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

HARRY BOHON,

Complainant, ADMINISTRATIVE PROCEEDING NO. 21-IC-02022

v.

ATLANTIC SPECIALTY INSURANCE COMPANY,

Respondent.

FINAL ORDER

On September 29, 2021, a hearing was held before Hearing Examiner Andrew Brison, Esquire, at the Office of the Insurance Commissioner, Charleston, West Virginia. Appearing on behalf of Complainant was Sam Cook, Esquire, and Christa Bohon, wife of Complainant. Appearing on behalf of Respondent was Erica M. Baumgras, Esquire and Olivia Ballesteros, Claims Representative for Respondent.

Based upon a thorough review of the record in this case, the undersigned now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Harry Bohon's (hereinafter, "Complainant") address is [redacted], Clarksburg, West Virginia.

2. Atlantic Specialty Insurance Company (hereinafter, "Respondent") is licensed to do insurance business in the state of West Virginia.

3. On or about October 17, 1999, Complainant's front yard, basement and garage were flooded due to a water main break. Complainant was not at home at the time of the water leak. (Tr. P. 6-7).

4. When he returned home and discovered the water in his house, he contacted 911. The fire department and City of Clarksburg maintenance personnel arrived to assist with stopping the water leak. Complainant estimated it took approximately 4 hours to stop the leak. He estimated the water level in his basement to be approximately 3-3.5 feet deep (Tr. P. 7).

5. Respondent's wife contacted the City of Clarksburg about paying for the damages to his home. She was referred to Respondent. (Tr. P. 8).

6. Complainant paid Bakers Waterproofing $13,341 to pay for some of the damage caused by the water leak. Complainant has more damage but has not paid someone to repair the damage due to financial concerns. (Tr. P. 9-10).

7. On or about October 19, 1999, Respondent contacted Complainant by letter advising the claim had been received, and that an investigation into his claim was ongoing. (Tr. P. 12). Respondent also contacted Complainant by telephone (Tr. P. 12-13; Exhibit 3).

8. By letter dated October 24, 1999, Respondent notified Complainant that his claim was denied. Respondent's letter stated their investigation did not reveal any negligence on behalf of their insured resulting in Complainant's damages. (Tr. P. 21 and Exhibit 1).

9. Olivia Ballesteros was assigned to investigate Complainant's claim. Ms. Ballesteros is licensed as an insurance adjuster and has worked for Respondent for 3 years and 9 months. She previously worked for approximately 10 years for Trident Insurance Company as an underwriter, claims assistant and claims adjuster (Tr. P. 33-34).

10. Ms. Ballesteros estimates she has handled approximately 100 claims involving water line breaks under commercial policies, approximately 50 of those while working for Respondent. (Tr. P. 35).

11. Ms. Ballesteros received notice of the claim from Jason Ferrell, the Superintendent of the Clarksburg Water Board. She discussed Complainant's claim by email and by telephone. (Tr. P. 37; Exhibit 3).

12. Mr. Ferrell confirmed that there was a water leak that caused damage to Complainant's property, as well as another property. (Tr. P. 41)

13. Ms. Ballesteros followed up with another email to Mr. Ferrell asking him questions regarding the leak. Mr. Ferrell responded that the Water Board was not working on the line at the time of the incident; the Water Board did not cause the leak; the Water Board became aware of the leak around 3:30 on October 17, 1999; that there were no photos; that there were no leaks in the area of the line in the prior 5 years; and that the line is roughly 63 years old, 2,600 feet long, ductile iron, and a 12 inch mail line. (Tr. P. 43-44).

14. After receiving the information from Mr. Ferrell, Ms. Ballesteros determined the insurance policy did not provide coverage for Complainant's loss due to there being no negligence on the part of their insured. She contacted Complainant by telephone to inform him of the decision to deny coverage. She informed Complainant that the cause of the water leak was the age of the line, and not the fault of the Clarksburg Water Board. She then sent out the denial letter to Complainant. (Tr. P. 46-48; Exhibit 4).

15. As part of her investigation, Ms. Ballesteros did not go to Complainant's property nor send a local adjuster there, as she had determined from the answers Mr. Ferrell provided that the Water Board was not responsible for Complainant's damages. (Tr. P. 57).

16. On or about May 2020, Respondent was notified of another complaint filed with the West Virginia Offices of the Insurance Commissioner regarding damage to his home as the

result of a water leak. The complaint mentioned there were other water leaks on the line in question. (Tr. P. 59).

17. Ms. Ballesteros sent Mr. Ferrell an email asking about the prior breaks on the line. Mr. Ferrell responded by saying 14 feet of the line had been replaced in 2014 near where the leak occurred, but it was on a different line, and the line was in decent shape. If a line is having multiple problems, the information is sent to the engineers for their opinion. Mr. Ferrell assumed the line was in decent shape since there were no leaks since 2014. (Tr. P. 59-60).

18. The lifespan of a water line is 20-25 years. The lifespan of the line in question was 63 years old. (Tr. P. 70).

19. On December 15, 2020, Complainant filed a third-party consumer complaint with the West Virginia Offices of the Insurance Commissioner. (Exhibit 2).

20. On June 25, 2020, the West Virginia Offices of the Insurance Commissioner sent Complainant a "merit letter," stating there were possible violations of W. Va. Code § 33-11-4(9)(c), and W. Va. Code R. § 114-14-6.1.

ISSUE

Whether the Respondent violated W. Va. Code § 33-11-4(9)(c), and W. Va. Code R. § 114-14-6.1.

BURDEN OF PROOF

The Complainant has the burden to prove, by a preponderance of the evidence, that the Respondent violated W. Va. Code § 33-11-4(9)(c) and W. Va. Code R. § 114-14-6.1.

JURISDICTION

The West Virginia Offices of the Insurance Commissioner has jurisdiction over this Complaint under W. Va. Code § 33-2-13

ANALYSIS

On June 25, 2020, the West Virginia Offices of the Insurance Commissioner issued a "merit letter" in the above captioned matter. The letter stated that the Commissioner's Office determined there may be violations of W. Va. Code § 33-11-4(9)(c) and W. Va. Code R. § 114-14-6.1.

All of these potential violations arise out of a water main leak that occurred on or about October 18, 1999, in Clarksburg, West Virginia. The water from the leak entered Complainant's house, causing damage to the home and personal belongings.

As noted above, the merit letter stated there may be a violation of W. Va. Code § 33-11-4(9)(c), which states as follows: "Unfair claim settlement practices—No person shall commit or perform with such frequency as to indicate a general business practice any of the following:

(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies."

The Insurance Commissioner also finds that W. Va. Code § 33-11-4(9)(d) is applicable which states," Refusing to pay claims without conducting a reasonable investigation based upon all available information."

These Code sections must be read in conjunction with W. Va. Code R. § 114-14-6.1 which states; in part:

> 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 . . . .

The Code requires the Respondent to adopt and implement reasonable standards for the prompt investigation of claims arising under its insurance policies. Additionally, Respondent's investigation must be reasonable, thorough, fair and objective.

Complainant notified the Clarksburg Water Board of the leak on October 17, 1999. Respondent notified Complainant on October 19, 1999, that the claim had been received and began investigating the circumstances regarding the water main leak. On October 24, 1999, the investigation was complete, and Complainant was notified by phone and letter that his claim was denied as no negligence was found on part of the Clarksburg Water Board.

In its denial letter, the Respondent stated, in relevant part,

> Our investigation of this matter failed to reveal any evidence of negligence on behalf of our insured for this incident and resulting damages. Our insured did not cause the water to enter your property by direct action or activity. In addition, we find no evidence that would waive the immunities granted by the State of West Virginia under Section 29-12A-5(a6). Therefore, we must respectfully deny your claim.

W.Va. Code §29-12A-5(a)(6) which was cited in Respondent's denial letter states,"A political subdivision is immune from liability if a loss or claim results from...snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the condition is affirmatively caused by the negligent act of a political subdivision." W. Va. Code §29-12A-5(a)(6) is not applicable to the present cause because complainant's complaint did not involve snow, ice or natural conditions on a public way or other public place due to weather conditions.

W.Va. Code §29-12A-4(c)(3) states as follows:

> (c) Subject to sections five [§ 29-12A-5] and six [§ 29-12A-6] of this article, a political subdivision is liable in damages in a civil

> action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows…
>
> (3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.

"The liability for political subdivisions created in *W.Va. Code, 29-12A-4(c)(3)* [1986] includes liability for injury, death, or loss to persons or property caused by a subdivision's negligent failure to keep its sewers and drains open, in repair, or free from nuisance." Syl. Pt. 4 Calabrese v. The City of Charleston, 204 W. Va. 650, 515 S.E.2d 814; (1999).

The investigation to determine whether there was any negligence must be thorough and fair. Respondent's investigation does not need to be perfect, but it must diligently pursue a thorough, fair and objective one. W. Va. Code R. § 114-14-6.1.

Respondent's investigation consisted of a phone conversation with Jason Ferrell, Superintendent of the Clarksburg Water Board, and sending him an email with eight (8) questions. Among other responses, Mr. Ferrell responded the Water Board was not working on the water line at the time of the leak. When asked whether the Water Board caused the leak, Mr. Ferrell responded, "We didn't do anything to cause the leak." He also stated there were no photos, and the line is roughly 63 years old with no leaks in the past five years.

Subsequent to Complainant's complaint, there was another complaint filed with the West Virginia Offices of the Insurance Commissioner regarding the same issue as the instant case. The complainant in that complaint stated there had been other water leaks on the line. In her investigation into that complaint, Respondent again sent an email to Mr. Ferrell.

Mr. Ferrell responded that there had been another leak in the area, but it was on a different line. He further responded by stating that if a line has multiple problems, the information is sent to the engineers for their "point of view." He further stated that since the last water leak on the line subject of the Complaint's complaint was in 2014, he can "assume the line is in decent condition."

As mentioned above, Respondent must "diligently pursue a thorough, fair and objective investigation." Respondent's investigation into Complainant's claim involved little more than a phone call and an email with eight questions. The responses to those questions were one- word responses of "yes" and "no." When Mr. Ferrell was asked if the Clarksburg Water Board caused the leak, he responded that they had not. No further information or reasoning was provided. He also stated there were no leaks within the past five years.

"A political subdivision of the State is subject to liability for its negligent failure to keep its sewers and drains open and in repair. This duty is not limited to having prior knowledge of a sewer line problem." Pingley v. Huttonsville Pub. Serv. Dist, 225 W.VA. 205; 210; 691 S.E.2d 531, 536 (2010).

Respondent's investigation does not reveal whether the sewer line was properly maintained. It does not reveal whether the sewer line was properly inspected. There is no indication when the sewer line was last inspected. Although Respondent received a response to

its question that there had been no problems in the prior 5 years, there was no evidence presented when the line was last inspected. Additionally, there is no indication how many times the line had been inspected prior to the water damage to Complainant's residence.

It is unclear how Mr. Ferrell knows the Water Board did not cause the water leak. Mr. Ferrell stated in a subsequent response to Respondent regarding a similar complaint that he "assumed" the line was in "decent shape" since there had been no leaks within the past five years. The Clarksburg Water Board did not take any photos of the leak. Although Mr. Ferrell stated the water leak was repaired, he did not mention in his email response to Respondent the steps he undertook to ensure the leak was not the cause of the Water Board's negligence. His decision appears to be based mainly upon his assumption that the line was in decent shape due to no leaks within the prior five years, and the Water Board not doing work on the line at the time the leak occurred. No further investigation into the cause of the leak was made. The investigation does not appear to be reasonable.

Respondent failed to "diligently purse a thorough, fair and objective investigation" to determine whether the Water Board was negligent in causing the water leak according to West Virginia Law. Therefore, Complainant has proven by a preponderance of the evidence, that Respondent violated W. Va. Code § 33-11-4(9)(c), W. Va. Code § 33-11-4(9)(d) and W. Va. Code R. §114-14-6.1.

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 Respondent violated the insurance laws of West Virginia.

2. The Complainant proved, by a preponderance of the evidence, that Respondent violated W. Va. Code § 33-11-4(9)(c), W. Va. Code § 33-11-4(9)(d) and W. Va. Code R. § 114-14-6.1 by proving Respondent did not diligently pursue a through, fair and objective investigation.

ORDER

The Insurance Commissioner finds that the Complainant proved, by a preponderance of the evidence, that Respondent violated W. Va. Code § 33-11-4(9)(c), W. Va. Code § 33-11-4(9)(d) and W. Va. Code § 114-14-6.1.

It is hereby ORDERED that this matter be referred to the Market Conduct Unit to conduct an examination of the Respondent to determine if the Respondent has committed these violations with such frequency as to constitute a general business practice.

The objections of any party aggrieved by this Order are preserved.

Entered this 2nd day of September, 2022

Respectfully submitted

Allan L. McVey

Allan L. McVey
CPCU, ARM,AAI, AAM, AIS
Insurance Commissioner