Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A13-002258

BETWEEN:

THILORTHAKA KANAGALINGAM

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Anne Morris

Heard: In person at ADR Chambers on March 2, 2016 and by written submissions due March 12, 2016

Appearances: Mr. Richard Levin for Ms. Thilorthaka Kanagalingam
Mr. Nicholaus de Koning for Economical Mutual Insurance Company

Issues:

The Applicant, Ms. Thilorthaka Kanagalingam, was injured in a motor vehicle accident on June 23, 2008 and sought accident benefits from Economical Mutual Insurance Company ("Economical"), payable under the *Schedule*.[1] (The parties refer in their materials to "Perth Insurance Company" which is part of the Economical Group). The parties were unable to resolve their disputes through mediation, and Ms. Kanagalingam, through her representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

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

The issues in this Preliminary Issue Hearing are:

1. Should the within Application for Arbitration be dismissed in its entirety because it is statute barred and time barred?
2. Is either party entitled to its expenses of the Preliminary Issue Hearing?

Result:

1. The within Application for Arbitration is dismissed as it is time barred.
2. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

BACKGROUND

This decision concerns a consideration of whether the Applicant, who elected to receive caregiver benefits ("CGBs") rather than income replacement benefits ("IRBs") as a result of the 2008 accident, and who received those benefits until December 2008 when they were terminated, can, because of an alleged invalid election in 2008, then elect instead to receive an income replacement benefit in 2011.

If the answer to this question is in the affirmative, is the claim for an income replacement benefit in 2011 time limited because income replacement benefits were denied in 2008?

EVIDENCE

The Applicant was injured in a motor vehicle accident on June 23, 2008 and filed an Application for Accident Benefits ("OCF-1"), dated June 27, 2008.[2] The Applicant indicated in the OCF-1 that her status at the time of the accident was "employed and working" and "caregiver". She indicated that she was the caregiver to two children born in 1993 and 1995 respectively, and that she worked as a cashier.

The Applicant was presented with a number of insurance forms to sign at her former lawyer's office on June 27, 2008, in blank, four days after her accident, and did so without reading or understanding their content. She understood that her lawyer would apply for insurance benefits to help while she recovered from her injuries.[3]

The Insurer sent the Applicant a letter, dated July 16, 2008,[4] which advised in part that the Applicant might be eligible for an IRB and a CGB. This letter, the first communication which the Applicant received directly from the Insurer, was 19 days after the Applicant had signed the insurance documents at her lawyer's office.[5] The only information from the Insurer in this letter respecting the election of an IRB or CGB was that only one of these benefits could be paid at any one time.[6]

The only reference to duration of an IRB provided by the Insurer in the July 16, 2008 letter is that it was limited to 12 or 16 weeks depending on the Whiplash Guideline, as indicated at paragraph 9 of the Factum of the Applicant.

Specifically, the July 16, 2008 letter states as follows with respect to the IRB:

> **Income Replacement Benefit:** You qualify in accordance with Section 4 of the Statutory Accident Benefits Schedule, as you suffer a substantial inability to perform the essential tasks of your employment. Be advised that income

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[2] Exhibit "A" to the Affidavit of Lisa Rath sworn on October 21, 2015.
[3] Affidavit of Thilorthaka Kanagalingam sworn on February 17, 2016, paras. 8 and 9.
[4] Exhibit "B" to the Affidavit of Lisa Rath sworn on October 21, 2015.
[5] Affidavit of Thilorthaka Kanagalingam sworn on February 17, 2016, para. 11.
[6] Factum of the Applicant, para. 10.

> replacement benefits are available for only 12 weeks/16 weeks if your injuries fall within the *Grade 1 Whiplash Guideline/Grade II Whiplash Guideline*.[7]

The July 16, 2008 letter indicated that the Applicant needed to choose which of the benefits she wished to receive and she was to do so by completing the enclosed election of income replacement, non-earner, or caregiver benefit ("OCF-10").[8]

The Explanation of Benefits ("OCF-9") which accompanied the letter of July 16, 2008 stated in the Part 2 Benefits Payable section of that form: "disability certificate required as well as election required for income replacement *and* caregiver benefit." (The emphasis on "and" is Mr. Levin's[9]).

The OCF-10 which is dated June 27, 2008 (prior to the date of the July 16, 2008 letter discussed), is signed by the Applicant and indicates that the Applicant elected to receive CGBs.[10]

After receipt of the OCF-10 from the Applicant's then lawyer,[11] the Insurer sent a letter to the Applicant dated July 23, 2008.[12] The letter enclosed an OCF-9 indicating that the Applicant had elected to receive the CGB subject to eligibility.[13]

The OCF-9 of July 23, 2008 also indicated that the Applicant was not entitled to receive an IRB as she had elected to receive the CGB. Box B of the form headed "not eligible/stoppage of benefit" states: "you are not entitled to receive an income replacement benefit as you have elected to receive the caregiver benefit." Part 6 of this OCF-9 set out the dispute resolution process and contained a warning with respect to the two-year limitation period.

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[7] Exhibit "B" to the Affidavit of Lisa Rath sworn on October 21, 2015.
[8] Exhibit "B" to the Affidavit of Lisa Rath sworn on October 21, 2015.
[9] Factum of the Applicant, para. 8.
[10] Exhibit "C" to the Affidavit of Lisa Rath sworn on October 21, 2015.
[11] Affidavit of Thilorthaka Kanagalingam sworn on February 17, 2016, para. 18.
[12] Exhibit "E" to the Affidavit of Lisa Rath sworn on October 21, 2015.
[13] Exhibit "F" to the Affidavit of Lisa Rath sworn on October 21, 2015.

The claim for CGBs was accepted as noted in a further OCF-9, dated July 31, 2008.[14] The pre-printed part of Part 2, section "A", states: "We have reviewed your application for income replacement benefits and have determined you." Then Box A under this print headed "eligible" is ticked off. Space is provided in this section for the calculation of the IRB. There is no calculation completed. The next box begins with pre-printed wording as follows: "Details of how we calculated your income replacement benefit, including adjustments for income or payments from other sources." The box is completed as follows: "Entitlement to caregiver benefit supported in disability certificate- entitlement to $300.00 per week - receipts required."

The CGB was later stopped following an Insurer Examination, pursuant to an OCF-9, dated December 2, 2008.[15]

The Applicant was involved in a further motor vehicle accident on August 16, 2008 and was approved for benefits from the different Insurer responsible for that claim almost immediately. Each insurance company was aware of the other accident. The Applicant received benefits as a result of the August 2008 accident including CGBs which were terminated in 2011 when her younger child turned 16 years.[16]

The Applicant's current lawyer, Mr. Levin, wrote to the Insurer on November 14, 2011,[17] indicating that he was seeking IRBs on behalf of his client with respect to the June 23, 2008 accident which is the subject of this decision. The Insurer responded with a letter dated November 29, 2011, addressed to the Applicant and copied to Mr. Levin, which indicated in part: "As you elected to receive the Caregiver benefit and based on our letter, dated December 2, 2008 you were no longer entitled to receive benefits, therefore nothing is payable."[18]

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[14] Exhibit "H" to the Affidavit of Lisa Rath sworn on October 21, 2015.

[15] Exhibit "J" to the Affidavit of Lisa Rath sworn on October 21, 2015.

[16] Factum of the Applicant, paras. 17, 18, and 19, supported by the Affidavit of Thilorthaka Kanagalingam sworn on February 17, 2016 and attached exhibits, as noted in the Factum.

[17] Exhibit "K" to the Affidavit of Lisa Rath sworn on October 21, 2015.

[18] Exhibit "L" to the Affidavit of Lisa Rath sworn on October 21, 2015.

The Applicant applied for mediation on the issue of IRBs and the Report of Mediator is dated January 4, 2013.[19] The within Application for Arbitration was filed on February 26, 2013.

The Applicant executed a Full and Final Release in relation to the August 2008 accident with the other insurance company on February 26, 2014. Non-earner benefits had been paid when the younger child turned 16 and the CGB in relation to the second accident ceased.[20]

The Applicant indicated in her Affidavit that following the motor vehicle accidents, she did not improve and seemed to get worse. She was seen by many doctors and continues under their care. She continues to require significant medications and therapy.[21]

Position of the Parties

It is the position of the Insurer that the election by the Applicant in 2008 to receive a CGB was a valid one and that the Applicant cannot apply in 2011 for IRBs. IRBs were properly denied in 2008 following the election of benefits, and the claim for IRBs is time barred.

While the Insurer in its materials indicated that the Applicant attempted to characterize the application for IRBs in 2011 as a re-election of benefits, the Applicant, through Mr. Levin, was clear that this is not a case of re-election.

It is, rather, the position of the Applicant that the 2008 election is invalid for the reason that the Insurer failed in its obligation to provide the information required by s. 32(d) of the *Schedule* with respect to "any possible elections relating to income replacement, non-earner and caregiver benefits."

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[19] Exhibit "M" to the Affidavit of Lisa Rath sworn on October 21, 2015.
[20] Affidavit of Thilorthaka Kanagalingam sworn on February 17, 2016, paras. 41, 42, 43, 44.
[21] Affidavit of Thilorthaka Kanagalingam sworn on February 17, 2016, para. 38.

It is the further position of the Applicant that since the election was invalid, the refusal of IRBs in 2008, based on an invalid election to receive CGBs, is also invalid. As such, the time limitation period has not begun to run with respect to IRBs.

ANALYSIS

Having elected to receive CGBs, can the Applicant subsequently apply to receive IRBs instead?

The relevant sections of the *Schedule* dealing with election of benefits are as follows:

> 36 (1) Only one of the following benefits may be paid to a person in respect of a period of time:
>
> 1. An income replacement benefit.
> 2. A non-earner benefit.
> 3. A caregiver benefit. O. Reg. 403/96, s. 36 (1).
>
> (2) If a person's application indicates that he or she may qualify for more than one of the benefits referred to in subsection (1), the insurer shall notify the person that he or she must elect within 30 days after receiving the notice which benefit he or she wishes to receive. O. Reg. 403/96, s. 36 (2).
>
> (3) The insurer shall deliver the notice under subsection (2) within 10 business days after receiving the person's application. O. Reg. 403/96, s. 36 (3); O. Reg. 546/05, s. 10.
>
> 32 (1) A person shall notify the insurer of his or her intention to apply for a benefit under this Regulation. O. Reg. 281/03, s. 11 (1).
>
> (1.1) A person shall notify the insurer under subsection (1) no later than,
>
> (a) the 30th day after the circumstances arose that gave rise to the entitlement to the benefit, or as soon as practicable after that day, if those circumstances arose as a result of an accident that occurred before October 1, 2003; or

(b) the seventh day after the circumstances arose that give rise to the entitlement to the benefit, or as soon as practicable after that day, if those circumstances arose as a result of an accident that occurred on or after October 1, 2003. O. Reg. 281/03, s. 11 (1).

(2) The insurer shall promptly provide the person with,

(a) the appropriate application forms;

(b) a written explanation of the benefits available under this Regulation;

(c) information to assist the person in applying for benefits; and

(d) information on any possible elections relating to income replacement, non-earner and caregiver benefits. O. Reg. 403/96, s. 32 (2).

These sections and in particular section 32(2)(d)[22] were considered by Director's Delegate Makepeace in *Antony and RBC General Insurance Company.*[23] The Director's Delegate found that there was a right to re-elect benefits in certain circumstances where an election was found to be valid. She found that a 30 day time limit applied to re-elections; or a longer period where an Applicant had a "reasonable explanation" for failing to comply with a time limit under Part X of the *Schedule* subject to considerations such as prejudice to the Insurer.

Ultimately, however, the Director's Delegate's decision turned on a finding in that case that the election was invalid as the Insurer had not provided the information required by s. 32(2)(d). This was so, even though a representative of the Insurer had met with the Applicant and an interpreter. The Director's Delegate stated:

> The SABS is complex, and what anyone making an IRB/CGB election wants to know is "what difference does it make to me?" The difference is not just in the amount of benefit, but the eligibility criteria and duration of the benefit. This should have been made clear to Ms. Antony. The evidence left the [hearing] Arbitrator with every reason to believe Ms. Antony chose CGBs because she could

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[22] Now 32(1.1)(d).

[23] FSCO Appeal, File P03-00023, July 22, 2004.

> claim a higher weekly benefit. I am not persuaded the Arbitrator erred in concluding the insurer was obliged to explain the other implications of her choice.

Mr. Levin submitted based on the evidence that the only information given to the Applicant in this case with respect to duration of the IRB was that the benefit might be limited to 12 or 16 weeks in the case of a Grade I or II whiplash. The Insurer did not correct this when the later disability certificate showed a Grade III whiplash.[24] The information supplied by the Insurer in the July 16, 2008 letter indicated that the Applicant was eligible for both an IRB and CGB. It indicated that she could not receive both these benefits *at the same time*. It did not tell her that if she chose CGBs, she could never receive an IRB.

It appears on the evidence that the Insurer did not provide any information with respect to quantum of the benefits.

The Applicant did have a lawyer at the time she signed the election and appears to have gotten at least some of the various forms including the election form from the lawyer before she got the application package from the Insurer. Her evidence, however, is that she signed the election form in blank, and there is insufficient evidence that the lawyer actually provided the information to the Applicant which the insurance company, from the evidence, appears not to have provided.

In *Antony,* the Director's Delegate was not satisfied that the fact of information being available from other sources relieved the Insurer of its obligation to provide information, citing from the Supreme Court of Canada decision in *Smith v. Co-operators General Insurance Company*:[25]

> As I have mentioned above, insurance law is, in many respects, geared towards protection of the consumer. This approach obliges the courts to impose bright-line boundaries between the permissible and the impermissible without undue solicitude for particular circumstances that might operate against claimants in certain cases.

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[24] Affidavit of Thilorthaka Kanagalingam sworn on February 17, 2016, paras. 25 and 26.
[25] [2002] S.C.J. No. 34, 2002 SCC 30.

In light of the above, I am prepared to find that the Insurer did not comply with its obligation to provide information to the Applicant pursuant to s. 32(2)(d) (now s. 32(1.1)(2)(d) of the *Schedule*).

The Applicant is therefore not prevented by her election of CGBs from claiming IRBs instead.

While the Director's Delegate in *Antony* discussed a time limit on re-election where the election was a valid one, she did not, however, discuss time limits with respect to an invalid election. I note, however, that she was dealing with an Insured who purported to change her election after three months. Here, the Applicant seeks to change her election after three years.

Is the claim for IRBs time limited?

It is not in dispute that the Application for Mediation in this matter and the Application for Arbitration were both filed more than two years from the OCF-9 of July 23, 2008 which purported to deny the claim for an IRB on the basis that the Applicant was not entitled to an IRB because she had elected to receive the CGB.

It is the position of the Applicant that this refusal of benefits was not valid because it was "the fruit of the poisoned tree" as Mr. Levin put it. If the election of CGBs was not valid, then the denial of IRBs based upon this election could not be valid, in Mr. Levin's submission.

It is accepted since the decision in *Smith* that the time limit of two years from the date of a refusal of the benefit only begins from the date of a clear and unequivocal refusal. In addition, the Insurer is required to inform the insured person in straightforward and clear language, directed towards an unsophisticated person, a description of the most important steps of the dispute resolution process.

My review of the OCF-9 of July 23, 2008 shows that it indicates clearly and unequivocally that the IRB benefit is denied. The reason for the denial is that the Applicant has elected CGBs. I

have found that election to be invalid based upon the provisions of the *Schedule* and the reasoning in the *Antony* case. The refusal of IRBs is nevertheless clear and the OCF-9 complies with the requirement to advise the Applicant of the dispute resolution process. It also sets out a warning with respect to the two-year limitation.

The Court of Appeal in *Turner v. State Farm Mutual Automobile Insurance Company*[26] upheld a refusal of benefits even though the reasons given were legally incorrect, where the refusal was otherwise clear and unequivocal and notice of the dispute resolution process was properly given.

> The notice clearly terminates the weekly benefit that the insured was receiving. While it offers as a reason that the legal test for another benefit is not met, the error neither renders the notice of termination less than clear and unequivocal nor breaches the obligation to give reasons. It simply gives a reason which the insured could, in a timely way, contest.

It is arguable in this case that the OCF-9 of July 23, 2008 did not in fact terminate the benefits which were being received. It terminated IRBs while CGBs were the benefits being received. The CGBs were terminated in December 2008.

The Court of Appeal in *Bustamante v. The Guarantee Company of North America*[27] considered a case where the Insured had elected to receive an IRB rather than a non-earner benefit. The Insurer accepted the claim for IRBs and advised the Insured by way of an OCF-9 that as she qualified for an IRB, she was not eligible for a non-earner benefit. She received an IRB for a period of time. She returned to work after the benefit was stopped. Three years later, she applied for a non-earner benefit. Her lawyer took the position that there had been no denial of non-earner benefits and the limitation period had not started to run. There had been no denial of non-earner benefits triggering the limitation period because she was not eligible for a non-earner benefit while she was receiving IRBs.

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[26] 2005 CanLii 2551, February 7 2005 (Court of Appeal).

[27] 2015 ONCA 530, July 13, 2015.

The Court disagreed. The OCF-9 in question accepting the claim for IRBs and denying the non-earner benefits explained the dispute resolution process and contained the two-year warning. The IRBs were terminated in July 2006, and the Applicant did not re-assert a claim for non-earner benefits until June 17, 2011 when she sought mediation. In denying the claim, the Court stated:

> In response to the appellant's argument that the start of the limitation period for the non-earner benefit does not start to run during the period when she was entitled to the income replacement benefit, we repeat and reinforce what this court said in *Sietzema,* at para. 16: "If we accepted the appellant's argument, the limitation period for making a claim for Non-Earner Benefits never began to run. This would defeat one of the primary purposes of the SABS regime, namely, to ensure the timely submission and resolution of claims for accident benefits."

I am persuaded by this reasoning that even though the election of CGBs in this case was invalid, and could have been changed for that reason within the two-year period, in my view, the OCF-9 of July 23, 2008 nevertheless clearly and unequivocally refused the IRB. It properly set out the dispute resolution process and contained a warning with respect to the two-year limitation period. As in the *Bustamante* case, the elected benefit was paid for a period of time, and the Applicant did not re-assert a claim to the alternate benefit until more than two years after even the elected benefit had been denied. That, however, does not alter my view that the two-year limitation period pursuant to s. 281.1(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 and s. 51 of the *Schedule* was triggered by the valid refusal of IRBs pursuant to the OCF-9 dated July 23, 2008.

The only substantive claim in the Application for Arbitration is IRBs. The Application for Arbitration is therefore dismissed as it is time barred.

EXPENSES:

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code.*

Anne Morris
Arbitrator

May 24, 2016
Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A13-002258

BETWEEN:

THILORTHAKA KANAGALINGAM

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Ontario Regulation 664, as amended, it is ordered that:

1. The Application for Arbitration is dismissed as time barred.
2. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Anne Morris
Arbitrator

May 24, 2016
Date