



FSCO A07-001712

BETWEEN:

ELIZABETH MCGREGOR

Applicant

and

ING INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Suesan Alves

Heard: By written submissions received by June 16, 2008

Appearances: Ms. Shanna Mittleman for Ms. Mc Gregor
Mr. David Dinner for ING Insurance Company of Canada

Issues:

Ms. McGregor was injured in a motor vehicle accident on December 7, 2005 in Ontario. She applied to ING (Ontario) for various statutory accident benefits under the *Schedule*,¹ and for arbitration of her entitlement to benefits at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

ING denied that her policy provided such coverage, and initiated a priorities dispute. In that dispute ING alleges that another insurer is responsible for paying Ms. McGregor's statutory accident benefits. That dispute will be adjudicated by a private arbitrator under the *Arbitrations Act, 1991*, pursuant to the provisions of the Priorities Dispute Regulation, O. Reg. 283/95.

¹ *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

ING wishes an arbitrator at the Financial Services Commission of Ontario to decide whether Ms. McGregor is an insured within the meaning of section 2 of the *Schedule*. Ms. McGregor submits that the dispute should be decided by the private arbitrator pursuant to the provisions of the Priorities Dispute Regulation, O. Reg. 283/95; not by an arbitrator at the Financial Services Commission of Ontario.

The preliminary issue is:

1. Should an arbitrator at the Financial Services Commission of Ontario appointed under the *Insurance Act*, determine whether Ms. McGregor is an insured within the meaning of section 2 of the *Schedule*, or should that issue be determined by an arbitrator appointed under the *Arbitrations Act, 1991* as part of the priorities dispute?

Result:

1. The issue should be determined as part of the priorities dispute by an arbitrator appointed under the *Arbitrations Act, 1991*. Ms. McGregor may proceed to a hearing before an arbitrator at the Financial Services Commission of Ontario to determine her entitlement to income replacement, attendant care, medical and housekeeping and home maintenance benefits, interest and both parties' entitlement to expenses as set out on page three of the pre-hearing report.

EVIDENCE AND ANALYSIS:

Ms. McGregor was injured in a multiple car accident in Mississauga, Ontario on December 7, 2005 while operating a vehicle which was registered in Quebec, and insured with ING (Quebec). The insurers of the other vehicles involved in the accident were State Farm Mutual Automobile Insurance Company, RBC Insurance Company and The Personal.

According to the Applicant's factum, at the time of the accident, Ms. McGregor was living and working in Toronto; however her primary residence was in Quebec. She decided that in light of the reciprocal insurance scheme, and the provisions of sections 45(1) and 226.1 of the *Insurance*

Act, she would apply to ING (Ontario) for statutory accident benefits.² On December 12, 2005, counsel for the Applicant submitted Ms. McGregor's application for accident benefits to ING by facsimile. This was five days following the accident. Ms. McGregor submitted various documents to support her claim for accident benefits in January and February 2006, however, ING (Ontario) did not adjust her claims.

ING (Quebec) took the position that Ms. McGregor purchased a property damage only policy which did not provide coverage for accident benefits. Ms. McGregor then applied for benefits from the Societe de l' Assurance Automobile du Quebec ("the SAAQ"). The SAAQ refused her claim on the basis that she was not a resident of Quebec at the time of the accident.

According to the Insurer's Factum, ING was first notified of the accident on November 29, 2006 when it received a copy of the application for mediation from the Financial Services Commission of Ontario. This is disputed by the Applicant. ING (Ontario) responded on behalf of ING (Quebec) and issued two Notices to Applicant of Dispute Between Insurers forms. One dated

² Sections 45 and 226.1 of the *Insurance Act* provide:

45. (1) A licence to carry on automobile insurance in Ontario is subject to the following conditions:

1. In any action in Ontario against the licensed insurer or its insured arising out of an automobile accident in Ontario, the insurer shall appear and shall not set up any defence to a claim under a contract made outside Ontario, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in Ontario and such contract made outside Ontario shall be deemed to include the statutory accident benefits referred to in subsection 268 (1).

2. In any action in another province or territory of Canada, a jurisdiction in the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule against the licensed insurer, or its insured, arising out of an automobile accident in that jurisdiction, the insurer shall appear and shall not set up any defence to a claim under a contract evidenced by a motor vehicle liability policy issued in Ontario, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in that jurisdiction. R.S.O. 1990, c. I.8, s. 45 (1); 1993, c. 10, s. 6; 1996, c. 21, s. 12.

Penalty for breach

(2) A licence may be cancelled when the holder commits a breach of condition as set out in subsection (1). R.S.O. 1990, c. I.8, s. 45 (2).

S. 226.1 An insurer that issues motor vehicle liability policies in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule may file an undertaking with the Superintendent, in the form provided by the Superintendent, providing that the insurer's motor vehicle liability policies will provide at least the coverage described in sections 251, 265 and 268 when the insured automobiles are operated in Ontario. 1996, c. 21, s. 16; 1997, c. 28, s. 110.

January 12, 2007, notified the Motor Vehicle Accident Claims Fund that it should pay Ms. McGregor's accident benefits.³ In the second Notice, dated January 31, 2007, ING (Ontario) notified ING (Quebec), State Farm Mutual Automobile Insurance Company, The Personal and RBC Insurance Company that they were to pay benefits.⁴ Ms. McGregor has not objected to either Notice.

ING's Notices set out in bold letters that: "**You will continue to receive accident benefits that you are entitled to from the insurer that you applied to while the insurers attempt to resolve their dispute.**" Ms. McGregor was injured in December 2005. More than two and a half years later, she has not received any statutory accident benefits.

Law and Analysis

The Insurer submits that the proper forum for determining the dispute as to whether Ms. McGregor is an insured person under the *Schedule* is before an arbitrator at the Financial Services Commission of Ontario. I disagree.

Arbitrators at the Financial Services Commission of Ontario decide disputes concerning entitlement to and the amount of statutory accident benefits pursuant to section 279 of the *Insurance Act*.⁵

Section 20 of the *Insurance Act* confers on an arbitrator at the Financial Services Commission of Ontario "exclusive jurisdiction to exercise the powers conferred upon him or her under this Act and to determine all questions of fact or law that arise in any proceeding before him or her and, unless an appeal is provided under this Act, his or her decision thereon is final and conclusive for all purposes."

³ Notice to Applicant of Dispute Between Insurers, dated January 31, 2007 and completed by Mark Cekuta on behalf of ING. under Part 3

⁴ *Ibid*

⁵ Section 279 (1) states: Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled shall be resolved in accordance with sections 280 to 283 and the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 279 (1); 1993, c. 10, s. 1.

The statutory scheme for accident benefits was designed so that any person who is injured in a motor vehicle accident, even a person who has not purchased an insurance policy, has access to accident benefits. As a result of the scheme, occupants and non-occupants of motor vehicles may potentially have access to multiple insurers for accident benefits. Section 268(2) of the *Insurance Act* sets out the priority in which such insurers are obliged to pay claims for statutory accident benefits.

Between 1990 and 1995, arbitrators at the Financial Services Commission of Ontario, decided priority disputes as a preliminary question, and then went on to determine entitlement to and the amount of statutory accident benefits.⁶

In May 1995, the Legislature carved out from the jurisdiction of FSCO arbitrators all disputes as to which insurer is required to pay benefits under section 268 of the *Insurance Act*. Since that time, priority disputes have been decided by private arbitrators appointed under the *Arbitrations Act, 1991*.⁷

In *Vieira and Royal Insurance Company of Canada and Chubb*, (P04-00016, February 15, 2005) the Director of Arbitrations set out one rationale for hiving off one aspect of the dispute to private arbitrators. He stated: “The Priorities Regulation was introduced to ensure that the payment of accident benefits is not delayed due to a dispute over which insurer should pay.”

At the same time, he noted that: “Unfortunately, the legislation has left gaps. Five years ago, in *Mohamed and State Farm Mutual Automobile Insurance Company and American Home Assurance Company*, (FSCO P99-00022, December 1, 1999), I commented on the irony that legislation meant to simplify matters for insured persons has created such confusion. This case is another example. Mrs. Vieira finds herself caught between two insurers, each claiming the other

⁶ Effective July 1, 1998, the Ontario Insurance Commission was changed to the Financial Services Commission of Ontario, pursuant to the *Financial Services Commission of Ontario Act, S.O. 1997, c.28*.

⁷ *Disputes Between Insurers O. Reg. 283/95*

is responsible for paying her accident benefits, precisely the situation the Priorities Regulation was meant to eliminate.”

In this case, ING is seeking a determination before an arbitrator at the Financial Services Commission of Ontario as to whether Ms. McGregor is an insured person under section 2 of the *Schedule*. I find this is a dispute as to coverage.

In *Vieira*, the Director of Arbitrations held that “Distinguishing between coverage disputes and disputes over insurer priority is artificial and leads to the dead end at which Mrs. Vieira now finds herself -- Royal is relieved from paying benefits because she is not an "insured person" under its policy and Chubb refuses to pay benefits on the basis that Royal was the first insurer to receive a completed application for benefits and did not challenge its obligation to pay under the Priorities Regulation.” Thus, fragmenting the dispute in this manner will lead to a “dead end.”

In *Vieira*, the Director of Arbitrations also dealt with the question of whether, in determining the insured person’s entitlement to benefits, a FSCO arbitrator could still consider coverage as part of the entitlement issue. He held that: “All disputes about which insurer must pay the benefits – the *who* pays question—are decided under the *Priorities Regulation*. This leaves FSCO arbitrators and judges to determine entitlement – the *what, if any, benefits* question. In other words, if the insurer before a FSCO arbitrator was the first insurer to receive a completed application, the arbitrator’s role is to determine what benefits that person is entitled to receive under the *SABS*, without regard to whether he or she is covered by that particular policy.”

The Director noted that: “Eventually matters are adjusted as between the insurers once the priorities dispute is resolved.... The correct approach, in my opinion, is to treat the *Priorities Regulation* as part of the claims process. It establishes procedures, not substantive entitlements. Insurers are required to participate in a scheme designed to ensure that injured persons will get a prompt determination of their entitlement to the accident benefits, even if they have chosen the wrong insurer. It is inherent in this scheme that an insurer may have to pay benefits that another insurer should be paying, but only on an interim basis. If the first insurer to receive a completed application wants to shift responsibility to another insurer, it must follow the procedures in the

Priorities Regulation. Although a FSCO arbitrator may need to determine whether the insurer before them was the first insurer to receive a completed application, if it was, that insurer can only resist the claim on the basis that the person is not entitled to the benefits provided under the *SABS*, not that he or she should be looking to another insurer to pay them.”

For these reasons I conclude that the question of whether Ms. McGregor is an insured under section 2 of the *Schedule* should be determined by an arbitrator appointed under the *Arbitrations Act, 1991* as part of the priorities dispute. I have vacated the September 29, 2008 hearing date scheduled to decide that issue at the Financial Services Commission of Ontario.

Ms. McGregor may therefore proceed to a hearing before an arbitrator at the Financial Services Commission of Ontario to determine her entitlement to income replacement benefits, attendant care benefits, medical benefits, housekeeping benefits, interest and both parties’ claims for expenses. This hearing was scheduled in January 2009 to allow time for a hearing on the issue of whether Ms. McGregor was an insured person. If counsel are able to proceed on an earlier date, they may jointly contact the case administrator to reschedule that hearing.

Expenses:

I leave the expenses of this hearing in the discretion of the hearing arbitrator.

Suesan Alves
Arbitrator

July 4, 2008

Date



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BETWEEN:

ELIZABETH MCGREGOR

Applicant

and

ING 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. The issue of whether Ms. McGregor is an insured within the meaning of section 2 of the *Schedule*, should be determined as part of the priorities dispute by an arbitrator appointed under the *Arbitrations Act, 1991*. The hearing date to decide that issue before the Financial Services Commission of September 29, 2008 is vacated.
2. Ms. McGregor may proceed to a hearing before an arbitrator at the Financial Services Commission of Ontario on January 12, 13, 14, and 15, 2009 to determine her entitlement to income replacement, attendant care, medical and housekeeping and home maintenance benefits, interest and both parties' entitlement to expenses. If counsel are able to proceed on an earlier date, they should contact the case administrator.

Suesan Alves
Arbitrator

July 4, 2008

Date