

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Erie Insurance Exchange, :  
Petitioner :  
 :  
v. :  
 :  
Insurance Department, : No. 40 C.D. 2008  
Respondent : Submitted: June 6, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: July 11, 2008

Erie Insurance Exchange (Erie) appeals the Insurance Commissioner's (Commissioner) decision that it had improperly cancelled Wayne Byman's (Insured) homeowner's insurance policy for nonpayment under the Unfair Insurance Practices Act (the "Act").<sup>1</sup> Because there is substantial evidence to support the Commissioner's determination, we affirm.

---

<sup>1</sup> Act of July 22, 1974, P.L. 589, *as amended*, 40 P.S. §§1171.1-1171.15. Section 5 of the Act, 40 P.S. §1171.5(a)(9), provides in relevant part:

Cancelling any policy of insurance covering owner-occupied private residential properties or personal property of individuals that has been in force for sixty days or more or refusing to renew any such policy unless the policy was obtained through material misrepresentation, fraudulent statements, omissions or

**(Footnote continued on next page...)**

Insured's homeowner's policy from Erie was paid quarterly. He paid the first quarterly payment on March 23, 2007, via Erie's online website. The second quarterly payment was due on June 22, 2007, and Insured used the online website again to make payment of \$255.00. The account number listed in Erie's records and transmitted to a bank for the June 22, 2007 payment was missing its last digit. On June 29, 2007, the bank indicated to Erie that payment was refused because of an invalid account number. On July 17, 2007, Erie sent Insured a letter stating that payment was refused "due to an invalid account." On the same day, Erie issued the cancellation notice cancelling the policy effective August 18, 2007.

Insured requested that the Insurance Department's Bureau of Consumer Services review his policy termination claiming that his policy was improperly cancelled because he had properly proffered payment to Erie. After an investigation, the Department issued an investigative report finding that Erie's

---

**(continued...)**

concealment of fact material to the acceptance of the risk or to the hazard assumed by the company; or there has been a substantial change or increase in hazard in the risk assumed by the company subsequent to the date the policy was issued; or there is a substantial increase in hazards insured against by reason of willful or negligent acts or omissions by the insured; *or the insured has failed to pay any premium when due* whether such premium is payable directly to the company or its agent or indirectly under any premium finance plan or extension of credit; or for any other reasons approved by the commissioner pursuant to rules and regulations promulgated by the commissioner. No cancellation or refusal to renew by any person shall be effective unless a written notice of the cancellation or refusal to renew is received by the insured either at the address shown in the policy or at a forwarding address[.] (Emphasis added.)

actions complied with the Act. Insured appealed this decision to the Commissioner.

At the hearing, Craig Burns (Burns), Erie's claims adjustor, entered into evidence the cancellation notice to Insured, the July 17<sup>th</sup> letter stating that payment was returned to Insured due to an invalid account, and the payment histories for both Insured's homeowner's policy and his account. Those records indicated receipt of payment on June 22, 2007, and telephone contact with Insured on June 28, 2007. With respect to the history for Insured's account for the homeowner's policy, Burns testified that Insured paid the premium on this account from the Erie website and when doing so, entered a bank account number against which payment could be drawn to pay the premium. However, Burns further testified that the number provided by Insured for the June 22, 2007 payment differed from the number used for the earlier payments in that it was one number less stating: "[t]here appears to be a five missing off of the end." (Reproduced Record at 20a.) Burns also testified that the exhibit detailing Insured's payment history for his account indicated next to the June 22, 2007 column that on June 29, 2007, an abbreviation was present, which stood for a negative amount for uncollected funds. (Reproduced Record at 22a.)

Insured testified on his own behalf about the circumstances surrounding his use of the website for the June 22, 2007 payment and his prior payment history with Erie. Insured stated that after he entered the information on the website, he was unable to print the confirmation page of the website, which would acknowledge payment and list the last four digits of the insured's account

number. To verify that payment had been received, Insured telephoned Erie on June 28, 2007, and a representative from Erie informed Insured that the June 22, 2007 payment was received. As to the missing digit, Insured stated: “I don’t know what happened to the digit. I’m just as stunned as anyone else ... I called and when I called in to the main switchboard or whoever accepts those calls, told me, informed me that my payment was fine.” (Reproduced Record at 36a.) When explaining the details of the webpage payment system, Insured testified:

When you make a webpage payment, ... you have to add in the account number twice, two times, which means that each time that you --- if I’m not mistaken, from memory here, the first time you assign the account number it’s encrypted. If the second time that you add in the account [it] is not the same as the encryption, a dropdown menu will appear and indicate invalid number, recheck your numbers.... So if I had dropped off the five from the first encryption, then that means I had to drop of [off] five from the second encryption. And my argument? Highly unlikely.

(Reproduced Record at 36-37a.)

Insured explained that he had used the webpage since 1999 and used the same bank account number to pay the monthly premiums for his auto insurance besides the monthly premiums for two homeowner’s insurance policies. He further testified that a year prior to the invalid account incident, he “made payment and accidentally had the correct payments ... put in the wrong amount to the account policy numbers[.]” After that, Erie realized that it was the right amount, but in the wrong policy, and switched the payments to the correct policies. (Reproduced Record at 37a.)

The Commissioner reversed the Department's determination and found that Erie had improperly cancelled his insurance because it had not met its burden under Section 5 of the Act, 40 P.S. §1171.5(a)(9), to establish that the insured failed to make necessary payments. Recognizing that Insured used the online website to make numerous payments for other policies with Erie in addition to his homeowner's policy, the Commissioner noted that the payment history displayed bank account numbers for prior payments as well as the refused payment, and the missing digit was "clearly visible on the payment history" because "someone, presumably at Erie, made notes on a copy of the payment history, including circling the bad account number and the space for the missing digit, while indicating that a '5' belonged in that space." (Adjudication and Order at 5.) The Commissioner found Insured to have testified "credibly, candidly, and in detail about his history of electronic payments and about the process itself," and determined that Erie's system requiring entry of the number twice made it "extremely unlikely" that Insured omitted the last digit of a number he "successfully entered on hundreds of other occasions." (Adjudication and Order at 9.) As a result, the Commissioner concluded that Erie did not establish that Insured failed to make necessary payments when due.

Instead, the Commissioner found it was more likely that a glitch at some other point in the system caused the number to be truncated and that Insured should not be penalized for a glitch "not of his making." (Adjudication and Order at 6.) Because Erie acknowledged receipt of the payment on June 22, 2007; informed Insured on June 28, 2007, that payment was received; and was later alerted by the bank that payment was rejected, the Commissioner stated Insured

“justifiably did not know that a deficiency existed.” (Adjudication and Order at 7.) The Commissioner also found that Erie had reason to know the bank’s refusal might have been the result of its own system failure and knew or should have known prior to cancelling the policy that it could not establish the reason for the cancellation because Erie had the means to discover that the last digit of Insured’s account number was dropped and that it had already communicated to Insured that payment was received.

The Commissioner held that:

When an insured properly utilizes a company’s electronic payment system, the payment is acknowledged by the company, and the company has reason to know that a problem in transferring funds may be the result of a system failure, the payment has been received by the company for the purpose of cancellation for nonpayment. (Adjudication and Order, Conclusions of Law #5 at 9.)

He ordered Erie to offer Insured homeowner’s insurance coverage with the types and limits of coverage “at least equal to those of the terminated policy” within 30 days of the order. (Commissioner’s Order dated December 10, 2007.) This appeal followed.<sup>2</sup>

---

<sup>2</sup> The Insurance Commissioner’s decision must be upheld unless necessary factual findings are not supported by substantial evidence, an error of law was committed, or constitutional rights were violated. *Donegal Mutual Insurance Company v. Insurance Department*, 719 A.2d 825 (Pa. Cmwlth. 1998). To the extent the Commissioner’s findings represent credibility determinations, they are not reviewable on appeal as a matter of administrative law. *Yugas v. Workmen’s Compensation Appeal Board (City of Pittsburgh)*, 476 A.2d 1377 (Pa. Cmwlth. 1984).

Erie argues that the Commissioner erred in holding that it improperly cancelled Insured's policy.<sup>3</sup> It points out that under the Act, an insurer may cancel a homeowner insurance policy when a premium payment is not received when due and does not require the companies to give a grace period to accept late payment. Because Insured entered the incorrect bank number on their website via an electronic payment, it argues that it was the same as if he was attempting to make payment with a bad check. Recognizing that this argument goes against the Commissioner's findings, it contends that substantial evidence does not support that Insured did not make an error when entering his bank account number, and the error must have occurred within Erie's payment system. We disagree.

Insured credibly testified that he made the payment; that he had made payments in the past; that the system required him to enter the number twice in the encrypted system; that it was highly unlikely that he would have dropped the last digit twice; and when he could not print a receipt of payment as he usually did to confirm payment, he called Erie to confirm that the payment was made and was told that payment had been made. The collective effect of these statements is that he entered the number correctly, and the logical and reasonable conclusion is that the only other party involved in this two-part transaction, Erie, committed the error in transmission to the bank. Erie offered no evidence to the contrary. Insured's testimony constitutes relevant and adequate evidence to support the Commissioner's findings of fact that Erie was the cause of the account number

---

<sup>3</sup> Erie also argues that the Commissioner's holding is inconsistent with prior Departmental determinations. However, none of the Department's determinations cited by Erie address the specific situation involving the payment of an insurance premium using a website.

error in the online payment system, and Erie failed to meet its burden of establishing that Insured failed to make payment when due.<sup>4</sup>

Accordingly, the adjudication and order of the Commissioner are affirmed.

---

DAN PELLEGRINI, Judge

---

<sup>4</sup> Erie also contends that the Commissioner's decision creates an unworkable directive for the insurance industry to correct customer errors when electronic payments are made to its website. What that statement ignores is that the Commissioner found Insured did make the payment, and the error in the account number transmitted to the bank was committed by Erie. What Erie is really arguing is that the risk of the transaction not going through should always be placed on the insured. However, nothing in the Act supports that proposition anymore than it places that risk on the insured if the insurer misprocesses a payment check.



