Neutral Citation: 2003 ONFSCDRS 37

FSCO A02–000217

FINANCIAL SERVICES COMMISSION OF ONTARIO

BETWEEN:

ANNABEL ANTONY

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: David Leitch

Heard: January 22, 23 and 28, 2003, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: David S. Wilson for Ms. Antony

Mauro D'Agostino for RBC General Insurance Company

Issues:

The Applicant, Annabel Antony, was injured in a motor vehicle accident on March 6, 2001. She elected and received caregiver benefits from RBC General Insurance Company ("RBC"), payable under the *Schedule.*[1] She later sought to change her election in order to claim income replacement benefits under the *Schedule* but RBC took the position that her original election was valid and could not be changed. The parties were unable to resolve this dispute through mediation, and Ms. Antony applied

[1] The *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, 303/98, 114/00 and 482/01.

for arbitration at the Financial Services Commission of Ontario under the *Insurance Act,* R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Was Ms. Antony's election to claim caregiver benefits under section 36 of the *Schedule* a valid election?

Result:

1. Ms. Antony's election was not a valid election and she is entitled to claim income replacement benefits from one week after the accident.

Background

Annabell Antony and her husband, Thomas Antony, were involved in a motor vehicle accident on March 6, 2001 while returning home from work. Sometime during the afternoon of March 7, 2001, the Antonys were visited at their home by Mr. John W. Fox, an independent adjuster retained by RBC, who was accompanied by a Tamil/English interpreter.

Mr. Fox met first with Mr. Antony in the dining room and then with Ms. Antony in her bedroom where she was in bed as a result of her injuries. Mr. Fox took statements from each of them and provided oral information through the interpreter. He also gave each of them Accident Benefits packages and other documents described below, written in English only and not translated into Tamil by the interpreter. Mr. Fox explained to the Antonys that while Ms. Antony had both employment and childcare duties prior to the accident, she could not claim both income replacement and caregiver benefits but was rather obliged to choose between them. After the meeting, Mr. Fox had the required "election" form sent to the Antonys by mail and on March 23, 2001,[2] Ms. Antony elected to claim caregiver benefits. RBC paid caregiver benefits in accordance with this election.

[2] Exhibit 2, Tab 5.

By letter dated June 19, 2001,[3] Mr. Wilson informed RBC that he was now representing Ms. Antony and that he wanted confirmation that she would be permitted to claim income replacement benefits should "at some point in the future my client ... be able to return to her caregiver duties but not her employment duties." Mr. Wilson indicated that if such confirmation was not forthcoming, he would commence proceedings to set aside the election on the ground that "it was based upon the recommendation of the independent adjuster, Mr. Jack Fox." By letter dated July 11, 2001,[4] RBC responded that Mr. Fox had not recommended to Ms. Antony that she elect caregiver benefits; he had merely explained the Accident Benefit Package and the election. RBC's letter also stated that Ms. Antony's caregiver election could not be changed.

At the hearing, RBC submitted that Ms. Antony's caregiver election was a valid and final election and could not be changed. RBC did not argue that an invalid election was final or could not be changed. Ms. Antony submitted that her election was invalid for several reasons. In the alternative, she argued even if her election was valid, it was not final and could be changed as of right as long she only claimed one benefit in respect of the same period.

The law

The relevant sections of the *Schedule* read 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.
>
> (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.
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> (3) The insurer shall deliver the notice under subsection (2) within 14 days after receiving the person's application.

[3] Exhibit 2, Tab 8.
[4] Exhibit 1, Tab 6.

> **32.** (1) A person who wants to apply for a benefit under this Regulation shall notify the insurer within 30 days after the circumstances arose that gave rise to the entitlement to the benefit, or as soon as practicable thereafter.
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> (2) The insurer shall promptly provide the person with,
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> (a) the appropriate application forms;
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> (b) a written explanation of the benefits available under this Regulation;
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> (c) information to assist the person in applying for benefits; and
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> (d) information on any possible elections relating to income replacement, non-earner and caregiver benefits.

In my view, the present case can be decided by interpreting and applying section 32(2)(d), in particular the words: "The insurer shall promptly provide the person with...information on any possible elections relating to income replacement...and caregiver benefits." Consequently, despite the thorough submissions of both counsel, I do not need to consider Ms. Antony's alternative argument that she was entitled to change her election under section 36 as of right.

In my opinion, section 32(2)(d) must be interpreted and applied in light of the Supreme Court of Canada's recent decision in the case of *Smith v. Co-operators General Insurance Co.* [2002] S.C.J. No. 34, 2002 SCC 30. The issue in that case was whether, in refusing a benefit, the Insurer had complied with its concomitant obligation under section 71 of the 1993 *Schedule* to "inform the [insured] person in writing of the procedure for resolving disputes relating to benefits under sections 279 to 283 of the *Insurance Act."* Compliance with section 71 would have triggered the start of the limitation period imposed by section 281(5) of the *Insurance Act* which, in turn, would have defeated Ms. Smith's claim for benefits. The Ontario Court of Appeal (Borins J.A. dissenting) held that the Insurer was only obliged to inform Ms. Smith of her right to refer a dispute to mediation, the first step in the dispute resolution procedure. Since it had done that and since the Mediator's Report had informed Ms. Smith of the limitation period, the Court of Appeal ruled that Co-operators was entitled to assert the limitation period defence. In reversing the Court of Appeal's decision, the Supreme Court (Bastarache J. dissenting) made the following comments at paragraphs 11 and 12:

> There is no dispute that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance. The Court of Appeal was unanimous on this point and the respondent does not contest it. In Insurance Law in Canada (loose-leaf ed.), Professor Craig Brown observed, "In one way or another, much of insurance law has as an objective the protection of customers" (p. 1-5). I note in this vein s. 279(2) of the Insurance Act which provides that any restriction on a party's right to mediate, arbitrate, litigate, or appeal is void, except as provided in the regulations. True to that purpose of consumer protection, no refusal under s. 71 of the SABS can be said to have been given by an insurer if there has not been adequate compliance with that section.
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> Borins J.A. was correct in observing that s. 71 is clear and unambiguous. The legislature clearly intended to place an obligation on the insurer to inform the claimant of the dispute resolution process under ss. 279 to 283 of the Insurance Act. The section does not refer only to s. 280(1), which gives the insured the right to refer the dispute to mediation. It refers to the whole process. In fact, having no indication that there is anything beyond mediation would tend to create a misguided sense of discouragement in the claimant.

These comments are important for the present purposes because, like the *Smith* case, this case raises an issue about the Insurer's obligation to inform, or to provide information to, the insured person. The information in the *Smith* case was to be provided in writing and was different from the information in the present case which, as section 32(2)(d) implies, could be provided orally. Nevertheless, in my opinion, the *Smith* decision clearly establishes that consumer protection is a main objective of automobile insurance law, that this objective is of particular importance in cases involving an insurer's obligation to inform the insured person and that the realization of this objective requires the insurer to provide the insured person with complete and correct information.

The *Smith* decision also establishes that in deciding whether or not an insurer has met its obligation to inform the insured person, a judge or arbitrator should remain impervious to the argument that the insured person was otherwise made aware of the information, or some portion of the information, which the insurer should have provided. The Court observed at paragraph 16:

> The respondent argued that the appellant was informed of the limitation period in any event through the mediator's report. Sharpe J.A. also took note of this, although not for the purpose of invoking it against the appellant as the respondent wishes to do. However, to take this fact into account against the appellant would be to ignore the particular nature of the matter. 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. Moreover, as previously discussed, the insurer's obligation extends beyond mere communication of the limitation period.

On my reading of this passage, a judge or arbitrator should be resistant to arguments alleging that the insured person would not, in any event, have conducted him/herself differently or made a different choice had he/she been fully and correctly informed by the insurer. In addition to its inherently speculative nature, an inquiry into that kind of allegation would, in my opinion, deviate from the "bright-line boundaries" approach endorsed by the Supreme Court and demonstrate "undue solicitude for particular circumstances that might operate against claimants in certain cases."

For this reason, the result in the frequently-cited FSCO case of *Olivito and Dominion of Canada General Insurance Company*[5] may well have been different had it been decided after the Supreme Court of Canada's decision in *Smith.*

In the *Olivito* case, the Applicant was required to elect either education benefits (under the 1993-1996 *Schedule*[6]) or income replacement benefits. Due to the injuries she suffered in the accident, the Applicant's decision was made by her father, Mr. Olivito, a man who, according to the Arbitrator, had "a good command of English." The Insurer sent Mr. Olivito a brochure entitled "What you need to know about **Election of Benefits."** This document informed him that in electing the most suitable benefit, an applicant should consider the eligibility requirements, how long he/she may qualify under each benefit, and the amount of the weekly benefit. Mr. Olivito admitted that he did not read this brochure before electing education benefits on his daughter's behalf.

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[5] (OIC A96-001429, October 6, 1997)

[6] The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996,* Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98.

However, the adjuster also misinformed Mr. Olivito about the earnings that could be included in the calculation of his daughter's income replacement benefit. Applicant's counsel argued that this error prevented Mr. Olivito from appreciating the "long term benefit of electing income replacement benefits." The Arbitrator rejected this argument and denied the Applicant's request to re-elect income replacement benefits. She wrote:

> ...I find... that Mr. Olivito's initial explanation was the most likely: he chose the education benefit because it was the highest. He admitted that he didn't seriously consider the long term implications of his decision, because he expected that benefits would continue as long as his daughter was disabled from either school *or* work. It was only with the benefit of legal advice and some hindsight, after his daughter returned to school and her benefits were terminated, that Mr. Olivito maintained otherwise.
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> ...
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> ...Although Ms. Olivito may have been *misinformed,* I am not persuaded that she was *misled* - that is that Dominion's error caused her to elect as she did. As noted above, it was Mr. Olivito who took responsibility for guiding the Applicant's decision. For the reasons already stated, he did not persuade me that he would have advised Ms. Olivito any differently, even if he had been correctly informed.
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> …
>
> ...The *Schedule* and the Election form clearly state that elections are final. Where, as here, the Applicant wishes to reverse that process, I find that the onus is on her to establish why the strict language of the *Schedule* should not apply. I find it would be unfair to undo the election process simply because the Insurer gave wrong advice, without some persuasive evidence that its misrepresentation led the Applicant to apply for a particular benefit.

In my view, this type of reasoning would now be contrary to the "bright-line boundaries" approach endorsed by the Supreme Court. As I understand it, this approach encourages the judge or arbitrator to focus on the primary question of whether or not the insurer met its obligation to inform the insured person. If satisfied that the insurer did not meet its obligation to inform the insured person, the "bright-line boundaries" approach then discourages the judge or arbitrator from going beyond this finding to entertain arguments based on "undue solicitude for particular circumstances that might operate against claimants in certain cases." In my opinion, the ruling that Ms. Olivito

was required to prove that she would have elected differently had she been properly informed should now be regarded as demonstrating "undue solicitude for particular circumstances" operating against the claimant.

Moreover, while I do not consider it necessary to rule upon the finality of elections made under the *Schedule* applicable to this case, I would consider it contrary to the *Smith* case to use a finding of finality as a reason to place an onus of proof on the insured person. In my opinion, the more final the insured person's election, the more important it must be for judges and arbitrators to interpret and apply the insurer's obligation to inform the insured person in the way which best serves the consumer protection objective of insurance law, as explained in *Smith.* That objective will be best served, in my view, by placing on the insurer the onus to prove that it met its obligation to fully and correctly inform the insured person before he/she made his/her election.

I also think that the *Olivito* decision illustrates the inherent risks in speculative reasoning: despite finding that the Applicant had chosen between the two available benefits by simply electing the one that paid the most money, the Arbitrator acknowledged that the evidence did not permit her to find which of the two benefits would, in fact, have paid the most money had the Insurer provided correct information. The decision thus left open the distinct possibility that the insured person would have elected differently had the Insurer provided correct information.

In terms of FSCO's case law, the other decision most frequently referred to is *Prosser and Progressive Casualty Insurance Company.*[7]

In the *Prosser* case, the adjuster recommended that the Applicant elect caregiver benefits "because it paid a larger weekly amount than the income replacement benefit." The Arbitrator allowed the Applicant to change her election and claim income replacement benefits but not because the adjuster had made a recommendation to the Applicant about which benefit to elect. The change of election was allowed because the adjuster had incorrectly informed the Applicant that her earnings from a second job

[7] (OIC A96-000358, May 28, 1997)

would not be included in the calculation of her income replacement benefit. The Arbitrator wrote:

> I find that [the adjuster] Mr. Picone's misinformation and incorrect advice directly led Mrs. Prosser to apply for the caregiver benefit. Further, I find that the company never corrected the erroneous information. Mrs. Prosser relied to her detriment on Progressive's representations, and on these facts Progressive cannot limit her claim to the caregiver benefit.

The facts

Ms. Antony and her husband testified that during their meeting with Mr. Fox on March 7, 2001, he recommended that Ms. Antony elect caregiver benefits because the amount payable would be higher than the amount payable for income replacement benefits. In his testimony, Mr. Fox denied making any such recommendation, maintaining that he only provided the Antonys with information about how the amounts payable were calculated for each of the two types of benefits.

On my view of this case, there is no need to resolve this apparent conflict in the evidence. However, since Mr. Wilson characterized this conflict as an issue of credibility and subjected Mr. Fox to vigorous cross-examination, it is appropriate for me to indicate that I would have accepted Mr. Fox's denial. I found credible his assertion that he never provides claimants advice or recommendations on which elections they should make as he does not consider that to be his role. In the case of Ms. Antony, this assertion was consistent with the fact that Mr. Fox did not obtain from Ms. Antony any independent verification of her pre-accident employment duties and earnings or of the nature of her injuries. It was also consistent with the fact that he did not take a blank election form with him to the Antonys' home but had one mailed later. This was hardly the behaviour of an adjuster who conceived of his role as being to influence the claimant to choose the benefit which the insurer could later most easily terminate. Mr. Wilson's allegation to this effect, made in both opening and closing remarks, was entirely speculative and unsupported by any evidence. It was also an allegation that was never squarely put to Mr. Fox on cross-examination as, in fairness, it should have been.

Nevertheless, based on the evidence of Mr. and Ms. Antony, I find that the meeting of March 7, 2001 somehow led them to believe that Ms. Antony should elect caregiver benefits solely because the amount payable would be higher than the amount payable for income replacement benefits. I do not consider it necessary to determine exactly how the meeting led them to form this belief. The best possible explanation from RBC's point of view would be that the Antonys formed this belief on their own, without any recommendation or influence from Mr. Fox, by simply relying upon the accurate information he provided about how the amounts payable were calculated for each of the two types of benefits. A less attractive explanation from RBC's point of view would be that the Antonys based their belief on something the Tamil interpreter told them which Mr. Fox would not have understood or have been able to correct. In this regard, I note that although the interpreter was identified by name in the productions,[8] no explanation was offered as to why he was not called to testify. Whatever the explanation, I accept the Antonys' evidence that the meeting of March 7, 2001 led them to believe that in making her election, Ms. Antony need only compare the amounts payable for each of the two benefits and choose the higher.

In addition, while Mr. Fox told the Antonys how to determine which benefit paid the most money, he freely admitted that he did not inform them that the benefit which paid the most money might not be the benefit which paid for the longest period. Indeed, he stated that he had, himself, never given any thought to the possibility that the higher benefit might not be the "better benefit" for a claimant to elect. In addition, there is no evidence that RBC provided this information to Ms. Antony in some other way before she made her election. In particular, I find that the RBC letter and pamphlets left with the Antonys failed to provide this information.[9] It is true that the "Weekly benefits"

[8] Exhibit 1, Tab 11 and Exhibit 2, Tab 9.

[9] A copy of the RBC letter is found in Exhibit 1, Tab 9; multiple copies of the pamphlets are found in Exhibit 1, Tabs 9, 10 and 11 and in Exhibit 2, Tab 2. Mr. D'Agostino correctly observed that the actual RBC letter and pamphlets received by the Antonys were never produced in evidence. However, Mr. Fox's testimony suggested no reason to believe that the actual pamphlets which he provided the Antonys were any different from the pamphlets produced in evidence. As for RBC's undated and unaddressed letter, Exhibit 1, Tab 9, I note that RBC made no attempt to enter a complete copy of what is obviously a form letter. I therefore draw the inference that insofar as the missing page or pages of this letter provided information on elections, the information so provided was the same as the information provided by the "Weekly benefits" pamphlet, described below.

pamphlet described, in a general way, the different eligibility tests and indicated that benefits would be payable during the period of disability. However, when it came to the subject of elections, the pamphlet only provided the following information:

> **Which Benefit is Right for Me?**
>
> You may be eligible for more than one weekly benefit. If your application for benefits discloses that you qualify for more than one benefit, your insurance company will notify you. However, you must choose one only. Your choice may be between the weekly income replacement, caregiver, or non-earner benefits.

Even if Mr. Antony was capable of reading this pamphlet in English (which Ms. Antony clearly was not), that he did so before Ms. Antony made her election and that his knowledge could be imputed to Ms. Antony, I find that this pamphlet did not inform Ms. Antony that the benefit which paid the most money might not be the benefit which paid for the longest period.

In sum, I find that as a result of her meeting with Mr. Fox on March 7, 2001, Ms. Antony was aware that caregiver benefits would pay more than income replacement benefits. I find that she subsequently elected caregiver benefits solely because it paid more than income replacement benefits. I further find that prior to electing caregiver benefits, RBC did not inform Ms. Antony that caregiver benefits might not be payable for as long a period as income replacement benefits.

Analysis and Conclusion

While the parties took opposing positions on the factual issue of whether Mr. Fox had recommended to Ms. Antony that she elect caregiver benefits, they appeared to agree that it would have been improper for him to have done so. Perhaps because they agreed, neither party provided any authority for the proposition that it is unlawful or otherwise improper for an insurer or its agent to recommend to an insured person that he/she make a particular election. As noted above, the *Prosser* decision certainly does not provide such authority. Nor, in my view, can such authority be found in section 32(2)(d) of the *Schedule,* even when that section is interpreted to achieve the insurance law objective of consumer protection.

Section 32(2)(d) only requires the insurer to provide information to the insured person; it does not prohibit the insurer from also providing advice or recommendations to the insured person. I acknowledge that an insurer or agent who does offer advice or recommendations to an insured person may be required to do so in accordance with certain legal standards. Nevertheless, Mr. Wilson made no attempt to invoke these standards in his closing argument. Instead, he characterized Mr. Fox's alleged recommendation as "misleading information provided by the insurer representative." That, it seems to me, was merely another argument based on section 32(2)(d) of the *Schedule* (Mr. Wilson's second): what it really questioned was not the alleged fact, per se, that Mr. Fox made a recommendation but rather the information Mr. Fox provided.

In short, the issue in this case, as I see it, is not whether or not Mr. Fox made a recommendation to Ms. Antony but whether RBC informed Ms. Antony in accordance with section 32(2)(d) of the *Schedule* before she made her election.

In approaching this issue, I note the common theme running through the *Prosser,* the *Olivito* and the present cases, namely, the tendency for some insured persons to elect the benefit which pays the most money. As the *Olivito* and present cases illustrate, an insured person who elects the benefit which pays the most money may later realize, or be advised, that the benefit not elected would have paid for a longer period and that, for that reason, his/her election was short-sighted.

I would certainly agree that an insured person is not at liberty to simply ignore clear, accessible and pertinent information provided by the insurer, as Mr. Olivito appears to have done. That said, the words "information on any possible elections" in section 32(2)(d) of the *Schedule* should, in my opinion, be interpreted to include the information that the benefit which pays the most money might not be the benefit which pays for the longest period. In my view, this interpretation promotes the consumer protection objective of insurance law by obliging the insurer to draw the insured person's attention to an important piece of information which he/she might otherwise overlook in making his/her election. More specifically, it recognizes that the insured person is most likely to make his/her election in the same period in which the insurer is least likely to contest

his/her eligibility to either benefit, that period being the period immediately after the accident. It acknowledges that this situation creates the risk that the insured person will make a short-sighted election, one which fails to consider that the benefit which pays the most money might not be the benefit which pays for the longest period. It then attempts to reduce this risk by requiring the insurer to provide this specific piece of information to the insured person.

In keeping with the "bright-line boundaries" approach endorsed by the Supreme Court, it is also my opinion that in challenging the validity of his/her election on the ground that the insurer failed to provide this piece of information, an insured person should not bear an onus to prove that he/she would have elected differently had the insurer provided complete information. On the contrary, in the event of such a challenge, the onus of proof, in my opinion, should fall upon the insurer to establish that it complied with its obligations under 32(2)(d) of the *Schedule* by providing the insured person with complete information prior to his/her making an election.

In the present case, I find that RBC failed to discharge its onus of proving that it complied with its obligation under section 32(2)(d) of the *Schedule.* I find that while Mr. Fox made Ms. Antony aware that she was required to elect between caregiver and income replacement benefits and that caregiver benefits would pay more than income replacement benefits, RBC did not inform Ms. Antony prior to her election that caregiver benefits might not pay for as long a period as income replacement benefits. I conclude that Ms. Antony was only provided with some of the required "information on any possible elections" within the meaning of section 32(2)(d). The incomplete nature of the information provided by RBC renders Ms. Antony's election invalid. She is, therefore, entitled to re-elect income replacement benefits from one week after the accident.

Expenses

The parties made no submissions on the issue of expenses. If they are unable to resolve the issue of expenses, they are required to so inform me within 30 days of the date of this decision.

March 12, 2003

David Leitch
Arbitrator

Date

Neutral Citation: 2003 ONFSCDRS 37

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FINANCIAL SERVICES COMMISSION OF ONTARIO

BETWEEN:

ANNABEL ANTONY

Applicant

and

RBC GENERAL 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. Ms. Antony's election of caregiver benefits was not a valid election and she is entitled to claim income replacement benefits from one week after the accident.

March 12, 2003

David Leitch
Arbitrator

Date