



Appeal P05-00005

**OFFICE OF THE DIRECTOR OF ARBITRATIONS**

ALLSTATE INSURANCE COMPANY OF CANADA

Appellant

and

TERRY GURNEY

Respondent

BEFORE: David Evans  
REPRESENTATIVES: Eric K. Grossman for Allstate  
Anthony J. Potestio for Mr. Gurney  
HEARING DATE: September 29, 2005

**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 in part. The arbitration order, dated February 15, 2005, is varied as follows:

Paragraph 1 is revoked and replaced with the following:

Mr. Gurney is not entitled to claim supplementary medical or rehabilitation benefits for a period in excess of ten years post accident.

2. The parties may contact me within 30 days if they are unable to agree on appeal expenses.

\_\_\_\_\_  
David Evans  
Director's Delegate

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January 27, 2006

\_\_\_\_\_  
Date

## **REASONS FOR DECISION**

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### **I. NATURE OF THE APPEAL**

Allstate appeals the arbitrator's finding that it should have offered Mr. Gurney the chance to buy optional indexation for his income replacement benefits ("IRBs"). However, the arbitrator found that she could provide no remedy. She made no order on this point and her *obiter* discussion is not subject to appeal.<sup>1</sup>

Allstate also appeals the arbitrator's finding that Mr. Gurney's supplementary medical and rehabilitation benefits are not time-limited.

### **II. BACKGROUND**

Mr. Gurney was injured in a motor vehicle accident on November 16, 1996. For the purposes of this hearing, the parties agreed that his injuries were not catastrophic. He made a claim for weekly IRBs and supplementary medical and rehabilitation ("med/rehab") benefits.

On November 1, 1996, the *SABS-1996*<sup>2</sup> amended existing automobile insurance policies — such as that covering Mr. Gurney at the time of the accident — subject to the transitional coverages afforded in s. 70 of the *SABS-1996*. Thus, while the revised *SABS* limited med/rehab benefits (for non-catastrophic claims) to a total of \$100,000 payable over a maximum of 10 years,<sup>3</sup>

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<sup>1</sup> *Saliba and Allstate Insurance Company of Canada et al.*, (FSCO P01-00031, July 24, 2001)

<sup>2</sup> The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended. It is also sometimes referred to simply as the *Schedule*.

<sup>3</sup> "No medical or rehabilitation benefit is payable for expenses incurred, (a) more than 10 years after the accident. . . ." [s. 18(1)(a)]; "The sum of the medical and rehabilitation benefits paid in respect of an insured person shall not exceed, for any one accident, (a) \$100,000. . . ." [s. 19(1)(a)]

transitional provision s. 70(3) increased the \$100,000 limit to \$1,000,000 for “the sum of the medical, rehabilitation and attendant care benefits paid.” Paragraph 10 of the agreed statement of facts, recited in the arbitration decision, noted:

The parties disagree about what affect the section 70 transitional coverages have in respect of . . . (b) Mr. Gurney’s right to claim supplementary medical and rehabilitation benefits after the ten year anniversary of the accident (the parties agree that the transitional benefits afford Mr. Gurney enhanced non-catastrophic monetary limits of \$1,000,000.00).

*L.F. and State Farm Mutual Automobile Insurance Company*, (FSCO P02-00026, June 3, 2004), considered the same transitional provision with respect to the maximum period attendant care benefits (“ACBs”) are payable.<sup>4</sup> The Director’s Delegate, in reversing the arbitral decision,<sup>5</sup> found that the 104-week maximum for non-catastrophic ACBs applied. However, the arbitrator in this case treated brochures as interpretive aids with which to distinguish the *L.F.* appeal decision. She found that “Mr. Gurney is entitled to claim supplementary medical and rehabilitation benefits for a period in excess of 104 weeks post accident.”

### III. ANALYSIS

The arbitrator in *L.F.* found that, although s. 70(3) increased the med/rehab and ACB limits to \$1,000,000 “for the sum of the medical, rehabilitation and attendant care benefits paid,” its application to ACBs was problematic because it did not provide any increase in the maximum of \$72,000 for ACBs to compensate for the changes imposed by the *SABS-1996*:

If effect were to be given to both subsection 18(2) (the durational limits) and paragraph 16(5)(a) (the monetary maximums) of the present *Schedule*, then the maximum amount available for attendant care would remain at \$72,000, despite the

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<sup>4</sup> For non-catastrophic impairments, the maximum amount of ACBs is \$72,000 [s. 19(2)(a)] payable at a maximum of \$3,000 per month [s. 16(5)(a)] up to 104 weeks after the accident [s. 18(2)].

<sup>5</sup> (FSCO A00-000364, August 21, 2002)

transitional provision of section 70. . . . I find that a “just and reasonable outcome” is obtained only by . . . consequentially setting aside the subsection 18(2) durational limit and continuing the indefinite availability of attendant care benefits.

This line of reasoning is inapplicable to med/rehab benefits because the transitional provision did serve to increase the maximum for med/rehab benefits. In fact, s. 70 increased the maximum available for med/rehab benefits tenfold. The problem for the arbitrator in *L.F.* was that s. 70 did not increase ACBs. Since that problem does not exist for med/rehab benefits, even the arbitration decision in *L.F.* provides no grounds to set aside the temporal limit for med/rehab benefits.

Nonetheless, the arbitrator in this case stated:

Using the example of medical rehabilitation benefits, if temporal limits apply, then the provision of \$1,000,000 for medical rehabilitation benefits, except for an extraordinarily rare case, has no meaningful effect *if it has to be incurred within 104 weeks*. Like the example of attendant care benefits, limiting medical rehabilitation benefits of \$1,000,000 *to two years* would not be consistent with the purpose of the transitional provisions to compensate an insured for a reduction of benefits in mid-contract. [Emphasis added.]

Since the durational limit for supplementary medical and rehabilitation benefits is ten years, not 104 weeks, the comparison with attendant care benefits falls. The arbitrator’s error with respect to the durational limit — an error that is fundamental to the decision — completely undermines her point that the increased amount is of no meaningful effect. There are many situations where the additional funds would have a meaningful effect for an insured over the course of 10 years.

Furthermore, the arbitrator’s decision in *L.F.* was overturned on appeal, and pursuant to *Vo and Maplex General Insurance Company and Insurance Bureau of Canada*,<sup>6</sup> appeals are binding on arbitrators. The arbitrator in this case found that brochures sent out by Allstate to advise insureds of the change in the law were “a significant piece of evidence which was not before the

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<sup>6</sup> (OIC P-002777, December 12, 1997)

Director's Delegate in *L.F.* when she interpreted the less than clearly drafted section 70.”  
However, the Director's Delegate in *L.F.* made two legal findings that exclude reliance on the brochures: she found that the arbitrator's reasoning in *L.F.* was not the most plausible interpretation of s. 70, and she found that, while the language of s. 70 could have been clearer, it was not ambiguous. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids (including other principles of interpretation).<sup>7</sup> Accordingly, there was no necessity to resort to the brochures as external interpretive aids, and the arbitrator erred in doing so.

The appeal is allowed, and the order will be amended to show that supplementary medical and rehabilitation benefits are not payable beyond 10 years after the accident.

#### **IV. EXPENSES**

The parties may contact me within 30 days if they are unable to agree on appeal expenses.

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David Evans  
Director's Delegate

January 27, 2006

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Date

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<sup>7</sup> *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at par. 29.