DRN-4332482

The complaint

A's complaint is about a claim it made on its HDI Global Specialty SE ('HDI') business insurance policy.

HDI declined the claim and voided the policy on the basis that A had made a deliberate or reckless misrepresentation when it took out cover.

This complaint is brought by Mr D on A's behalf.

All references to HDI in this decision include their claims handlers.

What happened

A took out a business insurance policy with HDI. When doing so it was asked several questions about whether it had a written health and safety policy, if it carried out a full health and safety risk assessment at contract sites, whether health and safety training was given to employees and if so whether it was recorded and whether it supplied and enforced the use of personal protective equipment ('PPE') where required. Mr D, on behalf of A, answered yes to all of those questions.

During the policy year, a claim was made against A by one of its labourers in relation to a fall on the site A was working on. Mr D claimed against the policy. HDI appointed a loss adjuster to investigate the claim. The loss adjuster interviewed Mr D and got in touch with the labourer. After considering both accounts and the documents provided by A, the loss adjuster concluded that A hadn't answered the questions put to it correctly when it took the insurance out. Consequently, HDI said they would never have offered A cover if the questions had been answered correctly, so voided the policy. They did however agree to return A's premium to it.

Mr D feels the decision HDI reached was wrong and that the loss adjuster misinterpreted the information he gave. He also says that he did answer the questions asked of him correctly when he took out the cover.

Our investigator considered A's complaint and concluded it shouldn't be upheld. He said that A's health and safety policy required the labourer to be wearing PPE and this wasn't the case when the incident the claim arose out of occurred, and the loss adjuster confirmed with Mr D that the labourer was working under his control. Because of this, the investigator thought it was fair for HDI to have declined the claim and voided the policy on the basis that Mr D had misrepresented the position when taking out the insurance which HDI would not have provided cover for.

Mr D doesn't agree. Because of this the matter has been passed to me to decide.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When A took its policy out with HDI, the relevant law was the Insurance Act 2015, under which there's a duty to make a "fair presentation" of the risk. This duty would equally have applied at each renewal of the policy. When buying or renewing the policy the party seeking insurance – in this case, A – was required to disclose every circumstance it knew, or should have known about, which would influence a prudent insurer in deciding whether to underwrite a risk or what premium to charge. In addition to the legal position, the documents provided to A made clear how important it was to provide relevant information.

Mr D doesn't dispute that he was under a duty to provide material evidence on behalf of A when taking out the cover. And he was specifically asked to confirm whether A supplied and enforced the use of PPE where required, to which he answered 'yes'.

Mr D has said that a health and safety policy was in force, which was adhered to on site on the day of the incident because a complete visual risk assessment was carried out. But the risk assessment for the site refers to the requirement for PPE including hard hats, gloves hi visibility vests and safety harnesses. In addition, the Method Statement I've seen refers to people carrying out the activity the labourer was at the time of the incident needing to *"wear full body harness and lanyard attached to horizontal rails above".* As I understand it, the labourer wasn't wearing any of the items mentioned in either the risk assessment or the Method statement at the time the incident took place, including a full body harness.

I appreciate that Mr D doesn't agree with the account the loss adjuster recorded of their conversations with him. In particular, he disputes saying the labourer wasn't wearing PPE because of extremely hot weather- as a justification for it- but rather that he surmised this must have been the case. He's gone on to tell the Financial Ombudsman Service that he had no control over what the labourer was wearing at the time the incident took place because he told him to wait for instructions rather than go ahead with the activity that caused the injury, but the labourer went ahead of his own accord. Whilst this might be right, I've not seen anything to suggest that Mr D disputes what the loss adjuster said he told them during his account of the incident. I note the report concludes Mr D *"concedes that the (labourer) was working under his control, using tools and equipment which he had provided."*

So even if it were the case that the labourer decided to carry out the activity of his own accord, I think it's right that he would still have been working under Mr D's control, who was on site at the time the incident occurred. And the requirement was for the labourer to have been wearing appropriate PPE, including a full body harness attached to horizontal rails which wasn't the case at the time of the incident. Given that wasn't the case, and taking into account the statements in the form that A was asked to confirm when taking out cover, the warnings about disclosing information, the need to say if anything was incorrect, and the wider legal duty to disclose anything that would influence the insurer's decision about offering cover, my judgment is that A should have reasonably answered 'no' to the question about enforcing the use of PPE. So, this should have been disclosed. By not telling HDI about this, A mispresented the risk and failed to meet its legal duty – whether the duty of "utmost good faith" or the duty make a "fair presentation" of the risk.

If the insured party fails to disclose this kind of circumstance, and the insurer can show it would not have offered the policy if it had been disclosed, it's entitled to void the policy. And if the breach was deliberate or reckless, it doesn't have to refund the premium to the insured. I've considered whether HDI has shown A's failure to disclose it wouldn't always enforce the use of PPE would have made a difference. The information I've seen strongly suggests this would have been the case. From what I've seen answering 'no' to the question wouldn't have yielded any quotes for insurance being offered at all in these circumstances. HDI has said that's because it would have considered the to it risk as unacceptable to them. So, cover wouldn't be offered.

I appreciate that Mr D might not have intended to allow labourers onto site to engage in the activities set out within its risk assessments without adequate PPE, but A was ultimately responsible for enforcing this. And given that HDI have returned the policy premium to A, I think this accords with the misrepresentation being careless rather than deliberate or reckless, as first contended by HDI. That's because HDI would have been entitled to withhold the policy premium if the misrepresentation was deliberate or reckless. In this case I'm satisfied that it was careless at the least, so I think the return of the premium was more than reasonable in the circumstances of this complaint.

Taking account of the relevant law, the policy terms and all the circumstances, I think HDI's decision was fair.

My final decision

For the reasons set out above, I don't uphold A's complaint against HDI Global Specialty SE.

Under the rules of the Financial Ombudsman Service, I'm required to ask A to accept or reject my decision before 20 October 2023.

Lale Hussein-Venn
Ombudsman