**OIC A96–000141**

**BETWEEN:**

**LLOYD W. KIRKHAM**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

**Insurer**

# DECISION ON PRELIMINARY ISSUE

## Issues:

The Applicant, Lloyd W. Kirkham, was injured in a motor vehicle accident on July 25, 1990. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under Ontario Regulation 672.[1] Weekly income benefits were terminated by State Farm on July 25, 1993. The parties were unable to resolve their disputes through mediation and Mr. Kirkham applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

[1]Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule — Accidents Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.

At the pre-hearing of this matter on April 29, 1996, State Farm claimed that Mr. Kirkham had applied for arbitration out of time. The preliminary issue on this application is:

> Is Mr. Kirkham precluded from proceeding to arbitration pursuant to section 281(5) of the *Insurance Act* on the basis that he is out of time?

An Agreed Statement of Facts was submitted and submissions were heard on June 3, 1996 by teleconference. Counsel for the Applicant asked to withdraw his Application for Arbitration because he intended to pursue the matter in Court. Written submissions were made and further submissions were heard by teleconference on July 23, 1996. At that time, counsel for the Applicant advised me that he had reviewed State Farm's file since the last meeting and had decided that he did not wish to withdraw the Application for Arbitration.

## Result:

1. Mr. Kirkham is precluded by section 281(5) of the *Insurance Act* from proceeding to arbitration on claims for weekly income benefits for the two-week pay periods which ended before January 9, 1994.

2. Mr. Kirkham is not precluded by section 281(5) of the *Insurance Act* from proceeding to arbitration on claims for weekly income benefits for the two-week pay periods which ended after January 9, 1994.

## Participants at the hearing:

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| Applicant's Representative: | Neil Sacks<br>Barrister and Solicitor |

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| Insurer's Representative: | Eric Grossman<br>Barrister and Solicitor |
| Before: | William J. Renahan<br>Arbitrator |

## Evidence:

Mr. Kirkham sustained injuries as a result of a motor vehicle accident on July 25, 1990. His insurer, State Farm, paid weekly income benefits pursuant to section 12 of the *Schedule* until July 24, 1993. State Farm advised Mr. Kirkham of its refusal to pay further weekly benefits by delivering to him an Assessment of Claim by Insurer form dated July 19, 1993 and a cover letter dated July 20, 1993. Mr. Kirkham did not argue that the notice of termination was not clear and I find that the notice of termination was clear and unequivocal. Mr. Kirkham sought mediation against State Farm in respect of this denial by way of Application for Appointment of Mediator dated November 11, 1993. The Report of Mediator dated January 25, 1994 indicated that the issue of further weekly income benefits beyond July 24, 1993 was not resolved. Mr. Kirkham commenced arbitration proceedings against State Farm by way of Application for Arbitration on January 9, 1996, about two and half years after receiving the notice of termination of benefits.

State Farm relied on the limitation period set out in section 281(5) of the *Insurance Act*.

> **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*.

Mr. Kirkham relied on a line of cases interpreting the limitation period applicable to accident benefit provisions prior to the 1990 amendments to the *Insurance Act* and the enactment of

section 281(5). Those cases held that the cause of action for weekly accident benefits arises periodically as accident benefits become due.

The only reference to those cases in arbitration decisions is in *Zeppieri and Royal Insurance Company of Canada* (February 17, 1994), OIC File A-005237 where Senior Arbitrator Naylor said:

> I invited counsel to address the applicability of prior case-law which established that an insurer's obligation to pay benefits, and therefore, an applicant's cause of action, accrued from week to week. I received no submissions which would assist me in reaching a different result than the one I have arrived at. I therefore make no findings in respect to this issue.

Arbitrators have generally followed the two-step process outlined in *Zeppieri* to determine whether the limitation period applies. That test is: "First it is necessary to ask whether, and when, there was a refusal to pay benefits; and second, whether the insurer may rely on a limitation period that runs from the date of the refusal."

## Analysis:

Prior to the enactment of section 281(5) and the promulgation of the *Schedule* on June 20, 1990, no-fault accident benefit provisions were contained in Schedules to the *Insurance Act*. The applicable limitation period under those Schedules was:

> 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]

[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).

The cases dealing with this limitation period held that separate causes of action accrued for each pay period for which the insurer failed or refused to pay weekly benefits. Therefore, the limitation period did not bar claims for weekly income benefits falling due in the one-year period before the action for recovery was commenced. A statement of this principle by Osler J. is found in *Morgan v. Dominion Insurance Corp.* (1980) 118 D.L.R. (3d) 675 (Ontario High Court of Justice).

> Upon first approaching this matter, I was inclined to the belief that as the contract called for weekly payments the liability of the insurer was a continuing one for each succeeding benefit so that, so long as the disability continued, the "limitation" period established by subpara. (7)(c) of the "Special Provisions" of para. B of the Schedule would only bar claims originating more than one year before the commencement of an action for recovery of a claim. This appears to be the effect of the American decisions, of which there are many in a variety of Courts. My examination of the Ontario cases to which I have referred has not altered that opinion.
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> 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 . . .

This conclusion is supported by the authors of *Insurance Law in Canada* [3] at page 246:

> 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),

[3]Brown, C., and Menezes J. *Insurance Law in Canada* (A treatise on the principles of indemnity insurance as applied in the common law provinces of Canada) 2d ed. Scarborough: Thompson Professional Publishing Canada, 1991.

> 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]

My examination of Ontario cases on accident and disability benefits under automobile accident benefit legislation in effect before June 20, 1990[4] and under accident and sickness policies[5] leads me to the same opinion. The question then is whether there is any reason to depart from the traditional interpretation the courts have placed on limitation periods applicable to proceedings for the recovery of ongoing payments when interpreting section 281(5) of the *Insurance Act*.

In my view, the change of words from "within one year from the date on which the cause of action arose" under the pre-1990 accident benefit legislation to "within two years of the insurer's refusal to pay" in the current legislation does not, by itself, signify a legislative intent to change the interpretation the courts have placed on limitation periods applicable to proceedings for the recovery of ongoing payments.

In my view, section 281(5) of the *Insurance Act* was amended in 1990 to remove the words "cause of action." Under the 1990 amendments to the *Insurance Act* the insured was given the right to either bring a proceeding in court or refer the matter to an arbitrator. The matter before an arbitrator is an application for arbitration and not a cause of action. Accordingly, the words "cause of action" are not applicable to describe the limitation period for bringing an application

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[4] *Zigouras v. Royal Insurance Company of Canada*, (1987) 46 D.L.R. (4th) 365; *McKenzie v. Federation Insurance Company of Canada*, [1981] I.L.R. 1-1412; *Hartford Fire Insurance Company v. Canadian General Insurance Company* [1981] I.L.R. 1-1313; *Morgan v. Dominion Insurance Corporation*, (1980) 118 D.L.R. (3d) 675; *Seer v. Royal Insurance Company Limited*, [1980] I.L.R. 1-1102; *Coombe v. Constitution Insurance Co.*, (1980) 115 D.L.R. (3d) 499.

[5] *Zappone v. Mutual of Omaha Insurance Co. Ltd.*, (1983) 1 D.L.R. (4th) 455; *Smith v. The Empire Life Insurance Company*, [1996] I.L.R. 1-3312.

for arbitration. The use of the words “within two years of the insurer’s refusal to pay” in the 1990 amendment is then consistent with the former limitation words “within one year from the date on which the cause of action arose” when one considers Mr. Justice Osler’s proposition, quoted above, that the cause of action arises with respect to any given week when there exists entitlement to the benefit and refusal or failure by the insured to pay it.

Nor do I accept the Insurer’s submission that the regime under the 1990 *Schedule* is so different from that which it replaced, that a new interpretation should be placed on the limitation period. Both regimes require the insurer to pay benefits for an initial period if the insured establishes that he was disabled from doing the work he was doing at the date of the accident. Prior to the 1990 amendments, the period was 104 weeks. After the promulgation of the *Schedule* it was 156 weeks. After the initial period, both systems require the insured to establish that he is continuously disabled from doing any kind of suitable work to be entitled to further weekly benefits. Both systems provide that benefits are to be paid on a periodic basis during the life of the insured so long as he meets the test. Although the amount of weekly benefit has been increased significantly, the tests for entitlement are similar.

The Insurer also argued that if I accept the Applicant’s argument that his right to apply for arbitration accrues at the end of each two-week pay period, then I must find that each two-week claim after the date of mediation cannot go to arbitration because it has not been mediated as required by section 281(2). In my view, this is not a reasonable interpretation of the provisions requiring mediation. The issue of ongoing entitlement beyond the date of mediation is often the subject of mediation even though the entitlement is concerned with future weekly benefits. The issue of entitlement to weekly benefits between the date of mediation and the date of arbitration is often dealt with in applications for arbitration.

Lastly, I asked for submissions as to whether section 26 of the *Schedule* clarifies or changes the meaning of section 281(5) of the *Act*. Section 26 adds a phrase to the limitation period provided for in section 281(5) of the *Act.* It could be argued that the additional phrase in section 26 is redundant if the insured's right to apply for arbitration accrues with each pay period.

> **26.**–(1) A mediation proceeding under section **280** of the *Insurance Act* or an arbitration or court proceeding under section 281 of the 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*. [Emphasis added]
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> (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. O.Reg.779/93, s.5.

Section 16 provides as follows:

> **16**.–(1) Subject to section 15 and subsection (3), a person receiving a benefit under this Part may attend school or accept, or return to, work at any time during the first two years following the accident for any period of time without affecting his or her benefits under this Part if, as a result of the accident, he or she is unable to continue at school or in the occupation or employment.
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> (2) Subject to section 15 and subsection (3), after the two year period referred to in subsection (1), a person receiving a benefit under this Part may attend school or accept, or return to, an occupation or employment for periods of up to ninety days without affecting his or her benefits under this Part if he or she, as a result of the injury, is unable to continue at school or in the occupation or employment.

In my view, the additional words in section 26(1) when read with section 16, are not redundant to the meaning of section 281(5). In my view, the additional words are needed to deal with the consequences of section 16.

Section 16 provides that an insured can return to work or school during the first two years following the accident without affecting his right to weekly benefits. One of the ways a person's right to weekly benefits is affected is by the running of the limitation period under section 281(5). Presumably then, section 16 suspends the running of the limitation period where a person works or returns to school during the first two years following the accident and where the insurer has delivered a refusal to pay further benefits. It appears to me then that the second part of section 26(1) is necessary to end the suspension of the running of the limitation period. Where a person works or returns to school during the first two years following the accident as allowed by section 16, the second part of section 26(1) specifies that the two-year limitation period starts to run again on the "insurer's refusal to pay further benefits."

For these reasons I am not persuaded to depart from the interpretation the Courts have placed on limitation periods for proceedings for the recovery of ongoing disability payments.

Pursuant to section 24(3) of the *Schedule* the insurer is required to deliver weekly benefit payments at least once every second week while it remains liable to the insured person. It is my view that the applicant's right to bring an application for arbitration accrues at the end of every two-week pay period and that where the insurer has refused to make payment, the limitation period bars claims for weekly benefits for the two-week pay periods which ended more than two years before the application for arbitration was brought. In this case, the application for arbitration was brought on January 9, 1996. Claims for weekly benefits for the two-week pay periods which ended before January 9, 1994 are barred by the operation of section 281(5) of the *Insurance Act*. Claims for weekly benefits for the two-week pay periods which ended after January 9, 1994 are not statute-barred.

**Order:**

1. The Applicant's claims 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 periods which ended after January 9, 1994 are not barred by operation of section 281(5) of the *Insurance Act*.

August 15, 1996

William Renahan
Arbitrator

Date