

Disciplinary Hearing

Bradley Gerald Kinchen

Hearing Date: Tuesday, April 28, 2009

Place: Saskatchewan Hail Insurance Council
310 – 2631 – 28th Avenue
Regina SK S4S 6X3

Hearing Committee: Rob Goeres, Chair
John Burwell
Garth Neher, CAIB
Rick Smith, CCIB, CRM, CAIB

Appearances: Dwayne Mitchell, Chair
Complaints and Investigation Committee
Hail Insurance Council

John Waugh, Member
Complaints and Investigation Committee
Hail Insurance Council

April Stadnek, Compliance Officer

Witnesses: John K. Waugh



Origins of the Case

The Complaints and Investigation Committee of the Saskatchewan Hail Insurance Council (the Committee) reviewed a complaint from DL against Bradley Gerald Kinchen (Kinchen). As a result of the review, the Committee determined that Kinchen should be required to appear before a Disciplinary Hearing Committee ("DHC") of the Hail Insurance Council to answer the committee's allegations of misconduct that rise from Kinchen's insurance dealings with DL.

The allegations in the notice of hearing dated January 27, 2009 state:

1. That contrary to Bylaw 8, Section 1, subsection (a), you failed to act in the best interests of DL and/or Wray Agencies Ltd. and/or Palliser Insurance Company Limited.
2. That contrary to Bylaw 8, Section 2, subsection (k), you failed to carry out the lawful instructions of DL.
3. That contrary to Bylaw 8, Section 2, subsection (b), you have demonstrated an unsuitability and untrustworthiness to act as a licensee.

Evidence from the Hearing

At the outset of the hearing the DHC was presented with a binder of documents titled "The Hail Insurance Council of Saskatchewan, Disciplinary Hearing Re: Bradley Gerald Kinchen". The notice of hearing showed that the accused, Kinchen, had received a binder of these same documents prior to the hearing date.

During the hearing the following additional documents were received into evidence and marked as follows:

- | | |
|-------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Tab L | November 14, 2008 letter to Kinchen in which the Committee offered the option of a Consensual Agreement and Undertaking (agreement). A draft of the agreement is attached. |
| Tab M | April 24, 2009 letter from Wray Agencies Ltd. confirming they had not been paid by Kinchen for the DL policy. |
| Tab N | E-mail correspondence from Kinchen to Wray Agencies Ltd. and a copy of an NSF cheque written on Kinchen's personal bank account to the order of Wray Agencies. |
| Tab O | Investigation notes prepared by John Waugh. |

Uncontested Facts

On January 27, 2009 Kinchen was sent via Registered Mail, a Disciplinary Hearing Notice with a hearing date set for April 9, 2009. Canada Post records confirm the delivery date of this notice and signature by Kinchen on February 16, 2009. Kinchen did not respond to the notice, nor did he appear on the required date, so the hearing did not proceed.



Repeated telephone calls and voice messages to Kinchen made over several weeks in follow up to the hearing notice went unanswered by Kinchen.

On April 24, 2009 a second Disciplinary Hearing Notice was hand delivered to his place of business and on April 25, 2009 another copy of the Disciplinary Hearing Notice was delivered to his residence. The Disciplinary Hearing Notice required Kinchen appear on April 28, 2009.

Again, Kinchen did not respond to the Disciplinary Hearing Notice nor to any voice messages in writing or otherwise.

The evidence presented at the April 28, 2009 hearing went in uncontested, as Kinchen did not appear.

Findings of Fact and Testimonial Evidence

Mr. Waugh, representing the Committee, was affirmed and presented his Investigative Report to the Committee, testifying to the following:

August 1, 2008 Council received a telephone call from DL. He initially spoke to Diane Lindsay.

Lindsay's notes say DL told her he:

- purchased a hail policy from Bradley Kinchen on July 11, 2008
- has not received a policy
- has a copy of the contract and his cancelled cheque
- talked to Scott Wray who told him he needed to get a hold of Kinchen
- contacted Kinchen and Kinchen told him he would look after it, and when he did not hear back from Kinchen he again called Scott Wray who told him that he couldn't do anything about it and that he would have to get a hold of Brad
- had the application and cancelled cheque faxed to Wray Agencies
- said the individual who faxed the material to Wray talked to Heather at Wray Agencies who was reported to have said this was happening quite a few times
- never talked to Scott Wray after the information was faxed

Council receives a fax from DL wherein he provides copies of the application and payment for hail insurance. The date stamp shows August 1, 2008 @ 14:17 (Exhibits A1 and A2).

August 1, 2008 Lindsay provided her notes to me. I called DL on August 1st and confirmed the information that was reported to Lindsay (Exhibit A3).



DL further explained that when he called Kinchen he was told there was no problem and the information had been faxed to Wray Agencies. DL said that he phoned Scott for a second time and told Scott what Kinchen had told him. DL said that Scott again told him that it was not his problem.

DL identified the person who had faxed the information referred to in Lindsay's notes as his grain agent who was helping him out.

August 1, 2008 contact with AD confirmed that he was the person who faxed DL's hail application and proof of payment to Wray Agencies on August 1st, prior to faxing the same information to Council later in the day.

AD confirmed the information that Heather had said there were a couple of other problems but she did not give him any specifics. He says Heather at Wray Agencies gave him Council's number to call respecting the problem DL was having with Kinchen.

August 1, 2008 called and spoke with Scott Wray. He says he is aware of the problem DL has with Kinchen. When asked if he told DL it was not his problem and that DL needed to deal with Kinchen he said he was not sure that is the way it was said.

When asked what he was doing with it, he said they now have the application and proof of payment and DL is covered.

When asked what he was doing with Kinchen, he questioned what concern did Council have if he did not get paid. He was advised that as the sponsoring general agent he has a responsibility to deal with a problem such as this when it is made known to him. He has information that an application was taken, money was taken and neither the money nor the application has been provided to the insurance company that should be of concern to him as a general agent and the sponsor of Kinchen's hail agent licence.

August 14, 2008 a letter is sent to Wray Agencies advising DL has still not received his policy and asking for information on the DL transaction (Exhibit B).

August 14, 2008 a letter is sent to Kinchen advising him of the complaint Council has received and asking him to explain why the application was not submitted to Wray Agencies. Wray Agencies are copied on the letter to Kinchen (Exhibit C).

September 18, 2008 call to DL, he still does not have a policy.

September 19, 2008 Scott Wray calls. The handling of the complaint is discussed and he is advised that DL still has not received a policy. Scott says it was sent and he cannot be held responsible for the mail.

September 22, 2008 a follow-up letter is sent to Kinchen, this time the letter is registered. The automated tracking system of Canada Post shows it was successfully delivered on September 24, 2008 (Exhibits E, E1 and E2).



September 24, 2008 DL is contacted and he says still no policy. They get their mail in town and he does not believe it got in the wrong box, as it would have been re-directed.

September 25, 2008 Wray Agencies responds to Council's letter and provides copies of the application and cheque.

The application and cheque show date stamp of August 1, 2008 @ 08:52 (Exhibits F, F1 and F2).

September 29, 2008 AD at Patterson Grain is contacted by phone. He says he is the Marketing Manager for Patterson Grain and says Kinchen worked for Patterson Grain, but he was not Kinchen's assistant or involved in the selling of hail insurance, nor was Patterson Grain.

He says Kinchen is working for Nutra Sun Foods Ltd. who are located in Regina. Nutra Sun is a division of Patterson Grain. Kinchen was supposed to go to Assiniboia but ended up in Regina.

Calls to Brad Kinchen reach only his answering machine and messages are left on his voice mail to call Council. Kinchen does not respond.

October 10, 2008 Council receives an email from Wray Agencies withdrawing sponsorship of Kinchen's licence.

October 14, 2008 letter to Wray Agencies asking for copy of the DL policy (Exhibit H).

October 22, 2008 a copy of the policy is provided (Exhibit I).

October 24, 2008 DL calls, says he got a policy. The date on the letter from Wray Agencies is October 14, 2008 and the date on the policy shows it was printed on October 14, 2008.

October 29, 2008 Wray Agencies, in response to further questions respecting DL's policy are answered (Exhibit J).

Kinchen's licence file documents (Exhibits K, K1, K2 and K3).

The Law

BYLAW 8 – MISCONDUCT

(1) For the purpose of the Act, regulations and bylaws, misconduct is a question of fact but includes any matter, conduct or thing, whether or not disgraceful or dishonorable, that is:

- (a) contrary to the best interests of the consumer or licensees or insurance companies;



(2) Without restricting the generality of subsection (1), a licensee may be guilty of misconduct if the licensee:

- (b) demonstrates an unsuitability or an untrustworthiness to act as a licensee;
or
- (k) fails to reasonably carry out a consumer's lawful instructions;

Decision

Charge 1

The DHC finds Kinchen guilty of misconduct in that he did breach the Saskatchewan Hail Insurance Council Bylaw 8, (1), (a). We find his conduct was contrary to the best interests of the consumer, licensees and insurance companies.

Charge 2

The DHC finds Kinchen guilty of misconduct in that he did breach Bylaw 8, (2), (k). We find he failed to reasonably carry out a consumer's lawful instructions.

Charge 3

The DHC finds Kinchen guilty of misconduct in that he did breach Bylaw 8, (2), (b). We find he demonstrated an unsuitability or untrustworthiness to act as a licensee.

Reasons for Decision

Charge 1

On July 11, 2008 Kinchen took an application for hail insurance from DL and received payment from DL in the amount of \$580.00. Kinchen did not submit the application or payment for the insurance to Wray Agencies Ltd.

DL trusted Kinchen to place the hail insurance for which he had applied and paid for. Even when DL contacted Kinchen he still took no action to correct a problem that he had to know existed. This is a most fundamental breach of the duty owed to a consumer by an agent.

When a licensee violates the trust of a consumer all licensees are, to a degree, tarnished.

A hail agent is permitted to collect premiums in their own name and remit the premium less their commission to the insurance company or general agent representing the insurance company. When an agent breaches that trust and does not pay the premium owing to the insurance company, the agent is, by Section 443 of *The Saskatchewan Insurance Act* (the Act) held to have provided prima facie evidence that he has applied or used the premium for a purpose other than paying it over to the insurer.



The duty of trustworthiness that an agent owes to an insurance company is the cornerstone under which reputable agents conduct business with the insurance companies they represent. If this trustworthiness is not present, both the consumer and the insurance company or their general agent is placed at risk.

The conduct of Kinchen is clearly contrary to the best interests of the consumer, licensees and insurance companies.

Charge 2

When Kinchen was contacted by DL on or about August 1, 2008 and asked why he had not received his hail insurance policy Kinchen told him he would look after it but Kinchen never did.

The evidence shows Kinchen failed to place the application with Wray Agencies Ltd. and/or Palliser Insurance Company. When DL made him aware of what may have been an omission on Kinchen's part, Kinchen did nothing to correct the problem. Kinchen's inaction forced DL to seek outside assistance to confirm he had insurance coverage in place. Kinchen failed to carry out DL's lawful direction.

Charge 3

Kinchen failed to place the application for hail insurance that he completed for DL.

Kinchen received full payment for the hail insurance premium from DL.

Kinchen then deposited the money into his own personal account and used the money for his own purposes.

Kinchen failed to pay to Wray Agencies Ltd. the premium Kinchen received from DL in the amount of \$580.00. The premium was paid to Kinchen in trust and he was obligated to pay the premium over to Wray Agencies Ltd.

The intentions of Kinchen at the time he took the application and premium payment can not be known with any degree of certainty, however, what is known is that when he was contacted by DL he promised to take care of it but never did. This is a demonstrated unsuitability and untrustworthiness to act as a licensee.

Furthermore, Kinchen when asked for payment by Wray Agencies Ltd., did not make prompt settlement and when he did pay the premium monies he owed to Wray Agencies Ltd., his cheque was not honored by the bank. This is as well a demonstrated unsuitability and untrustworthiness to act as licensee.

The Penalty

Charge 1

The Committee orders for contravention of Bylaw 8, Section 1, subsection (a):

1. Kinchen's license be cancelled;



2. Kinchen pay hearing costs in the amount of \$950.00;
3. Kinchen pay investigation costs in the amount of \$2,420.00; and
4. Kinchen pay a fine of \$500.00.

Charge 2

The DHC orders for contravention of Bylaw 8, Section 2, subsection (k):

1. Kinchen's license be cancelled;
2. Kinchen pay hearing costs in the amount of \$950.00;
3. Kinchen pay investigation costs in the amount of \$2,420.00; and
4. Kinchen pay a fine of \$500.00.

Charge 3

The Committee orders for contravention of Bylaw 8, Section 2, subsection (b):

1. Kinchen's license be cancelled;
2. Kinchen pay hearing costs in the amount of \$950.00;
3. Kinchen pay investigation costs in the amount of \$2,420.00; and
4. Kinchen pay a fine of \$500.00.

Summary

Licence cancellation;

Total hearing costs of \$950.00;

Total investigation costs of \$2420.00; and

Total fines of \$1,500.00.

"Rob Goeres"
R. Goeres, Chairman

Dated this 19th day of May, 2009.