

BETWEEN:

DEXTER HOWARD

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Joyce Miller

Heard: July 17, 2002, at the offices of the Financial Services
Commission of Ontario in Toronto.

Appearances: Alan J. Davis for Mr. Howard
Eric K. Grossman for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Dexter Howard, was injured in a motor vehicle accident on August 13, 1990. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.¹ State Farm alleges that it terminated Mr. Howard’s weekly income benefits on February 7, 1992 when Mr. Howard returned to work. On July 27, 2000, Mr. Howard applied for further benefits. State Farm alleges that Mr. Howard had applied for arbitration later than two years after the denial of the claim and that he was therefore barred from proceeding with his claim. The parties were unable to resolve their disputes through mediation, and Mr. Howard applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *Statutory Accident Benefits Schedule — Accidents On or Between June 22, 1990 and December 31, 1993*, Regulation 672 of R.R.O. 1990, as amended by Ontario Regulations 660/93 and 779/93.

The preliminary issue is:

1. Is Mr. Howard precluded from proceeding to arbitration because his application for arbitration was filed beyond the two-year limitation period set out in subsection 281(5) of the *Insurance Act* and subsection 26(1) of the *Schedule*?

Result:

1. Mr. Howard is not precluded from proceeding to arbitration.

EVIDENCE AND ANALYSIS:

The parties proceeded on the following agreed statement of facts:

Agreed Statement of Facts

1. State Farm provided a policy of automobile insurance to Mr. Nikolaos Traikos.
2. On August 13, 1990, Mr. Traikos lost control of the insured vehicle and struck Mr. Dexter Howard as a pedestrian.
3. Mr. Howard was taken by ambulance to Sunnybrook Hospital where he was treated for a fractured femur, which required an open reduction with internal fixation.
4. At the time of the accident, Mr. Howard maintained two positions of employment. In the first position, he worked full-time at Becker's Milk in shipping and receiving. In the second position, he worked part-time with the Howard Johnson Hotel as banquet personnel.
5. Following the accident, Mr. Howard received physiotherapy treatments and participated in a return to work program.
6. State Farm paid Mr. Howard weekly benefits in the amount of \$194.90 from August 20, 1990 to May 10, 1991, and then \$553.60 a week thereafter to January 24, 1992.

7. In an Application for Additional Accident Benefits dated July 27, 2000, Mr. Howard claimed Income replacement benefits from January 1992 to current, and ongoing – to be calculated.
8. State Farm responded by referencing an Assessment of Claim by the Insurer dated February 2, 1992, indicating that Mr. Howard had returned to work.
9. The parties agree to the following chronology:
 - *Date of Loss - August 13, 1990
 - *Application for Accident Benefits completion - undated
 - * Application for Accident Benefits received by State Farm - May 28, 1991
 - *Assessment of Claim by Insurer - February 7, 1992
 - *Application for Additional Accident Benefits - July 27, 2000
 - *Assessment of Claim by Insurer - August 16, 2000
 - *Application for Mediation - March 2001
 - *Report of Mediator - May 2, 2001
 - *Application for Arbitration - November 8, 2001
(Date received by FSCO)

In addition, Mr. Howard testified that when he returned to work in January 1992 he never received State Farm’s notice of Assessment of Claim by Insurer dated February 7, 1992. Nor was he told that payments by the Insurer would stop. He stated that his previous lawyers handled his claim and that State Farm sent his weekly income benefit cheques to his lawyer’s office. His lawyer then passed cheques on to him. He stated after he returned to work he never asked his lawyers why his cheques had stopped coming. He stated that he assumed that his benefits from the Insurer would stop when he returned to work. He had no reason to speak to his lawyers about it.

Mr. Howard testified that he changed jobs in September 1995 for a more sedentary job. Mr. Howard stated that he worked at his sedentary job until August 1996 and has not worked since then.

Mr. Howard testified that he called his previous lawyer sometime in 1995 and was told his case “was open.” He stated that he changed lawyers in 1997 but he did not know the status of his accident benefits at that time.

Submissions

1. *State Farm’s Submissions*

State Farm submits that Mr. Howard’s weekly income benefits were terminated on February 7, 1992. State Farm submits that the refusal in the Assessment of Claim which states “Final payment based upon my conversation with Francis, she has informed me that you returned to work” is clear and unequivocal notice that Mr. Howard’s benefits were being terminated. State Farm submits that Mr. Howard is not credible when he testified that he had no knowledge that State Farm had terminated his weekly income benefits. In any case, State Farm submits that no distinction should be made between whether Mr. Howard or his previous lawyer had received the notice of Assessment of Claim by Insurer. Succinctly, State Farm submits that notice of termination of benefits to Mr. Howard’s lawyers was notice to Mr. Howard.

State Farm further submits that even though, pursuant to section 16(1) of the *Schedule*, Mr. Howard is allowed to return to work during the first two years following his accident for any period of time without affecting his benefits, he is still out of time. In support of this submission State Farm relies on the following two cases. *Shirani and Wellington*² and *Toteda and Zurich*.³

² *Shirani and Wellington Insurance Company* (OIC A96-000114, January 7, 1997)

³ *Toteda and Zurich Insurance Company* (FSCO A00-000246, April 17, 2001)

In *Shirani*, the applicant sent the insurer a note from his doctor dated May 11, 1992 which stated that he was able to return to work at the end of May or start of June. The insurer responded by letter of June 3, 1992 enclosing his “final cheque” and noting that the applicant had been cleared by his family physician to return to work at the beginning of June. At the hearing, the applicant testified that he received the letter and the cheque and that he knew that his benefits were terminated because the doctor had cleared him to return to work. In his decision, Arbitrator Evans made the following findings:

It is not clear to me that section 16 **suspends** the limitation period set out in the earlier part of subsection 26. In fact, it may be that sections 16 and the latter part of 26(1) could work to **impose** a limitation period in certain circumstances in the absence of an outright refusal to pay benefits. Suppose the person had returned to work part-time and then stopped working, claiming the injuries from the accident prevent him or her from working at all. The insurer continues to pay benefits, but at a reduced level, claiming the person could work part-time. Benefits never cease, so the limitation set out in the first part of subsection 26(1) would never commence, but the second phrase of subsection 26(1) would impose upon the person a time limit of two years from that *refusal to pay further benefits* to seek a resumption of the full benefits.

In any event, as I read section 16, both subsections 16(1) and 16(2) only apply to **“a person receiving a benefit under this Part.”** Surely, if a person has received an insurer’s notice of termination of benefits, that person is no longer a person receiving a weekly benefit. Therefore, the requirements of subsections 16(1) and (2) are not met — or, in the phrasing of subsection 26(1), the return to work after the termination of benefits is not “as permitted by section 16.” Consequently, the only relevant limitation period is that as set out in subsection 281(5) of the *Act* and in the first part of subsection 26(1) of the *Schedule*: the claim must be brought within two years of the insurer’s refusal to pay further benefits.

As more than two years passed after Mr. Shirani received the notice of refusal before he applied for arbitration, he is precluded from proceeding with the arbitration hearing. [emphasis in original]

In *Toteda*, the applicant applied for arbitration in February 2000, more than two years after his benefits were terminated in June 1997, asserting that his situation fell within the exceptions to this rule set out in subsection 72(1) of the *Schedule*.⁴ Specifically, he asserted that he engaged in employment permitted by section 14 of the *Schedule*⁵ when he returned to work for various periods in 1997 and 1998 and as a result he was entitled to request that his benefits be reinstated. In support of this view he relied on the appeal decision in *Wright*⁶ in which Director's Delegate Draper found that the right of an applicant who returns to work within two years after an accident to assert a later claim is "preserved when he or she attempts to return to work."

In her decision Arbitrator Novick held that:

In my view, the *Wright* decision referred to above does not assist Mr. Toteda. That case dealt with the question of whether subsection 14(1) or 14(2) of the *Schedule* should be applied to Mrs. Wright's request for further benefits. In finding that subsection 14(1) applies to cases in which an insured person returns to or begins work within 104 weeks after the accident, Director's Delegate Draper stated:

In my view, what subsection 14(1) preserves is the insured person's right to assert a claim for IRBs based on an accident-related disability. If he or she returns to work at an early date, as obliged to do if possible, the insurer cannot assume that entitlement has ended or require a new application if faced with a subsequent claim. **The insured person is entitled to go back to the insurer and ask that his or her IRBs be reinstated.** The longer the return to work, the more difficult it is likely to be to establish the claim, but section 14 preserves the right to assert it. [emphasis in original]

⁴ Subsection 72(1) is similar to subsection 26(1) of the subsequent Bill 164 *Schedule* - Ontario Regulation 776/93, as amended, the *Statutory Accident Benefits Schedule - Accidents after December 31, 1993 and before November 1, 1996*.

⁵ Section 14 is similar to section 16 of the subsequent Bill 164 *Schedule* - Ontario Regulation 776/93, as amended, the *Statutory Accident Benefits Schedule - Accidents after December 31, 1993 and before November 1, 1996*.

⁶ *Allstate Insurance Company of Canada and Wright* (FSCO P98-00051, January 18, 1999)

Mr. Toteda alleges that he was unable to work as of May 1, 1999. His application for arbitration was not filed until February 28, 2000, some ten months later. He did not “go back to the insurer and ask that his... IRBs be reinstated,” as set out in the above excerpt. I was not advised of what, if anything, was communicated between the Applicant and Zurich during that period. While I agree with the above statement that section 14 preserves an insured person’s right to claim continued benefits if he or she returns to work on a temporary basis, the insured person is still obliged to request that the benefits be reinstated in a timely manner. In the absence of such a request or corresponding “refusal to pay further benefits” as contemplated in subsection 72(1) of the *Schedule*, I find that Mr. Toteda is precluded from proceeding with his claim for income replacement benefits.

State Farm submits Mr. Howard received a proper notice of termination and that based on the reasoning in *Shirani* and *Toteda*, even though Mr. Howard returned to work within two years of the accident, he is precluded from proceeding to arbitration with his claim for weekly income benefits. Accordingly, State Farm submits Mr. Howard is barred from claiming further weekly income benefits.

2. Mr. Howard’s Submissions

Mr. Howard submits that, in its Assessment of Claim dated February 2, 1992, State Farm did not terminate his benefits and therefore the limitation period does not apply. Mr. Howard pointed out the following statements in the Assessment Claim which supports his position. The form states:

The insurer has reviewed your application for no-fault benefits and has assessed your claim below. **Where the insurer has denied a benefit claim entirely or in part, this is a notice to you of denial of a claim.** [emphasis added]

The form then gives the Insurer four items to choose from regarding the status of an Applicant’s claim for weekly income benefits. These are: Not Applicable, Claim Accepted in Entirety, Portion of Claim Denied and Entire Claim Denied.

In the Assessment of Claim form that Mr. Howard was sent, the phrase **Claim Accepted in Entirety** is checked off. Mr. Howard submits therefore that the Assessment of Claim on its face is not a refusal of benefits.

Mr. Howard submits that the case law is clear **S** notice of refusal must be in writing to the insured and it must be clear and unequivocal. Mr. Howard submits there is no evidence that he received the notice of Assessment of Claim. Even if he was found to have received the notice, he submits that the form is not a clear and unequivocal refusal of benefits. Mr. Howard submits that the applicable Assessment of Claim form in which his benefits were refused is the one that was sent to him on August 16, 2000. He submits that since he applied for arbitration on November 8, 2001 he was within the two year limitation period and not barred from proceeding to arbitration.

The Law

Subsection 281(5) of the *Insurance Act* provides that:

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*.

Subsection 26(1) and (2) of the *Schedule* provides that:

(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.

(2) Despite subsection (1), an arbitration or court proceeding under section 281 of the *Insurance Act* may be commenced within ninety days after the mediator reports to the parties under subsection 280 (8) of the Act.

Subsection 24(8) of the *Schedule* provides that:

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.

Section 16 of the *Schedule* which deals with a temporary return to school or work states:

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.

(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.

(3) The insurer is not required to pay weekly benefits under section 13 for any week in which the insured person attends school.

Findings

The leading arbitration case regarding terminating benefits and the limitation period is *Zeppieri and Royal Insurance Company of Canada*.⁷ In that case, Arbitrator Naylor held that where an insurer wished to terminate an insured's accident benefits the refusal must be "... clear and unequivocal, and must be communicated to the applicant. Section 24(8) of the regulations indicates that the notice must be in writing, and provide reasons for the refusal. The onus is on the insurer to establish that an applicant has received proper notice." I agree with this conclusion.

⁷*Zeppieri and Royal Insurance Company of Canada* (OIC A-005237, February 17, 1994), affirmed on appeal (OIC P-005237, December 22, 1994).

The onus of proof rests with State Farm to show that Mr. Howard was provided with a clear and unequivocal refusal of his benefits in its notice of Assessment of Claim on February 7, 1992. For the following reasons I find that State Farm has not discharged its burden.

First, I agree with State Farm's submission that the notice of Assessment of Claim sent to Mr. Howard's lawyer regarding the status of Mr. Howard's weekly income benefits is a valid notice to Mr. Howard even if no formal notice was sent to him. This position is in keeping with the conclusions of Arbitrator Makepeace in *Simms and Markel Insurance Company*.⁸ In that case, the insurer sent its notice of Assessment of Claim to the applicant's lawyer on February 22, 1995 terminating the applicant's benefits but did not copy the applicant. The applicant argued that the limitation period did not begin to run from the February date because the insurer did not satisfy the requirement for notice of termination set out in subsection 24(8) of the *Schedule*.

Arbitrator Makepeace held that: "At common law, 'notice to a solicitor about a matter of which it is part of the solicitor's duty to inform himself or herself is actual notice to the client.'"⁹ She went on to state:

I accept that the statutory accident benefit scheme and the dispute resolution process were intended to provide insured persons with a relatively inexpensive, informal and accessible system. Arbitration decisions have promoted values of transparency and responsiveness in interpreting subsection 24(8) and other notice provisions. Mr. Farovitch also pointed out that it would have cost the Insurer very little to mail the notice to the Applicant at the same time it was mailed to Mr. Wilson. This minimal cost contrasts sharply with the steep cost to the insured, who may be statute-barred from arbitration if her lawyer receives the notice but fails to pass it on to her. In my view, insurers should give notice of termination to the insured personally, as well as to his or her lawyer.

⁸ (FSCO A97-001825, November 19, 1998), affirmed on appeal (FSCO P99-00002, September 27, 1999)

⁹ C.E.D. (Ont. 3rd), Barristers and Solicitors, para. 160. [Insurer's counsel] also relied on: *St. John and Quebec R. Co. v. Bank of British North America and the Hibbard Co.* (1921), 67 D.L.R. 650 (S.C.C.); *Cross v. Dares et al.*, [1933] 2 D.L.R. 97 (N.S.S.C.); and *Dominion Readers' Service Ltd. v. Brant et al.* (1982), 41 O.R. (2d) 1 (Ont. C.A.).

However, these policy considerations do not persuade me that they are required to do so where the insured has retained counsel to conduct all dealings with the insurer on her behalf. I find nothing in the language of subsection 24(8) to rebut the presumption against changing the common law.¹⁰

In the circumstances of the present case, where Mr. Howard had given full authority to his lawyer to deal with the Insurer, I find that Arbitrator Makepeace's conclusion is applicable. Specifically, I find that the notice of Assessment of Claim dated February 7, 1992 to Mr. Howard's lawyer was notice to Mr. Howard.

Although I find that the notice of the Assessment of Claim to Mr. Howard's lawyer constitutes notice to Mr. Howard, I do not find that it was a clear and unequivocal notice of termination of Mr. Howard's weekly income benefits.

I do not agree with State Farm's submission that where the Assessment of Claim form states "final payment" it was a clear and unequivocal notice of termination of Mr. Howard's weekly income benefits.

In my view, on the facts of this case, the words "final payment" refers to a specific event, namely, that Mr. Howard had returned to work and as a result State Farm was stopping to pay weekly income benefits. It did not mean that his weekly income benefits were terminated for all time. State Farm had the option of checking off either "Portion of Claim Denied" or "Entire Claim Denied." Had it checked off either of these phrases then the statement "Where the insurer has denied a benefit claim entirely or in part, **this is a notice to you of denial of a claim**" would have been notice to Mr. Howard that his claim was being refused. However, it did not do so. Instead, the phrase "**Claim Accepted in Entirety**" was checked off. [emphasis added]

¹⁰*Driedger on the Construction of Statutes (Third Edition)*, Ruth Sullivan (Butterworths, 1994), pp. 298-299.

If State Farm meant for the words “final payment” to mean that Mr. Howard’s weekly income benefits were terminated for all time, it clearly contradicted itself by checking off the phrase “Claim Accepted in Entirety.” I cannot conclude from this contradiction that the notice of termination of benefits was “clear and unequivocal.”

Accordingly, I find that in its Assessment of Claim by Insurer of February 7, 1992, State Farm did not give Mr. Howard proper notification of its refusal to pay his weekly income benefits. Mr. Howard is, therefore, not barred from proceeding to arbitration.

For the sake of completeness, if I am overturned on this conclusion, I would like to state that I agree with the conclusions in the *Shirani* and *Toteda* cases put forward in State Farm’s submissions.

Accordingly, on the facts of this case if Mr. Howard had received a proper notice of termination, I find that based on the reasoning in *Shirani* and *Toteda*, even though Mr. Howard returned to work within two years of the accident, he would be precluded from proceeding to arbitration with his claim for weekly income benefits.

EXPENSES:

The issue of expenses is left to be dealt with by the hearing Arbitrator.

Joyce Miller
Arbitrator

August 29, 2002

Date

FSCO A02-000004

BETWEEN:

DEXTER HOWARD

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Howard may proceed to arbitration with respect to his entitlement to weekly income benefits.

Joyce Miller
Arbitrator

August 29, 2002

Date