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Appeal P-013860

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Appellant

and

SHAWN P. LUNN

Respondent

BEFORE: David R. Draper, Director's Delegate

COUNSEL: David Zarek (for State Farm)
Stanley B. Pasternak (for Shawn P. Lunn)

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 dismissed and the arbitration decision, dated August 18, 1995, is confirmed.

2. State Farm Mutual Automobile Insurance Company shall pay Mr. Lunn's reasonable appeal expenses.

April 30, 1997

David R. Draper
Director's Delegate

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This is an appeal by State Farm Mutual Automobile Insurance Company ("State Farm") from an arbitration decision, dated August 18, 1995. State Farm contends that the arbitrator erred in refusing to order Mr. Lunn to repay benefits under section 27 of Ontario Regulation 672, the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994* ("the *Schedule"*).

II. BACKGROUND

The history of this dispute is more complicated than usual. It arises from an automobile accident on December 25, 1993. Within a few weeks of this accident, Mr. Lunn applied to State Farm for accident benefits. To respond his claim, State Farm had to decide whether he qualified for weekly benefits under section 12 or 13 of the *Schedule*. Section 12 provides benefits of up to $600 per week for those who meet one of the employment related criteria set out in the section. Other applicants are limited to a fixed rate of $185 per week under section 13.

To qualify under section 12, an applicant must establish that at the time of the accident, he or she:

1. was employed or self-employed [s.12(2)1i];

2. was on a temporary lay-off [s.12(2)1ii];

3. was entitled to start work within one year under a legitimate offer of employment made before the accident and evidenced in writing [s.12(2)1iii]; or

4. had been employed or self-employed for any 180 days in the twelve-month period before the accident [s.12(3)].

Mr. Lunn provided inconsistent information about his employment status, although the arbitrator found that this was unintentional. On his application form, he checked the box indicating that he

was on a temporary lay-off, but responded to another question as "unemployed at the time of the accident." His most recent employer also completed a form, listing his last day of employment as July 13, 1993, five months before the accident. Despite these inconsistencies, State Farm decided to pay weekly income benefits to Mr. Lunn under section 12 without asking for any clarification.

State Farm then had to determine the amount it should pay. According to section 12 of the *Schedule*, weekly income benefits are based on the applicant's average gross weekly income in the four or fifty-two weeks preceding the accident, whichever is greater. At the time of Mr. Lunn's application, there were conflicting decisions about whether this calculation should be done over the full four and 52-week periods ("the *Vo* approach"[1]), or only over the periods that the person was employed ("the *Scavuzzo* approach"[2]). State Farm used the *Scavuzzo* approach, averaging Mr. Lunn's income over the 19 weeks he worked in the 52 weeks preceding his accident. This worked to Mr. Lunn's advantage and, as a result, he received $595.51 per week.

State Farm paid weekly income benefits for 39 weeks, a total of $23,224.89. Effective September 30, 1994, it stopped paying on the basis that Mr. Lunn was no longer substantially unable to perform the essential tasks of his pre-accident employment. Mr. Lunn disagreed with this decision and applied for mediation.

The Report of Mediator makes it clear that the dispute was about Mr. Lunn's ongoing disability, not the proper category or amount of his benefits. By the time of the arbitration hearing, however, the issues had changed completely. State Farm claimed that Mr. Lunn had been paid under the wrong section and, as a result, was substantially overpaid. More specifically, State Farm argued that at the time of his accident, Mr. Lunn was not on a temporary lay-off and had not been employed for at least 180 days in the preceding 12 months. Therefore, he should have been considered under section 13 of the *Schedule*, not section 12. Because the amount payable

[1] *Vo and Maplex General Insurance Company*, (October 4, 1993, OIC A-002777), appeal pending.

[2] *Scavuzzo and Canadian Home Assurance*, (June 19, 1992, OIC P-000626).

under section 13 is only $185 per week, State Farm argued that Mr. Lunn had to repay $16,009.89, plus interest.

Not only did the focus of the arbitration hearing shift, the original disability issue disappeared. State Farm agreed that if the arbitrator found that Mr. Lunn qualified under section 12, it would pay the additional period that he claimed from October 1, 1994 to February 15, 1995, when he returned to work.

Following a three-day hearing, the arbitrator found that although Mr. Lunn was not on a temporary lay-off at the time of the accident, he qualified under section 12 because he had been employed for 180 days in the past 12 months. According to the agreement, this meant that Mr. Lunn was entitled to an additional 19 weeks of benefits. However, there was still a repayment issue. State Farm claimed that if it had known Mr. Lunn was unemployed at the time of the accident, even if he had clearly been employed for 180 days in the preceding year, his weekly income benefits would have been calculated based on *Vo*, not *Scavuzzo*.

Without deciding the proper amount of Mr. Lunn's benefits, the arbitrator considered whether he was required to repay any amout to State Farm. Overpayments are dealt with in section 27 of the *Schedule*. The relevant parts state:

> **27.**-(1) A person must repay to the insurer any benefit received under this Regulation that is paid to the person through error or fraud.
>
> (2) A person must repay to the insurer any benefit received under sections 12 and 13 that is paid to him or her if the person or the person in respect of whom the payment was made was disqualified from payment under section 17.
>
> (3) A person must repay to the insurer any benefit received under sections 12 and 13 to the extent of any payments received by the person that are deductible from benefits under subsection 12(4) or 13(3).

State Farm claimed that Mr. Lunn was overpaid "through error" based on its understanding that

he was on a temporary lay-off at the time of the accident. The arbitrator found, however, that Mr. Lunn did not intentionally misrepresent his employment status. Following the approach taken in *Theuma and Halifax Insurance Company*, (April 28, 1994, OIC A-006496), she concluded that because the benefits were not paid based on any misconduct by Mr. Lunn, he was not required to repay them.

State Farm appealed the arbitrator's order, seeking an order calculating the proper amount of Mr. Lunn's weekly income benefits and an order for repayment. State Farm accepts the arbitrator's conclusion that Mr. Lunn qualified for benefits under section 12, but submits that she erred in her interpretation of section 27.

This left one more problem. Since the arbitration decision did not deal with the proper amount of Mr. Lunn's benefits, it was not clear how much State Farm was obliged to pay for the additional period of eligibility. Therefore, Mr. Lunn applied for arbitration to determine the correct amount of his weekly income benefits. The second arbitration hearing was held before the same arbitrator. In a decision dated July 24, 1996, she adopted the "*Vo* approach," averaging Mr. Lunn's income for the 19 weeks he worked in the 52 weeks preceding the accident. As a result, she ordered that he was entitled to $250.22 per week, considerably less than the $595.51 per week he received.

Mr. Lunn appealed this order. The parties agreed, however, that his appeal should be put on hold pending the appeal decision in *Vo and Maplex Insurance Company*, currently pending before the Director of Arbitrations. Therefore, this decision deals only with State Farm's appeal.

III. THE APPEAL

The question in this appeal is whether the arbitrator erred in concluding that Mr. Lunn was not required to repay any overpayment. State Farm acknowledges that her approach is consistent with many other arbitration decisions, but contends that these decisions all rely on the faulty

analysis in the *Levenson and The General Accident Assurance Company of Canada*, (February 18, 1992, OIC A-000260). I agree that *Levenson* is the pivotal case. Many subsequent decisions, including *Theuma*, have relied on it without providing much additional analysis.

In *Levenson*, the main issue was the period of Ms. Levenson's entitlement to weekly benefits under section 13 of the *Schedule*. At the time of her accident on September 1, 1990, she was just about to return to school for her third year of university. She missed the first week of classes, but returned to school on September 9, 1990. Although Ms. Levenson attended classes, she claimed that her injuries materially affected her performance. The insurer paid her weekly benefits from September 8, 1990 to April 13, 1991, but later claimed she had to repay the full amount because she never met the eligibility test in section 13.[3]

The arbitrator concluded that Ms. Levenson was entitled to weekly benefits, but only until October 16, 1990. The remaining issue was whether she was required to repay the six months of benefits she received after that date. The arbitrator's often cited analysis of section 27(1) of the *Schedule* starts at page 27 of the decision:

> Repayment of benefits is governed by Section 27 of the No-Fault Benefits Schedule. This section provides as follows:
>
> > (1) A person must repay to the insurer any benefit received under this Schedule that is paid to the person through error or fraud.
>
> Section 27(1) requires that benefits must be repaid when they have been paid to the person "through error or fraud". Fraud is not in issue here. It is a term readily understood. However, the meaning of the phrase "paid through error" is less clear.
>
> The Concise Oxford Dictionary defines "error" as follows;
>
> > 1. A mistake. 2. the condition of being wrong in conduct or judgement. 3. a wrong opinion or judgement 4. the amount by which something is incorrect or inaccurate in a calculation or measurement.

[3] At the arbitration hearing in *Levenson*, the insurer also attempted to argue that Ms. Levenson was disentitled under section 16(3) of the *Schedule* because she was attending school. The arbitrator ruled that this was a new issue and could not be raised at such a late stage of the proceedings.

> There is therefore a number of meanings in ordinary usage that may be attributed to the word used. However, some assistance is provided by the statutory context in which the words appear. Subsection 27(2) and (3) provide for repayment of benefits in circumstances where there is no "error" but where the recipient is disqualified from payment or where deductible payments have been received, in which case repayment is required to the extent of the deduction.
>
> These provisions suggest that the requirement of "error" in section 27(1) requires more than an error of judgement or "being wrong" on the part of the insurer in paying benefits. Otherwise, the broader wording of Section 27(2) and (3) would be redundant. It is not sufficient therefore to establish merely that an applicant has received benefits to which he or she is subsequently adjudged not to be entitled. **To give meaning to the terminology of the section, the stipulation that benefits be paid "through error" in order to be recoverable must require that responsibility for the payment be attributable in some material way to the actions of the applicant.**
>
> [emphasis added]

It is rarely mentioned that in *Levenson*, the arbitrator ordered repayment. She found that the insurer acted properly in paying weekly benefits while it took reasonable steps to evaluate Ms. Levenson's claim. In contrast, she found that Ms. Levenson was less than cooperative. The arbitrator ordered repayment because the "actions of the Applicant [Ms. Levenson] and her representatives were responsible in a material way for the error of the Insurer in continuing to pay benefits during the period when the Applicant ceased to be entitled to such benefits." (Decision, p.32)

Ms. Levenson appealed. The Director of Arbitrations dismissed the appeal, but it appears that the arbitrator's analysis of section 27 was not seriously tested. Nor has it been directly considered in any subsequent appeal decisions.

State Farm claims that the analysis in *Levenson* is flawed. In particular, it points to the arbitrator's reliance on subsections 27(2) and (3). In State Farm's submission, subsection 27(1) can be given its plain and ordinary meaning without making subsections 27(2) and (3) redundant.

State Farm contends that subsection 27(1) does not require misconduct by the insured person. It allows insurers to recover benefits paid "through error or fraud," not "through error or fraud *by*

the insured person." The plain meaning of this section, it submits, is that insurers can recover benefits paid through error, whether by the insured person or the insurer. State Farm claims that subsections 27(2) and (3) are necessary because they allow insurers to recover some payments that were **not** made through error or fraud, but were paid because the *Schedule* required payment pending some later determination.

For example, section 17(c) of the *Schedule* states that an insurer is not required to pay weekly income benefits to someone who is convicted of operating the automobile while impaired by alcohol or a drug. This raises a timing issue. An insured person may apply for accident benefits long before his or her guilt is determined. Because section 24 of the *Schedule* requires the insurer to pay weekly income benefits within 10 days of receiving a completed application, it cannot wait for the outcome of the criminal proceedings. Without a conviction, there is no basis for denying benefits. If the person is eventually convicted, it would be difficult for the insurer to argue that the benefits were paid "through error or fraud." They were paid because the *Schedule* required payment. Therefore, subsection 27(2) is needed for the insurer to recover the benefits paid.

The situation is similar for collateral benefits. According to section 12(4)(b) of the *Schedule*, the amount of the insured person's weekly income benefits is reduced by payments for loss of income available for other sources. Accident benefits, including weekly benefits, are to be paid quickly. The determination of the person's entitlement to other benefits may take longer. It is consistent with both the language and intent of the *Schedule* for an insurer to pay weekly income benefits, without deductions for collateral benefits, pending a determination that they are available. Section 27(3) allows the insurer to recover the benefits it paid if the person is eventually found entitled to other payments for loss of income covering the same period.

State Farm's submissions have considerable strength. I accept that the purpose of subsections 27(2) and (3) is to allow insurers to recover certain benefits that were not paid "through error or fraud." For the following reasons, however, I am not persuaded that undermines the *Levenson* approach.

Subsection 27(1) makes it clear that not all overpayments are recoverable. The insured person is only required to repay benefits paid "through error or fraud." In *Levenson*, the arbitrator considered whether "error" was broad enough to allow insurers to recover any benefit to which the person is not entitled, even if the lack of entitlement is not determined until much later. I agree with the arbitrator that an interpretation of that breadth would make subsections 27(2) and (3) unnecessary. Quite properly, she rejected it, stating: "It is not sufficient therefore to establish merely that an applicant has received benefits to which he or she is subsequently adjudged not to be entitled." (Decision, p.28)

While "error" cannot be given its broadest possible interpretation, the question is whether the arbitrator interpreted it too narrowly. State Farm submits that its interpretation not only follows the plain meaning of the section, it makes sense in a system where insurers are required to pay quickly, often without complete information. To hold otherwise, it claims, would discourage insurers from paying benefits where there is any doubt about the claim.

In support of its position, State Farm refers to my arbitration decisions in *Morin*, *Upper* and *Boodhai*,[4] claiming that they reflect the intent of the legislation better than the decisions following *Levenson*. I do not view my decisions as a departure from the *Levenson* approach. Rather, they address the limits of that approach, suggesting that "error" should not be interpreted so narrowly that insurers would be discouraged from paying benefits at a reasonable rate until the claim is completely documented. In each decision, I concluded that the insurer was entitled to repayment because it had acted reasonably in paying benefits based on inaccurate or false information provided by the insured person.

The decisions in *Morin*, *Upper* and *Boodhai* do not adopt the kind of broad interpretation of "error" urged by State Farm. I share the view underlying *Levenson* that an "innocent" insured

[4] *Morin and Lumbermens Mutual Casualty Company*, (June 16, 1993, OIC A-001311); *Upper and Canadian General Insurance Company*, (June 3, 1994, OIC A-002855); *Boodhai and Allstate Insurance Company of Canada*, (November 21, 1994, OIC A-004002).

person should be able to rely on the benefits he or she receives without being left vulnerable to a later claim for repayment based on new calculations or a different interpretation of the *Schedule*.

Accident benefits are meant to respond to the immediate financial consequences of automobile accidents, covering basic needs such as medical treatment, transportation, and income replacement for those who are unable to return to work. To achieve the purposes of the accident benefits scheme, both parties have obligations. The insured person must notify the insurer of the accident and provide medical and financial information. The insurer must promptly evaluate the claim and pay benefits if the person is eligible. In my view, the fact that a later reevaluation leads to a different conclusion does not necessarily mean that the benefits were paid "through error."

The determination of whether benefits were paid "through error" will depend on the particular facts of each case. The focus, however, should be on the situation at the time the benefits were paid. If the insured person materially contributed to the overpayment, it must be repaid. However, if the overpayment is based on information that legitimately was not available earlier, or on later arbitral or court decisions affecting the interpretation of the *Schedule*, repayment is not required, although the insured person's ongoing benefits could be affected.

In this case, the arbitrator found that Mr. Lunn provided the information requested by State Farm to the best of his ability. Although this information did not give a clear picture of Mr. Lunn's employment status at the time of the accident, State Farm decided to pay him weekly income benefits under section 12. The conflicting decisions in *Scavuzzo* and *Vo* may have presented State Farm with a dilemma about whether to average Mr. Lunn's pre-accident income over the weeks that he actually worked, or over the full 52 weeks preceding the accident. Neither decision suggests, however, that the calculation would be different depending on whether he qualified under section 12 as a result of being on a temporary lay-off, or working for 180 days in the preceding 12 months.

State Farm decided to use the *Scavuzzo* approach although Mr. Lunn's situation seems closer to

that of Mr. Vo than Mr. Scavuzzo. Mr. Scavuzzo had starting working just before his accident and would have continued to work full time if the accident had not occurred. At the time of his accident, Mr. Vo had been on an "indefinite lay-off" for almost five months.

This is not a case where the insured person failed to provide information requested by the insurer. It is not even a case where the insurer made an obvious mistake in applying the *Schedule* to the facts of the case. Based on the *Scavuzzo* decision, State Farm calculated Mr. Lunn's benefits properly. I am not persuaded, therefore, that State Farm paid benefits in error. In my view, this is the kind of reassessment based on new information and developing case law that should not result in a repayment.

The situation here is not unlike that in *Sittler and Canadian General Insurance Company and Pilot Insurance Company*, (August 11, 1995, OIC P-000951, V-000951, P-004495 and V-004495). In that case, Canadian General appealed the arbitrator's decision following an opposite conclusion of a judge of the Ontario Court (General Division). The Director refused to extend the appeal period, stating as follows:

> Chaos would result if, every time a court decision or a Commission pronouncement appeared to differ from a finding in an arbitration case, the Director granted an extension of time allowing an appeal of a decision that the parties have been living with peaceably to proceed.

In its appeal submissions, State Farm suggested that arbitrators can protect "innocent" insured persons by limiting the insurer's recovery of the overpayment. It argued that while overpayments should be treated as legally recoverable, arbitrators have a discretion to restrict the insurer's right to recovery depending on the particular facts of each case. While this approach holds some attraction, it is hard to ignore the mandatory wording of section 27(1). It states that benefits "must" be repaid if they were paid through error or fraud.

Arbitrators under the *Insurance Act* are statutory decision makers. They have only the authority

given in the legislation or required by necessary implication. It is far from clear to me their jurisdiction, or my jurisdiction on appeal, includes the authority to relieve an insured person from his or her legal obligation to repay benefits to the insurer. In my view, the *Levenson* approach is preferable.

State Farm also argued that later changes to the *Schedule* support its interpretation of subsection 27(1). The *SABS - 1994* allows insurers to recover benefits paid "through error, willful misrepresentation or fraud."[5] It also puts some limits on recovery. Insurers must give notice of the overpayment and recovery from ongoing benefits is limited to 20 per cent. For overpayments resulting from "error," a kind of limitation period is created, precluding recovery of benefits paid more than 12 months before the insurer gives notice of the overpayment. The *SABS -1996*[6] changed the overpayment provision again by allowing recovery of overpayments paid "as a result of an error on the part of the insurer, the insured person or any other person, or as a result of willful misrepresentation or fraud."

As is often the case, however, legislative change can be used to support either side. The new provisions may have been intended to clarify the law under the *Schedule*, as suggested by State Farm, but it is equally arguable that they reflect new legislative policy. I find it significant that the changes seem to reflect the same concern for protecting "innocent" insured persons as seen in the *Levenson* decision.

Finally, as an alternative argument, State Farm claims that the arbitrator erred in finding that Mr. Lunn innocently misrepresented his employment status. In its submission, the evidence supported a finding that Mr. Lunn purposely led the insurer to believe that he was on a temporary lay-off at the time of the accident.

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[5] Ontario Regulation 776/93, the *Statutory Accident Benefits Schedule -Accidents After December 31, 1993 and Before November 1, 1996.*

[6] Ontario Regulation 423/96, the *Statutory Accident Benefits Schedule - Accidents On or After November 1, 1996*.

It is well established that it is not my role on appeal to second-guess the arbitrator's assessment of the evidence. She heard from three witnesses, including Mr. Lunn, and could evaluate the exhibits in light of their testimony. I find no indication that there was insufficient evidence to support her findings of fact and, therefore, have no basis for interfering.

IV. EXPENSES

Mr. Lunn successfully resisted State Farm's appeal. In the circumstances, he should receive his reasonable appeal expenses.

April 30, 1997

David R. Draper
Director's Delegate