NOTICE OF AGENCY'S FINAL DECISION

(Please keep form with file until a final decision is issued)

Case Name: [redacted] vs. Allstate Property & Casualty Insurance

ALJ: Baker Decision Date: 2/21/18

Case No.: MIA-CC-33-17-37748

Agency Case No. (if applicable): ______

Document Name (CRS): ______

Please check one:

✓ AFFIRMED

___ AFFIRMED w/ comment

___ MODIFIED

___ REVERSED

___ OTHER ______

If not affirmed in its entirety, please append a copy of the Agency's Final Decision.

03/19/2018
Date

Signature Appears on Original
[redacted]
Secretary or Designee

Please return to:

Librarian
Office of Administrative Hearings
Administrative Law Building
11101 Gilroy Road
Hunt Valley, Maryland 21031-1301

OAH-OPER-10
(REVISED 10/02)

RETURN TO OAH

MARYLAND INSURANCE	*	**BEFORE WILLIS GUNTHER BAKER,**
ADMINISTRATION	*	**AN ADMINISTRATIVE LAW JUDGE**
EX REL.	*	**OF THE MARYLAND OFFICE**
[redacted]	*	**OF ADMINISTRATIVE HEARINGS**
COMPLAINANT	*	
v.	*	
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,	*	**OAH No.: MIA-CC-33-17-37748**
	*	**MIA No.: 2017-11-016**
LICENSEE	*	

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On May 17, 2016, the Maryland Insurance Administration (MIA) received a complaint from [redacted][1] (Complainant) alleging unfair claims settlement practices by Allstate Property and Casualty Insurance Company (Licensee). Specifically, the Complainant alleges that the Licensee failed to fully compensate the Complainant for damage to his shed from a fallen tree branch.

After an investigation, the MIA found that the Licensee did not violate sections 4-113 or 27-303(1), (2) or (6) of the Insurance Article and notified the Complainant of its finding by a letter dated July 26, 2017. On August 21, 2017, the Complainant requested a hearing. On

[1] I have used the Complainant's initials to preserve confidentiality.

November 22, 2017, the MIA transmitted the matter to the Office of Administrative Hearings (OAH) for a contested case hearing. In its transmittal, the MIA delegated to the OAH authority to issue a Proposed Order.[2]

On February 2, 2018, I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Ins. §§ 2-210, 2-213 (2017); Code of Maryland Regulations (COMAR) 31.15.07. The Complainant appeared without representation. Melissa D. McNair, Esquire, represented the Licensee.

The contested case provisions of the Administrative Procedure Act, the MIA's hearing regulations, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 31.02.01; COMAR 28.02.01.

ISSUE

Did the Licensee's refusal to pay the full amount of the Complainant's claim based on lack of causation and policy exclusions constitute an unfair claim settlement practice?

SUMMARY OF THE EVIDENCE

Exhibits

I incorporated the entire MIA file, consisting of seven exhibits, into the record as follows:

MIA Ex. 1 - May 17, 2016 Complaint filed with MIA

MIA Ex. 2 - May 24, 2016 letter from MIA to Licensee advising of Complaint and seeking information

MIA Ex. 3 - Licensee's Claim File pertaining to Complainant's claim, including Confidential Claim Log

---

[2] Under the relevant statute and regulations, the Insurance Commissioner may, on a case-by-case basis, delegate to the OAH the authority to issue: (a) proposed or final findings of fact; (b) proposed or final conclusions of law; (c) proposed or final findings of fact and conclusions of law; or (d) a proposed or final order. Md. Code Ann., State Gov't § 10-205 (2014); Code of Maryland Regulations (COMAR) 31.02.01.04-1(A)(2).

MIA Ex. 4 - July 19, 2017 to July 20, 2017 emails between MIA and Licensee

MIA Ex. 5 - July 26, 2017 determination letter from MIA to Complainant, including Hearing Request Form and Survey

MIA Ex. 6 - August 21, 2017 Hearing Request

MIA Ex. 7 - August 28, 2017 letter from MIA to Complainant and Licensee granting the hearing

I admitted the following joint exhibits:

Jt. Ex. 1 - May 3, 2016 Photographs of Complainant's shed taken by Thomas Krauth

Jt. Ex. 2 - April 27, 2016 Photograph of Complainant's shed taken by Joseph Zimmerman

I admitted the following exhibits on behalf of the Complainant:

Compl. Ex. 1 - Drawing of Complainant's shed

Compl. Ex. 2 - Drawing of roof section of Complainant's shed

I admitted the following exhibits on behalf of the Licensee:

Lic. Ex. 1 - Curriculum Vitae of Thomas M. Krauth, P.E.

Lic. Ex. 2 - March 9, 2016 Krauth Engineering Report

Lic. Ex. 3 - April 17, 2016 Krauth Re-Inspection Engineering Report

Lic. Ex. 4 - April 6, 2016 Photographs of Complainant's shed taken by Krauth

Lic. Ex. 5 - February 25, 2016 Photographs of Complainant's shed taken by Bryan Edwards

Lic. Ex. 6 - February 25, 2016 Estimate by Licensee

Lic. Ex. 7 - March 9, 2016 Revised Estimate by Licensee

Lic. Ex. 8 - Payments made by Licensee to Complainant

Lic. Ex. 9 - April 11, 2016 Final Estimate by Licensee

Lic. Ex. 10 - April 27, 2016 Photograph of bottom of shed wall taken by Joseph Zimmerman

Testimony

The Complainant testified on his own behalf[3] and did not offer any other witness.

The Licensee presented the following witnesses:

Thomas M. Krauth, P.E., who was accepted as an expert in the field of structural engineering;

Bryan Mark Edwards, Licensee's Claims Property Inspector;

Joseph R. Zimmerman, Licensee's Quality Evaluator.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. On July 24, 2015, a large tree branch fell on a detached shed at the Complainant's property. The Complainant reported the damage to the Licensee, his homeowner's insurance company, on October 27, 2015.

2. On February 23, 2016, the Complainant provided the Licensee a contractor's estimate for replacement of his shed at a cost of $32,183.06.

3. On February 25, 2016, Bryan Edwards, the Licensee's Claims Property Inspector, went to the Complainant's property to inspect the damage and write an estimate for repairs. Mr. Edwards noted the shed damage to include damage to roof shingles, plywood sheeting, and fascia board that he estimated at $1,056.32, and damage to personal property in the shed, consisting of a snow shovel and chain saw, estimated at $554.30. The Licensee issued payments to the Complainant in these amounts.

4. The Complainant objected to these estimates and spoke with Mr. Edward's Supervisor, Mr. Gray, who agreed to hire an engineer to inspect the property.

[3] The Complainant sought to be qualified as an expert in engineering so as to give an expert opinion about the structural integrity of the shed as a result of the tree limb strike. The Licensee objected. deThe Complainant's experience and training were in the field of HVAC and mechanical contracting and did not include any course work or licensing in engineering, so I declined to accept him as an expert in engineering.

5. On March 3, 2016, Thomas M. Krauth, a Registered Professional Engineer, inspected the Complainant's shed to provide the Licensee an engineering assessment of the tree branch impact. The assessment was requested and paid for by the Licensee.

6. The shed sustained damage due to the tree limb impact which included roof shingle damage at the rear roof slope; trim, rafter and sheathing damage at the rear roof overhang; roof sheathing fracture and separation from rafters; a ridge board fracture; and roof frame shifting. Mr. Krauth recommended removal and replacement of the entire roof structure due to the branch impact.

7. Although not caused by the tree branch impact, Mr. Krauth recommended the additional repair of replacing the king post truss or alternatively, installing ceiling joists at each rafter set to eliminate the need for the king post truss. The king truss was deflected due to a long term creep of the wood from the many years of the load of the roof itself and the load of the items stored in the loft, not from the temporary load of the tree branch.

8. Upon receipt of Mr. Krauth's report, Mr. Edwards consulted with Mr. Gray, and the Licensee's estimate was revised to include replacement of the entire roof, tree branch removal from the roof of the shed and debris removal from the property and additional payments were issued to the Complainant in the amount of $2,390.20.

9. The Complainant indicated to the Licensee that he was not satisfied with Mr. Krauth's report and believed that the impact of the tree branch had caused a downward deflection of the rear wall framing, an uplift of a front wall post and an outward deflection of the side wall framing, requiring replacement of the walls of the shed.

10. The Licensee requested that Mr. Krauth re-inspect the property. On April 6, 2016, Mr. Krauth met the Complainant to review his specific concerns about the damages as

identified above and also regarding the detachment of a wall cabinet alleged to be caused by the tree branch impact. Mr. Krauth did not alter his original assessment of the damage to the shed structure, but did concede that the detachment of the cabinet from the wall could have been a result of the tree limb impact.

11. Joseph Zimmerman, the Licensee's Quality Evaluator, inspected the Complainant's shed on April 27 and April 28, 2016 after the Complainant was dissatisfied with Mr. Krauth's re-inspection. Although Mr. Zimmerman found no additional damage, he agreed to pay for some additional 4x4 posts to be replaced within the shed structure.

12. The Licensee made additional adjustments to the estimate for the posts and the cabinet and paid the Complainant an additional 2 checks, in the amounts of $1,816.36 and $518.86.

13. The Licensee has paid the Complainant a total of $6, 336, 04 to date for the damage to his shed and personal property from the branch strike.

14. The shed was estimated to be thirty to forty years old and was of pole construction, also described as barn construction. The shed displayed many years of weathering and deterioration to the exterior walls, roof and rafters that existed prior to the tree branch strike, as well as improper design.

15. There was no noticeable change in coloration in the wood, no evidence of movement of the posts, nor any gaps at joints to indicate a shift of the walls of the shed due to the tree branch impact.

16. The Licensee agreed to send out an engineer again when the Complainant began the repairs of the roof so that the structure could be re-inspected for any damage hidden by the roof. To date, the Complainant has not had any repairs made to the shed.

17. The Complainant's policy with the Licensee had exclusions for coverage that indicated it would not cover losses due to wear and tear; aging and deterioration of a structure; nor due to faulty, inadequate or defective planning, construction or maintenance. It further stated that losses would not be covered if they were due predominantly to an excluded cause.

DISCUSSION

When the MIA referred this case to the OAH, it directed the Administrative Law Judge conducting the hearing to pay close attention to section 27-303 of the Insurance Article. The Complainant asserts that the Licensee violated that statute by engaging in unfair claim settlement practices under section 27-303(1), (2) and (6), which states:

> It is an unfair claim settlement practice and a violation of this subtitle for an insurer, nonprofit health service plan, or health maintenance organization to:
>
> (1) misrepresent pertinent facts or policy provisions that relate to the claim or coverage at issue;
>
> (2) refuse to pay a claim for an arbitrary or capricious reason based on all available information;
>
> . . .
>
> (6) fail to provide promptly on request a reasonable explanation of the basis for a denial of a claim;....

Md. Code Ann., Ins. § 27-303 (2017).

I will first analyze section 27-303(2), which prohibits an insurer from refusing to pay a claim for an arbitrary or capricious reason. Neither the statute nor any regulation promulgated by the MIA defines the "arbitrary or capricious" standard in the context of an administrative review of an insurer's refusal to pay a claim.. In *Berkshire Life Insurance Co. v. Maryland Insurance Administration*, 142 Md. App. 628, 671 (2002), however, the Court of Special Appeals discussed the meaning of the "arbitrary or capricious" standard as clarified by the

Maryland Insurance Commissioner in *Gabler v. American Manufacturers*, MIA No. 60-7/97. In *Gabler,* the Commissioner stated:

> [A] claimant must prove that the insurer acted based on "arbitrary and capricious reasons." The word "arbitrary" means a denial subject to individual judgment or discretion, and made without adequate determination of principle. The word "capricious" is used to describe a refusal to pay a claim based on an unpredictable whim. Thus, under [Insurance Article] § 27-303, an insurer may properly deny a claim if the insurer has an otherwise lawful principle or standard which it applies across the board to all claimants and pursuant to which the insurer has acted reasonably or rationally based on "all available information."

Berkshire Life Ins. Co., 142 Md. App. at 671 (quoting Order of Remand at 6-7, MIA No. 60-7/97 (Mar. 11, 1998)) (internal citations omitted). The *Berkshire* court adopted the Insurance Commissioner's interpretation of "arbitrary and capricious" as applied to the facts of the *Berkshire* case. 142 Md. App. at 672.

The Complainant, as the party asserting the affirmative on the issue of an unfair claim settlement practice, has the burden of proving by the preponderance of the evidence that the Licensee acted arbitrarily and capriciously in denying his claim. Md. Code Ann., State Gov't § 10-217 (2014); *Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996); *Berkshire*, 142 Md. App. at 672.

As it pertains to section 27-303(1) and (6), the Complainant also bears the burden, by preponderance of the evidence, of establishing that the Licensee engaged in unfair claim settlement practices by misrepresenting pertinent facts or policy provisions relating to the Complainant's claim or coverage, or failing to provide promptly on request a reasonable explanation of the basis for a denial of the claim. Md. Code Ann., Ins. § 27-303(1), (6) (2017). If the MIA finds that the Licensee violated section 27-303, it has the authority to take action against the Licensee's ability to operate in Maryland pursuant to section 4-113 of the Insurance Article.

The crux of the Complainant's claim is that the Licensee failed to adequately compensate him for the damages to his shed and that he is entitled to repair or replacement of the shed walls in addition to the roof, essentially requesting a complete replacement of the shed. The Complainant argued that the Licensee hired a biased engineer to minimize the amount it would be required to pay and relied on vague and unclear contract language to deny him full coverage for his shed. In support of his claim, the Complainant only offered his own testimony. He testified that based on his observation and the operation of physics, the weight of the branch caused downward force to the roof that then caused the deflection in the king truss and pushed the walls outward. He provided evidence that the Licensee revised its estimate four different times, which he claimed showed that it was not dealing fairly, but trying to pay the least amount possible. He argued that the language in the policy did not clearly state why the walls to the shed would not be covered and that the Licensee was failing to give the full coverage afforded by the policy, which was unfair.

On cross-examination, the Complainant agreed that he provided the Licensee with an estimate for replacement of the shed at a cost of $32,000. The Complainant conceded that the estimate included upgrades that would be required to bring the structure within the current building codes, and that the upgrades were not covered by the policy. The Complainant also agreed that the base of the shed walls had been exposed to water and wet leaves that caused deterioration of the siding, that some of the wood supports were warped due to water and time, and that the shed was thirty to forty years old. However, the Complainant stated none of these issues impacted the soundness of the walls and the walls were compromised due to the branch strike.

The Licensee provided the testimony of two employees and an independent engineer to support its determination. Thomas M. Krauth was accepted as an expert in engineering based on his education, experience in the field since 1993 and his inspection of the Claimant's shed. He testified that in assessing the damage to the shed due to the tree limb, he was looking for new, fresh damages consistent with impact. He observed damage to the roof shingles, the trim along the fascia boards, the plywood roof deck, the ridge board and the rafters, which he attributed to the tree limb strike and recommended complete replacement of the roof.

Related to the remainder of the shed, Mr. Krauth looked for separation, structural movement, gaps, failure or widening of connections and freshness of appearance of wood to decide if any damage was new or old. He observed decay, rotting, staining, and long term separations that were inconsistent with a recent impact. Mr. Krauth noted extended exposure to the elements, age and wear that caused decay in the wall panels, wall frame distortion and twisting and bowing of wood posts. He testified that the king truss showed "creep" and distortion from years of stress that, in his expert opinion, could not have been caused by the temporary impact of the tree branch. Mr. Krauth provided a report to the Licensee that was shared with the Complainant.

The Complainant disagreed with Mr. Krauth's assessment and the Licensee requested that Mr. Krauth make a re-inspection of the shed to address the Complainant's remaining concerns, which Mr. Krauth did. The Complainant pointed out additional issues to Mr. Krauth regarding the movement of the front and rear wall, but Mr. Krauth testified he was unable to see any evidence of movement, noting that the sheathing was intact and there was no separation, that the posts and beams and connections showed no change and there was no buckling or cracking of paneling. The Complainant also pointed out a wall cabinet on the rear wall that had fallen off the wall.[4] Mr. Krauth determined that it was possible that the cabinet dislodged as a result of the tree strike and added it to his report as recoverable.

The Licensee also offered the testimony of Bryan Edwards, its Claims Property Inspector. Mr. Edwards was the first person to inspect the Complainant's shed on behalf of the Licensee and while he noted damage to roof shingles, plywood sheeting and fascia board, he estimated the damages at $1,056.32 for the shed, and an additional $554.30 for damages to personal property, consisting of a snow shovel and chain saw. After he received Mr. Krauth's report, Mr. Edwards revised his estimate to include complete replacement of the roof. He determined that under the Licensee's policy, it was appropriate to restyle the shed partially by just replacing the roof, rather than the complete rebuild that the Complainant sought.

The Licensee provided the testimony of Joseph Zimmerman, its Quality Evaluator. Mr. Zimmerman inspected the Complainant's property after Mr. Krauth's second inspection, due to the Complainant's lingering concerns about the walls. Mr. Zimmerman testified that he inspected the shed closely, looking for evidence of connection of the bottom of the wall to footers. He found no evidence that the walls pushed out. He agreed to replace the vertical 4x4 posts and authorized additional payment to the Complainant. He also agreed that once the roof was removed, the Licensee would send an engineer for an additional inspection to see if further damage had been hidden by the roof. Mr. Zimmerman testified that the Licensee paid Mr. Krauth for his unbiased opinion as an expert engineer. The Licensee accepted Mr. Krauth's recommendation and provided payment to the Complainant.

The Complainant argues that the Licensee violated Insurance Article 27-303. The Complainant claimed that the policy language was vague and unclear, but provided no testimony or other evidence of what specific language he challenged or how the Licensee misrepresented

[4] The Complainant had not mentioned this cabinet to Mr. Krauth or Mr. Edwards prior to April 6, 2016.

policy provisions under section 27-303(1). The Complainant asserted that he was entitled to replacement of the shed under the policy, but cited no policy language to support his claim. The Licensee, however, provided the exclusion language under which it assessed the Complainant's claim denial. There is no evidence of misrepresentation of policy provisions.

Similarly, there was simply no evidence presented that the Licensee failed to provide promptly on request a reasonable explanation of the basis for a denial of the claim. The record showed ongoing communication between the parties over many months by letter, phone and in person. The Complainant did not testify that the Licensee failed to provide him information for the basis of its denial. His testimony was simply that he disagreed with the Licensee's evaluation. Therefore, the claim under section 27-303(6) fails.

The Complainant's main focus was that the Licensee was arbitrary and capricious in its handling of his claim, in violation of section 27-303(2). The Complainant provided only his own testimony to assert that the recommendation of replacement of the roof was insufficient to cover his loss. He argued that the shed walls, the king truss and the side supports were all damaged by the tree branch strike, necessitating a complete rebuild of the shed. The Complainant agreed that the shed was thirty to forty years old and was on the property for many years before he moved there and built his house. He did not construct the shed. It is obvious from the photographs that the shed was old, had not been renovated or repaired over the years and was seriously weathered by the elements. There was no photographic evidence to support the Complainant's contention that the walls were displaced by the branch strike. Similarly, the only expert testimony was that the damage to the shed caused by the branch strike was restricted to the roof structure. The Complainant had four opportunities during the shed inspections to show the Licensee's representatives and engineer evidence to support his theory that the walls shifted. He provided no evidence at the hearing to show a wall shift or connection changes. Dozens of photographs were put into evidence and none demonstrated the damage that the Complainant alleged.

It is understandable that the Complainant was frustrated that it took much back and forth for him to receive the funds that he did finally recover. However, the Licensee did take the Complainant's claim seriously, hired an independent engineer to inspect the property, accepted that engineer's conclusions and compensated the Complainant adequately for the loss under the policy terms. Replacement of the entire shed was not a reasonable request under the terms of the policy and the circumstances of the loss. Compensation for replacement of the shed roof was all that was required and the Licensee did that, and added additional repairs in an attempt to satisfy the Complainant. Furthermore, the Licensee has agreed to re-inspect the shed for hidden damage once the Complainant undertakes his repairs.[5] The Complainant failed to demonstrate that the Licensee acted arbitrarily and capriciously in denying him compensation for the wall replacement and the Complainant has been made whole pursuant to the policy terms.

I conclude that the Licensee acted lawfully in handling the Complainant's claim under the policy. A reasoning mind could have reached the same decision as the Licensee; therefore, the Licensee's partial denial of the Complainant's claim was not arbitrary or capricious.

CONCLUSION OF LAW

I conclude as a matter of law that the Complainant did not show that the Licensee engaged in an unfair claim settlement practice under the Insurance Article when it denied part of the Complainant's claim. Md. Code Ann., Ins. § 27-303(1), (2), (6) (2017).

[5] The Complainant has yet to undertake any repair to the shed, so arguably, the Licensee has not yet completed its damage assessment. Furthermore, the shed has stood without repair for over three and a half years through a blizzard, high winds and serious storms.

PROPOSED ORDER

Based upon the above Findings of Fact, Discussion, and Conclusion of Law, I **PROPOSE** that the Licensee not be found in violation of section 27-303(1), (2) or (6) of the Insurance Article and that the charges made by the Complainant be **DENIED AND DISMISSED.**

I further **PROPOSE** that the records and publications of the Maryland Insurance Administration reflect this decision.

Signature Appears on Original

February 21, 2018
Date Decision Issued

Willis Gunther Baker
Administrative Law Judge

WGB/cj
#172261

RIGHT TO FILE EXCEPTIONS

Upon receipt of this proposed decision, affected parties have twenty days to file exceptions with the Insurance Commissioner. Code of Maryland Regulations (COMAR) 31.02.01.10-1B(1). If they wish to have a transcript of the hearing before filing exceptions, they have ten days to file with the Insurance Commissioner a copy of their written request to a private stenographer for preparation of a transcript. COMAR 31.02.01.10-1B(2). If a transcript is requested, the transcript must be filed with the Commissioner within sixty days of the request, and then the parties have thirty days after the filing of the transcript to file exceptions with the Insurance Commissioner. COMAR 31.02.01.10-1D. Written exceptions and copies of requests for transcripts should be addressed to the Insurance Commissioner, Maryland Insurance Administration, 200 St. Paul Place, Suite 2700, Baltimore, MD 21202. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

[redacted]

[redacted]

[redacted]