Virginia Code of State Rules §114-14-2.11, which states:

2.11. "Claim" means any communication by a claimant to an insurer or its agent which reasonably apprises the insurer or agent of an occurrence which might give rise to liability under a policy or contract of insurance.

The Complainant testified that she called Mr. Davenport, an employee of the Respondent, just before Christmas in 2018. She wanted Mr. Davenport to review her mother's accounts with the Respondent since she was concerned that she was not informed about the interest rate and withdrawal charges on an annuity she purchased for her mother. In other words, she is attempting to contact the Respondent which could reasonably suggest that there might be liability for failing to fully disclose the details of the annuity, therefore, a claim. Under the definitions cited above, the communication by the Complainant would fall under West Virginia Code of State Rules §114-14-5.3.

The Complainant followed up the initial call with one or two additional calls to Mr. Davenport. According to the Complainant, Mr. Davenport never did return her call.

Neither Mr. Davenport nor any other representative of the Respondent was present at the hearing, so the only evidence that we have that Mr. Davenport did not respond within fifteen working days was the testimony of the Complainant and Young.

There was testimony that the Complainant believes that she contacted Mr. Mattox, an Agency Manager for the Respondent, to ask him to review her mother's accounts. She did not remember when she talked to Mr. Mattox. However, Young provided testimony that the

Complainant would not have talked to Mr. Mattox prior to April 1, 2019. The basis of his statement was that he was discharged by the Respondent on April 1, 2019, and Mr. Mattox would not have been involved with the Complainant's concerns while Young was still responsible for the Complainant's annuity. Mr. Mattox was not at the hearing.

Since there was no evidence that Mr. Davenport or Mr. Mattox responded to the Complainant's initial inquiry, which clearly suggested that a response was expected, within fifteen business days, the Complainant proved that the Respondent violated West Virginia Code of State Rules § 114-14-5.3.

An issue raised by the Complainant at the hearing and again in her brief was the issue of Scott Wyant. Young testified that he had told Ms. Herring at the January meetings that she needed to contact Mr. Wyant, a "Medicaid Expert", to assist her in her financial planning. Young also recommended that Ms. Herring's children meet with Mr. Wyant.

The Complainant correctly stated that there is no such classification as a "Medicaid Expert" under West Virginia law. While this is true, there is no requirement that, in order to be called an expert, that there has to be a classification established under West Virginia law. In fact, there are several instances in the law where a person is determined to be an expert based solely on his experience and education. A perfect example of this is in the area of Medical Malpractice. In Medical Malpractice actions, an expert must opine that a physician committed malpractice before an action can be filed. There is no classification of "Medical Expert" under West Virginia law. At a trial in medical malpractice, the credentials of the so-called expert are presented to the Court and then the Judge determines whether that person is an expert or not. Therefore, the allegations that Young should not have referred Ms. Herring or her children to Mr. Wyant because he was not classified as a "Medicaid Expert", is not relevant to this decision.

Even if Mr. Wyant was not a "Medicaid Expert" that issue is not germane since there was no evidence introduced that either Ms. Herring or the Complainant contacted Mr. Wyant prior to purchasing the annuity.

Along with a referral to Scott Wyant, the Complainant also brought into evidence the FINRA report about Young. He also raised the issue that Young had been discharged by the Respondent as an agent of the Respondent to support her contention that Young had violated the insurance laws of West Virginia.

The FINRA report stated that Young was "terminated for repeatedly failing to identify replacement transactions, provide disclosures regarding replacements, repeatedly paying for consumers to receive estate planning services as an inducement to purchase life insurance/annuities violating company policies regarding replacements and inducements."

While this report does dovetail with the allegations of the Complainant, it is not conclusive as to the issues raised by the Complainant. The FINRA report simply states the reasons offered by the Respondent for terminating Young. It does not indicate that a hearing was held where evidence was produced to determine that Young committed these violations.

It does indicate that the Respondent determined, by some unknown procedure, that Young committed these violations. The only items that can be considered in this action is the evidence presented at the hearing. The fact that the Respondent made those conclusions, without presenting the evidence that formed the basis of those conclusions, is not relevant to this action, therefore, were not considered in this decision.

Finally, the Complainant argues that Young was an agent of the Respondent and under agency law, the actions of Young can be construed as the actions of the Respondent. It is well settled law in West Virginia, that an entity is bound by the actions of its agent. Travis v. Alcon

Laboratories, 202 W.Va. 369, 504 S.E2d 419 (1998)

Under agency law, the violations of Young are imputed to the Respondent, as long as Young was acting within the scope of his employment. There was no evidence presented by the Respondent that indicated that Young was told by the Respondent, as related to the actions with the Complainant, to cease and desist his actions. There was also no evidence that the Respondent provided any education to Young or Andrew Young about the proper procedures to follow when a client is purchasing a new annuity.

It is true that the Respondent did discharge Young; however, that occurred nearly one year after the Complainant purchased the annuity. At the very least, the Respondent should have taken some action after the Complainant told Mr. Davenport about her concerns. This occurred in December of 2018 and Young was not discharged until April 1, 2019. There was no evidence that the Respondent took any action against Young related to the complaint of the Complainant. It is possible that if the Respondent had presented any evidence to show that Young was acting outside his scope of employment and training, there might be an issue on whether agency law would apply in this matter. However, no evidence was presented to overcome the presumption of agency.

Therefore, for the above stated reasons, both the Respondent and Young violated West Virginia Code of State Rules § 114-8-4.2(a), West Virginia Code of State Rules § 114-8-4.2(b) and West Virginia Code of State Rules § 114-14-5.3.

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. Under Travis v. Alcon Laboratories, 202 W.Va. 369, 504 S.E2d 419 (1998)

the actions of Young are imputed to the Respondent.

3. West Virginia Code of State Rules § 114-8-1 *et seq.* governs the Replacement of Life Insurance Policies and Annuity Contracts.

4. West Virginia Code of State Rules § 114-8-1.1 states that "[T]he purposes of this rule are to regulate the activities of insurers and producers with respect to the replacement of existing life insurance and annuities and to protect the interests of life insurance and annuity purchasers by establishing minimum standards of conduct to be observed in replacement or financed purchase transactions."

5. As a matter of law, the Complainant was using funds from another annuity to fund the annuity purchased in 2018.

6. West Virginia Code of State Rules § 114-8-4.2(a) requires when a purchaser is using funds from another annuity to fund a new annuity "the producer shall present and read to the applicant, not later than at the time of taking the application, a notice regarding replacements in the form as described in Appendix A or other substantially similar form approved by the commissioner."

7. The annuity purchased by the Complainant was funded by another annuity. The Complainant testified that she did not waive the reading of the notice on the application and the notice was not read to her. Therefore, the Complainant proved that West Virginia Code of State Rules § 114-8-4.2(a) was violated.

8. West Virginia Code of State Rules § 114-8-4.2(b) requires that "The notice shall list all life insurance policies or annuities proposed to be replaced, properly identified by name of insurer, the insured or annuitant, and policy or contract number if available; and shall include a statement as to whether each policy or contract will be replaced or whether a policy will be used

as a source of financing for the new policy or contract."

9. As stated above, the new annuity was replacing the 2005 annuity and that the annuity used to fund the 2018 annuity should have been listed on the application. That section was blank on the application, thus proving a violation of West Virginia Code of State Rules § 114-8-4.2(b).

10. West Virginia Code of State Rules §114-14-5.3 addresses the issue applicable to communication between an insurance provider and a claimant. The Rule states that "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."

11. The Complainant is a claimant based on the definitions found in West Virginia Code of State Rules § 114-14-2.2, West Virginia Code of State Rules § 114-14-2.3 and West Virginia Code of State Rules § 114-14-2.11.

12. The Respondent did not respond to an inquiry from the Complainant within 15 working days, the Complainant proved that the Respondent violated West Virginia Code of State Rules §114-14-5.3.

Recommended Decision

It is recommended that the Complainant proved, by a preponderance of the evidence, that Young and Respondent violated the Unfair Trade Practices Act. Therefore, the Complainant's complaint should be upheld.

Respectfully recommended,

MARK W. CARBONE
HEARING EXAMINER

Sept 13, 2022
DATE