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INSURANCE DEPARTMENT
BEFORE THE INSURANCE COMMISSIONER
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COMMONWEALTH OF PENNSYLVANIA
ADMIN HEARINGS OFFICE

IN RE: Appeal of: : Pursuant to the Act of June 17, 1998,
Mark and Tracy Elias : P.L. 464, No. 68 § 1 (40 P.S. §§
204 Tangelo Drive : 991.2001-991.2013)
Jefferson Hills, PA 15025 :
:
File No. 13-115-147448 :
:
ENCOMPASS HOME AND AUTO :
INSURANCE COMPANY :
Policy No. 281214573 : Docket No. P13-10-005

ADJUDICATION AND ORDER

AND NOW, this 8th day of May, 2014, Michael F. Consedine, Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), makes the following Adjudication and Order. In this adjudication, the Commissioner must decide whether Encompass Home and Auto Insurance Company ("Encompass") properly refused to renew the automobile insurance policy of Mark and Tracy Elias ("the insureds").

HISTORY

On August 5, 2013, Encompass issued a notice refusing to renew the insureds' automobile insurance policy. The insureds requested that the Pennsylvania Insurance Department's Bureau of Consumer Services review this policy termination. After investigating the nonrenewal, the Insurance Department issued an investigative report on

DATE MAILED: May 8, 2014

September 17, 2013 holding that Encompass's actions complied with Act 68,¹ the law governing nonrenewal of automobile insurance policies. The insureds appealed the Insurance Department's decision and requested an administrative hearing.

Upon receipt of the request for hearing, a presiding officer was appointed. A hearing was held on February 20, 2014 in Pittsburgh, Pennsylvania attended by one of the insureds and a representative for the insurer. At the conclusion of the hearing, the parties reserved the right to file briefs. Neither of the parties elected to file a brief by the deadline and this matter now stands ready for adjudication. Specific findings of fact in this matter have been incorporated into the Discussion section of this adjudication.

DISCUSSION

This adjudication determines whether Encompass properly nonrenewed the automobile insurance policy of Mark and Tracy Elias. An insurer may nonrenew, cancel or refuse to write an automobile insurance policy only in accordance with statutory provisions contained in Act 68.

Act 68 prohibits an insurer from refusing to renew an automobile insurance policy under certain specified circumstances. More specifically, section 2003(b) of the Act provides that: "[a]n insurer may not cancel or refuse to renew a policy of automobile insurance on the basis of one accident within the thirty-six (36) month period prior to the upcoming anniversary date of the policy." 40 P.S. § 991.2003. However, an insurer may

¹ Act of June 17, 1998, P.L. 464, No. 68 § 1, 40 P.S. §§ 991.2001-991.2013. This act substantially reenacted the Automobile Insurance Act, Act of June 5, 1968, P.L. 140, No. 78, (formerly 40 P.S. §§ 1008.1-1008.11) (repealed by Act of June 17, 1998, P.L. 464, No. 68 § 3) (Act 78). Act 68 contains essentially the same restrictions on termination of automobile insurance policies previously contained in Act 78. Cases cited herein construing Act 78 are equally applicable to the present matter, as the cases interpret provisions which were reenacted by Act 68. See *Beitler v. Commonwealth, Dept. of Transportation*, 811 A.2d 38, 42 n. 7 (Pa. Cmwlth. 2002).

nonrenew a policy for two accidents within the specified thirty-six month period. *Tabas Appeal*, 473 A.2d 1143 (Pa. Cmwlth. 1984).

Certain types of accidents excluded by Act 68 may not be used by an insurer to nonrenew a policy. 40 P.S. § 991.2003(a)(13). Additionally, the insurer must make payments totaling \$1,450.00 as a result of the accidents used for nonrenewal. 75 Pa.C.S. § 1799.3; Ins. Dept. Notice No. 2011-01, 41 Pa. Bull. 121 (January 1, 2011). Therefore, an insurer may refuse to renew an automobile insurance policy when the insured is involved in two or more non-excluded accidents during the designated thirty-six month period provided that payments in excess of \$1,450.00 in the aggregate were made as a result of the accidents. The insured's "fault" with respect to these accidents is immaterial. *Musto v. Pennsylvania Insurance Department*, 683 A.2d 1325 (Pa. Cmwlth. 1996).

The insurer has the burden of proving compliance with the Act concerning nonrenewal; therefore, the insurer must prove that there was more than one accident with total damages in excess of the threshold amount under the policy within thirty-six months of the anniversary date of the policy. *McDonnell v. Insurance Department*, 503 A.2d 1042 (Pa. Cmwlth. 1986). The burden then shifts to the insured to demonstrate that the policy should not have been terminated. *Egnal v. Commonwealth, Ins. Dep't*, 573 A.2d 236 (Pa. Cmwlth. 1989). The insured's burden includes establishing circumstances which exclude an accident from being used for nonrenewal. *Phillips v. Insurance Commissioner*, 980 A.2d 687, 689 (Pa. Cmwlth. 2009).

To terminate Mark and Tracy Elias's policy, Encompass on August 5, 2013 mailed a notice of nonrenewal to the insureds. The notice stated the following:

The reason for nonrenewal is unacceptable driving record for you, or members of your household:

Mark Elias:

- 07/20/2012 Accident, Insured struck a guardrail, \$4,603.74 collision paid
- 01/12/2011 Accident, Insured's vehicle rear-ended other vehicle, \$405.02 property damage paid.

[Exhibit E1]. The effective date of the policy termination was October 10, 2013. [*Id.*].

Karen McNamara, a representative for Encompass, testified that two claims were paid by the insurer for two automobile accidents, one which occurred January 12, 2011 and the other which occurred July 20, 2012. [N.T. 14–15]. The decision not to renew the policy owned by Mark and Tracy Elias was based on claims information provided to the underwriting department. [N.T. 15]. Encompass presented a copy of Notice of Nonrenewal with proof of mailing to corroborate Karen McNamara's testimony. [Exhibits E1].

Mark Elias, as an insured, testified and did not dispute the occurrence of the accidents, or the amounts paid out by Encompass. [N.T. 18]. However, Mark Elias contended that the January 12, 2011 accident should not have been used as a basis for non-renewal because his car was rear-ended in that incident. [N.T. 19–20]. On the day of the accident a snow squall had just "blown up." [N.T. 19]. He came to a stop sign and stopped behind a truck. [*Id.*]. A driver behind him pushed his stopped car into the truck in front of him. [*Id.*]. He did not get a ticket and did not observe any damage to the other two vehicles. [N.T. 19–20].

When he reported the accident to the company, Mr. Elias explained that his car had been pushed into the stopped truck. [N.T. 20, 24–25; Exhibit P3]. He later learned that the company had subrogated the claim and he questioned why he was being charged for an accident when the company itself appeared to have fought paying for the claim. [N.T. 21–22]. When Mr. Elias learned that Encompass had paid half of the damages to

the truck in front of him, he objected but the Encompass adjuster said it was less expensive to pay the claim than to fight it. [N.T. 20–21].

Refusal to renew an automobile insurance policy by an insurer is permissible when two non-excludable automobile accidents occur within the thirty-six month period preceding the policy's anniversary date. *McGarvey/Prudential*, PH97-02-039 (1998); *Perry v. Liberty Mutual*, 485 A.2d 516, 518 (Pa. Cmwlth. 1984); *Tabas Appeal*, 473 A.2d 1143 (Pa. Cmwlth. 1984). An insurer may not use an accident for nonrenewal purposes when the insured's "automobile is struck in the rear by another vehicle and the applicant or other resident operator has not been convicted of a moving traffic violation in connection with this accident." 40 P.S. § 991.2003(a)(13)(iii). This exclusion applies to an accident in which an insured's vehicle is struck in the rear by another vehicle, causing it to strike the vehicle in front of it, and the insured has not been convicted of a moving traffic violation in connection with the accident. *Ezell/Allstate*, PI90-04-04 (1990); *Riendean/Allstate*, PH90-04-13 (1990); *Strickler/Erie*, P97-05-032 (1997).

In this case Encompass has presented no corroborating evidence to support its decision to include the insured's January 12, 2011 accident for nonrenewal. The company's representative confirmed that Encompass had subrogated the claim and entered into an intercompany arbitration to determine liability for the accident. [N.T. 22]. The claim was settled with Encompass and the insurer for the driver behind Mr. Elias each paying half of the truck driver's damages. [N.T. 22; Exhibit P2]. Ms. McNamara did not know if the arbitration addressed the question of whether the insured's car had been pushed into the claimant's truck. [N.T. 23].

In contrast, the insured credibly described the rear-end accident in detail. [N.T. 19–21]. From the time Mr. Elias first reported the accident to his agent he described a rear-end accident. [N.T. 25; Exhibit P3]. The insured contended that the company's

decision to make a partial payment on the claim should not be a reason for the company to refuse to renew his policy. [N.T. 24–25].

Taken all together, the record in this case establishes that the January 12, 2011 accident was an excludable rear-end accident. Consequently, the July 20, 2012 accident is the only viable accident under the policy and the nonrenewal violated Act 68.

A finding that a nonrenewal violates Act 68 authorizes the Commissioner to reimburse an insured for the cost incurred in obtaining replacement coverage. 40 P.S. 991.2009(I)(3). Reimbursement is limited to the cost which “exceeds the cost which would have been incurred had the policy under review remained in effect” and “on the difference of the cost of the policies to the extent that the coverage and limits of the replacement coverage does not exceed the original coverage.” *Id.*

The burden of requesting reimbursement and proving any increase in the cost of insurance rests with the insured. 40 P.S. 991.2009(i)(3). In this case, the insured has met his burden by requesting reimbursement and providing evidence showing the increased cost he incurred for his replacement insurance coverage. [N.T. 29; Exhibit P5]. Mr. Elias confirmed that he paid \$680 per year, or \$13.00 per week, for his Encompass Policy which covered his Nissan Maxima. [N.T. 29; Exhibit P4]. For less coverage on the same vehicle, he paid Progressive \$1,200.00 for six months or \$46.00 per week of coverage. [N.T. 29; Exhibit P5]. This means that Mr. Elias’s weekly cost for insurance is now \$33.00 more per week than the cost he incurred prior to the nonrenewal. In accordance with the guidelines of Act 68, Encompass must reimburse Mr. Elias pursuant to the directions contained in the accompanying Order.²

² The insured did not present any evidence to show what it would have cost him if he had obtained coverage equal to that which he had under the Encompass policy. Thus the amount due him is calculated solely on the difference in cost shown on the declaration pages he presented at the hearing. [Exhibits P4 and P5].

CONCLUSIONS OF LAW

1. The Insurance Commissioner has jurisdiction over the parties and the subject matter of this proceeding.

2. An insurer may nonrenew an automobile insurance policy when more than one accident occurred under the subject policy within the thirty-six months preceding the policy's anniversary date provided that payments in excess of \$1,450.00 in the aggregate were made as a result of the accidents and that the accidents were not of a type excluded by Act 68.

3. An insurer has the burden of proving that its refusal to renew complies with Act 68.

4. An insurer may not use an accident for nonrenewal purposes when the insured's "automobile is struck in the rear by another vehicle and the applicant or other resident operator has not been convicted of a moving traffic violation in connection with this accident." 40 P.S. § 991.2003(a)(13)(iii).

5. When an insured's vehicle is struck in the rear by another vehicle, causing it to strike the vehicle in front of it, and the insured has not been convicted of a moving traffic violation in connection with the accident, the accident is excluded for purposes of nonrenewal.

6. Encompass Home and Auto Insurance Company has not satisfied its burden of proving compliance with Act 68.

7. A finding that a nonrenewal violates Act 68 authorizes the Commissioner

to reimburse an insured for the cost incurred in obtaining replacement coverage. This reimbursement is limited to the cost which exceeds the cost which would have been incurred had the policy under review remained in effect and on the difference of the cost of the policies to the extent that the coverage and limits of the replacement coverage does not exceed the original coverage.

8. The insured has met his burden of proving an increase in the cost of insurance.

9. If any of the foregoing Conclusions of Law should be held to constitute Findings of Fact, the ones so found are incorporated therein by reference.

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ORDER

Based upon the foregoing Discussion and Conclusions of Law, **IT IS HEREBY ORDERED THAT:**

1. The September 17, 2013 determination issued by the Insurance Department of the Commonwealth of Pennsylvania which held that Encompass Home and Auto Insurance Company's nonrenewal of automobile insurance policy No. 281214573 issued to Mark and Tracy Elias did not violate the Act of June 17, 1998, P.L. 464, No. 68 is **REVERSED**.

2. Nonrenewal of automobile insurance policy No. 281214573 by Encompass Home and Auto Insurance Company **VIOLATED** the Act of June 17, 1998, P.L. 464, No. 68.

3. Encompass Home and Auto Insurance Company shall cease and desist from terminating Mark and Tracy Elias's automobile insurance policy No. 281214573 except at the request of the insureds or for any lawful reason which may occur following this adjudication.

4. Within **30 days** of the date of this order, Encompass Home and Auto Insurance Company shall offer to reinstate prospectively automobile insurance policy No. 281214573 or offer an equivalent policy with types and limits of coverage equal to nonrenewed policy No. 281214573. At the time it makes the offer to Mark Elias,³ Encompass Home and Auto Insurance Company shall notify the Administrative Hearings Office of the offer in writing.

5. **Within thirty (30) days** of the mailing of an offer of reinstatement, Mark Elias shall notify Encompass Home and Auto Insurance Company in writing of the election to accept or reject said offer. In the absence of a response the offer shall be deemed rejected on the thirtieth day following the offer. Should Mark Elias accept the offer, the acceptance shall designate an effective date which shall be on or before **October 19, 2014**.

6. Encompass Home and Auto Insurance Company shall reimburse Mark Elias for the additional cost of replacement coverage, **within fifteen (15) days** of the earlier of: 1) Encompass Home and Auto Insurance Company's receipt of acceptance; 2) Encompass Home and Auto Insurance Company's receipt of rejection; or 3) deemed rejection of an offer. Reimbursement shall be \$33.00 times the number of full weeks between October 10, 2013 and Encompass Home and Auto Insurance Company's receipt

³ The insureds are divorced and Tracy Elias is no longer on the same insurance policy as Mark Elias. Thus, Encompass only needs to make its offer and reimbursement to its named insured, Mark Elias.

of acceptance or rejection; should the offer be deemed rejected, Encompass Home and Auto Insurance Company shall reimburse Mark Elias for \$33.00 times the number of full weeks between October 10, 2013 and the date of the offer. At the time it makes reimbursement, Encompass Home and Auto Insurance Company shall notify the Administrative Hearings Office that it has done so.

7. **Within thirty (30) days from the date of this order**, and pursuant to 40 P.S. § 991.2013, Encompass Home and Auto Insurance Company is directed to **pay a civil penalty of one thousand dollars (\$1,000.00)**, payable to the Commonwealth of Pennsylvania and directed to April Phelps, Administrative Assistant, Bureau of Licensing and Enforcement, Pennsylvania Insurance Department, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120. At the time it makes payment, Encompass shall notify the Administrative Hearings Office that it has done so.

8. This Order is effective immediately.


MICHAEL F. CONSEDINE
Insurance Commissioner