



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. III

In the matter of

Appeal No. 53 of 2012

EFU General Insurance Limited

..... Appellant

Versus

Executive Director (Insurance)

Securities and Exchange Commission of Pakistan

..... Respondent

Date of Hearing

21/01/15

### ORDER

#### Present:

#### For the Appellant:

1. Mr. Rashid Sadiq, CEO RS Corporate Advisory

#### For the Respondent (through video conferencing):

1. Mr. Tariq Hussain, Director (Insurance)

2. Mr. Arif Nizami, Deputy Director (Insurance)

1. This order shall dispose of appeal No. 53 of 2012 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 28/09/12 (the "Impugned Order") passed by the Respondent.



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2. An onsite inspection of the Company was conducted under the Order of the Respondent dated 05/07/11 in exercise of powers conferred under section 59A of the Insurance Ordinance, 2000 (the "Ordinance"). During the course of the onsite inspection, the inspection team was not given access to various claim files relating to motor claims, which were misplaced during the shifting of the Company's corporate branch from Business Plaza to EFU House, Karachi, as reported by the Company. These files pertained to the workshops namely Saleem Autos, Mahmood Autos and Fine Autos. The amounts of claims paid to these workshops were aggregating to more than Rs.1,869,384 (excluding coinsurance shares). Further, survey reports of aforementioned claims were also not available on the Company's Intranet portal. It is important to mention that paid claim files were kept in logic sequence in different bunches. However, when the inspection team requested the Company to provide some of the claim files on random sampling basis, the same were not provided although follow ups were also made by the inspection team during the period starting from October 2011 to February 2012. It was found that 54 claim files related to Saleem Autos for the years 2009 and 2010, 26 claim files related to Fine Autos for the year 2010, and 36 claim files related to Mahmood Autos for the years 2009 and 2010 were missing from the record of the Company. Further, that the account opening records of the bank accounts of the abovementioned workshops in which the respective claim payments were transferred, were also reviewed by the inspection team, which indicated that all these workshops were interrelated in the manner that Mr. Mahmood, the owner of Mahmood Autos is also the partner in Saleem Autos and is both in law and next in kin of Muhammad Amir, who is owner of Fine Autos. The misplacement of entire claim record of three particular workshops raises serious doubts on authenticity of all these claim payments. Further, missing of 116 files signals inappropriate maintenance of records by the Company.



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3. Show cause notice (“SCN”) was issued to the Appellant under section 45 read with section 156 of the Ordinance. The Appellant filed reply to the SCN and hearing in the matter was held. The Respondent, dissatisfied with the response of the Appellant, passed the Impugned Order and imposed a penalty of Rs. 500,000 on the Appellant and directed the Company to probe into the issue of missing files and genuineness of claims paid and to immediately recover the missing files and report to the Commission within 90 days.
  
4. The Appellant has preferred the instant appeal against the Impugned Order. The Appellant’s representative argued that the Appellant is maintaining computerized records of its claims data in terms of section 45(5)(b) of the Ordinance. Section 45(5)(b) of the Ordinance specifies any books required to be prepared under the Ordinance may be kept by recording or storing the matters concerned *inter alia* an electronic device provided that such matters recorded are capable of being reproduced in a written form. As already noted in the reply to the SCN dated 06/08/12, the “missing” records of claims sought by the Respondent during the onsite inspection of the Appellant cannot in fact be considered missing at all since the Appellant management was able to duly furnish the requisite information to the Respondent’s inspection team by retrieving the same from the computer records maintained by the Appellant. There was, therefore, sufficient compliance by the Company in regard to the foregoing provisions. Any allegation or insinuation that the Company is trying to hide any information from the Commission is misconceived and baseless.

Secondly, the Appellant had already intimated to the Respondent numerous times including at the time of the onsite inspection, in its comments to the draft Inspection Report, in its reply to the SCN as well as at the hearing of the Appellant in the Respondent’s office that the physical files were misplaced during the shifting of the Appellant’s corporate branch from Business Plaza to



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EFU House, Karachi. However, it may be noted that although the physical files relating to the claims were misplaced, the Appellant helped the inspection team verify the claims paid by extracting and producing related records from the Appellant's computer system. Therefore, it is entirely inaccurate to assert that the Respondent's inspection team was "denied access" to the claims files in question. Section 45(6) of the Ordinance requires an insurer to take "all reasonable precautions" to avoid damage to or destruction or falsification of books required to be kept under the Ordinance. Even if it assumed that the Ordinance requires the insurer to keep individual files on every claim, it is in no way "reasonable" to assume that every single such file, out of hundreds of thousands, should always be available for inspection, even after a fire or flooding. For that matter, it is hardly surprising if a few claim files are lost when the insurer is shifting its offices from one place to another and when the risk of losing files is particularly high. The Appellant has already stated why the survey reports relating to all the missing claims files were not available on the Appellant's Intranet Portal as the Appellant had in place a policy of not uploading survey reports of small losses of below Rs. 25,000 on the intranet system. It is pertinent to mention that the usual company practice is that survey reports of small losses of Rs. 25,000 are not uploaded to the intranet system. However, the Appellant started the practice of uploading all losses in their internet system from 2011. The Appellant has sound control systems in place for ensuring that the records of the Company are not damaged or destroyed as it simultaneously maintains computerized records of claims in addition to physical records. Further, the Appellant has established a separate department at the head office for maintaining prior year records of the Appellant.

Moreover, the Respondent's assertion that the genuineness and authenticity of claim payments made by the Appellant are in doubt because the claims files found to be missing by the Commission during the onsite inspection all relate to

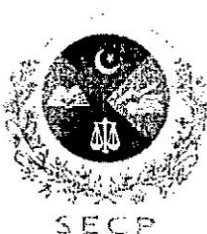


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payments made to workshops which are interrelated.. There can be cases where two or more workshops are owned by family members or their close relatives but this cannot put into doubt the authenticity of claims payments made by the Appellant to these workshops or for that matter, on the entire books and records maintained by the Appellant. The Respondent is overlooking the fact that the Appellant has paid out claims amounting to over Rs. 10.687 million during the years 2009 and 2010 and the amount paid to the above mentioned workshops is only Rs. 1.9 million.

Finally, the Respondent failed to appreciate that section 156 of the Ordinance specifically provides that where an insurer, or in case the insurer is a company, any director or other officer of the company, knowingly makes default in complying with or acts in contravention of any requirement of the Ordinance, they will be liable to be fined. It is important to highlight that they will be found to be liable only if the default has been committed "knowingly" as per section 156 of the Ordinance. Therefore, the imposition of penalty under section 156 is subject to the determination that the default was made "knowingly". The facts that the Appellant had sound systems in place to ensure that data was not destroyed damaged or falsified by way of simultaneously maintaining computerized records and the fact that the missing claims files in question are not an isolated incident which occurred due to the shifting of the Appellant's offices, indicate that the alleged default was not committed knowingly.

5. The department's representative argued that the intention and purpose and meaning of the section 45(6) is manifestly clear. Accordingly it is quite reasonable to expect that each part of record is taken care of. The reportedly missing files were not a "few". The total motor claims in the year 2010 were over 90,000. The files requested for inspection were 133 out of which 116 were



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missing. All these files contained the documentary evidence of the payment of about two million to the three workshops belonging to people who are relatives. This can hardly be dismissed as accidental loss of the files. There had been no fire or flooding on the premises of the Appellant which could provide some plausible excuse for missing files. Shifting of the office and files must have been a planned activity; the Appellant should have exercised some caution and care about the security of the files. It is an admitted fact that a number of specified claim files were not produced by the Appellant team on the plea that they had been misplaced during the shifting. At the same time no solid evidence had been brought forth in support of their assertion. Hence it can only be inferred that the missing files that were kept somewhere else; away from the reach of the Respondent.

Furthermore, the Appellant has attempted to conclude that computer record retrieved was as good as the original missing files. Therefore, no contravention of section 45 took place; however, this is not the case. What the computer records offered was secondary level of information, derived from the actual files of claim, however, the primary level of information remained with the actual physical files. It is the latter which also carries the survey report was required to authenticate the veracity of claim payment.

Finally, while it is correct that section 156 of the Ordinance links the punishment of the default with the proviso of, 'knowing', the case of missing files could hardly be termed as accidental or inadvertent due to the fact that the missing files pertained to the claim payment of about Rs 1.9 million and all the files related to the workshops owned by close relatives.

6. We have heard the arguments. Sections 45 and 156 of the Ordinance are reproduced for ease of reference:



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45. Books and records.- (1) Every insurer, in respect of all insurance business transacted by him, and in the case of an insurer incorporated in a jurisdiction outside Pakistan in respect of the insurance business transacted by the insurer in Pakistan, shall maintain proper books and records.

- (2) Books, accounts and records in respect of insurance business transacted in Pakistan shall be maintained in Pakistan and in either the English or the Urdu language.
- (3) For the purposes of this Ordinance, proper books and records shall include without limitation:
- (a) a register or record of policies, in which shall be entered, in respect of every policy issued by the insurer, the name and address of the policy holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice;
- (b) a register or record of claims, in which shall be entered every claim made together with the date of the claim, the name and address of the claimant and the date on which the claim was discharged, or, in the case of a claim which is rejected, the date of rejection and the grounds therefor; and
- (c) such other books and records as may from time to time be prescribed.
- (4) For the purposes of this Ordinance, the expression "books" includes -
- (a) a register;
- (b) accounts or accounting records, however compiled, recorded or stored;
- (c) a document; and
- (d) any other record of information.
- (5) A book that is required by this Ordinance or the Companies Ordinance, 1984 to be kept or prepared by an insurer may be kept or prepared:
- (a) by making entries in a bound or loose leaf book;
- (b) by recording or storing the matters concerned by means of a mechanical, electronic or other device; or
- (c) in any other manner approved by the Commission.
- Provided that the matters recorded or stored are capable, at any time, of being reproduced in a written form or a reproduction of those matters is kept in a written form approved by the Commission.
- (6) An insurer shall take all reasonable precautions, including such precautions, if any, as may be prescribed, for guarding against damage to, destruction of or falsification of or in, and for discovery of falsification of or in, any book or part of a book required to be kept or prepared by an insurer.



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*156. Penalty for default in complying with, or acting in contravention of this Ordinance.- Except as otherwise provided in this Ordinance, any insurer who makes default in complying with or acts in contravention of any requirement of this Ordinance, [or any direction made by the Commission, the Commission shall have the power to impose fine on the insurer]<sup>16</sup> and, where the insurer is a company, any director, or other officer of the company, who is knowingly a party to the default, shall be punishable with fine which may extend to one million rupees and, in the case of a continuing default, with an additional fine which may extend to ten thousand rupees for every day during which the default continues.*

Emphasis Added

The Appellant has argued that books and records were maintained properly and they had computerized records of the files. The files had gone missing as a result of shifting of the Appellant's corporate branch from Business plaza, to EFU House Karachi. Moreover, the claim files which had gone missing were smaller in number in comparison to the vast number of claims amounting to over Rs 10.687 million during the years 2009 and 2010. The Respondent has argued that out of 133 files requested for inspection, 116 were missing i.e. 87% of the record requested was not provided. Further, the computer records were not a substitute for actual missing files as details like survey report etc. was not available in the computer record. The Appellant should have taken care of the files while shifting premises and this could not be deemed to be inadvertent on their part.

We are of the view that the Appellant was under responsible to ensure proper care of record / claim files. The fact that the Appellant was unable to provide 87% of the requested files depicts that there has been some level of negligence on part of the Appellant. The total numbers of motor claims in the year 2010 were over 90,000 and the inspection team had requested to inspect claims of only Rs. 1.9 million, however, out of the 133 files requested by the inspection team 116 were missing which is quite a high percentage of files. Moreover, all these files were related to the workshops owned by close relatives. The Appellant may have computerized information of these

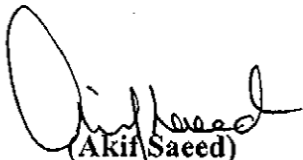





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claims but it did not contained basis of payment of claims i.e. survey report. Further, as original files were claimed to be maintained for other payments, these should have been maintained for the claims in question. The Appellant, therefore, has not complied in terms of section 45(1) of the Ordinance. Moreover, the default was committed 'knowingly' in terms of section 156 of the Ordinance as the Appellant's stance has been the same throughout i.e. it was not necessary to provide the original files as computer records would suffice.

In view of the foregoing, we see no reason to interfere with the Impugned Order with no order as to costs.

  
(Akif Saeed)  
Commissioner (SCD)

  
(Tahir Mahmood)  
Commissioner (CLD)

Announced on: **17 FEB 2015**