**OIC A96–001835**

**BETWEEN:**

**FRANCIS NAND**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

**Insurer**

# DECISION ON A PRELIMINARY ISSUE

**Issue:**

This case deals with the scope of the issues to be placed before the Arbitrator at the hearing. The Applicant, Francis Nand, was injured in a motor vehicle accident on May 23, 1996. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.[1] State Farm determined that no accident benefits were payable because of collateral benefits Mr. Nand was receiving from other sources. Mr. Nand proceeded through mediation (unsuccessfully) and then applied for arbitration on the narrow issue of the deduction of collateral benefits. State Farm then mediated the issue of entitlement[2] and sought to have it added to the arbitration. Mr. Nand objected.

The issue in this preliminary hearing is:

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[1]The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993, and before November 1, 1996*, called "the *Schedule*" in this decision. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94 and 781/94.

[2] Specifically, State Farm disputes that Mr. Nand suffers a partial or incomplete inability to carry on a normal life, the prerequisite for "other disability benefits" under section 19 of the Schedule. The Mediator's Report, dated April 17, 1997 states that Mr. Nand objected to the mediation and asserted that his participation in the mediation was not to be construed as acquiescence to State Farm's right to mediate this issue.

1. May the Insurer raise the issue of entitlement in the hearing?

## Result:

1. The Insurer may raise the issue of entitlement in the hearing.

## Reasons:

Until recently the case law at the Commission provided that applicants generally had control over the issues to be determined at an arbitration. The insurer had no independent right to refer matters to arbitration which did not "naturally or consequentially flow" from the applicant's claims.[3] This approach was consistent with section 282 (3) of the *Insurance Act* which, until November 1, 1996, provided**:**

> The Arbitrator shall determine all issues in dispute and such other issues as the parties may agree.

However, this provision was amended on November 1, 1996, under the *Automobile Insurance Rate Stability Act*. The new section provides:

> The Arbitrator shall determine **all** issues in dispute, **whether the issues are raised by the insured person or the insurer**. [emphasis added]

[3] *Kotsiakos and State Farm Mutual Insurance* (July 26, 1994), OIC A-002354; *DeCicco and State Farm Mutual Automobile Insurance Company* (February 21, 1992), OIC P-000277.

Mr. Wilson argues that this provision does not apply to this case because Mr. Nand's Application for Arbitration is dated October 28, 1996 - three days before the November 1 proclamation date. However, the Application was not received at the Commission until November 5, 1996.[4]

The *Practice Code* in effect in November 1996 [5] sets out rules regarding the filing and service of documents. An insured person "must complete and file" an Application for Arbitration with the Commission.[6] The filing is a prerequisite for the commencement of a proceeding - if the applicant files an incomplete application, or does not pay the required application fee, the Commission may reject the application.[7] A party may file a document in various ways, including regular mail.[8] Rule 7, which sets out the time frames for filing documents, states that where a document is served by mail, as Mr. Nand's application was, service will be considered to take place "on the fifth day after the day on which the document is mailed."[9] That means that in this case Mr. Nand's application was not filed until November 2, 1996, at the earliest. By then the new section 282(3) was in place.

Counsel agree that the new provision applies to Applications filed after November 1, 1996. As Mr. Nand's application was filed on November 2, 1996, at the earliest, it is subject to the new provision. This should, at first blush, end the matter, as the new provision states that the arbitrator shall determine "**all** issues in dispute" (my emphasis), regardless of which party raised them. Mr.

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[4] According to the OIC stamp on the original Application for Arbitration, contained in the OIC file. I received no evidence as to when the Application was mailed.

[5] Although several portions of the *Code* were amended as of April 15, 1997, the provisions dealing with the filing and service of documents are largely the same. In any case, counsel agreed that the provisions in place in November, 1996 govern this preliminary issue.

[6] Rule 24.2

[7] Rule 24.3

[8] Rule 6

[9] Rule 7.3(b)

Wilson, however, argues that the issue which State Farm seeks to add, being entitlement, is not properly "in dispute," and therefore cannot be added.

In this regard, Mr. Wilson asserts that State Farm "conceded" entitlement in its Explanation of Assessment. This form, dated July 2, 1996, explains how the Insurer calculated benefits. It notes that Mr. Nand was "eligible" for "other disability benefits" of $185.00 weekly, but that State Farm was entitled to deduct "income from other sources" in the sum of $234.52, resulting in a net benefit of zero.[10]

Mr. Wilson argues that once State Farm acknowledged that Mr. Nand was eligible for benefits, it conceded he was disabled, and cannot later challenge that assessment unless there is evidence of "error or fraud." I disagree; though an insurer is expected to behave in accordance with its assessment, it may later reassess the case and adjust the benefits because of new information regarding the applicant's injuries. If it does so unreasonably, it runs the risk of a special award.[11] But it is not bound forever to its original assessment. Nor do I agree with Mr. Wilson's submission that an insurer cannot rely on a change in the applicant's medical circumstances to justify reassessment unless it complies with the procedures set out in the *Schedule* regarding the stoppage of benefits and attendance at Designated Assessment Centres (DACs). If the insurer fails to comply with the procedural requirements of the *Schedule*, the applicant may challenge the withholding of benefits at the arbitration hearing; this does not, in my view, prevent the insurer from raising the issue of entitlement at the hearing.

Mr. Wilson's final and most surprising submission is that the new section 282(3) does not significantly change the law. He argues that, even with this amendment, the insurer cannot add an

[10] According to the Application for Arbitration. I was not provided with page 2 of the Explanation of Assessment, which supposedly contains this information.

[11] Section 282(10) of the *Insurance Act* allows the arbitrator to award a lump sum to the applicant if she finds an insurer "has unreasonably withheld or delayed payments."

issue to the arbitration unless it is "inextricably related to the proceeding begun by the applicant." The amendment, he suggests, does no more than "codify" the *Carby*[12] decision, where Arbitrator Bayefsky allowed more flexibility in determining when an insurer may add an issue to an arbitration, but required nonetheless that the issues be "reasonably incidental to each other."

In my view, the amendment marks a new and significantly broader approach to setting the parameters of an arbitration. As several Commission decisions have noted, under the previous legislation[13] only an insured can refer a matter to arbitration. Within that limitation, arbitrators struggled over whether to add issues to which an applicant had not consented. In *DeCicco*,[14] Arbitrator Naylor (as she then was) held that "the authority of the arbitrator extends to anything that reasonably and consequentially flows from the issues that are before her." This approach was confirmed on appeal. In *Ayerty*,[15] the arbitrator held that an insurer cannot raise a new benefit category against the applicant's wishes, even if the matter was mediated. The later cases of *Kotsiakos*[16] and *Slivecka*[17] found that an arbitrator can only consider those issues that "naturally or consequentially flow" from the matters referred to arbitration by the applicant, and not unrelated issues or ones involving a different type of inquiry and evidence than the applicant's issues; for example, arbitrators found that issues of quantum and repayment do not flow from the question of entitlement.

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[12] *Carby and Co-operators General Insurance Company* (January 12, 1996), OIC A-950220

[13] Section 282(1) of the *Insurance Act*

[14] *Supra*, note #3

[15] *Ayerty and Toronto Transit Commission* (June 1, 1995), OIC A-004077

[16] *Kotsiakos and State Farm Mutual Automobile Insurance Company* (June 21, 1995), OIC A-002354

[17] *Slivecka and Canadian General Insurance Company* (September 27, 1995), OIC A-008342

Until the recent amendment, therefore, the case law consistently held, as noted by Arbitrator Beyefsky in *Carby*, "that the applicant must have some control over the arbitration process and that insurers are, consequently, not entitled to raise disputes regarding entitlement to or the amount of a **different** benefit." (emphasis in original) It was against this background that the new section 282(3) was passed, suggesting, I believe, that the legislators intended to clarify what the parameters of an arbitration should be. The contrast between what was permitted under the old wording - "such other issues as the parties may agree" - and the new wording - "whether the issues are raised by the insured person or the insurer" - is, in my view, a clear movement toward an inclusive approach to the hearing. Once an applicant has opted for arbitration, this amendment requires the arbitrator to determine "all" issues in dispute. As such, it goes well beyond the guidelines expressed in *Carby*.

Mr. Wilson is correct that in this case, an inclusive approach will significantly expand the scope and length of this inquiry. Until now, the hearing has been confined to a question of law regarding the deductibility of CPP payments, which could be argued in less than a day. If I permit the insurer to add the issue of entitlement, the hearing will involve medical testimony and will likely require several days of documentary and oral evidence. The alternative, however, is likely less desirable: regardless of the outcome of the dispute regarding CPP benefits, State Farm may continue to refuse benefits on the basis that Mr. Nand has not proven entitlement - i.e., he has not suffered a partial or complete inability to carry on a normal life. Mr. Nand must then bring a further arbitration or court proceeding to establish entitlement,[18] resulting in delay, split proceedings, and at least some duplication of time and cost. This conflicts with the public policy goal underlying the new provision, namely to encourage speedy and effective dispute resolution.

[18] Mr. Wilson argues that State Farm would be estopped from disputing entitlement in a later proceeding because it "conceded" entitlement in its Explanation of Assessment ( *supra*, see p.4*)*. Even if he is correct, which seems unlikely, his position would result in a preliminary hearing to determine the issue of estoppel, thus again causing delay and further proceedings.

I do not intend by these comments to suggest that under the new provision an arbitrator has no discretion over whether to include an issue at the hearing. The insurer must satisfy the arbitrator that there is a genuine issue for determination, and that the matter has not been raised late in the proceeding for tactical reasons. If the hearing arbitrator determines that the insurer abused this process, she may issue a special award and/or address the matter through expenses. In this case, however, I am satisfied that the issue of entitlement is properly added to this arbitration.

## Order:

1. The Insurer may raise the issue of entitlement in the hearing.

July 28, 1997

Deena Baltman
Arbitrator

Date

## SCHEDULE "A"

### Hearing:

The hearing was held at the offices of the Ontario Insurance Commission in North York, Ontario, on June 30, 1997, before me, Deena Baltman, Arbitrator.

### Present at the Hearing:

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| Applicant: | Francis Nand |
| Mr. Nand's Representative: | David S. Wilson<br>Barrister and Solicitor |
| State Farm's Representative: | Eric Grossman<br>Barrister and Solicitor |