

This disciplinary decision was taken after an appeal to The Insurance Agents' and Adjusters' Licensing Appeal Board (the "Board"). As is the case with its own disciplinary decisions, the Insurance Adjusters Council has determined that publication of the Board's decisions (after adjustment for privacy/identifying considerations) are in the public interest. The Board's decision in this case is therefore available in accordance with section 7.2(1) and (2) of *Manitoba Regulation 227/91*.

Dated: October 6, 2014

IN THE MATTER OF: The Insurance Act, R.S.M. 1987 c.140

AND IN THE MATTER OF: Adam Reade Clements

REASONS FOR DECISION OF THE INSURANCE AGENTS' AND ADJUSTERS' LICENSING APPEAL BOARD

Appearances:	For the appellant Adam Reade Clements:	Himself and a Representative
	For the Insurance Council of Manitoba:	Michael Richards D'Arcy & Deacon LLP

The Insurance Agents' and Adjusters' Licensing Appeal Board (the "Panel") heard this appeal on Thursday, May 15, 2014. The appellant, Adam Reade Clements ("Mr. Clements"), appealed a decision made by the Insurance Adjusters Council of Manitoba (the "Council"). A hearing before the Council was held on July 11, 2013. This matter arose out of a complaint regarding the appellant which was received by Council. This resulted in an investigation pursuant to Section 396.1(7)(e) of the Insurance Act, R.S.M. 1987 c.140 (the "Act") and Section 7(2)(e) of Regulation 227/91 (the "Regulation"). An investigation was carried out to determine whether the appellant violated the Act and/or the Regulation and/or the Insurance Adjusters' Code of Conduct (the "Code"). At the outset of this appeal, Council introduced into evidence Exhibit 1, which is a Book of Documents relating to this matter. All references hereinafter will refer to the tab number in Exhibit 1.

Council had initially made an intended decision that there were three violations of the Code. At the hearing before Council it made the decision that two violations of the Code, being Section 2 – Competence and Section 4 – Advising Clients, should be withdrawn. The other preliminary determination made by Council was with regard to a violation of Section 3 – Quality of Service of the Code – which was confirmed. On this basis, pursuant to Section 7(4)(c) of the Regulation and Section 371(1.1) of the Act, Council ordered that Mr. Clements be fined \$500.00 and it assessed partial investigation costs of \$250.00. This decision of Council was signed August 19, 2013.

Background

The complaint was filed by an individual on November 12, 2012. The appellant had been the adjuster on a file involving a claim by the individual and his/her spouse ("the insureds"). Water damage had been suffered by the insureds at a rental property in October of 2011. A radiator in the rental property was leaking and had rusted through. The decision made by the plumbing company and the insureds was to cap the radiator and to remove it. This was done and within several hours, the tenant contacted the insureds indicating that there had been a loud bang and that the main floor dining room radiator had burst. This caused extensive damage to the property of the insureds. The insureds contacted their insurance broker to open a water damage claim and they were told that after hours adjusters would handle the claim and the adjuster handling the claim would be the appellant. This claim was not completed until September, 2012, almost a year after the claim was made. As a result of the onset of cold weather and a lack of heat to the house, more radiators were damaged. One of the insureds complained generally that they had difficulty getting in touch with the appellant and the contractor and the claim dragged out for an extended period of time.

Evidence before Panel

This appeal was a new hearing. The Panel heard evidence from Council and the appellant. The investigator for the Insurance Council of Manitoba testified on behalf of Council. Mr. Clements testified on his own behalf and a representative from his employer also assisted with the hearing.

The issue before the Panel was whether the appellant breached Section 3 – Quality of Service – under the Code. This commentary for Section 3 provides generally:

Standard of Service

All adjusters are required to provide service to Principals, policy holders and claimants on a standard at least equal to the service a prudent and competent adjuster would provide. If undue delay or other impediments in providing conscientious, diligent and efficient service can be foreseen, the Principal, policy holder and/or claimant should be so informed.

The commentary goes on to provide specific examples of what the adjuster shall and shall not do. The commentary under "Standard of Service" provides that the adjuster shall not:

- (a) Fail to inform a Principal or policyholder of any matter or fact which may materially affect the claim or prejudice their interest.

It is the position of Council the omission of the appellant to clearly address mitigation obligations resulted in a breach of Section 3 of the Code. At the hearing, Council argued that in the particular circumstances of this case, being winter conditions, a vacant rental property and demonstrated electrical issues that risked disrupting the temporary heating being provided to the property, the standard required the appellant to send a letter to the insured highlighting these risks, the need for mitigation and responsibility in the event these risks occurred.

It does appear at the outset, being late October, 2011, the insureds were unsure about whether to continue with the claim as they were considering placing the property up for sale. Shortly thereafter, they did decide to proceed with the clean-up of the property and the claim continued on. Cold weather set in shortly after the initial claim was made. When the insureds had their tenant light the boiler as a result of the colder weather, this caused five further radiators to crack, causing further damage. In early November, the contractor advised there were electrical issues at the insured's property as the portable heaters kept turning off or shutting off due to fuses blowing. New radiators were ordered on January 4, 2012 and received February 23, 2012.

Throughout this period of time, the insureds were complaining they were unable to get in touch with the contractor. Tab 14 of Exhibit 1 indicates that this was communicated to the contractor by the appellant. In this case, the insureds often communicated with their insurance broker, who would address issues with both the insurer involved, and the adjusters. In January, the insurance brokerage expressed the view to the insured that the delays in the finalization of this claim were caused by a combination of many factors. These factors were primarily that the contractor was slow, the appellant did not follow up with the contractor, and the insurer not making up its mind about issues related to the claim.

The insurer had a communication checklist to be used for claims, which was apparently not used by the appellant in this case.

Another issue was that the insureds were pursuing a rental loss claim. There was no documentation in the appellant's activity log to indicate that the appellant had contacted the insureds directly with regard to this issue.

Work continued on in terms of electrical and plumbing clean-up throughout the spring of 2012 and in June of 2012, another adjuster took over conduct of the file until it was concluded in September of 2012.

The evidence of Council was that the responsibility of the property owner was not addressed directly with the insureds and that the appellant should have ensured that the insureds understood that the welfare of the property was their responsibility. The appellant indicated that it was the adjusting firm's policy to treat a loss as though it was not covered at the outset, however, this was not communicated in the letter that the appellant wrote to the insureds on November 1, 2011 (Tab 9) or in other correspondence with the insureds.

It is the position of Council that the appellant had failed to inform the insureds of facts which might materially have affected the claim or prejudiced their interests. One of the key points was whether the appellant raised with the insureds the issue of additional heating sources being placed in the home to reduce risks. There was no letter from the appellant to the insureds on this issue.

On cross-examination, the appellant admitted that it was important to provide information to the insureds in writing. Tab 13, being the time records of the appellant, documented the appellant did have a great deal of communication with the insurer and the broker, however, there was little documented communication with the insureds. In cross-examination, the appellant said that he had discussed mitigation with the insureds on the telephone, but he acknowledged that he did not address the statutory conditions in writing. Statutory Condition No. 9, relating to salvage, requires the insured to take all reasonable steps to prevent further damage to any such property damaged and to prevent damage to other property.

The appellant also admitted that he had knowledge the house was going to be vacant and the vacancy issue should also have been raised with the insureds. In cross-examination the appellant admitted that he would raise the vacancy issue with insureds now with regard to the statutory conditions.

On November 13, 2011, the appellant contacted the insurer with regard to issues relating to portable heaters. The file of the appellant did not indicate a communication with the insured on these issues. In early November, the emerging issues of the radiators not yet being ordered and the impact of the onset of winter were not raised with the insureds. The appellant did not indicate to the insureds that they were obligated to obtain temporary heat for their property prior to the replacement radiators being ordered and installed. There was no documentation on his file of a discussion with the insureds as to who was responsible for heating issues. Prior to the further damage occurring in January, the appellant had not inquired of the insureds as to how often they were going to the premises, nor did he ensure that the contractor was checking the property.

Argument of Council

It is the position of Council that the claim involved a number of unique factors, including that the property was a rental property, that there was tenant vacancy, that there was a unique heating system involving boilers and radiators and that the replacement of the radiators was going to take time. In addition, there were complicating factors such as the

fact that this claim was going to continue on into the winter and that the contractor had indicated there were problems with regard to electrical panel in the property. As this claim proceeded on in November and December Council's position was that the appellant had obligations arising from these factors.

Council's position was that the appellant should have clarified who was responsible for the heating of the house and put the insureds on notice that they had mitigation problems and that the replacement of their electrical panel which was not going to be covered by the insurance company would cause further difficulties and potential losses.

Council submitted that the appellant did not deliver the quality of service expected in the circumstances. Although the appellant indicated there were some verbal discussions with the insureds with regard to mitigation, this was not communicated in writing. The appellant had assumed the contractor was taking care of these issues, but he assumed this without knowing how often the contractor or the insureds were checking on the property. It is submitted by Council that it would have been the appellant's job to coordinate this. It is submitted that these factors should have been highlighted in writing by the appellant to the insureds in November. The costs of the initial claim were increased significantly by steps not being taken to protect the property in the winter months.

Argument of the Appellant

It is the position of the appellant that he did not breach Section 3 of the Code. He indicated that he did tell the insureds to review their policy and refer to their broker and that he did not see a reason to raise mitigation issues in writing.

The appellant submitted that the only extra costs as a result of the further damage was the cost of \$4,400.00, being the cost for the additional five radiators which were damaged as a result of the circumstances arising from the cold weather. It was submitted on behalf of the appellant that he did speak to the insureds and advised them of their obligation to mitigate. It was submitted on behalf of the appellant that the contractor was to be responsible for maintaining the heating in the house.

Decision

The Panel finds that the appellant did breach Section 3 – Quality of Service – of the Code. In this case, the appellant appears to have delegated his responsibilities, at least in part, to the contractor. He failed to communicate in writing with the insureds with regard to their obligations to mitigate. Further efforts should have been made to have ongoing contact with the contractors to determine what steps were being taken with regard to the heating of the property. Steps should have been taken to determine that the property was being inspected and heating maintained properly.

The commentary provides that an adjuster shall not fail to inform a principal or policyholder of any matter or fact which may materially affect the claim or prejudice their interest. In this case, because mitigation was not communicated clearly to the policyholders in writing, a failure to mitigate may have resulted in the insurer denying the additional aspects of the insureds' claim, which arose after the freeze of the additional radiators. The insureds' interests could have been prejudiced as a result of the appellant's failure to fully inform the insureds of the statutory conditions and their obligations.

As a result, the Panel orders the following:

- (1) The appellant is fined \$750.00; and
- (2) The appellant is assessed costs of \$500.00.

The Decision is to be provided to the appellant by registered mail.