

BETWEEN:

TRACY SCHUTT

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Joyce Miller

Heard: Written submissions from both parties were received
by September 20, 2001.

Appearances: Michael Smitiuch for Mrs. Schutt
Eric K. Grossman for Allstate Insurance Company of Canada

Issues:

The Applicant, Tracy Schutt, was injured in a motor vehicle accident on September 10, 1997. She applied for and received statutory accident benefits from Allstate Insurance Company of Canada (“Allstate”), payable under the *Schedule*.¹ Allstate terminated weekly income replacement benefits on February 4, 1998. The parties were unable to resolve their disputes through mediation, and Mrs. Schutt 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 after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96 and 303/98.

The preliminary issue is:

1. Is Mrs. Schutt precluded from proceeding to arbitration because her application for arbitration was filed beyond the two-year limitation period set out in subsection 281(5) of the *Insurance Act* and subsection 51(1) of the *Schedule*?

Result:

1. Mrs. Schutt is precluded from proceeding to arbitration because her application for arbitration was filed beyond the two-year limitation period set out in subsection 281(5) of the *Insurance Act* and subsection 51(1) of the *Schedule*. This arbitration is dismissed.
2. If required, I may now be spoken to on the issue of the expenses of this arbitration proceeding.

BACKGROUND:

By a letter dated January 21, 1998 (with Notice of Stoppage of Weekly Benefits and OCF 17 forms) to Mrs. Schutt's previous lawyer, Mr. William Taberner, Allstate terminated Mrs. Schutt's income replacement benefit effective February 4, 1998.

On September 3, 1998, Allstate received a notice that Mrs. Schutt had changed lawyers and was now being represented by her present lawyer, Mr. Michael Smitiuch.

On June 16, 1999, Mr. Smitiuch filed for mediation on behalf of Mrs. Schutt. The application for mediation requests “payment of Income Replacement benefits from February 4, 1998, to present,” as well as payment of medical and rehabilitation benefits and housekeeping and home maintenance expenses.

On July 16, 1999, Ms. Donna Kadirally, a mediation caseworker at FSCO, wrote to Mrs. Schutt and Mr. Smitiuch² advising them of the following:

We are returning the attached **Application for Mediation**. **The mediation branch of the Dispute Resolution Group requires a mediation application to be completed in all areas before a Mediator may be appointed to the file.** [underline/bold in the original]

The letter further stated that the application should be amended and resubmitted so that a Mediator may be appointed. The amendments requested were in regards to the issues of medical and rehabilitation benefits and housekeeping and home maintenance expenses. The letter also stated that FSCO:

...will hold the file in abeyance for a period of 20 days from the date of this letter. If we do not receive a response within that time, **we will assume that you are no longer interested in pursuing mediation and will close our file accordingly.** [emphasis added]

The letter from FSCO also included a copy of Rules 12.3 and 12.4 of the *Dispute Resolution Practice Code*³ (the *Practice Code*) which state:

²This letter was date stamped as being received by Mr. Smitiuch on July 22, 1999.

³(3rd Ed. April 15, 1997)

- 12.3 If it appears that an *Application for Mediation* is incomplete, or exceeds the jurisdiction of the Commission, the Commission will:
- (a) deliver written notice of the jurisdictional concerns or deficiencies in the *Application* to the Applicant and their representative, and
 - (b) hold the *Application* in abeyance for **20 days** from the delivery of the notice.
- 12.4 Where the Applicant fails to address the jurisdictional concerns or rectify the deficiencies set out in the written notice within **20 days** provided under **Rule 12.3(b)**, the Commission may reject the *Application*. [emphasis in the original]

One year later, on July 12, 2000, Mr. Smitiuch wrote to Ms. Kadirally the following letter:

On June 16, 1999, we filed an application for mediation with your office. On July 16, 1999, **this application was returned to our office** because of alleged deficiencies with the materials. Enclosed with this letter are copies of the relevant documents.

Since our client had her weekly benefits terminated in January, 1998, the insurer is now taking the view that the two-year limitation period has expired. It is our view that this application was made on June 16, 1999, and as such falls within the requisite time period. Upon review of the SABS and the *Insurance Act* there appeared to be no references as to the form that an application for mediation must be in. In fact, on many occasions before, we have submitted applications for mediation in the same form as this matter and they were not sent back. As such, **please confirm that our application for mediation will be deemed to have been made on June 16, 1999.** [emphasis added]

There appears to have been no response from FSCO to Mr. Smitiuch's letter.

On August 15, 2000, Mr. Smitiuch wrote to Ms. Kadirally wherein he stated:

Further to our telephone conversation regarding [Tracy Schutt and Allstate Insurance Company], the additional information that you require is as follows:

1. The amount of the goods and services proposed in the treatment plan dated October 13, 1998, is \$2,100.00-\$2,400.00. A copy of the treatment plan is attached to this letter.
2. The housekeeping services were provided by Barbara Bazin who is from a company called Housekeepers located at 7 Lady Stewart Blvd. in Brampton.

You should now have all the information that you require in order that we may proceed with the mediation. [emphasis added]

As well, on August 15, 2000, Mr. Smitiuch wrote to Allstate wherein he stated:

Some time ago we submitted an application for mediation to the Financial Services Commission and a copy was sent to your office. The application was received by FSCO on June 22, 1999, **but there have been some processing problems.** It appears that this application will now be processed by FSCO and you should be getting notice shortly. The issues in this mediation relate to the payment of income replacement benefits and a treatment plan prepared by Rehabilitation Management Inc. dated October 13, 1998. [emphasis added]

On August 17, 2000, Ms. Kadirally wrote to Allstate wherein she stated:

Enclosed please find a copy of the **application for mediation** made by Ms. Schutt. The application is being processed. **You will be notified as soon as a mediator is appointed.** [emphasis in the original]

On September 14, 2000, Mr. Andrew Hajsaniuk, a mediator at FSCO, wrote to Allstate, Mrs. Schutt and her counsel, Mr. Smitiuch, that he had been appointed the mediator in response to Mrs. Schutt's application for mediation and that he would attempt to resolve the issues in dispute within 60 days of the date of his appointment. A mediation was conducted in this matter on November 14, 2000 and the mediator issued his report on November 14, 2000.

On February 12, 2001, Mrs. Schutt applied for arbitration on the issues that remained in dispute and that had failed at mediation, including her weekly income replacement benefits.

The issue I must decide is whether Mrs. Schutt is precluded from proceeding to arbitration because her application for arbitration was filed beyond the two-year limitation period set out in subsection 281(5) of the *Insurance Act* and subsection 51(1) of the *Schedule*.

Submissions:

Mrs. Schutt's Submissions:

Mrs. Schutt submits that her application for mediation was commenced within the required time on June 16, 1999. Mrs. Schutt submits that any defect in her application for mediation did not invalidate her application for mediation. Mrs. Schutt submits that Rule 1.3 of the *Practice Code* specifically provides that “[a] defect in form or other technical breach will not make a proceeding invalid.” Succinctly, Mrs. Schutt submits that the information FSCO was requesting on July 16, 1999 regarding the medical rehabilitation and housekeeping issues was to correct a defect in form and accordingly, her application for mediation was not time barred.

Mrs. Schutt further submits that the application for mediation dated June 16, 1999 was never physically sent back to her counsel and when the mediation was conducted, her original application was used for the mediation on November 14, 2000. Mrs. Schutt submits that this reinforces the argument that a mediation had been commenced when the application was sent on June 16, 1999 and that additional information was “merely” provided afterwards.

Mrs. Schutt submits that if it is found that a mediation was not commenced within the requisite two-year period, then this should only relate to the medical rehabilitation and housekeeping issues. Mrs. Schutt

submits that these two latter issues should be severed from the application for mediation leaving the income replacement benefit to stand on its own. From this, Mrs. Schutt asks that I then conclude that the income replacement benefit issue was mediated in time.

Mrs. Schutt submits that Allstate would not be prejudiced if it is accepted that the mediation was commenced in June 1999. Mrs. Schutt submits that Allstate was sent a copy of the application for mediation in June 1999 and was aware at that early date that she was contesting the termination of her income replacement benefits.

Allstate's Submissions:

Allstate presented very detailed submissions on this issue, including comprehensive supporting evidence and an affidavit by William Sproull, an associate with the law firm Zarek Taylor Grossman Hanrahan LLP, solicitors for Allstate. Succinctly, Allstate submits that Mrs. Schutt has failed to mediate and thus arbitrate the issue of income replacement benefits within the prescribed time limits and is therefore barred from proceeding to arbitration on this issue.

Allstate submits that Mrs. Schutt cannot retroactively sever the issue of weekly income replacement benefits from the other issues in her June 16, 1999 application for mediation. Allstate submits that the Mediation Unit rejected the application for mediation in its entirety. At no time did Mrs. Schutt advise the Mediation Unit before her limitation period expired that she was withdrawing the issues for which particulars were requested and was choosing to proceed only on the income replacement benefit issue. Allstate submits that Mrs. Schutt cannot circumvent the limitation period by unilaterally declaring in her letter to FSCO on July 12, 2000 that her application for mediation be deemed to have been made on June 16, 1999.

Allstate submits that there is no evidence that FSCO formally acknowledged receipt of a completed application for mediation pursuant to the provisions of the *Practice Code* until August 17, 2000, two days after Mrs. Schutt's counsel provided additional information in his letter of August 15, 2000. Allstate further submits that no letter was sent to the parties until September 14, 2000 to advise that a mediator was appointed in accordance with Rules 4 and 12 of the *Practice Code*. Accordingly, Allstate submits that September 14, 2000 must be the date that the mediation application was "filed" pursuant to the *Practice Code* Rules.

Allstate further submits that, based on the contents of the affidavit of William Sproull dated September 18, 2001 (which deals with three telephone conversations⁴ Mr. Sproull had with Ms. Kadirally, the mediation caseworker at FSCO), there is apparently one letter dated September 23, 1999 which passed between the Mediation Unit at FSCO and Mrs. Schutt's counsel. Pursuant to an order on the exchange of documents, her counsel should have produced this letter. It was not produced. Allstate submits that an adverse inference must be drawn as to the contents of that letter.⁵

Allstate submits that the timing of the September 23, 1999 letter from the Mediation Unit was important in that it was the only letter sent from the Mediation Unit after the July 16, 1999 letter which had given notice to Mrs. Schutt that she had 20 days to submit a complete application, failing which the Mediation Unit stated it would close its file. Allstate submits that it is logical to conclude that the September 23,

⁴The dates of the telephone calls as stated in the Affidavit are: August 21, 2001, August 29, 2001 and September 13, 2001.

⁵In the Affidavit Mr. Sproull affirms that he attempted to get a copy of the September 23, 1999 letter and was first advised by Ms. Kadirally on August 29, 2001 that she would fax him a copy of the letter. On September 13, 2001 Ms. Kadirally advised him that because the letter was not addressed to his client or his law firm he would be required to make a request under the *Freedom of Information Act* and get approval from the Director of Mediation Unit. See paragraphs 4 to 6 of the Affidavit.

1999⁶ letter must have advised Mrs. Schutt and her counsel that the Mediation Unit was indeed closing its file.

The Law:

The limitation period for statutory accident benefit proceedings is set out in subsection 281(5) of the *Insurance Act* and section 51 of the *Schedule*.

Subsection 281(5) of the *Insurance Act* provides, in part, that an insured person may only refer issues in dispute to an arbitrator **within two years after the insurer's refusal to pay the benefit claimed** or within such longer period as may be provided in the *Schedule*.

Section 51 of the *Schedule* requires that a mediation, as well as an arbitration proceeding, must be **commenced** within two years from the insurer's refusal to pay the amount claimed. It also extends the time limit for commencing an arbitration proceeding. As long as a mediation proceeding is commenced within two years of the insurer's refusal to pay benefits, the dispute can be referred to arbitration within 90 days after the mediator reports to the parties on the outcome of the mediation.

Zeppieri and Royal,⁷ which has been affirmed on appeal and which has been followed in numerous arbitration decisions, sets out a two-step approach to determine whether a limitation period is applicable. First, the insurer has to show that the refusal was clear and unequivocal and was communicated to the applicant in writing, with supporting reasons. Secondly, the insurer has to show that it is not estopped from relying on the limitation period because the applicant relied on its actions to

⁶According to paragraph 4 of Mr. Sproull's Affidavit, the September 23, 1999 letter was the only other letter in the file with the July 16, 1999 letter from the Mediation Unit to Mrs. Schutt and her counsel.

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

his or her detriment. Ongoing negotiations or requests for further information between the applicant and the insurer do not extend the time limits for disputing a clear and unequivocal refusal of benefits.

An arbitrator does not have the jurisdiction to grant an aggrieved party relief from forfeiture.⁸ It is also settled law that arbitrators have no jurisdiction to extend the two-year limitation period. This issue was decided in the case of *Kirkham and State Farm*,⁹ and has been affirmed on appeal by the Director's Delegate, upheld by the Divisional Court on Judicial Review,¹⁰ and consistently followed in arbitration decisions. Succinctly, this case stands for the proposition that if an insured does not apply for arbitration within two years of an insurer's refusal to pay further benefits, then the limitation period cannot be extended. Consequently, there is no "rolling limitation" period available to an insured.

ANALYSIS AND FINDINGS:

The onus is on Allstate to show, on a balance of probabilities, that Mrs. Schutt commenced an arbitration outside the prescribed limitation period. For the following reasons I find that Allstate has met its burden of proof.

I find there is no dispute with respect to the following facts.¹¹ One, Mrs. Schutt's income replacement benefit was terminated on February 4, 1998. Two, Mrs. Schutt applied for mediation on June 16, 1999. Three, on July 16, 1999, FSCO wrote to Mrs. Schutt's counsel requesting additional information

⁸See for instance *Lopez and Commercial Union Assurance Company of Canada* (FSCO A98-001223, April 13, 1999); *Brauen and Personal Insurance Company of Canada* (FSCO A99-000441, July 14, 1999); *Rahman and Co-operators General Insurance Company* (OIC A-000854, December 21, 1993); and *Zeppieri*, supra.

⁹*Kirkham and State Farm Mutual Automobile Insurance Company* (OIC A96-000141, August 15, 1996); appeal decision (OIC P96-00069, January 27, 1997); Application for judicial review dismissed (March 31, 1998) Court File No. 510/97 (Div.Ct.).

¹⁰Leave to appeal the Divisional Court decision to the Court of Appeal was denied (July 19, 1998), Court File No. M22347 (C.A.).

¹¹Mrs. Schutt agreed to these facts at paragraph 13 of her submissions.

regarding medical, rehabilitation and housekeeping benefits and notifying her that, pursuant to the Rules of the *Practice Code*, her file may be closed if she did not respond within 20 days. And four, Mrs. Schutt's counsel did not respond to FSCO's request until August 15, 2000, some 13 months after FSCO's request and approximately six months after Mrs. Schutt's limitation period had expired.

I do not accept Mrs. Schutt's submission that her application for mediation *form* was not in fact returned to her counsel on July 16, 1999 and therefore her mediation proceeded on her original application for mediation form dated June 16, 1999, and hence her application was filed within the limitation period.

As noted above, FSCO's letter to Mrs. Schutt states that her application was being returned with the letter. This fact is confirmed by Mrs. Schutt's counsel's letter to FSCO on July 12, 2000, wherein he states: "On July 16, 1999, this **application [for mediation] was returned** to our office because of alleged deficiencies with the materials. Enclosed with this letter are copies of the relevant documents." Accordingly, I find that Mrs. Schutt's application for mediation was in fact returned to her. Even if the application form was not returned to her, I find that Mrs. Schutt did not commence her mediation in time. [emphasis added]

I do not accept Mrs. Schutt's submission that pursuant to Rule 1.3¹² of the *Practice Code*, by her letter of August 15, 2000, she was "merely" rectifying a defect of form and that this did not invalidate the mediation proceeding, hence her application for mediation on June 16, 1999 was commenced within the limitation period.

¹²Rule 1.3 provides that "A defect in form or other technical breach will not make a proceeding invalid."

I draw an adverse inference from the fact that Mrs. Schutt failed to produce the September 23, 1999 letter when she had undertaken at the pre-hearing to produce “all correspondence and telephone notes relating to the limitation issue, including any dealings with the Financial Services Commission regarding the ejected mediation.”¹³

I find that it is more likely than not that the September 23, 1999 letter in the mediation file, which was not produced, was a follow-up to Mrs. Schutt’s lack of response to FSCO’s letter dated July 16, 1999. I find that it is more likely than not that it is reasonable to conclude that pursuant to Rule 12.4 of the *Practice Code* this letter indicated that Mrs. Schutt’s application for mediation was rejected.

The evidence reveals that on July 12, 2000, Mrs. Schutt’s counsel wrote to FSCO expressing concern that he was facing a limitation problem and asked that Mrs. Schutt’s application for mediation be “deemed” to have been filed on June 16, 1999. This shows that Mrs. Schutt was concerned that she may be out of time. From this I conclude that by her letter of July 12, 2000 Mrs. Schutt was attempting to circumvent the expired limitation period under the guise of correcting a defect in form.

I find Mrs. Schutt had ample time, approximately seven months, between the time FSCO asked her to correct the deficiencies and the expiration of the limitation period. She did not do so. I have received no objective verifiable evidence that at any time after FSCO rejected her application for mediation and prior to the expiration of the limitation period, February 4, 2000, that Mrs. Schutt commenced a mediation pursuant to subsection 51(1) of the *Schedule*.

My finding is reinforced by the fact that it was only on August 17, 2000, based on Mrs. Schutt’s August 15, 2000 letter to FSCO, that FSCO wrote to Allstate pursuant to Rule 13 of the

¹³Letter dated June 5, 2001 from Mr. Grossman to Mr. Smitiuch.

*Practice Code*¹⁴ and acknowledged receiving an application for mediation from Mrs. Schutt, and advised that a mediator would be appointed.¹⁵ This indicates that it was not until August 15, 2000 that Mrs. Schutt “commenced” a mediation pursuant to the statutory regulations. This was clearly outside the prescribed limitation period.

It is important to note that in making my finding I am not saying that an applicant must file a “completed” application for mediation in order that a mediation proceeding “be commenced” pursuant to subsection 51(1) of the *Schedule*. Pursuant to Rule 13 of the *Practice Code*, a “completed” application for mediation is only required before a mediator will be appointed.¹⁶

For example, an applicant may commence a mediation proceeding five days before the limitation period expires. For the purpose of the statutory regulation the mediation proceeding has been “commenced” within the prescribed limitation period. Nevertheless, the application for mediation may have a “defect in form” and may not be a “completed” application for the purpose of appointing a mediator pursuant to the *Practice Code*. However, pursuant to Rules 1.3 and 12.4 of the *Practice Code*, the applicant may be allowed to correct the “defect in form” within 20 days and file a “completed” application for mediation even though the limitation period has passed. The mediation proceeding in this case would still be considered to have been “commenced” within the limitation period.

¹⁴Rule 13.1 states: On receipt of a completed Application for Mediation: (a) the Commission will deliver a copy of the *Application* to the other party; and (b) **a mediator will be appointed promptly.**

¹⁵Pursuant to the Rules of the *Practice Code* a mediator was appointed on September 14, 2000 and thereafter a mediation was completed within the required 60 days on November 14, 2000.

¹⁶Supra, Footnote 14

Succinctly, there are cases where an applicant is not necessarily precluded from proceeding to arbitration where a mediation proceeding is “commenced” **before** the limitation period expired, but a “defect in form” is corrected and a “completed” application for mediation is filed **after** the limitation period has expired. This, however, is not what occurred in this case.

In summary, on the facts of this case, my findings are that: Mrs. Schutt’s application for mediation of June 16, 1999 **was rejected** by FSCO in September 1999. Mrs. Schutt’s limitation period regarding the termination of her income replacement benefit **expired** on February 4, 2000. Mrs. Schutt had ample time to correct any deficiencies and commence a new mediation before her limitation period expired. She did not do so. Mrs. Schutt’s letter of August 15, 2000 did not correct a defect in form so as to revive her original application for mediation of June 16, 1999 Accordingly, Mrs. Schutt **missed the limitation period by not commencing** a mediation within the prescribed time period for all issues in dispute including her weekly income replacement benefit.

Accordingly, I find that Mrs. Schutt is barred from proceeding to arbitration as she failed to comply with the limitation requirements under subsection 281(5) of the *Insurance Act* and subsection 51(1) of the *Schedule*.

EXPENSES:

If required, I may now be spoken to on the issue of the expenses of this arbitration proceeding.

Joyce Miller
Arbitrator

November 1, 2001

Date

FSCO A01-000238

BETWEEN:

TRACY SCHUTT

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. This arbitration is dismissed.
2. If required, I may now be spoken to on the issue of the expenses of this arbitration proceeding.

Joyce Miller
Arbitrator

November 1, 2001

Date