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Appeal P96-00069

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Appellant

and

LLOYD W. KIRKHAM

Respondent

BEFORE: David R. Draper, Director's Delegate

COUNSEL: Eric K. Grossman (for State Farm)
Neil E. Sacks (for Lloyd W. Kirkham)

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that**:

1. The appeal is allowed and paragraph 2 of the arbitration order, dated August 15, 1996, is amended to read as follows:

    2. The Applicant's claim for weekly benefits after January 9, 1994 is also barred by the operation of section 281(5) of the *Insurance Act*.

2. State Farm Mutual Automobile Insurance Company shall pay Lloyd W. Kirkham's reasonable expenses related to the preliminary issue, both at arbitration and on appeal.

January 27, 1997

David R. Draper
Director's Delegate

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This appeal concerns the two-year time limit for applying for arbitration found in section 281(5) of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended ("the *Act*"). State Farm Mutual Automobile Insurance Company ("State Farm") submits that the arbitrator erred in concluding that although Mr. Kirkham applied for arbitration more than two years after he stopped receiving weekly income benefits, he is only precluded from arbitrating the part of his claim for periods ending more than two years before his application for arbitration. Counsel for State Farm characterized the arbitrator's approach as a "rolling" or "floating" limitation period.

Arbitrators have disagreed on this issue. After this arbitration decision was released, two other arbitrators considered it, but both took a different approach.[1]

II. BACKGROUND

Mr. Kirkham was injured in a motor vehicle accident on July 25, 1990. As a result, State Farm paid him statutory accident benefits, including weekly income benefits, according to Ontario Regulation 672, *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994* ("the *Schedule*"). His weekly income benefits continued until July 25, 1993, when State Farm stopped paying them on the basis that he did not meet the stricter post-156 week test set out in section 12(5)(b) of the *Schedule*.

State Farm notified Mr. Kirkham of its decision to terminate his benefits by delivering an Assessment of Claim by Insurer form, dated July 19, 1993, with a covering letter dated the next day. The Assessment of Claim advised Mr. Kirkham as follows:

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[1] *Abdi and Wawanesa Mutual Insurance Company*, (November 21, 1996, OIC File No. A96-000681); *Do and Royal Insurance Company of Canada*, (Letter decision, dated September 6, 1996, full reasons pending, OIC File No. A95-000643).

> At the present time, it is apparent from the Rehab. Involvement that the injury does not prevent him engaging in any occupation for which he is reasonably suited by education, training or experience. As a result, disability payments cease at the 3 year level.

The covering letter provided similar information:

> As indicated previously to you, your Automobile policy pays disability for 3 years or 156 weeks while you are unable to perform the occupation you were doing at the time of the accident. After 3 years, it must be shown that the injury continues to prevent you from engaging in any occupation for which you are reasonably suited by education, training and/or experience. Through the rehabilitation process that has been undergone at Kingston General Hospital, it is apparent that you are in a position to perform duties of many occupations for which you are suited by training and/or experience. As a result, disability payments have ceased as of July 24th 1993 which is the 3 year anniversary date of the accident.

The arbitrator found that this notice was clear and unequivocal, and this finding was not challenged on appeal. By the end of July 1993, therefore, Mr. Kirkham had clear notice of State Farm's refusal to pay him further weekly income benefits.

Mr. Kirkham applied for mediation on November 11, 1993, nearly four months after his weekly income benefits were terminated, but well within the two-year time limit. The Report of Mediator, dated January 25, 1994, states that Mr. Kirkham's claim for weekly income benefits from July 25, 1993 onwards was not resolved.

Mr. Kirkham did not apply for arbitration until January 9, 1996, approximately two and a half years after his weekly income benefits were terminated. State Farm argued that Mr. Kirkham's application for arbitration was time-barred by virtue of section 281(5) of the *Act*, which states:

> **281**.–(5) A proceeding in a court or an arbitration proceeding in respect of statutory accident benefits must be commenced within two years after the insurer's refusal to pay the benefit claimed or within such longer period as may be provided in the *Statutory Accident Benefits Schedule*.

Section 26 of the *Schedule*, as amended, modifies the time limit as follows:

> **26.**–(1) A mediation proceeding under section 280 of the *Insurance Act* in respect of benefits under the Regulation must be commenced within two years from the insurer's refusal to pay the amount claimed in the application for statutory accident benefits or, if the person has attended school or accepted, or returned to, an occupation or employment, as permitted by section 16, within two years of the insurer's refusal to pay further benefits.
>
> (2) Despite subsection (1), an arbitration or court proceeding under section 281 of the *Insurance Act* may be commenced within 90 days after the mediator reports to the parties under subsection 280(8) of the Act.

Mr. Kirkham relied on a line of court decisions interpreting the limitation period for accident benefits that was in effect before the 1990 amendments to the *Insurance Act* and the making of the *Schedule*. He argued that these decisions stand for the proposition that a new cause of action arises as each payment of weekly benefits becomes due and, therefore, the limitation period in section 281(5) should run separately for each two-week period that he did not receive weekly income benefits.

The arbitrator accepted Mr. Kirkham's position, holding that the changes to the *Act* and the introduction of the *Schedule* were not sufficient to alter the approach taken by the courts. Treating each pay period as a separate cause of action, the arbitrator concluded that Mr. Kirkham lost only his right to arbitrate his entitlement to weekly income benefits for the two-week periods ending more than two years before he filed his application for arbitration. Therefore, he ordered as follows:

> 1. The Applicant's claim for weekly benefits for the two-week pay periods which ended before January 9, 1994 are barred by operation of section 281(5) of the *Insurance Act*.

2. The Applicant's claims for weekly benefits for the two-week pay period which ended after January 9, 1994 are not barred by operation of section 281(5) of the *Insurance Act*.

State Farm appeals the second paragraph of this order.

III. ANALYSIS

The application of a limitation period to periodic benefits is not obvious. It raises questions about the nature of the insured person's claim and the insurer's response. Does the insured person make a single claim for ongoing weekly benefits, or is it a claim that is reasserted for each period for which weekly benefits might be paid? Should the insurer's refusal to pay benefits be treated as a single refusal, or as a repeated refusal for each potential pay period?

For the following reasons, I prefer the approach taken by the arbitrators in *Abdi and Wawanesa* and *Do and Royal Insurance*, cited above. Like them, I am persuaded that the limitation period was changed as part of the 1990 amendments to the *Act*. The claim for weekly benefits is treated as an ongoing claim and once the insurer refuses to pay or to continue paying, the insured person has two years to dispute that decision through the courts or the dispute resolution process.

Before the 1990 amendments, the no-fault benefit provisions were contained in a schedule to the *Act*. *Schedule "C"* and its predecessor, *Schedule "E"*, included the following provisions for the payment of weekly benefits (Subsection (3), paragraph 7):

> (a) . . . The initial benefits for loss of time under Part II of subsection (2) shall be paid within 30 days after it has received proof of claim, and payments shall be made thereafter within each 30-day period while the Insurer remains liable for payments if the insured person, whenever required to do so, furnishes prior to payment proof of continuing disability.

> (b) No person shall bring an action to recover the amount of a claim under this section unless the requirements of provisions 3 [notice of claim, proof of claim and medical certificates] and 4 [insurer's medical examinations] of this subsection are complied with, nor until the amount of the loss has been ascertained as provided in this Section.
>
> (c) Every action or proceeding against the Insurer for the recovery of a claim under this section shall be commenced *within one year* **from the date on which the cause of action arose** and not afterwards.[2] [emphasis added]

The courts have been asked on a number of occasions to interpret these provisions in situations similar to Mr. Kirkham's. Not surprisingly, the decisions focus on when the "cause of action" arose. In *Morgan v. Dominion Insurance Corp.* (1980), 118 D.L.R. (3d) 675 (Ont. H.C.J.), Mr. Justice Osler said the following about *Schedule "E"* to the *Act*:

> It is a proposition which, I think, requires no authority that the date upon which a cause of action arises is the date upon which every element of that cause first exists. With respect to any given week, therefore, there must be in existence entitlement to the benefit and refusal or failure by the defendant to pay it. If, therefore, disability is established, the cause of action with respect to benefits arises and may be asserted from week to week . . . (p.688)

The courts have consistently held that because the cause of action does not arise until the particular payment is overdue, the limitation period only bars claims for weekly benefits that were due more than one year before the action for recovery was commenced. This approach is supported by the authors of *Insurance Law in Canada* [3] at page 246:

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[2] *Insurance Act*, R.S.O. 1970, c. 224, Schedule E, s.s. (7)(c) and *Insurance Act*, R.S.O. 1980, c. 218, Schedule C, s.s. (7)(c).

[3] Brown, C., and Menezes J. *Insurance Law in Canada* (Second edition), (Scarborough: Thompson Professional Publishing Canada, 1991).

> Causes of action for the recovery of ongoing payments, such as income replacement benefits under no-fault auto insurance or accident and sickness insurance, continually renew themselves each time an instalment becomes payable because the insurer is under a continuing liability for each succeeding benefit. Therefore so long as entitlement to the benefits continues (by continued disability), the limitation period only bars claims "originating more than [the prescribed period] before the commencement of an action." Each cause of action "originates" with each benefit as it becomes payable, allowing for any time period between entitlement and the insurer's deadline to pay. [footnotes omitted]

Counsel referred at length to the recent decision of the Ontario Court of Appeal in *Wilson's Truck Lines Limited v. Pilot Insurance Company*, an unreported decision issued approximately November 4, 1996 (#C10306). Unfortunately, the facts are complicated and counsel had trouble explaining the result. Although I share their uncertainty about the specific outcome, the Court's analysis is helpful. It found that the old *Schedule "C"* to the *Act* created a "rolling" or "floating" time limit running for one year from the date that the payment of each benefit period becomes overdue. In my view, the decision emphasizes the importance of the particular words chosen to define the limitation period. The Court specifically relied on the fact that the time limit in *Schedule "C"* ran from the date on which the cause of action arose, not from the insurer's refusal to pay further benefits.

In 1990, the *Insurance Act* was amended substantially, limiting the right to sue, enhancing the role of statutory accident benefits, and establishing a dispute resolution system. The amendments included a differently worded limitation period for pursuing accident benefits claims (s.281(5)). The time limit was extended from one to two years, and the triggering event changed. It no longer ran from the date the insured person's "cause of action" arose. Instead, it runs from the "insurer's refusal to pay the benefit claimed."

The arbitrator found that "cause of action" was not used in the 1990 amendments because it would not fit with the arbitration option that was created. He reasoned that a matter before an

arbitrator is an application for arbitration, not a cause of action. I agree with State Farm's submission that this is not an adequate explanation. If the only concern was linguistic, a more neutral term, such as "proceeding," could have been used to refer to either court or arbitration. As suggested by State Farm, the Legislature could have retained the *Schedule "C"* limitation period with the following wording:

> A proceeding in a court or an arbitration proceeding in respect of statutory accident benefits must be commenced within two years from the date on which the claimant's entitlement to benefits arose.

In my opinion, section 281(5) reflects a change in the nature of the limitation period. It states that the two-year time limit runs from the insurer's refusal to pay the benefits claimed. The refusal is the triggering event, not the insurer's failure to pay or the existence of a cause of action. Not only is this the plain and ordinary meaning of the section, it is consistent with the *Act* and the *Schedule* read as a whole.

The process for applying for accident benefits is established in the *Schedule*. Section 22 requires the insured person to pursue his or her claim in a timely manner. An initial notice of the claim must be given to the insurer within 30 days of the accident, or as soon as practicable thereafter. The completed application for accident benefits is then due within 90 days after the initial notice is provided. A failure to meet these time limits does not invalidate the claim, however, "if the claimant has a reasonable excuse and so long as there is compliance within two years of the accident." This means that although there is some initial flexibility, a two-year time limit is established. If the insured person does not pursue his or her claim for weekly benefits by applying within two years of the accident, the claim is out-of-time and can be refused.

The *Schedule* also brought in a legislated application form (s.29(1)). The form (Form 1) is quite detailed and is intended as an "initial application for benefits" under Part II [supplementary medical and rehabilitation benefits and care benefits], IV [weekly benefits] or V [accidents in

Quebec]. Although a claimant could state in the application that his or her claim for weekly benefits is limited to a specific period, the form seems designed to accommodate claims for ongoing weekly benefits. A second form is created for "additional benefits," but this is designed for later expenses, not further claims for weekly benefits (see Form 2).

There are other indications in the *Schedule* that claims for weekly benefits are to be treated as ongoing claims. The insurer is obliged to pay weekly benefits to eligible applicants within 10 days after receiving the completed application form, and at least once every second week thereafter as long as the applicant remains eligible (s.24). If the insurer refuses to pay benefits, it must give written notice to the applicant with reasons for the refusal:

> **24. -**(8) If the insurer refuses to pay an amount claimed in an application for statutory accident benefits, the insurer shall forthwith give written notice to the insured person giving the reasons for the refusal.

I agree with State Farm's submission that the insurer's obligation to give written notice and reasons for its refusal to pay benefits is a clear link to the time limits in section 281(5) of the *Act* and section 26 of the *Schedule*. The applicant makes a claim for weekly benefits by submitting an application to the insurer. If the insurer decides that no benefits are payable, or that the applicant is no longer eligible at some later date, it must notify the applicant of its decision in writing and provide reasons. An applicant who wants to pursue his or her claim must do so within two years of this refusal. As with the initial application, a failure to pursue the claim within two years means that it is out-of-time. If the insurer fails to give written notice of its refusal to pay benefits, it may not be able to rely on the limitation period.

Finally, I agree with State Farm's submission that the combination of section 26(1) and section 16 of the *Schedule* also provides support for its position. Section 26(1) extends the limitation period in section 281(5) of the *Act* by adding the following highlighted phrase:

> **26.**–(1) A mediation proceeding under section **280** of the *Insurance Act* in respect of benefits under this Regulation must be commenced within two years from the insurer's refusal to pay the amount claimed in the application for statutory accident benefits **or, if the person has attended school or accepted, or returned to, an occupation or employment, as permitted by section 16, within two years of the insurer's refusal to pay further benefits.**

Section 16 protects the benefits of those who attend school or return to work, but are unable to continue due to their accident-related injuries. If the insurer's refusal to pay weekly benefits is treated as a continuing refusal, as the arbitrator's approach suggests, it is difficult to understand the need for the additional protection in section 26(1). In my view, the section underscores that the limitation period runs from the insurer's refusal to pay further weekly benefits. This general rule is specifically modified for those who go to school or return to work. They are allowed to reassert their claim for weekly benefits if they are unable to continue at school or work, and are given two years from the insurer's subsequent refusal to challenge the decision.

By the end of July 1993, Mr. Kirkham had clear notice of State Farm's refusal to pay further weekly income benefits. He did not apply for arbitration until January 9, 1996, more than two years after the refusal. Therefore, his claim for additional weekly income benefits is out-of-time and cannot proceed to arbitration.

IV. EXPENSES

Mr. Kirkham asks for his expenses of this preliminary issue, both at the arbitration and on appeal. State Farm does not vigorously resist paying Mr. Kirkham's appeal expenses on the basis that he was responding to its appeal, but argues that he should not receive his arbitration expenses. In State Farm's submission, Mr. Kirkham created the issue through his delay, putting State Farm to considerable expense.

The arbitration decision does not deal with expenses. I assume that was because the arbitrator felt it would be better addressed following the hearing on the merits of Mr. Kirkham's claim. Given my decision, that option is no longer open.

Although I find some merit in State Farm's position, I am persuaded that given the novelty and importance of the issue involved, Mr. Kirkham should receive his reasonable expenses, both at arbitration and on appeal.

State Farm also asked that I find that the Commission had no jurisdiction to proceed with Mr. Kirkham's application for arbitration. To explain this request, counsel referred to the arbitration decision in *Holguin and Allstate Insurance Company of Canada*, (July 26, 1995, OIC File No. A-009270), was cited in explanation for this request. That case involved a preliminary issue about the timeliness of Mr. Holguin's application for arbitration. The arbitrator concluded that the application was clearly out-of-time. Although he found that the application should not have been brought forward, he did not order Mr. Holguin to pay Allstate its assessment, as allowed by section 282(11.2) of the *Act*. He did suggest, however, that in light of his findings, Allstate might want to apply to the Registrar for a refund of its assessment.

I take no position on the return of State Farm's assessment. This is an administrative matter handled by the Registrar. Mr. Kirkham applied for arbitration, asserting a claim for additional weekly income benefits. State Farm responded by arguing that his application was time-barred. The arbitrator held a hearing to determine that issue. On appeal, I reviewed the arbitrator's decision, concluding that Mr. Kirkham was precluded from proceeding to arbitration. It is not obvious to me that this is a question of jurisdiction, as opposed to a successful defence to Mr. Kirkham's claim.

January 27, 1997

David R. Draper
Director's Delegate