

FINANCIAL SERVICES COMMISSION OF ONTARIO

BETWEEN:

ANNABEL ANTONY

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

DECISION ON A THIRD 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 Mrs. 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.

In a preliminary issue decision dated March 12, 2003, I decided that Ms. Antony's election of caregiver benefits was not valid and that she was, therefore, entitled to claim income replacement benefits commencing one week after the accident. I found it unnecessary to deal with Ms. Antony's alternative argument. The issue raised by this alternative argument can be identified through the following question:

1. Assuming that Ms. Antony's election was valid, was she nevertheless entitled to change her election as of right as long as she only claimed one benefit in respect of the same period?

My preliminary decision that Ms. Antony's election was invalid was appealed. In a letter decision dated April 14, 2003, the Director's Delegate decided that the appeal was premature and directed me to "decide the right to re-elect issue" raised by Ms. Antony's alternative argument. Since this issue was argued before me on January 28, 2003, I now issue my decision on this issue without having heard any further submissions.

Result:

1. Assuming Ms. Antony's election was valid, she was not entitled to change it as of right.

The Law

In view of the comparison drawn by Mr. Wilson between section 36 of the *Schedule* applicable to this case and section 61 of the *Schedule* applicable to accidents after December 31, 1993 and before November 1, 1996,² I set out both sections below:

ELECTION OF INCOME REPLACEMENT, NON-EARNER OR CAREGIVER BENEFIT

36. (1) Only one of the following benefits may be paid to a person in respect of a period of time:

² 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.

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.

(3) The insurer shall deliver the notice under subsection (2) within 14 days after receiving the person's application.

ELECTION OF WEEKLY BENEFITS

61.—(1) No more than one weekly benefit shall be paid to an insured person under this Regulation for the same period of time.

(2) If it appears from an application for benefits under this Regulation that, in the absence of subsection (1), a person would be entitled to receive more than one weekly benefit under Part II, section 15 and Part IV, the insurer shall notify the person that the person must, within thirty days of receiving the notice, elect which weekly benefit he or she wishes to receive.

(3) Within thirty days of receiving the notice, the person shall elect which weekly benefit he or she wishes to receive.

(4) Pending receipt of the person's election, the insurer shall pay one of the weekly benefits to which the person is entitled and, when the insurer receives the election, the insurer shall adjust the amount of the weekly payments retroactively to the date the person became entitled to the weekly benefits that the person has elected.

(5) If the person does not elect which benefit he or she wishes to receive within the thirty day period referred to in subsection (3), the person shall be deemed to have elected the highest weekly benefit.

(6) If a person ceases to receive weekly caregiver benefits under Part IV because there is no longer anyone who meets the qualifications set out in subsection 18(5) and the person meets the qualifications set out in paragraph 5 of subsection 7(1), the insured person is entitled to elect to receive weekly income replacement benefits under Part II and the insurer shall notify the person of that entitlement.

(7) Subject to subsection (6), an election under this section may not be changed.

Since reference will also be made to section 69, paragraph 3 of the *Schedule*, I set it out as well:

69.

Each of the following documents shall be in a form approved by the Superintendent:

...

3. A notice under subsection 36 (2)...

ARGUMENTS AND ANALYSIS:

Mr. Wilson advanced the following arguments in support of his submission that Ms. Antony enjoyed an "absolute right" to change her election. First, he argued that both the goal of consumer protection and the purposes of the *Schedule* would be undermined if Ms. Antony were "locked in" to an election which was prejudicial to her interests. Second, he argued that unlike section 61(7) of the *Schedule* applicable to accidents after December 31, 1993 and before November 1, 1996, which specifically stated that "an election under this section may not be changed", section 36 of the *Schedule* applicable to this case does not state that Ms. Antony cannot change her election. He submitted that section 36 cannot, therefore, be interpreted as taking away her right to change her election, particularly if that interpretation would frustrate the goal of consumer protection or the purposes of the *Schedule*. Third, Mr. Wilson argued that insofar as the election form itself purported to inform Ms. Antony that her choice could not be changed, this form went beyond the governing provision, section 36, and could not be authorized under section 69.

In making these arguments, Mr. Wilson relied on two authorities: the Supreme Court of Canada's decision in the case of *Smith v. Co-operators General Insurance Co.*³ and the Ontario Court of Appeal's decision in *Bapoo v. Co-Operators General Insurance Co.*⁴ The *Smith* decision establishes that consumer protection is a main objective of automobile insurance law. The *Bapoo* decision establishes that interpretations of the *Schedule* which undermine its purposes must be rejected. I am, of course, bound by these decisions but I do not think they support Mr. Wilson's submission that Ms. Antony

³ [2002] S.C.J. No. 34, 2002 SCC 30.

⁴ (1997) 36 O.R. (3rd) 616.

was entitled to change her election as of right as long as she only claimed one benefit in respect of the same period.

Prejudice

In my view, there was a serious flaw in Mr. Wilson's submission. He most emphatically asserted that Ms. Antony was prejudiced by her original election and that RBC would not be prejudiced by her being allowed to change her election. He did not, however, acknowledge that his submission that she should be entitled to change her election as of right did not depend in any way on the accuracy of his assertions about prejudice. In fact, allowing Ms. Antony to change her election, *as of right*, would mean that she could do so without any enquiry into whether she was in any way prejudiced by her original election or whether RBC's right to investigate her entitlement to income replacement benefits was in any way prejudiced by the delay in her claiming those benefits. Indeed, although it is clear that my decision would only govern Ms. Antony's case, it is also clear that if Ms. Antony is allowed to change her election, as of right, without enquiry into relative prejudice, other insured persons will assert the same right.

I acknowledge that in my first preliminary decision, I held that where it is determined that an insurer failed to discharge its statutory obligation to inform the insured person, that person should be entitled to change his/her election without enquiry into whether he/she was prejudiced by the original election.⁵ However, in my view, the opposite must be true where it is determined or assumed that the insurer did discharge all of its statutory obligations to inform the insured person and that the election was otherwise valid. In this latter case, unless there is some evidence that the original election was prejudicial to the insured person, I fail to understand how refusing to allow the insured person to change his/her election could frustrate either the goal of consumer protection or the purposes of the *Schedule*. I do, on the other hand, understand how the goal of consumer protection requires that the insured person be permitted to lead evidence that

⁵ I wrote: "In keeping with the 'bright-line boundaries' approach endorsed by the Supreme Court [in *Smith*], it is ... my opinion that in challenging the validity of his/her election on the ground that the insurer failed to provide ... information, an insured person should not bear an onus to prove that he/she would have elected differently had the insurer provided complete information."

he/she was prejudiced by his/her original election. But, in my view, the insurer must also be permitted to show that it would be prejudiced by any change in the election. In short, the question, as I see it, would cease to be simply whether the insured person was entitled to change his/her election *as of right* and would become instead a far more complex question dealing with relative prejudice, consumer protection and legislative purposes.

In the preliminary issue hearing before me, both parties made plausible allegations of prejudice but neither party led any substantive evidence to prove prejudice. My first preliminary decision made no findings about prejudice to either party.

Legislative Silence

Both parties pointed to the fact that section 36 was silent on the question of whether an insured person can change his/her election. As noted earlier, Mr. Wilson contrasted this silence with the provision in the earlier *Schedule* and drew the inference that section 36 must be read to allow Ms. Antony to change her election. Mr. D'Agostino interpreted this same silence as confirmation that such changes were simply not contemplated. The parties also differed on the significance of the words "in respect of a period of time". Mr. Wilson maintained that these words confirm that section 36 contemplates that different benefits can be paid in respect of different periods of time, consistent with his right to re-elect argument. Mr. D'Agostino responded that the words "in respect of a period of time" are only intended to cover the period prior the election being made when the insured person might receive a different benefit than the benefit ultimately elected.

In my view, even if Mr. Wilson's submissions were preferred over Mr. D'Agostino's, they would not support a finding that Ms. Antony was entitled to change her election *as of right*. Just as section 36 does not say that Ms. Antony could not change her election, nor does it say that she could change her election *as of right*, i.e., regardless of whether she was prejudiced by her original election and regardless of whether RBC would be prejudiced by her change in election.

As already indicated, it is my opinion that if the insurer discharged all of its statutory obligations to inform the insured person and if the election was otherwise valid, the question of whether Ms. Antony could change her election should be determined on the basis of relative prejudice, consumer protection and legislative purposes.

The election form

At paragraph 19 of the *Smith* case, Gonthier J. observed:

...the industry practice of using the form prescribed by the Commissioner [now the Superintendent] cannot somehow be a substitute for conformity with s. 71 of the *SABS*. Section 71 clearly states that it is the insurer who "shall inform the insured person in writing" of the dispute resolution procedure. There is no indication that insurers are legally prevented from adding to the prescribed form so that it is in conformity with the legal requirements.

It is clear from this passage that in the event of any conflict between a provision of the *Schedule* and a form prescribed by the Superintendent, it is the provision of the *Schedule* which governs. In the present case, the form purported to address an issue not addressed by the provision of the *Schedule*, namely, whether an election could be changed. However, it is my opinion that even if section 36 specifically stated that an election could not be changed, thereby eliminating any conflict with the information contained in the form, this would not prevent Ms. Antony from arguing that the insurer failed to discharge its obligations to inform her under the *Schedule*, that the original election was invalid for some other reason, that she was in some way prejudiced by her original election or that RBC was not in any way prejudiced by the delay in claiming income replacement benefits. Likewise, even if I were to assume that RBC discharged all of its statutory obligations to inform Ms. Antony, that her election was otherwise valid and that section 36 specifically stated that her election could not be changed, I would still be of the opinion that the answer to the question whether she could nevertheless change her election should be based on a consideration of relative prejudice, consumer protection and legislative purposes.

I, therefore, reject Ms. Antony's alternative argument that even if her original election was valid, she was nevertheless entitled to change her election as of right.

EXPENSES:

I leave the question of expenses of the hearing, as it related to this issue, to the discretion of the hearing arbitrator.

David Leitch
Arbitrator

May 26, 2003
Date

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.l.8, as amended, it is ordered that:

1. Assuming Ms. Antony's election was valid, she was not entitled to change it as of right.

David Leitch
Arbitrator

May 26, 2003
Date