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

Austin Moss,
Complainant

v. **Admin. Proceeding No. 23-IC-157761**

National Union Fire Insurance Company of Pittsburgh, PA.,
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 proved, by a preponderance of the evidence, that Respondent, National Union Fire Insurance of Pittsburgh, PA, violated West Virginia Code § 33-11-4(9)(d) and West Virginia Code of State Rules § 114-14-6.1.

Pursuant to W.Va. Code R. §114-76-7.7.c, the West Virginia Insurance Commissioner shall conduct an investigation to determine if the violation was committed with such frequency as to constitute a general business practice. Further, pursuant to W.Va. Code R. §§114-76-7.7.a and 114-76-7.7.b, the Insurance Commissioner finds that the violation was not intentional nor was it the result of an egregious act.

Inasmuch as orders entered by the Commissioner are subject to judicial review in 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 after the entry of the judgment being appealed, file an appeal as set forth in W.Va. Code §33-2-14 and W.Va. R.A.P., Rule 5(b).

THEREFORE, it is **HEREBY ORDERED** that the Complaint by Austin Moss is upheld.

ENTERED this 21ST day of May, 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 February 15, 2024, a hearing was held before Hearing Examiner Mark W. Carbone, Esq. in the Marion County Courthouse, Fairmont, West Virginia. There then being present on behalf of National Union Fire Insurance Company of Pittsburgh PA. (hereinafter "Respondent") was Mr. Don Parker, Esq., Mr. Charles H. Morris III, Mr. Keith Tucker. Mr. Austin Moss (hereinafter "Complainant") appeared pro se.

Statement of the Case

This matter arises out of a third-party complaint filed against Respondent alleging it violated West Virginia Code § 33-11-4(9)(d) and West Virginia Code of State Regulations § 14-14-6.1.

Findings of Fact

1. On April 20, 2023, the Complainant was traveling down Brown Avenue in Belington, West Virginia. A Barbour County School Bus was approaching the Complainant coming

towards him on Brown Avenue. As the Complainant was passing the school bus, something struck the hood of his car and then the windshield wipers. (Tr. P. 8)

2. When the object struck the Complainant's vehicle he thought the bus tire had blown. He then saw a can of ravioli on the side of the road. The Complainant did a U-turn and caught up to the bus when it went to its next stop. (Tr. P. 8)

3. The Complainant then got out of his vehicle and approached the bus. The bus driver was outside of the bus, so he and the Complainant had a conversation. According to the Complainant, Ms. Robinson was also present and engaged in the conversation with the Complainant and the bus driver. (Tr. P. 8, 10; Complainant's Ex. 1)

4. The Complainant presented a letter from Ms. Danielle Robinson during the hearing. Counsel for the Respondent objected to the admission of the letter on two grounds. The first objection was that since this was a letter and Ms. Robinson was not present at the hearing, there was no opportunity to cross examine Ms. Robinson. The second objection was that Counsel was unaware of the existence of Ms. Robinson prior to the hearing. (Tr. P. 10-11; Complainants Ex.1)

5. Initially the Complainant stated that Ms. Robinson is related to him through marriage. The Complainant then testified that possibly Ms. Robinson's great grandfather and the Complainant's great-great grandmother were cousins or brother and sister. (Tr. P 14-15)

6. The Complainant initially called 911 but the West Virginia State Police were stuck in traffic, due to construction on United State Route 250, and were not able to get to the scene. (Tr. P. 8)

7. The Complainant asked the driver of the school bus for his insurance information. The driver could not find the insurance information, so the parties decided to allow the bus to

continue its route and the Complainant would go to the bus garage the next day to get the information. (Tr. P. 9)

8. The Complainant attempted to get the name of the student who threw out the can of ravioli from the school bus window but was told that the School Board could not give him the name due to a privacy act. The Complainant did not know whether the privacy act that they were referring to was FERPA. (Tr. P. 9)

9. The Complainant claims that the Barbour County School System failed to provide him with any documentation that he requested and did not know whether the School System had contacted their insurance company. (Tr. P. 12-13)

10. The Complainant believes that he talked to Mr. Morris a couple of times. Mr. Morris works for AIG[1] on behalf of BRIM (West Virginia Board of Risk and Insurance Management). In addition, the Complainant believes he may have received some emails from Mr. Morris. (Tr. P. 13, 21-22)

11. Mr. Morris was first assigned the Complainant's claim on June 28, 2023. At that point, Mr. Morris reviewed the file for coverage then looked at all the relevant documents contained in the file. (Tr. P. 28-29; Respondent Ex. 1)

12. Attached to an email from Ms. Annette Hughart to BRIM claims was the accident report prepared by the Barbour County School Board. In the report, it listed the date of the incident, the name of the bus driver, the Complainant's name, and the bus driver's account of the incident. (Tr. P. 30-31; Respondent Ex. 3)

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[1] National Union Fire Insurance Company of Pittsburgh is a subsidiary of AIG.

13. The description of the incident prepared by the bus driver stated, "Student threw a can of ravioli out the window, hitting another vehicle." It goes on to state "No damage to the bus." The bus driver signed this document. (Tr. P.31; Respondent Ex. 3)

14. The accident investigation report did not mention Ms. Robinson. In neither the recorded statement of Complainant nor in the Insurance Loss Notice was Ms. Robinson mentioned. (Tr. P. 31-33; Respondent Ex. 3, 4, 6)

15. In the notes prepared by Mr. Morris, his first impression was that the School System did not appear to be negligent, therefore no liability. This impression was based on Mr. Morris' past experiences. Even though his first impression was that there was no liability, he continued his investigation. (Tr. P. 36-37; Respondent Ex. 8)

16. Mr. Keith Turner, Mr. Morris' supervisor, also made an entry into the claim log on June 29, 2023. In that entry he stated that the School System would not be liable for the actions of the student, unless the student was under an IEP (Individual Education Plan) with an aide. He stated that the Complainant's claim should be turned over to the parents of the student. (Tr. P 39, 47; Respondent Ex. 8)

17. On July 13, 2023, Valerie, from the School System, emailed Ms. Jo Jackson, an analyst for the Respondent, informing her that there was no horseplay going on in the bus, but it was loud due to the students talking. According to Valerie, one student handed the other student a can of ravioli. The second student then tossed the can of ravioli out of the window. The note claimed that the can was not hurled out of the window. The student that had thrown the can had been kicked off the bus prior to this incident for his behavior. (Tr. P. 45; Respondent Ex. 9)

18. When asked the reason the student had been kicked off the bus in a prior incident, Mr. Morris testified that the reason had not been determined by the Respondent. (Tr. P. 59)

19. On July 13, 2023, Mr. Morris was informed that the student, who had thrown the ravioli can out of the school bus window, did have an IEP. Mr. Morris then requested that the School System let him know whether the student was accompanied by an aide while on the bus. Later, Mr. Morris was informed that the student's IEP did not require that he be accompanied by an aide. (Tr. P. 46-49; Respondent Ex. 9)

20. Once it was determined that the student's IEP did not require that the student be accompanied by an aide, the Respondent decided that there was no negligence on the part of the bus driver, therefore, there was no liability on the part of the Barbour County Schools. (Tr. P. 49-50)

21. In the statement by Ms. Robinson, she stated that students were hanging out the bus windows and yelling. (Tr. P. 53; Complainant's Ex. 1)

22. Mr. Morris testified that even if had had Ms. Robinson's statement it would not have made a difference in the Respondent's decision that there was no negligence.

23. On July 17, 2023, the Respondent sent the Complainant a letter denying liability (Tr. P. 54; Respondent Ex. 12)

Issue

Whether the Respondent violated West Virginia Code § 33-11-4(9)(d) West Virginia Code of State Rules § 114-14-6.1, 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 as identified in the Merit Letter issued by the West Virginia Offices of the Insurance Commissioner.

Jurisdiction

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

Analysis

On November 30, 2023, the West Virginia Offices of the Insurance Commissioner issued a merit letter indicating that the Respondent may have violated West Virginia Code § 33-11-4(9)(d) West Virginia Code of State Rules § 114-14-6.1.

West Virginia Code § 33-11-4(9)(d) states as follows:

(9) Unfair claim settlement practices. -- No person shall commit or perform with such frequency as to indicate a general business practice any of the following:

(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information.

West Virginia Code of State Rules § 114-14-6.1. is based on West Virginia Code § 33-11-4(9)(d) and states as follows:

§114-14-6. Standards For Prompt Investigations And Fair And EquitableSettlements 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.

The only issue to address in this decision is whether the Respondent conducted a reasonable investigation into the Complainant's claim.

Several issues were developed during the hearing. The first issue is the letter from Ms. Robinson that the Complainant placed into evidence. The Respondent's counsel objected to the admission of the letter because Ms. Robinson was not present at the hearing, so that he was

unable to cross examine her. That is a valid objection, especially since this was just a letter and not an affidavit. The other objection, made by the Respondent, is that it was unaware of the existence of Ms. Robinson until the Complainant presented the letter. That issue will be addressed later in this decision.

Another issue raised by the Complainant was that the Barbour County School Board is responsible for a student's welfare, safety and behavior. West Virginia Code of State Rules § 126-99. While that may be applicable to whether there is liability on the part of the School System, it is not relevant as to whether the Respondent conducted a reasonable investigation.

The Respondent also raised an issue dealing with liability. The hearing examiner requested that counsel for the Respondent provide case law dealing with the liability of a school system when a student's action causes an injury to another person. The case law provided by counsel clearly indicates that for there to be liability on the part of a school board there must exist some negligence on the part of an employee of the school board.

The Respondent states that there can be no liability on the part of the Barbour County Board of Education since there was no evidence showing any negligence on the part of the bus driver.

I agree with the contention of the Respondent that unless negligence is shown by an employee of the School Board there can be no liability.

However, that issue again relates to liability and not directly the reasonableness of the investigation.

The incident occurred on April 20, 2023. It was the testimony of the Complainant that he immediately asked the bus driver for the School System's insurance information. When he was unable to obtain this, he went to the bus garage to get the information.

It was the testimony of Mr. Morris that he was not assigned the matter until June 28, 2023, over two months after the incident. While this is not the fault of the Respondent, there is some indication of the lack of urgency to handle this matter on the part of the Barbour County Schools.

Upon being assigned the claim, Mr. Morris reviewed the file. He received an email from Annette Hughart which listed the date of the incident, name of the bus driver and the name of the Complainant. In addition, there was a signed statement from the bus driver. The description of the incident prepared by the bus driver states, "Student threw a can of ravioli out the window, hitting another vehicle." It goes on to state "No damage to the bus."

There was no evidence that the Respondent talked directly to the bus driver. It seems obvious that if someone from the Respondent had talked to the bus driver, a more detailed interview could have been conducted.

Early in the process, the Respondent determined that probably there would not be liability unless the insured had been negligent. Even with this determination, Mr. Morris continued his investigation. He testified that he talked to the Complainant on possibly two occasions and exchanged emails.

Mr. Morris' supervisor, Mr. Tucker, advised him that if the student who threw out the can of ravioli was on an Individual Education Plan, there may be liability. Afterward, it was determined that the student was on an IEP. This was later clarified that for there to be any liability, the IEP did require that an aide be with the student while on the bus.

Therefore, based on the alleged fact that there was no negligence on the part of a Barbour County School's employee and that the student's IEP did not require any aid to accompany him on the bus, the Respondent denied the claim.

Under West Virginia Code of State Rules § 114-14-6.1, The Respondent is required to conduct an investigation that is thorough fair and objective. This does not mean that the investigation has to be perfect, but it must be thorough.

While it is true that an investigation was conducted by the Respondent, the issue becomes whether the Respondent fully inquired into the possible bases of the Complainant's claim.

The evidence is that the Respondent did contact the Complainant, two months after the incident. According to Mr. Morris, the Complainant never did mention that Ms. Robinson was present at the scene and was a witness. It is also true that in the bus driver's short statement, he did not mention that Ms. Robinson was present.

It seems obvious to me that a reasonable question to ask the Complainant, during one of the conversations that representatives had with the Complainant, was whether there were any witnesses.

At no point did Mr. Morris ask the Complainant about any other witnesses. If he had, that would have been mentioned by him during the hearing. So, the only other possibility is that he had asked the question and the Complainant had lied about the presence of the witness. However, if the second possibility had occurred, Mr. Morris would have testified that he had asked the question, and the Complainant did not respond in any way.

It was clear at the hearing that neither Mr. Morris nor his counsel had any idea that there had been a witness to the incident until the Complainant brought forth the letter of Ms. Robinson.

In fact, one of the objections to the admissibility of the letter was that the Respondent had never heard of Ms. Robinson until the day of the hearing.

Since it is obvious that Mr. Morris did not ask the question about witnesses to the Complainant, that part of the investigation was not reasonable nor thorough.

Another related issue is whether the Respondent ever talked to the bus driver. While someone at the School System must have talked to the bus driver, there was no evidence that the Respondent did. It appears that the Respondent solely relied on its client's representation of what the bus driver had said.

The incident report has a signed statement from the bus driver. The statement simply states that a student had thrown a can of ravioli out the bus window and struck a vehicle. No other detail is given except to say that the bus wasn't damaged.

The Respondent had a duty to talk to the bus driver to obtain further details of the incident, such as how he knew that a can had been thrown out of the bus, whether the bus was moving and importantly whether there were any witnesses present.

How can the Respondent determine whether there was any negligence on the part of a Barbour County Schools' employee if it never talked to the bus driver. Simply relying on the signed statement cannot be deemed to be sufficient for a reasonable investigation.

Other than the signed statement, the Respondent relied on information provided by the School System. One such reliance was the behavior of the students while on the bus. It is possible that the School System asked that question to the bus driver, but the Respondent relied on information provided to it by an individual not present at the time of the incident to make that determination. The best and most efficient way to determine the behavior of the students on the bus would be to interview the bus driver.

According to the testimony of Mr. Morris, Valerie, an employee of the School System, contacted Ms. Jo Jackson, another analyst for the Respondent, and informed her that there was no horseplay on the bus, that one student handed another student the can of ravioli and then that student tossed the can of ravioli out of the bus window. She stated that it had not been hurled out the window.

Ms. Jackson was not at the hearing, so it is unknown where Valerie obtained this information. One can only assume it came from the bus driver. If that is the source of the information, then the bus driver would have had eyes on the two students while driving the bus. It is possible that it happened the way Valerie conveyed the information, but no one asked the driver how he could be driving the bus and watching what two students were doing behind him.

Another issue to determine is whether there was a video camera on the bus. Many school systems in West Virginia do have video cameras on their school buses. When asked if there was a video, Mr. Morris stated that he was not told that there was a video and if there was he had not seen it. Again, that would be a simple question to ask someone from the School System, Mr. Morris failed to do so.

The final issue is the reason why that student had been kicked off the bus prior to this incident. He may have been kicked off for a variety of reasons, but the Respondent did not ask the reason for the student being kicked off the bus. If the student had been kicked off the bus for something related to throwing things out the window and the School System had allowed him to get back on the bus without proper supervision, then an argument could have been made that the School System was negligent.

Mr. Morris stated, after reading the statement of Ms. Robinson, that it would not make a difference in his determination of liability, however, that statement, while may be true, overlooks the fact that the Respondent never asked anyone about witnesses.

I do not have any opinion on whether the School System should be liable to the Complainant, nor do I have any reason to believe that the incident didn't occur as described by the Respondent. However, the fact that the Respondent failed to talk to the bus driver, failed to investigate the prior reason the student was kicked off the bus, failed to inquire whether there was a video camera on the bus and were unaware of the existence of Ms. Robinson, is sufficient to find that the investigation was not thorough, therefore, it was not a reasonable investigation.

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 decision is only applicable to any violations of West Virginia Code § 33-11-4(9)(d) and West Virginia Code of State Regulations § 114-14-6.1 as identified in the Merit Letter.

4. The Complainant proved by a preponderance of the evidence that the Respondent failed to conduct a reasonable investigation. The investigation must be thorough to be

reasonable. The Complainant proved that the Respondent violated of West Virginia Code § 33-11-4(9)(d) and West Virginia Code of State Regulations § 114-14-6.1.

Recommended Decision

It is recommended that the consumer complaint of Austin Moss against National Union Fire Insurance Company of Pittsburgh be upheld.

Respectfully recommended,

MARK W. CARBONE